



University of Technology, Sydney

Jennifer Burn
Anti-Slavery Project
Faculty of Law
PO Box 123
Broadway 2007

Tel: (02) 9514 9662
Fax: (02) 9514 9685

Email:
Jennifer.Burn@uts.edu.au
Monday, 8 August 2005

The Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate

Parliament House
Canberra ACT 2600
AUSTRALIA

email: legcon.sen@aph.gov.au

Senate Legal and Constitutional Committee Inquiry into the administration and operation of the Migration Act 1958

Our submission in response to the Terms of Reference is attached.

The focus of the submission is to show how the operation and administration of the Migration Act, its regulations and guidelines impact adversely on Australia's response to the issue of human slavery and trafficking.

Thank you for the opportunity to contribute to the Committee's inquiry.

Yours sincerely

Jennifer Burn and Frances Simmons

Introduction

This submission is in response to the Senate Legal and Constitutional Committee Inquiry into the administration and operation of the Migration Act 1958. Relevantly, the terms of reference cover:

- (a) the administration and operation of the *Migration Act 1958*, its regulations and guidelines by the Minister for Immigration and Multicultural and Indigenous Affairs, with particular reference to the processing and assessment of visa applications, migration detention and deportation of people from Australia;
- (b) the activities and involvement of the Department of Foreign Affairs and Trade and any other government agencies in processes surrounding the deportation of people from Australia;
- (c) the adequacy of healthcare, including mental healthcare, and other services and assistance provided to people in immigration detention;
- (d) the outsourcing of management and service provision at immigration detention centres; and
- (e) any related matters

This submission focuses on the way in which the administration and operation of the *Migration Act 1958*, its regulations and guidelines by the Minister for Immigration and Multicultural and Indigenous Affairs impact on the victims of trafficking. It examines the operation and administration of the visa package for trafficking victims/witnesses introduced in January 2004 and the related matter of the provision of victim support for the victims of trafficking.

Background to Submission

The Impact of the Migration Act 1958 on the victims of trafficking

In 1999, in response to increasing concern about the trafficking of women into sexual servitude, the Government introduced the *Criminal Code Amendment (Slavery and Sexual Servitude) Offences 1999*. The tragic death of Puontong Simaplee, who died in Villawood detention centre on the 26th of September 2001 after being trafficked to Australia to work in sexual servitude, illustrated that legislation criminalising trafficking will have little effect if the visa arrangements and victim support provided to trafficked persons are inadequate.

Until recently, evidence suggests that trafficking victims were detained and removed under the mandatory detention provisions of the *Migration Act 1958*.¹ Commentators have observed that by removing the victims of trafficking from Australia, the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA)

¹ Carrington K and Hearn J "Trafficking and the Sex Industry: from Impunity to Protection" (2002-3) *Current Issues Brief* No. 28, Department of the Parliamentary Library

deported the evidence of trafficking and, inadvertently, provided the traffickers with impunity from prosecution.²

Since the death of Puontong Simaplee, the Government's response to people trafficking has improved. In October 2003 the Government revealed a four year \$20 million package, followed by the launch in June 2004 of the *Commonwealth Action Plan to Eradicate Trafficking in Persons* and, most recently, the introduction of the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005*. There has been increasing recognition, reflected in the 2005 *Criminal Code Amendment (Trafficking in Persons Offences) Act*, that people trafficking is not a problem which is restricted to the sex industry but that can occur in a wide range of industries.

In January 2004, as part of the Government's response to people trafficking, a new visa package was introduced for potentially trafficked persons. These new visas are essential – without access to the visas, victims of trafficking may be subject to the mandatory detention provisions in the Migration Act and are unable to receive the new victim support services for trafficked persons, including accommodation, living expenses and a wide range of social support, legal, medical and counselling services.

