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VICTIM PROTECTION MEASURES IN AUSTRALIA ARE NOT CONSISTENT WITH THE UNITED NATIONS PREVENTION OF HUMAN TRAFFICKING PROTOCOL

This paper proposes that Australia's implementation of the *Trafficking Protocol*¹ is not consistent with the victim protection articles,² which seek to ensure that victims are protected and not re-victimised.

Every State is obliged to criminalise slavery and protect victims from further victimisation,³ yet there remain an estimated 21m to 35.8m people living in some form of slavery.⁴ Slavery situations range from small operations involving a few women and a massage parlour in Melbourne,⁵ to operations sourcing thousands of young boys to work on fishing boats in Thailand⁶ to large illegal mining and ecocide in Eastern Congo⁷ and to industrial scale slavery, such as that practiced by Boko Haram and ISIS.⁸ There is no published data showing how the 35.8m people are distributed within these situations, but it is not relevant for the purpose of this paper. No matter the scale or context, the offence basically comes down to slavery and the

¹ *United Nations Convention Against Transnational Organized Crime and The Protocols Thereto, Annex II, Protocol to Prevent, suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Text against Transnational Organized Crime herein after referred to as the 'Trafficking Protocol'.*

² Ibid art 6-8.

³ *United Nations Convention Against Transnational Organized Crime and The Protocols Thereto, Annex II, Protocol to Prevent, suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Text against Transnational Organized Crime.*

⁴ Dr James Cockayne and Kari Panaccione, 'Fighting Modern Slavery What Role for international criminal justice?' (Research Report), United Nations University, December 2015 2.

⁵ *The Queen v Tang* (2008) 249 ALR 200.

⁶ Philip Sherwell, 'Thai Police General Investigating Human Trafficking Seeks Asylum in Australia', *The Telegraph* (United Kingdom), 10 December 2015.

⁷ Kevin Bales, *Blood and Earth* (Spiegel & Grau New York, 1st ed 2016) 23 – 26.

⁸ Dr James Cockayne and Kari Panaccione, 'Fighting Modern Slavery What Role for international criminal justice?' (Research Report), United Nations University, December 2015 9.

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impact on victims is a horrific and very personalised experience.⁹ Australia is a destination country for victims and while Australia's vulnerability to slavery is low,¹⁰ there are nevertheless an estimated 3,000 people in the Country who are considered to be victims of slavery.¹¹

In slavery, it is often the case that victims become 'triple exploited'.¹² Firstly, they are enslaved. Secondly, if the slavers are arrested, the victims can also be arrested for illegal activities (for example illegal drug making). Thirdly, if deported, the victims may be placed back into the hands of the slavers and re-sold.¹³ If this cycle is to be broken it is paramount that, after having been identified as a victim, the victim is not prosecuted for unlawful activities relating to their status, but rather, they are protected from further harm. The *Trafficking Protocol* seeks to achieve this by providing that States should adopt laws that consider the 'humanitarian and compassionate' factors of the victim's situation and permit him or her to remain in the destination country temporarily or permanently.¹⁴

⁹ <<https://vimeo.com/39029758>>

¹⁰ United States of America, - Department of State, *'Trafficking in Persons Report'* [July 2015] 76.

¹¹ Walk Free Foundation, 'The Global Slavery Index' (Research Report 2014, Walk Free Foundation, 2014) 109.

¹² Anna Marie Gallagher, 'Triple Exploited: Female victims of trafficking networks-strategies for pursuing protection and legal status in countries of destination' (2004) 19:99 *Georgetown Immigration Law Journal* 99-100.

¹³ *Ibid* 100.

¹⁴ *United Nations Convention Against Transnational Organized Crime and The Protocols Thereto, Annex II, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Text against Transnational Organized Crime*, [2004] art 7.

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There are two main international law conventions that provide support for the abolition of slavery:¹⁵

- the Supplemental Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (*'Slavery Convention'*), which entered into force on 30 April 1957; and
- the United Nations Convention against Transnational Organized Crime and its supplementary Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (*'Trafficking Protocol'*), which entered into force on 25 December 2003.

The focus in this paper is on the *Trafficking Protocol*, which was ratified by Australia on 14 September 2005.¹⁶

- Part I of the paper provides historical context to modern day efforts to abolish slavery. It considers the definitions of human trafficking and migrant smuggling and the significance of the distinction.

¹⁵ Australian Government, 'The National Action Plan to Combat Human Trafficking and Slavery 2015-19' 7.

¹⁶ <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en>

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- Part II considers the *Trafficking Protocol* in some detail but with emphasis on victim protection aspects.
- Part III sets out Australia’s implementation through the *Criminal Code Act 1995* (Cth) (*‘the Act’*) and the National Action Plan to Combat Human Trafficking and Slavery 2015-19 (*‘the Plan’*).
- Part IV considers the situation in Western Australia, including a review of current cases.
- Part V concludes that the protection of victims in Australia is inadequate and not consistent with the intention of the *Trafficking Protocol* and that the reason for this is due to the Australian Government’s approach to irregular migration and the ‘floodgates argument’.¹⁷

¹⁷ Andreas Schloenhardt and Jarrod Jolly, *Trafficking in Persons in Australia - Myths and Realities* (LexisNexis Butterworths, 1st ed, 2013) 233[6.13].

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I MODERN DAY SLAVERY IN CONTEXT

A Historical Context of Modern Day Slavery

The enslavement of human beings can be traced back as far as 6800B.C. and as recently as 1641 it was a legally supported practice.¹⁸ Slavery has not always been considered inhumane or wrong. Many attempts have been made to justify slavery based on notions that it is 'natural that some people are slaves' or that 'slaves are inferior beings' or that it is 'acceptable in this culture' and that 'living in slavery is better than starving to death'.¹⁹ Because of these and other misguided beliefs the abolition of slavery has a long and complex history.

One of the first abolition measures was in 1781 with the abolition of serfdom in the Austrian Habsburg dominions,²⁰ but perhaps the most well known abolitionist was William Wilberforce and his activist work that led to the British Parliament passing the *Abolition of the Slave Trade Act 1807*.²¹ A similar act was passed by the United States Congress in the same year. While these acts ultimately resulted in ending the transatlantic African slave trade, slavery persisted. Even in the middle and towards the end of 20th century cold-war tensions between different belief systems worked to slow the anti-slavery development, as '...the Soviet Block argues that slavery can only

¹⁸ <<http://www.freetheslaves.net/about-slavery/slavery-in-history/>>

¹⁹ BBC - Ethics <<http://www.bbc.co.uk/ethics/slavery/ethics/justifications.shtml>>

²⁰ Free The Slaves <<http://www.freetheslaves.net/about-slavery/slavery-in-history/>>

²¹ The Abolition Project <http://abolition.e2bn.org/slavery_113.html>

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exist in capitalist societies, and the Western Block argues that all people living under communism are slaves.¹²² Nevertheless, the drive for the global abolition of slavery continued throughout the 20th century with the introduction of the '*International Slavery Convention*'¹²³ in 1926 and the '*Supplementary Convention*'¹²⁴ in 1956. These important initiatives, *inter alia*, expanded the definition of slavery and significantly influenced subsequent conventions in the 21st century.¹²⁵ Equally important was the development of international labour law and conventions dealing with the abolition of forced labour, setting the minimum employment age and the elimination of the worst forms of child labour.¹²⁶

In 2000, these conventions, together with a number of initiatives from diverse sources of international law such as human rights, the rights of the child and forced labour, culminated in the development of what is perhaps the most important document in the history of prohibition, the *Trafficking Protocol*.¹²⁷

Figure 1: Contributions to the *Trafficking Protocol* came from diverse branches of international law.¹²⁸

¹²² Free The Slaves <<http://www.freetheslaves.net/about-slavery/slavery-in-history>>

¹²³ International Slavery Convention, adopted 25 September 1926, entered into force 9 March 1927, 60 L.N.T.S. 253.

¹²⁴ UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted 7 September 1956, entered into force 30 April 1957, 266 UNTS 3.

