



# Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012

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Senate Legal and Constitutional Affairs Committee

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Written submissions to the Inquiry and evidence from witnesses during the Inquiry hearing addressed visa support for trafficked people. The current support system is linked to the requirement that victims of trafficking contribute to the criminal justice process. This supplementary submission outlines the visa framework for trafficked people in Australia and makes recommendations.

## **I. International law basis for the current visa framework**

Article 7 of the United Nations Supplementary Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking Protocol) encourages States to consider adopting legislative or other measures to permit victims of trafficking to remain in their territory, temporarily or permanently, in appropriate cases.

Australia's visa scheme was created on 1 January 2004 as part of the *Australian Government's Action Plan to Eradicate People Trafficking* and amended on 1 July 2009.<sup>1</sup> The trafficking visa framework for victims of trafficking provides visa security and protection for some victims of trafficking or trafficking-related crimes. In circumstances where trafficked people hold valid visas and choose to remain on their substantive visa, rather than moving to one of the visas in the trafficking visa framework, they will be eligible for support under the Australian Government's Support for Trafficked People Program (Victim Support Program). The trafficking visa framework will benefit an unlawful non-citizen by authorising further stay in Australia, and access to support. Regardless of visa type, if a person is identified as a 'suspected victim of human trafficking' or required to stay in Australia for 'the administration of justice' they may access the Victim Support Program.<sup>2</sup>

### **The trafficking visa scheme contains three different visas.**

#### ***Bridging F Visa (Class WF)***

The Bridging F Visa (Class WF) is available if 'an officer of the Australian Federal Police, or of a police force of a State or Territory, has told Immigration, in writing, that the applicant has been identified as a suspected victim of human trafficking' or is a member of the person's immediate family.<sup>3</sup> This visa may be granted regardless of whether the person will assist in police investigations,<sup>4</sup> and holders of a Bridging F Visa can access the Victim Support Program run by the Australian Red Cross. The Bridging F visa is ordinarily valid for 45 days<sup>5</sup> A second Bridging F visa is available in circumstances where 'a person is willing but not able to assist police because of their current mental, physical or emotional state'.<sup>6</sup>

#### ***Criminal Justice Stay Visa***

If an unlawful non-citizen is likely to be removed from Australia, a Commonwealth Criminal Justice Stay Certificate may issue if the Attorney-General considers that a Criminal Justice Stay Certificate

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<sup>1</sup> Migration Legislation Amendment Regulations 2009 (No2) SLI 116, Sch 8.

<sup>2</sup> Anti-People Trafficking Strategy. <http://www.fahcsia.gov.au/our-responsibilities/women/programs-services/reducing-violence/anti-people-trafficking-strategy>.

<sup>3</sup> Migration Regulations 1994, Schedule 1, Item 1306(3)(d)(i)(ii).

<sup>4</sup> DIAC, PAM3:Act – Compliance and Case Resolution – Program Visa – Bridging F visas 'There is no requirement that they be willing to assist with an investigation', para 2.2.

<sup>5</sup> Migration Regulations 1994, Schedule 2, clause 060.511(3)(b)(ii)

<sup>6</sup> DIAC, PAM3:Act – Compliance and Case Resolution – Program Visa – Bridging F visas, para 2.2.

should be issued for the purposes of ‘the administration of criminal justice in relation to an offence against a law of the Commonwealth’ a Certificate will stay the non-citizen’s removal from Australia.<sup>7</sup> If a Criminal Justice Stay Certificate is in force, a Criminal Justice Stay Visa (CJSV) may be provided to the non-citizen<sup>8</sup> at the absolute discretion of the Minister for Immigration.<sup>9</sup>

### ***A Witness Protection (Trafficking) (Permanent) Visa***

A Witness Protection (Trafficking) (Permanent) Visa (WPTPV) may be offered to a trafficked person if the Attorney General certifies they have ‘made a contribution to, and cooperated with, the prosecution of a person who was alleged to have trafficked a person or who was alleged to have forced a person into exploitative conditions (whether or not the person was convicted)’ or an investigation that the Commonwealth Director of Public Prosecutions has decided not to prosecute;<sup>10</sup> and the Minister is satisfied they would be in danger if returned home.<sup>11</sup> The grant of a WPTPV allows the person and their immediate family to live in Australia permanently; to travel and enter Australia on the visa for 5 years; and access to Medicare and income support.<sup>12</sup>