The operation and administration of this new visa framework is crucial in evaluating the effectiveness of Australia's response to people trafficking. The new *Criminal Code Amendment (Trafficking in Persons Offences) Act (2005)* will not be successful in securing prosecutions of traffickers if visa arrangements and victim support for trafficked persons are inadequate. More broadly, it is important to recognise trafficked persons not just as potential witness in criminal proceedings but as victims of human rights violations that have occurred in Australia.³

The New Visa Package

From 1 January 2004, the *Migration Regulations* were amended by the *Migration Amendment Regulations (No.11) 2003*. The amendments established two new witness protection (trafficking) visas providing temporary or permanent stay to persons who had made a significant contribution to the prosecution or investigation of alleged trafficking offences and who may be in danger upon returning to their home country.

The Witness protection (trafficking) visas are part of a four-stage package consisting of:

Stage 1: A new Bridging Visa F (subclass 060)

Stage 2: The existing criminal justice stay visa (Pt 2, Division 4 of the *Migration Act 1958*)

Stage 3: Class UM, Subclass 787 (Witness Protection (Trafficking) (Temporary) Visa under Regulation 2.07AJ); and

² Ibid

³ For a detailed analysis of the new visa framework see Burn J, Simmons F, "Rewarding witnesses, ignoring victims: an evaluation of the new trafficking visa framework", (2005) 24 *Immigration Review* 387.

Stage 4: Class DH, Subclass 852 (Witness Protection (Trafficking) (Permanent) Visa under Regulation 2.07AK.)

From 1 January 2004 to 30 June 2005, 42 suspected victims of trafficking have been granted Bridging F visas. During the same period 28 suspected victims of trafficking have been granted Criminal Justice Stay visas, and 2 suspected victims of trafficking have been granted Criminal Justice Entry visas. From 1999 to 31 December 2003, 11 suspected victims of trafficking were granted Criminal Justice Stay visas, and 1 suspected victim of trafficking was granted a Criminal Justice Entry visa. At the time of writing, no Witness Protection (trafficking) visas had been granted.⁴

Bridging Visa F

The Bridging Visa F is granted to 'persons of interest' to the police in relation to offences or alleged offences of people trafficking, sexual servitude or deceptive recruiting.⁵

This grant of the BVF is tied to the criminal justice process. The applicant must be the subject of written advice from Federal, State or Territory police stating that the applicant is a person of interest in relation to an offence or alleged offence involving people trafficking, sexual servitude or deceptive recruiting or the member of the immediate family of such a person.⁶ Thus the focus is on the person's potential as a witness rather than their status and needs as a trafficked person.

Crucially, the grant of a BVF allows trafficking victims to access victim support. Where BVF holders are alleged victims of trafficking, they are given access to victim support administered by Southern Edge Training Pty Ltd under a contract for services issued by the Office of the Status of Women. This support includes temporary accommodation, access to Medicare and medical services, counselling and legal services, training and social support. Although BVF holders are not eligible for social security payments, hotel accommodation is provided as well as a \$500 emergency allowance, a food allowance of \$80 per week and a living allowance of \$80 per week.⁷

If a person in immigration detention is granted a BVF, he or she will be released and allowed to stay lawfully in the community while the law enforcement agency assesses whether the person is able and willing to assist with investigations into people trafficking, sexual servitude and/or deceptive recruiting.

⁴ Source: DIMIA, personal communication, August 2005.

⁵ *Migration Regulations*, Schedule 1, Item 1306, Bridging Visa F.. See also *Migration Regulations*, Schedule 2, 060.22 Criteria to be satisfied at time of decision The Minister is satisfied that the applicant is a person of interest in relation to an offence or an alleged offence involving:

- (a) people trafficking; or
- (b) sexual servitude; or
- (c) deceptive recruiting.

The Minister is satisfied that suitable arrangements have been made for the care, safety and welfare of the applicant for the proposed period of the visa.

The Minister is satisfied that, if the bridging visa is granted, the applicant will abide by the conditions imposed on it.