¹²⁵ Corin Morcom and Andreas Schloenhardt, 'All About Sex?! The Evolution of Trafficking in Persons in International Law' (Research Paper, The University of Queensland Australia Human Trafficking Working Group, March 2011), 8.

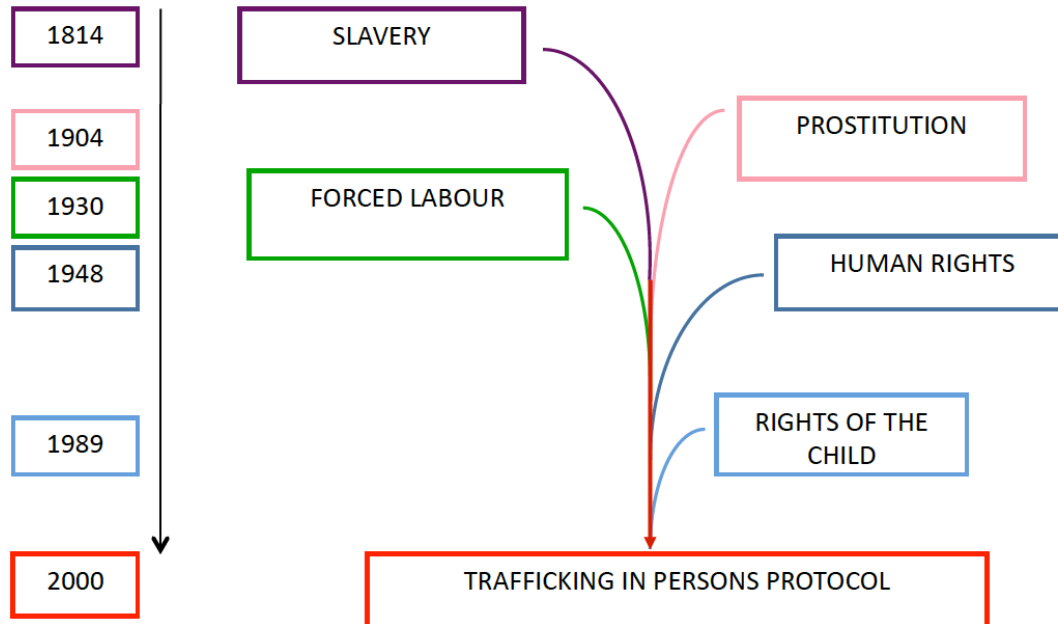
¹²⁶ Corin Morcom and Andreas Schloenhardt, 'All About Sex?! The Evolution of Trafficking in Persons in International Law' (Research Paper, The University of Queensland Australia Human Trafficking Working Group, March 2011), 18-20.

¹²⁷ <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en>

¹²⁸ Corin Morcom and Andreas Schloenhardt, 'All About Sex?! The Evolution of Trafficking in Persons in International Law' (Research Paper, The University of Queensland Australia Human Trafficking Working Group, March 2011), 5.

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B Definition of Trafficking

It has been said that 'if you cannot define it...it is no use talking about it'.²⁹ The history of the definition of trafficking is as long and complex as the history of trafficking itself.³⁰ It is perhaps because of this complexity that the development of international and domestic laws to eliminate trafficking have been so slow to evolve³¹ and why the 2000 definition, set out in the *Trafficking Protocol*, is so important. The definition provides:

²⁹ Whately Carington, *Matter, Mind and Meaning - Philosophy of Mind* (Routledge, 2015) 185-186.

³⁰ Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 1st ed, 2010) 13.

³¹ Ibid.

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“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (emphasis added)

There are three key elements to the definition: acts; means; and purpose.

The 'action' element has widened the range of activities that may become criminal. Not just the main operators are potentially caught, but people such as 'owners and managers, supervisors and controllers of any place of exploitation such as a brothel'³² (emphasis added) may now be included in the scope.

The 'means' element is the second part of the *actus reus* of the definition. Again the definition is wide and mostly self-explanatory³³ however the understanding of the intention behind such terms as the abuse of a person in the 'position of vulnerability' have been enhanced by the UN Office on Drugs and Crime ('*UNODC*') Model

³² Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 1st ed, 2010) 30.

³³ Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 1st ed, 2010) 31.

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Trafficking Law, which states in with respect to such terms, that 'in order to better protect victims' the focus should be on the intention of the offender, rather than the 'state of mind of the victim'.³⁴ Note however, that the means element does not apply if the victim is under the age of 18.³⁵

The 'purpose' element is the *mens rea* aspect of the definition and is the most difficult element to establish. For example, while it is clear that the intention can be found in any of the acts involved with trafficking and that a person does not need to have been actually trafficked before intent can be established, it is nevertheless a difficult element to establish with respect to, for example, a recruiter or transporter who may deny any knowledge of the final and end purpose of their act.³⁶ It is argued that this initiation based interpretation is 'extremely difficult to prove' and this, coupled with destination countries motivations to classify irregular migrants as smuggled rather than trafficked, limits the effectiveness of anti-trafficking laws.³⁷

Notwithstanding this imperfect definition of trafficking, it is a vast improvement on prior attempts to define the same, and as at 2014, 85% of countries, considered to be

³⁴ United Nations Office on Drugs and Crime, *Model Law on Trafficking in Persons*, UN Sales No. E.09.V.11(2009) 9 - 10.

³⁵ *United Nations Convention Against Transnational Organized Crime and The Protocols Thereto, Annex II, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, [2004] art 3(c)(d).

³⁶ Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 1st ed, 2010) 34.

³⁷ Nicola Piper, 'A Problem by a Different Name? A Review of Research on Trafficking in South-East Asia and Oceania' (2005) 43 (1/2) *International Migration* 222 - 223.

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relevant for this purpose, have criminalised all aspects of trafficking in persons as listed in the *Trafficking Protocol*.³⁸

³⁸ United Nations Office on Drugs and Crime, 'Global Report on Trafficking in Persons' 2014 51.

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C Migrant Smuggling v Human Trafficking

The definition of 'Smuggling in migrants' was crafted at the same time as the *Trafficking Protocol* and reads:

'Smuggling in migrants' shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State party of which the person is not a national or a permanent resident³⁹

In Australian law the difference has been described thus, 'victims of people trafficking are regarded as commodities, individuals who are smuggled across borders are more like clients who pay for a service.'⁴⁰ The distinction is important as the legal protections and remedies for 'victims' and 'clients', as will be discussed later in this paper, are very different.

³⁹ *United Nations Convention Against Transnational Organized Crime and The Protocols Thereto, Annex III, Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, [2004].

⁴⁰ Australian Government - Australian Institute of Criminology, 'People Smuggling versus trafficking in persons: what is the difference?' No. 2 2008.

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II THE TRAFFICKING PROTOCOL

The *Trafficking Protocol* is one of three protocols attached to the United Nations Convention against Transnational Organized Crime ('*the Convention*'), which was adopted by the General Assembly of the United Nations in November 2000. The other protocols deal with Migrant Smuggling and Illicit Manufacturing and Trafficking of Firearms.⁴¹

The *Trafficking Protocol* created a new platform and opportunity for the international community to deal with trafficking in a comprehensive manner.⁴² The purpose of the *Trafficking Protocol* as set out in Article 2 provides:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
- (c) To promote cooperation among States Parties in order to meet those objectives.

Some important documents supporting the *Trafficking Protocol* include :

⁴¹ United Nation Office on Drugs and Crime <<https://www.unodc.org/unodc/treaties/CTOC/>>

⁴² Andreas Schloenhardt, 'Prevented, Suppresses, and Punished!? Twelve Years of the Trafficking in Persons Protocol' (Research Paper, The University of Queensland Australia Human Trafficking Working Group, January, 2012) 2-3.

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- *UNODC*, 'Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocol Thereto' United Nations New York (2004) (*'the Legislative Guide'*);
- *UNODC*, 'Toolkit to Combat Trafficking in Persons - Global Programme Against Trafficking in Human Beings' (United Nations, New York, 2006) (*'the Toolkit'*); and
- *OHCHR*, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (United Nations 2002) (*'the Guidelines'*).