## **II. Comments and Recommendations**

### **1. The ‘reflection and recovery’ period**

Article 7 of the Trafficking Protocol requires states to “give appropriate consideration to humanitarian and compassionate factors” when considering measures to permit trafficked persons to remain in their territory. The Special Rapporteur notes that this should be reflected in States providing, at minimum, a ‘reflection and recovery’ period that allows “trafficking persons to regain physical and psychological stability and to reflect on available options.”<sup>13</sup> This period of reflection is integral to the process of recovery for victims of trafficking, as well as providing an opportunity to make informed decisions on their safety and well-being, and their ability to assist in further criminal investigations.<sup>14</sup> The Special Rapporteur notes that there is empirical evidence to suggest that a ‘reflection and recovery’ period should be a minimum of 90 days to ensure recovery of victims to a level where they may thoughtfully make these decisions, and provide more reliable information to police investigations.<sup>15</sup>

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<sup>7</sup> Migration Act 1958 (Cth), Sections 141, 147.

<sup>8</sup> Migration Act 1958 (Cth), Section 157.

<sup>9</sup> Migration Act, 1958 (Cth) Section 158.

<sup>10</sup> Migration Regulations 1994, Regulation 2.07AK.

<sup>11</sup> Migration Regulations 1994, Regulation 2.07AK.

<sup>12</sup> Migration Regulations 1994, Regulation 2.07AK.

<sup>13</sup> Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 13 April 2011 (A/HRC/17/35) 50.

<sup>14</sup> Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 13 April 2011 (A/HRC/17/35) 27; see also Anne T Gallagher, *The International Law of human Trafficking* (Cambridge University Press, 2010) 321.

<sup>15</sup> Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 13 April 2011 (A/HRC/17/35) 27; Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 18 May 2012 (A/HRC/20/18) 54.

## **2. Increasing the ‘reflection and recovery period’ from 45 days to 90 days**

Article 6 of the Trafficking Protocol encourages States to consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking. This will include access to housing; counselling and information in the language of the victim; medical, psychological and material assistance; employment, educational and training opportunities.

The current Bridging F Visa of 45 days is granted to those identified by the Federal, State or Territory Police as victims of trafficking, regardless of whether they can help police investigations. This provides for a 45 day period of ‘reflection and recovery’ during which time victims have access to emergency accommodation, support funds, physical and psychological support services, and legal assistance. An additional Bridging F Visa of 45 days may be granted in some circumstances, but as the Special Rapporteur notes, this is in situations where extreme trauma is evidenced.<sup>16</sup>

The Special Rapporteur states in her report to Australia that “A 45-day reflection period may not be an adequate time period for persons who have been trafficked to reflect and make critical decisions. An initial automatic reflection period of 90 days for all persons would be more appropriate and in accordance with article 6 of the Trafficking Protocol.”<sup>17</sup>

Anti-Slavery Australia supports the recommendation that the initial and automatic reflection period given to a person identified by the AFP as a victim of trafficking be extended from 45 to 90 days.

The 90 day period should be allowed to the person regardless of whether or not they can or will assist in an investigation. Anti-Slavery Australia recommends that this period be intended for reflection, and not intended to be investigatory time. We recommend that during this period, persons may be interviewed by police in exceptional circumstances, such as protecting the human rights of others.

## **3. At the end of the ‘recovery and reflection’ period**

A suspected victim may be granted a CJSV at the expiry of the Bridging F Visa, if the person will contribute to a prosecution or investigation. The CJSV allows the holder to remain in Australia for the duration of court proceedings or criminal investigation. The holder will have continued access to the Support for Trafficked Victims program run by the Red Cross

Our experience of the operation of the CJSV is that trafficking investigations can be complex and protracted. Victim-witnesses face uncertainty for their future, and concern for the safety of their family, particularly young children. The CJSV does not provide victim-witnesses who are afraid of the consequences of giving evidence against their traffickers with any guarantee that they will receive further visa protection after the prosecution has completed. Compounding this adverse effect on the victim-witness is the anxiety and uncertainty created if the holder of the CJSV has family or children who remain in their country of origin. There is no mechanism within the CJSV for that visa holder to

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<sup>16</sup> Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 18 May 2012 (A/HRC/20/18) 54.

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be reunited with his or her family in Australia. This has contributed to the ongoing trauma experienced by trafficked people assisting police.

The current practice of issuing a permanent visa to victim-witnesses is guided by policy that a decision to consider requesting a WTPV will be taken within 3 months of a decision to prosecute or not to prosecute. We recommend the consideration that a permanent visa is issued earlier than current practice, within 6 months of the grant of a CJSV.

#### **4. Compassionate Circumstances**

We recommend the consideration of a grant of a permanent visa in compassionate circumstances, where victims of trafficking are unable to participate in a criminal investigation.

Associate Professor Jennifer Burn, Director Anti-Slavery Australia