A Criminalisation

States are required to take legislative steps toward the implementation of *the Convention*, which includes an obligation to criminalise trafficking as set out in Article 5 of the *Trafficking Protocol*.^{43 44} The wide scope of the *Trafficking Protocol*, has been confirmed to include trafficking within country borders and offences involving just a two person trafficking operation.⁴⁵ Criminalisation includes not just the activities set out in the definitions but activities such as attempting to

⁴³ Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 1st ed, 2010) 370 - 371.

⁴⁴ United Nations Office of Drugs and Crime, 'Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocol Thereto' United Nations New York (2004) 266 [30].

⁴⁵ *Ibid* 7.

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commit an offence, participating as an accomplice in an offence and organising or directing other persons to commit an offence. In order to meet the criminalisation requirement (for these activities) domestic legislation must distinguish between trafficking in children and adults and the criminalised activity must not be restricted only to acts against women and children.⁴⁶ However, although the scope of the activities that are subject to criminalisation is wide, it does not extend to each of the constituent acts which, when taken together, would constitute trafficking. For example, conduct, such as bribery of an official in of itself would not constitute trafficking offence.⁴⁷ The scope of offences does not extend to the activities of the users of the trafficked victims.⁴⁸

States need to observe that the definition, as discussed above, provides that the '...consent of a victim...shall be irrelevant...'.⁴⁹ This is an important distinction between migrant smuggling and trafficking, the former involving an agreement whereby a person may pay a smuggler in order to facilitate a persons illegal migration. In the case where a smuggled migrant retracts his/her consent during the smuggling operation but is forced to continue, the individual may still not be considered a victim of trafficking if the other elements of the definition are not met.⁵⁰

⁴⁶ Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 1st ed, 2010) 373 - 374.

⁴⁷ Andreas Schloenhardt, 'Prevented, Suppresses, and Punished!?' Twelve Years of the Trafficking in Persons Protocol' (Research Paper, The University of Queensland Australia Human Trafficking Working Group, January, 2012) 8.

⁴⁸ Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 1st ed, 2010) 377 - 378.

⁴⁹ *United Nations Convention Against Transnational Organized Crime and The Protocols Thereto, Annex II, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, [2004] art 3(b)(c).

⁵⁰ *Ibid* 5.

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B Victim Protection

Trafficking is made possible by the use of violence and intimidation, but unlike other types of crimes, the danger to the victim does not end once they become free.⁵¹ The violence and risk of being re-trafficked is common and very real, Anuradha Koirala, founder of a safe house in Nepal advises that:

The criminal elements that "deliver" young girls are a ruthless enemy and have political connections at the highest levels in India and Nepal. Maiti Nepal's main office in Kathmandu has been destroyed twice and Maiti workers must travel with a bodyguard when overseeing rescue missions in India.⁵²

The *Trafficking Protocol* recognises this and provides that States should adopt measures to protect victims from being re-victimised.⁵³ *The Toolkit* expands on this by suggesting that measures should include: physical protection (safe houses etc); and the provision of evidentiary rules to protect victims giving evidence against their traffickers. Part II of the *Trafficking Protocol* sets out the protection requirements for victims of trafficking under three main topics: assistance and protection; status

⁵¹ Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 1st ed, 2010) 301 [5.3.2].

⁵² <<http://www.friendsofmaitinepal.org/anuradha-koirala.php>>

⁵³ 'United Nations Convention Against Transnational Organized Crime and The Protocols Thereto, Annex II, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, [2004] art 9 (1)(b).

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(allowing the victim to remain in the destination country); and repatriation to country of origin.

However, before a victim can be protected they need to be identified as such and, like the issue with the definition of trafficking itself, the lack of clarity about who is a victim hampers efforts to implement the protective measures of the *Trafficking Protocol*.⁵⁴ The process of identifying victims is not helped by the fact that victims may not identify themselves as such and are often unwilling to share their experiences.⁵⁵ Many trafficked victims are heavily traumatised, live in fear of intimidation by their traffickers and have no other means to support themselves or their families back home. Some victims also are at risk of being re-trafficked if they are sent home without sufficient support.⁵⁶

1 *Victim Identification*

Chapter 6 of *the Toolkit* deals with the identification of victims and refers to *the Guidelines* on this matter which note that States are obliged to not only identify trafficked persons but also exercise due diligence in identifying traffickers and those

⁵⁴ The Inter-Agency Coordination Group against Trafficking in Persons, 'ICAT Paper Series - Issue 1, International Legal Instruments' [4.1].

⁵⁵ Alexis A. Aronowitz, 'Victimization of Trafficked Persons and Illegal Migrants' (2004) 11 *International Review of Victimology* 11 - 32.

⁵⁶ Andreas Schloenhardt, 'Prevented, Suppresses, and Punished!? Twelve Years of the Trafficking in Persons Protocol' (Research Paper, The University of Queensland Australia Human Trafficking Working Group, January, 2012) 11.

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involved with the exploitation.⁵⁷ As well as providing standard checklists to facilitate the identification of victims, *the Toolkit* provides tips for health care providers and law enforcement officers as well as guideline on ethical and safe conduct of interviews. The *Legislative Guide* offers three sources for the definition of 'victim of trafficking' that States may adopt in their legislation: the *UNODC Model Law on Justice in Matters Involving Child Victims and Witnesses of Crime*; the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; or the Council of European Convention on Action against Trafficking in Human Beings. Of these definitions the European definition is the most closely related to the *Trafficking Protocol* as it picks up on the definition of trafficking itself, the definition reads as follows:

The Convention defines “victim” as “any natural person who is subjected to trafficking in human beings as defined in this Article”. As explained above, a victim is anyone subjected to a combination of elements (action – means – purpose) specified in Article 4(a) of the Convention. Under Article 4(c), however, when that person is a child, he or she is to be regarded as a victim even if none of the means specified in Article 4(a) has been used.⁵⁸

⁵⁷ United Nations Office on Drugs and Crime, 'Toolkit to Combat Trafficking in Persons - Global Programme Against Trafficking in Human Beings' (United Nations, New York, 2006) 104 105 [6.2]

⁵⁸ Council of Europe, 'Treaty Series - No 197 Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, (2005) 40 [99] [100].

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Notwithstanding, these definitions and the importance of correctly distinguishing between an irregular migrant and a trafficking victim, there is an 'incentive for national authorities to identify irregular migrants as smuggled rather than trafficked' and this does lead to trafficking victims being prosecuted under Immigration and other laws.⁵⁹

2 Victim Assistance and Protection

The terms of the *Trafficking Protocol* provides for victim protection with no strings attached. However, a number of countries link the provision of assistance, such as medical and psychological services, conditional upon cooperation with criminal justice agencies. Such practices can result in a continuation of an exploitative situation or the emergence of a new one.⁶⁰ *The Guidelines* note that the trafficking cycle '...cannot be broken without attention to the rights and the needs...' of the victims and that provision (of shelter) should not be made contingent on the willingness of victims to give evidence in criminal proceedings.⁶¹ *The Toolkit* makes it clear that the protection under the *Trafficking Protocol* is 'not to be made conditional upon the victim's capacity or willingness to cooperate in legal

⁵⁹ Nicola Piper, 'A Problem by a Different Name? A Review of Research on Trafficking in South-East Asia and Oceania' (2005) 43 (1/2) *International Migration* 222

⁶⁰ Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 1st ed, 2010) 298 [5.3.1].

⁶¹ Office of the High Commissioner for Human Rights, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (United Nations 2002) 8.

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proceedings.⁶² The *Legislative Guide* provides that:

Those victims who do not want or do not dare to act as witnesses—or are not required as witnesses because they do not possess any relevant information or because the perpetrators cannot be identified or taken into custody—require adequate assistance and protection on an equal footing with victims who are willing and able to testify⁶³

Therefore, while the *Trafficking Protocol* does not itself prohibit linking support with cooperation, the important supporting documents make it very clear that there should be no link.

3 *Non-Criminalisation of Victims*

As mentioned previously, in trafficking there is a saying that victims can become thrice wronged in a vicious cycle. If this cycle is to be broken it is paramount that, after being identified as a victim, the victim is not prosecuted for unlawful activities relating to their status as victims. This however, is not covered in the *Trafficking Protocol* and 'trafficked persons are routinely criminalised, imprisoned, and deported for offences that relate directly to their status.'⁶⁴

⁶² United Nations Office on Drugs and Crime, 'Toolkit to Combat Trafficking in Persons - Global Programme Against Trafficking in Human Beings' (United Nations, New York, 2006) 141.

⁶³ United Nations Office on Drugs and Crime, 'Model Law against Trafficking in Persons' 46.

⁶⁴ Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 1st ed, 2010) 284 [5.2.1].

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4 Immigration Status of Victims and Repatriation

A trafficking operation can be very effective when it involves crossing international borders as it is easy to control a victim who is dependent on traffickers who supported their visa application and hold their passport. Exposure to immigration authorities is one weapon traffickers use to threaten and exploit their victims.⁶⁵

Recognizing this aspect of the traffickers craft, the *Trafficking Protocol* provides that States should adopt laws that consider the 'humanitarian and compassionate' factors of the victims situation and permit the victim to remain in the destination country temporarily or permanently.⁶⁶

Naturally, many victims may wish to return home after their ordeal and the *Trafficking Protocol* provides that States should provide for the safe repatriation of such individuals.⁶⁷ However, there are those who do not wish to return home and even for those who do, there are significant challenges and risks.⁶⁸ The *Trafficking Protocol* does not adequately cover these situations and some commentators have stated that the 'vague and generic' approach to victims does not even cover the

⁶⁵ Andreas Schloenhardt, 'Prevented, Suppresses, and Punished!? Twelve Years of the Trafficking in Persons Protocol' (Research Paper, The University of Queensland Australia Human Trafficking Working Group, January, 2012) 15.

⁶⁶ *United Nations Convention Against Transnational Organized Crime and The Protocols Thereto, Annex II, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, [2004] Art 7.

⁶⁷ *United Nations Convention Against Transnational Organized Crime and The Protocols Thereto, Annex II, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, [2004] Art 8.

⁶⁸ United Nations Office on Drugs and Crime, 'Toolkit to Combat Trafficking in Persons - Global Programme Against Trafficking in Human Beings' (United Nations, New York, 2006) 127.

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provision of support services, which are necessary for the unique issues faced by trafficking victims.⁶⁹ Commentators have noted that during the negotiations on the protection aspects of the *Trafficking Protocol*, the developed countries (typically destination countries) generally took to the position that there should be no legal right for victims to remain in the destination country as this would 'provide an incentive both for trafficking and illegal migration'. Conversely, the developing countries (typically origination countries) sought as much protection and legal status as possible for victims in the destinations country.⁷⁰ Human Rights groups representing the non-government sector view this aspect of the *Trafficking Protocol* as a 'lost opportunity' as it fails to require governments to provide any services to victims and no basis for insisting the government treat victims of trafficking different from undocumented migrants.⁷¹

These shortfalls in the *Trafficking Protocol* have to a limited extent been covered by documents such as *the Toolkit*⁷² and the *Legislative Guide*.⁷³ However, given the largely voluntary nature of the *Trafficking Protocol* itself, any supporting guidelines or recommendations have no legal power and have been largely ignored. The *UNODC* report on the implementation of the *Trafficking Protocol* estimates that

⁶⁹ Andreas Schloenhardt, 'Prevented, Suppresses, and Punished!? Twelve Years of the Trafficking in Persons Protocol' (Research Paper, The University of Queensland Australia Human Trafficking Working Group, January, 2012) 17.

⁷⁰ Elizabeth F. Defeis, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons - A new approach' (2004) 10:485 *ILSA Journal of international and Comparative Law* 489.

⁷¹ *Ibid* 490.

⁷² United Nations Office on Drugs and Crime, 'Toolkit to Combat Trafficking in Persons - Global Programme Against Trafficking in Human Beings' (United Nations, New York, 2006) 125 - 133.

⁷³ United Nations Office on Drugs and Crime, 'Model Law against Trafficking in Persons' 64.

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'more than 2 billion people lack the full protection' of the *Trafficking Protocol* relative to the criminalisation of trafficking. The report does not comment on the status of implementation of the protective measures.⁷⁴

C Conclusion on Trafficking Protocol

The *Trafficking Protocol* focuses on criminalisation and law enforcement. The protection of victims is very much a secondary priority,⁷⁵ primarily because of the reluctance of the developed countries to provide a legal right for victims to remain in the destination country.⁷⁶

The weaknesses in the *Trafficking Protocol*, particularly on the victim protection side, could be addressed if more mandatory language was used.⁷⁷ However, even without amendments, the *Trafficking Protocol*, taken together with key implementation documents, provides adequate support for State bodies to act strongly in all aspects toward the eradication of human trafficking and the protection of victims in their territory.

⁷⁴ United Nations Office on Drugs and Crime, 'Global Report on Trafficking in Persons' (2004) 12.

⁷⁵ Andreas Schloenhardt, 'Prevented, Suppresses, and Punished!? Twelve Years of the Trafficking in Persons Protocol' (Research Paper, The University of Queensland Australia Human Trafficking Working Group, January, 2012) 27.

⁷⁶ Elizabeth F. Defeis, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons - A new approach' (2004) 10:485 *ILSA Journal of international and Comparative Law* 489.

⁷⁷ Andreas Schloenhardt, 'Prevented, Suppresses, and Punished!? Twelve Years of the Trafficking in Persons Protocol' (Research Paper, The University of Queensland Australia Human Trafficking Working Group, January, 2012) 27.

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III AUSTRALIA'S IMPLEMENTATION OF THE TRAFFICKING PROTOCOL

A The Federal Government Response

The Australian Government ratified *the Convention* in 2005 and amended *the Act* the same year to better comply with the provisions of the *Trafficking Protocol*.⁷⁸ These important amendments to *the Act*, changed the Government's approach to trafficking which had hitherto been 'framed as a migration issue, with trafficked persons being regarded as, and deported as 'undocumented arrivals'.⁷⁹ Further amendments to *the Act* were made in 2012, which introduced new offences such as 'forced labour, forced marriage, harbouring a person for the purposes of furthering the offence of trafficking, and organ trafficking'.⁸⁰ Changes were also made to make it clear that a victim's consent cannot be used as a defence.⁸¹

Aside from *the Act* there are other acts relevant to human trafficking. These include the *Crimes Act 1914* ('*Crimes Act*'), *Migration Act 1958* ('*Migration Act*') and the *Fair Work Act 2009* ('*Fair Work Act*'). The *Crimes Act* sets out certain minor protections for victims in the context of prosecution proceedings,⁸² the *Migration Act*

⁷⁸ Sarah Steele, 'Trafficking in People: The Australian Government's Response' [2007] *Alternative Law Journal* 18 32(1).

⁷⁹ Ibid 31.

⁸⁰ Commonwealth, *Second Reading Speech*, House of Representatives, 30 May 2012, 6225 (Nicola Roxon MP).

⁸¹ Ibid 6226.

⁸² *Crimes Act 1914* Part 1AD.

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sets out offences related to allowing non-citizens to work without the appropriate visa or sponsoring a visa application in return for a benefit⁸³ and the *Fair Work Act* deals with matters such minimum employment standards and wages.⁸⁴

Executive Government actions to combat trafficking have run parallel with legislative initiatives. The most recent being National Action Plan to Combat Human Trafficking and Slavery 2015-19 (*'the Plan'*).⁸⁵ *The Plan* brings several government departments together to tackle the trafficking on a 'whole-of-community' basis. The implementation of *the Plan* will be monitored by the Attorney-General's Department which chairs the Interdepartmental Committee on Human Trafficking and Slavery.⁸⁶

B Prosecutions and Convictions in Australia

Trafficking offences are mainly federal law and, as such, the responsibility for enforcement lies with the Australian Federal Police (*'AFP'*) who have a specialist unit dealing with Human Trafficking and People Smuggling.^{87 88}

As mentioned previously, Australia is a destination country for victims and it is estimated that there are over 3,000 victims in Australian.⁸⁹ Sexual exploitation has

⁸³ *Migration Act 1958* ss 245AA-245AK, 245AR-245AS.

⁸⁴ Andreas Schloenhardt and Jarrod Jolly, *Trafficking in Persons in Australia - Myths and Realities* (LexisNexis Butterworths, 1st ed, 2013) 201 [5.52].

⁸⁵ Australian Government, 'The National Action Plan to Combat Human Trafficking and Slavery 2015-19.

⁸⁶ *Ibid* 3.

⁸⁷ Australian Federal Police <<http://www.afp.gov.au/policing/human-trafficking>>

⁸⁸ Fiona David, 'Trafficking of Women for Sexual Purposes' (2008) 95 *Australian Institute of Criminology* 11.

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historically been the most well known form of slavery.⁹⁰ Reflecting this, most cases prosecuted to date have involved females – adults and children – trafficked for the purpose of sexual exploitation. It is noted however that in Australia and internationally the labour hire businesses carry a higher risk of being involved with human trafficking than any other employer⁹¹ and there is much academic discussion about whether trafficking for labour exploitation should be separated from sexual exploitation. Human trafficking expert, Fiona David⁹² notes that as a matter of legal drafting the three elements of the definition in the *Trafficking Protocol* are not mirrored in *the Act* but that the distinction is difficult to maintain in practice and that debates about terminology are important, but 'they should not be permitted to lead to inaction'.⁹³ David also notes that the *Trafficking Protocol* includes several overlapping but potentially different kinds of conduct, including sexual exploitation and forced labour or services.⁹⁴

Although the number of prosecutions since the introduction of Divisions 270 and 271 of *the Act* is only 17,⁹⁵ they are nevertheless very significant. The very first conviction was in 2008 and involved a brothel owner, Ms Wei Tang, who was convicted of purchasing five women from Thailand to work in debt-bondage in

⁸⁹ Walk Free Foundation, 'The Global Slavery Index' (Research Report 2014, Walk Free Foundation, 2014) 109.

⁹⁰ Fiona David, 'Labour Trafficking' (2010) 108 *Australian Institute of Criminology* 16.

⁹¹ Dr Mark Zirnsak - Director - Justice and International Mission unit - Uniting Church of Australia, Submission to the Senate Education and Employment Committee to the Inquiry into The Impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders, May 2015 3.

⁹² <<http://fionadavid.com/>>

⁹³ Fiona David, 'Labour Trafficking' (2010) 108 *Australian Institute of Criminology* 5 - 6.

⁹⁴ *Ibid* 6.

⁹⁵ Australian Government, 'Trafficking in Persons Report' (July 2014 - July 2015) 28.

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Melbourne.⁹⁶ The Wei Tang case was important because it established that more subtle forms of control and possession rather than physical threats and force can be used to establish ‘slavery’ under *the Act*, it brought the definition of ‘slavery’ in Australian law broadly into line with the definition of ‘slavery’ under international law and it highlighted the need to interpret the definition of terms like ‘slavery’ in *the Act* in a manner consistent with international law.⁹⁷

In 2013 the Australian Institute of Criminology (‘AIC’) analysed 15 publically available judgments on Human Trafficking and concluded as follows:

1. offenders have typically used subtle means of control rather than overt force or threats;
2. offenders and victims were often the same gender and shared similar backgrounds and experiences;
3. the reported cases do not match the common assumption about the involvement of high end organized crime;
4. all offenders were motivated by profit; and
5. the trafficking process often involves other criminal activity such as immigration fraud and money laundering.

⁹⁶ Andreas Schloenhardt and Jarrod Jolly, *Trafficking in Persons in Australia - Myths and Realities* (LexisNexis Butterworths, 1st ed, 2013) 158 159 [5.12].

⁹⁷ Elizabeth Broderick and Bronwyn Byrnes, 'Beyond Wei Tang: Do Australia's human trafficking laws fully reflect Australia's international human rights obligations?' (Speech delivered at the Workshop on Legal and Criminal Justice Responses to Trafficking in Persons in Australia: Obstacles, Opportunities and Best Practice, Australian Human Rights Commission, 9 November 2009).

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The report highlights the importance of not stereotyping trafficking situations as to do so may result in 'one size fits all' rigid policies and practice for prevention.⁹⁸

C Victim Protection in Australia

Victim stories are horrific.⁹⁹ In an open message of thanks to the Justices of the High Court following the Wei Tang case, victims speak of being treated 'like animals. We were sexually abused, we were dragged, we were hit.' 'It felt like we survived and died at the same time.' 'When someone treats you like a dog...your start to believe you are a dog. You never get your voice back. You lose your confidence. You feel like an animal. Afterwards, sometimes I felt like I was too dirty to touch my own son.'¹⁰⁰

Many commentators view the *Trafficking Protocol* as a 'lost opportunity to protect the rights of victims of trafficking'¹⁰¹ as it does not require governments to provide any services to victims nor does it provide a basis for insisting that governments treat victims of trafficking differently from undocumented migrants.¹⁰² Australia's approach to victim protection perpetuates this lost opportunity and can best be

⁹⁸ Frances Simmons, Brynn O'Brien, Fiona David, Laura Beacroft 'Human Trafficking and Slavery Offenders in Australia' (2013) 464 *Australian Institute of Criminology*.

⁹⁹ <<https://vimeo.com/39029758>>

¹⁰⁰ Project Respect, 'An Open Message to the Justices of the high Court of Australia' (2008) Victoria Law Foundation.

¹⁰¹ Elizabeth F. Deфеis, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons - A new approach' (2004) 10:485 *ILSA Journal of international and Comparative Law* 490.

¹⁰² *Ibid* 490.

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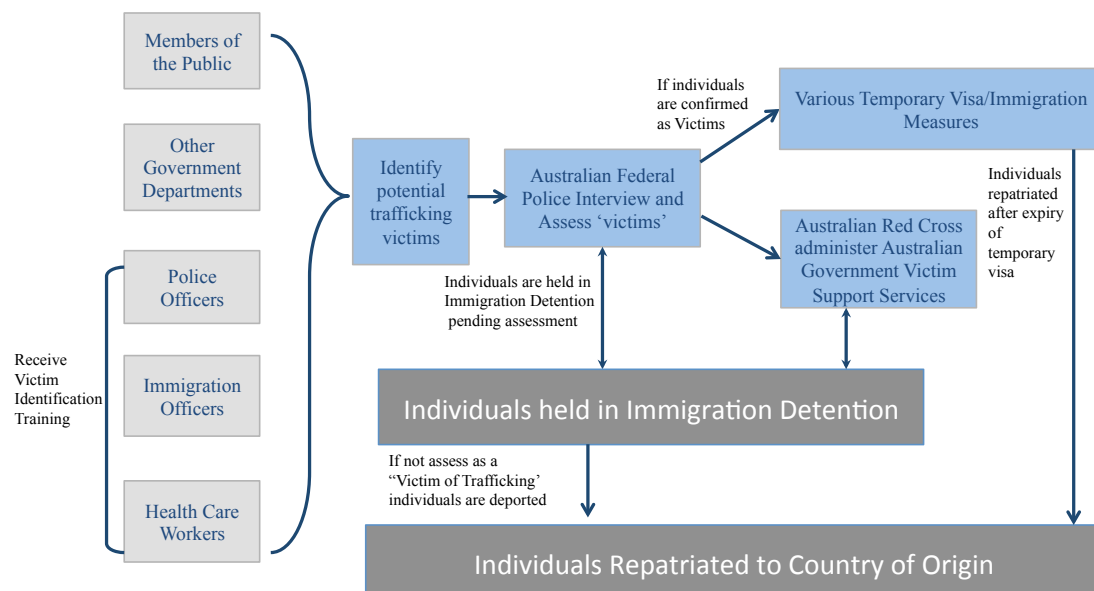
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understood by reading the Declaration made upon ratification of the *Trafficking Protocol*.

The Declaration reads:

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.¹⁰³

The below high-level chart sets out the Australian Government support structure for victims of human trafficking.



¹⁰³ United Nations, *Treaty Series*, vol. 2237, p. 319; Doc. A/55/383
<https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-a&chapter=18&lang=en>

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1 *Victim Identification*

As mentioned previously, locating and identifying victims is the most important first step to protect victims,¹⁰⁴ as failure to identify victims correctly can lead to a further denial of the persons rights.¹⁰⁵ The tension between migration law and the protection of victims is a significant source of contention and up until 2004 local trafficking agents were essentially immune from prosecution because their victims were 'routinely deported' (and therefore unable to give evidence).¹⁰⁶

Possible victims of trafficking can be identified by anyone, however only the *AFP* is able to define an individual as such as they have the sole responsibility for defining victims and the Red Cross are only able to provide support to people who have been referred to them by the *AFP*.^{107 108} Although the *AFP*, Immigration Officers and others undergo specialist training¹⁰⁹ there has only been 273 victims supported by the Support for Trafficked People Program ('*Victim Support Program*')¹¹⁰ since 2005.

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¹⁰⁴ Andreas Schloenhardt and Jarrod Jolly, *Trafficking in Persons in Australia - Myths and Realities* (LexisNexis Butterworths, 1st ed, 2013) 264 [7.3].

¹⁰⁵ Frances Simmons and Jennifer Burn, 'Evaluating Australia's response to all forms of trafficking: Towards rights-centered reform' (2010) 84 *Australian Law Journal*, (2010) 714.

¹⁰⁶ Paul Williams, 'Discord within consensus: The UN trafficking instruments' (2004) 66 *Development Studies Network, Development Bulletin, People Trafficking, Human Security and Development* 62 63.

¹⁰⁷ <<https://www.dss.gov.au/our-responsibilities/women/programs-services/reducing-violence/anti-human-trafficking-strategy>>

¹⁰⁸ <http://www.redcross.org.au/files/ARC_Trafficking-_English.pdf>

¹⁰⁹ Australian Government, 'Trafficking in Persons Report' (July 2014 - July 2015) 28.

¹¹⁰ Andreas Schloenhardt and Jarrod Jolly, *Trafficking in Persons in Australia - Myths and Realities* (LexisNexis Butterworths, 1st ed, 2013) 208 - 210 [5.58].

¹¹¹ Australian Government, 'Trafficking in Persons Report' (July 2014 - July 2015) 36.

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2 Non-criminalisation of victims

Australian criminal law does not contain any specific provisions offering such protection, although the general defences such as self-defence, duress and sudden or extraordinary emergency may apply. At the time of writing there are no known cases that test whether the existing laws are sufficient to exculpate victims from criminal prosecution.¹¹²

Immigration laws have been adopted¹¹³ to offer the possibility of protection from further harm, but as set out below, they are quite limited and inadequate.

3 Support for Trafficked People

(a) Immigration Law

Once identified as a victim, before services can be provided, it is often necessary to regularise his/her visa status. In order to do this effectively the *People Trafficking Visa Framework* ('*Visa Framework*') was introduced with effect from 1 January 2004. In 2009 amendments were made to the effect that there are now three visa's

¹¹² Andreas Schloenhardt and Jarrod Jolly, *Trafficking in Persons in Australia - Myths and Realities* (LexisNexis Butterworths, 1st ed, 2013) 209-210 [5.58].

¹¹³ Australian Government Fact Sheet, 'Australian Government Anti-People Trafficking Strategy' (2009)

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available to victims namely Bridging F Visa, Criminal Justice Stay Visa and the Witness Protection (Trafficking)(Permanent) Visa.¹¹⁴

The Bridging Visa provides victims with 45 days stay in Australia if a Police Officer provides support statement to the Department of Immigration confirming that the person is a victim of trafficking and that they will be cared for during the 45 days (an extension of a further 45 days is available).¹¹⁵

The Criminal Justice Stay Visa is not specifically for trafficking victims and allows the holder the ability to stay for the purpose of participating in criminal justice proceedings.¹¹⁶

Victims can not apply independently for a Witness Protection (Trafficking)(Permanent). The procedure for making an application is typically the responsibility of the *AFP* and in order to grant such a visa the Department of Immigration must received from the Attorney-General a Witness Protection Certificate setting out that the applicant 'made a contribution to, and cooperated closely with, an investigation in relation to another person who was alleged to have engaged in human trafficking, slavery or slavery-like practices'.¹¹⁷

¹¹⁴ Andreas Schloenhardt and Jarrod Jolly, *Trafficking in Persons in Australia - Myths and Realities* (LexisNexis Butterworths, 1st ed, 2013) 222 - 229.

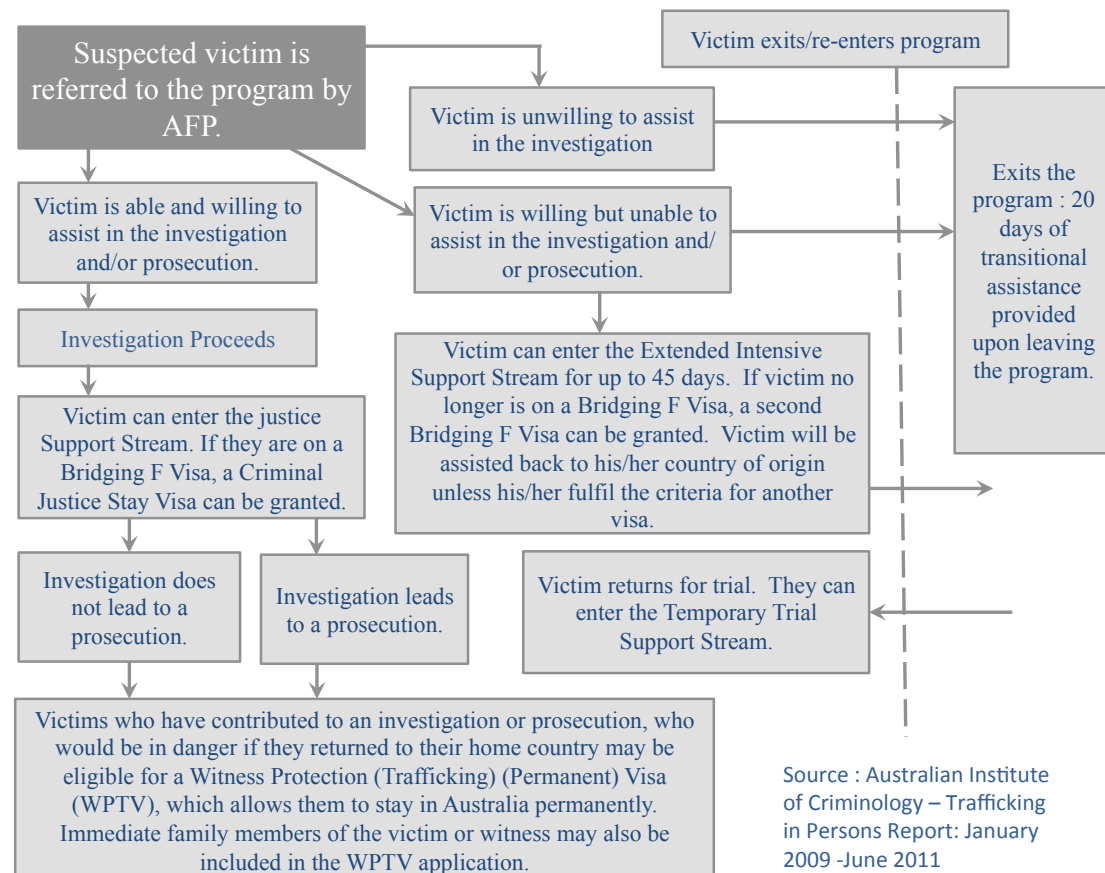
¹¹⁵ *Ibid* 223 [6.6].

¹¹⁶ *Ibid* 225 [6.7].

¹¹⁷ *Migration Regulations 1994* (Cth) subreg 2.07AK(3)(c).

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One of the drivers behind the Government's implementation of the Visa Framework in 2004 was the death a trafficked Thai brother worker named Puangthiong Simpalee.¹¹⁸ Ms Simpalee died in Villawood Detention Centre after receiving inadequate medical treatment. This case highlighted the need to improve services and

¹¹⁸ Department of Parliamentary Services, *Bills Digest*, No 96 of 2004-05, 4 February 12.

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protection to victims.¹¹⁹ However, the criminal justice approach to the *Visa Framework* is considered problematic for three main reasons. Firstly it does not recognize the status of victims as people who have had a serious crime and human rights violation committed against them. Secondly there is a failure to recognise the extreme trauma the victims have experienced and their lack of trust in authorities and thirdly, there is a risk of further traumatization to the victims through the prosecution of the traffickers.¹²⁰

Recent reports from *NGO's* working in this field have concluded that 'women who have experienced tremendously serious violence in this country can spend years in limbo'. It is further reported that the requirement to contribute to legal proceedings (before a visa and other support can be made available) 'puts victims' lives at risk due to the danger of reprisals from 'ruthless people trafficking syndicates'.¹²¹

Australia's approach to visa protection is not consistent with international best practice. Documents, such as the *Principles and Guidelines*, the *Toolkit* and the *Model* law all require that victims should be protected from further harm and as such

¹¹⁹ Miranda Devine, 'Are you one of the men who helped kill Puangthong?', *Sydney Morning Herald* (Sydney), 4 May 2003.

¹²⁰ Andreas Schloenhardt and Jarrod Jolly, *Trafficking in Persons in Australia - Myths and Realities* (LexisNexis Butterworths, 1st ed, 2013) 231 - 232 [6.11].

¹²¹ Katri Uibu, 'Human Trafficking: Most of Australia's alleged sex slavery victims left without government support', ABC News (Australia) 27 August 2015.

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'protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings'.¹²²

¹²² Andreas Schloenhardt and Jarrod Jolly, *Trafficking in Persons in Australia - Myths and Realities* (LexisNexis Butterworths, 1st ed, 2013) 232 - 233 [6.12].

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(b) Support Services

The *Victim Support Program* seeks to provide trafficked people in Australia with access to a flexible support framework for themselves and their families.

Implementing the Program is the responsibility of the Department of Social Services but it is outsourced to the Australian Red Cross.

The Program is divided into an assessment stream, and extended assessment stream, a justice support stream and a temporary trial stream. These Program streams are short term and in some cases only last for as long as the investigation or prosecution of the people trafficking matter is finalised.¹²³

This program is inadequate and there are consistent reports in Australia of victims being put in danger because of their inability or unwillingness to support the prosecution of traffickers with victims advising that 'they were going to send me somewhere, break my legs or arms, take me to a different country'.¹²⁴ In 2014, 46 out of 88 women on the Government's support program left the program for reasons that are unclear. Kathleen Maltzahn, the Founder of Project Respect¹²⁵ advises that when

¹²³ Andreas Schloenhardt and Jarrod Jolly, *Trafficking in Persons in Australia - Myths and Realities* (LexisNexis Butterworths, 1st ed, 2013) 232 - 233 [6.12].

¹²⁴ Katri Uibu, 'Human Trafficking: Sex slavery victims risking brutal reprisals to access government support, campaigners say' ABC News 26 August 2015.

¹²⁵ <<http://www.projectrespect.org.au/>>

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exited victims are 'left to fend for themselves in the same country where they had been subjected to severe sexual violence'.¹²⁶

4 National Action Plan 2015

In 2015 the Australian Government released the National Action Plan to Combat Human Trafficking and Slavery (*'the Plan'*). *The Plan* provides a framework for Australia's response to Human Trafficking and has four central pillars: Prevention and Deterrence; Detection and Investigation; Prosecution and Compliance; and Victim Support and Protection.¹²⁷ One area of *the Plan's* focus is the monitoring of 'provision of support to trafficked people' over the life of *the Plan*.¹²⁸ It is too early to consider whether *the Plan* will achieve its objectives.

5 Conclusion on Australian Implementation

Australia's adoption and implementation of the criminalisation aspects of the *Trafficking Protocol* is considered to be fully compliant with 'the minimum standards for the elimination of trafficking'¹²⁹ and it is acknowledged by some academics that

¹²⁶ Katri Uibu, 'Human Trafficking: Sex slavery victims risking brutal reprisals to access government support, campaigners say' ABC News 26 August 2015.

¹²⁷ Australian Government, 'The National Action Plan to Combat Human Trafficking and Slavery 2015-19' 19.

¹²⁸ *Ibid.*

¹²⁹ United States of America, - Department of State, *'Trafficking in Persons Report'* [July 2015] 76.

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the Government has ‘made significant resources available and mandated a great range of agencies to fight trafficking’.¹³⁰

However, the victim protection aspects of the implementation are not consistent with the intent of the *Trafficking Protocol*, specifically the practice of linking support with prosecution are a ‘core point of contention’.¹³¹

IV SLAVERY - A WESTERN AUSTRALIA CASE STUDY

The precise size of trafficking in Western Australian is unknown. However, research has confirmed that there have been instances of unreported or unrecognized labour trafficking in the state.¹³² Each Australian state and territory has an important role to play in combatting trafficking. It is clear that the offences under *the Act* are 'not intended to exclude or limit the operation of...any law of a State or Territory'.¹³³

A Prosecutions

On the prosecution side, the *Criminal Code Act 1913* (WA) provides for offences of Sexual Servitude, Conducting business involving sexual servitude and Deceptive

¹³⁰ Andreas Schloenhardt and Jarrod Jolly, *Trafficking in Persons in Australia - Myths and Realities* (LexisNexis Butterworths, 1st ed, 2013) 350 [9.2].

¹³¹ *Ibid* 305 [7.47].

¹³² Fiona David, 'Labour Trafficking' (2010) 108 *Australian Institute of Criminology* 59

¹³³ *Criminal Code Act 1995* s 270.12 and 271.12.

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recruiting for commercial sexual services.¹³⁴ Other potentially trafficking related offences include offences against liberty.¹³⁵ However, the prosecution of trafficking offences is largely the responsibility of the *AFP* with state police playing a supportive role.

In January 2012 it was reported that there is a 'police crack down on human trafficking' in Western Australia¹³⁶ and in May 2012 it was reported that sex-trafficking is 'a booming trade in Western Australia'.¹³⁷ The first Western Australian case to be prosecuted under Section 271.8(1) of *the Act* came in 2014 and involved factory workers from Estonia who had their passports taken upon arrival and were told they would have to work to pay off their debt. This case was however discharged by the jury after being unable to reach a verdict.¹³⁸

In another case, on 5 May 2014, a multi agency team raided a property in Carabooda Western Australia in response to suspected international money laundering and the use of undocumented foreign workers.¹³⁹ Over 500 law enforcement agents were involved and more than 130 foreign nationals were taken into custody and taken to the Yongah Hill immigration detention centre for questioning and subsequent

¹³⁴ *Criminal Code Act 1913* s 331B, 331C and 331D.

¹³⁵ *Criminal Code Act 1913* Chapter XXXIII.

¹³⁶ Angela Pownall, 'Police Crack down on human trafficking' *The West Australian* (Western Australia), 31 January 2012.

¹³⁷ Chloe Sargent, 'Sex-Trafficking a booming trade in Western Australia' *Murdock Independent* (Western Australia) 21 May 2012.

¹³⁸ Joanna Menagh, 'Estonia migrant case: Perth jury unable to reach verdict on whether welders were exploited', *ABC News* (Australia) 7 November 2014.

¹³⁹ Australian Federal Police Media Release : Projects Tricord Operation Polo 5 May 2014.

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deportation.^{140 141} It is alleged that the some of the workers accommodation were so filthy that at least one woman needed medical treatment. There were other indicators of forced labour including excessive security at the property, the retention of passports, underpayments and excessive deduction from wages for accommodation, transport and meals. Western Australian Police Assistance Commissioner Mr Craig Ward described the situation as a 'human tragedy, saying that the raid...found 30 people living in a house with one toilet'.¹⁴²

The Carabooda case is still working its way through the prosecution process. It is believed that the 130 foreign national were not identified as victims of human trafficking and were deported due to immigration irregularities. It is also believed that no human trafficking charges have been brought against the suspects in the case.

B Victim Identification Linkage to Prosecution

The linkage between human trafficking victims access to services and the provision of evidence to prosecute wrong-doers has been noted. However, what happens if the wrong doers are not prosecuted under the human trafficking provisions but for other crimes such as money laundering (ref Part 10.2 *the Act*). It is possible to be a victim of human trafficking if there have been no prosecutions under section 270 of *the Act*?

¹⁴⁰ 'Carabooda raids: Numerous charges after WA operation targets organised crime' ABC News (Australia) 5 May 2014.

¹⁴¹ Australian Migrations <<http://www.australianmigrations.com/announcements/foreign-workers-caught-up-in-wa-crime-bust>>

¹⁴² Gabrielle Knowles, Alex Massey and Gary Adshead,'Crime syndicate probe extended to Neerabup' The West Australian (Western Australia), 6 May 2014.

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It appears not, and this certainly seems to be the situation in the Carabooda case where the foreign individuals, who appeared to be living in slavery like conditions, appear to have been deported without entering into the *Victim Support Program*.¹⁴³

In addition will the non-criminalisation practices referred to earlier apply? Certainly the general practice in relation to victims under the *Victims of Crime Act 1994* would apply,¹⁴⁴ but what about the specific protections for victims set forth in the *Trafficking Protocol* and the *Victim Support Program* and the *Visa Framework*? It seems clear that these programs would not apply to anyone other than those who have been identified as victims as part of the prosecution relative to human trafficking offences and as far as the non-criminalisation aspect is concerned the limited evidence available suggests, at least in the case of irregular migrants, they will be treated as illegal immigrants, held in detention for interrogation prior to deportation.¹⁴⁵

C Victim Remedies

The opportunity for statutory recourse to compensation for victims of trafficking are very limited. There is no government funded scheme of compensation for victims of

¹⁴³ Gabrielle Knowles, Alex Massey and Gary Adshead, 'Crime syndicate probe extended to Neerabup' *The West Australian* (Western Australia), 6 May 2014.

¹⁴⁴ *Victims of Crimes Act 1994* s 3.

¹⁴⁵ Dr Mark Zirnsak - Director - Justice and International Mission unit - Uniting Church of Australia, Submission to the Senate Education and Employment Committee to the Inquiry into The Impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders, May 2015 5.

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crime. A claim must therefore be made at state level, in Western Australia, under the *Criminal Injuries Compensation Act 2003* (WA), the maximum amount of award currently being \$75,000. To date, there are no known awards made to victims of Trafficking in Western Australia. The *Plan* does not mention the need for a compensation scheme.

Tortious civil remedies may be more lucrative but may not be easier to obtain. Claims of action could include trespass to the person, tort of assault, battery, false imprisonment, deceit and conspiracy by unlawful means.¹⁴⁶ However, to date there have been no reported cases of trafficked persons successfully seeking tortious damages in Australia.¹⁴⁷

V CONCLUSION

The then Secretary-General of the United Nations noted in the Forward to *the Convention* that :

...the trafficking of persons, particularly women and children, for forced and exploitative labour, including for sexual exploitation, is one of the most egregious violations of human rights that the United Nations now

¹⁴⁶ Pam Stewart, 'Tortious Remedies for Deliberate Wrongdoing to Victims of Human Trafficking and Slavery in Australia' (2011) 34(3) UNSW Law Journal 908.

¹⁴⁷ Ibid 908.

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confronts. It is widespread and growing.¹⁴⁸

Modern day slavery is not only a humanitarian disaster, it is an environmental catastrophe. It has been said that if the all the activities carried out by slavery (such as illegal mining, charcoal-burning, brick making and logging etc.) were to be added together the combined greenhouse gasses would make slavery the third largest emitter of CO₂ on the planet, after China and the United States.¹⁴⁹ Tackling this crime is complex and politically sensitive, with esteemed academics and abolition philanthropists not agreeing even on a methodology for how to count the number of current victims. In some countries slavery permeates every aspect of the economy. For example, in Thailand, which is a major origination, transit and destination country for trafficking, the sex slave trade is so sophisticated that a system of exchange known as 'tok khiew' (green harvest) has developed whereby impoverished hill farmers can pledge their 12-13 year old girls (the year compulsory school finishes) to 'snake-heads' in return for finance.¹⁵⁰ Slavery is also rife in the Thai fishing industry as recently exposed by the Environmental Justice Foundation¹⁵¹ and the politics is a little more deadly in Thailand where it has been reported that the Country's top trafficking investigator fled the country after death threats following his abruptly halted probe which had implicated powerful Thai army and regional

¹⁴⁸ Kofi A. Annan Secretary-General, 'United Nations Convention Against Transnational Organized Crime United Nations New York (2004) - Forward iv.

¹⁴⁹ Kevin Bales, *Blood and Earth* (Spiegel & Grau New York, 1st ed 2016) 115.

¹⁵⁰ Louise Brown, *Sex Slaves the trafficking of women in Asia* (Virago 2000) 54.

¹⁵¹ Peter Alford, 'Stench of Seafood Slavery' *The Australian* (Australia) 30 December 2015 8. and <<http://ejfoundation.org/video/thailands-seafood-slaves>>

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officials.¹⁵² Although these wrong doings are outside Australia, Australian's are involved, either as clients traveling to Thailand for sex holidays¹⁵³ or as consumers of cheap seafood^{154 155} and action is being taken but it is not sufficient or adequate.

The many strengths of the *Trafficking Protocol* (for example the universally accepted definition of trafficking) are generally considered to outweigh it's flaws (for example the non-mandatory language of the victim protection provisions).¹⁵⁶ It is considered that Australia 'fully complies with the minimum standards for the elimination of trafficking'¹⁵⁷ but this does not mean that there is no room for improvement. On the prosecution side it is recognised that there have been 'modest' law enforcement efforts. On the victim protection side efforts have been 'limited' and there is a recognition that Australian need to 'strengthen efforts to proactively identify trafficking victim among vulnerable groups'.¹⁵⁸

It has been argued that the definition of trafficking offences in *the Act* conflate human trafficking offences with people smuggling offences and that the law does not take into account human rights concerns.¹⁵⁹ Furthermore, by making the visa permits contingent on the ability of victims to support prosecutions, Australia 'both

¹⁵² Philip Sherwell, 'Thai Police General Investigating Human Trafficking Seeks Asylum in Australia', *The Telegraph* (United Kingdom), 10 December 2015.

¹⁵³ *Kaye v The Queen* [2004] WASCA 227.

¹⁵⁴ Peter Alford, 'Stench of Seafood Slavery' *The Australian* (Australia) 30 December 2015 8.

¹⁵⁵ Sarah Danckert, 'Woolies, Coles, Aldi caught up in child labour scandal', *Sydney Morning Herald* (Australia), 15 December 2015.

¹⁵⁶ Andreas Schloenhardt, 'Prevented, Suppresses, and Punished!? Twelve Years of the Trafficking in Persons Protocol' (Research Paper, The University of Queensland Australia Human Trafficking Working Group, January, 2012) 27.

¹⁵⁷ United States of America, - Department of State, *'Trafficking in Persons Report'* [July 2015] 76.

¹⁵⁸ United States of America, - Department of State, *'Trafficking in Persons Report'* [July 2015] 76 77.

¹⁵⁹ Aderajew Teshome, 'Australia's Response to Human Trafficking' [2011] 30(2) *University of Tasmania Law Review* 51.

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contravenes...international obligations and has the effect of rendering the human rights needs of victims merely secondary.'¹⁶⁰

The emphasis of the *Trafficking Protocol* on prosecution over protection has been amplified in Australia. The narrow range of victim services are only accessible if a victim is able to be identified as such by the *AFP* and to date there have been very few such cases identified.

It is clear that the protection of victims aspects are lacking both in terms of type of service and accessibility. These shortfalls could easily be remedied with legislative changes, which include victim identification requirements, immunity from prosecution of victims and the right of victims to apply for some form of permanent residency.

¹⁶⁰ Aderajew Teshome,'Australia's Response to Human Trafficking' [2011] 30(2) University of Tasmania Law Review 51.

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