⁶ *Migration Regulations*, Schedule I, Item 1306 Bridging Visa F; Migration Series Instruction 391: People Trafficking, para 8.2.3

⁷ Malcom Turnbull, House of Representatives, *Hansard*, 14 March 2005, p12

The BVF is valid for a maximum of 30 days. However, under the *Migration Regulations* a BVF can expire at a date specified by the Minister or if the AFP tells Immigration, in writing, that the BVF holder is no longer a person of interest in relation to an offence involving people trafficking, sexual servitude or deceptive recruiting and the Minister informs the BVF holder, in writing, that for this reason the BVF is no longer in effect.⁸

While DIMIA policy recognises that “a trafficking victim/witness with confidence in government authority is more likely to reveal they have been trafficked and be willing to assist with the investigation and prosecution of people trafficking offenders”⁹ the effect of the *Migration Regulations* is that not all BVF holders are given the maximum 30 day period to receive victim support and develop confidence in government authority.

Anecdotal evidence from anti-trafficking NGO Project Respect suggests that the decision that the holder of the BVF is not a person of interest is frequently made within days of the grant of the BVF. On the 12th of January 2005, *The Australian* reported that “Julia”, who claimed to have been trafficked, was “kicked off” the bridging visa program after the police told her statement was “useless”.¹⁰

In our view, the *Migration Regulation* should be revised to ensure all suspected trafficking victims who are granted a BVF are given the benefit of victim support for a minimum of 30 days. the maximum 30 day period. The BVF should be

⁸ *Migration Regulations*, Schedule 2, 060.5 . This states a BVF is in effect:

- (a) coming into effect on grant; and
- (b) permitting the holder to remain in Australia until the earliest of the following:
 - (i) a date specified by the Minister;
 - (ii) the end of 30 days after the date of the grant;
 - (iii) if:
 - (A) an officer of the Australian Federal Police, or of a police force of a State or Territory, has told Immigration, in writing, under [paragraph 1306\(3\)\(d\)](#) of Schedule 1 that the holder is a person of interest in relation to an offence or an alleged offence involving:
 - (I) people trafficking; or
 - (II) sexual servitude; or
 - (III) deceptive recruiting; and
 - (B) an officer of that police force tells Immigration, in writing, that the holder is no longer a person of interest in relation to the offence or the alleged offence; when the Minister gives a written notice to the holder, by one of the methods specified in [section 494B](#) of the Act, that the holder is no longer a person of interest;
 - (iv) if:
 - (A) a holder is a member of the immediate family of a person; and
 - (B) an officer of the Australian Federal Police, or of a police force of a State or Territory, has told Immigration, in writing, under [paragraph 1306\(3\)\(d\)](#) of Schedule 1 that the person is a person of interest in relation to an offence or an alleged offence involving:
 - (I) people trafficking; or
 - (II) sexual servitude; or
 - (III) deceptive recruiting; and
 - (C) an officer of that police force tells Immigration, in writing, that the person is no longer a person of interest in relation to the offence or the alleged offence; when the Minister gives a written notice to the holder, by one of the methods specified in [section 494B](#) of the Act, that the person is no longer a person of interest.

⁹ Migration Series Instruction 391: People Trafficking, para 4.1.5.

¹⁰ “Use and Abuse”, *The Australian*, 12 January 2005, p 11

reconceptualised as reflection and recovery time, where suspected victims of trafficking have access to intensive victim support. Hasty decisions that BVF holders are no longer 'persons of interest' ignore the fact that a reflection period is vital to develop trust between the trafficked person and the law enforcement agency.

Ultimately, eligibility for a BVF should not be dependent on whether a person is willing or able to assist police but on their status as a victim of trafficking. A BVF should be available to all suspected victims of trafficking.

Criminal Justice Stay visa

If a law enforcement agency certifies that a person on a BVF is required in Australia to assist in the administration of justice, the person will probably be granted a criminal Justice Stay Visa (CJSV).¹¹ The grant of CJSV is discretionary. CJSV holders may remain in Australia for while they are required for law enforcement purposes. This time frame is decided by law enforcement agencies and not the needs of trafficking victims.

The consequence of the arbitrary character of a CJSV is that trafficking victims must live with the uncomfortable knowledge that their continued stay in Australia is conditional on their ability to be able to provide adequate assistance to police. Once the investigation or prosecution is over, trafficking victims can not apply for a Witness Protection (Trafficking) (Temporary) Visa unless invited to apply by the Minister.

A holder of a criminal justice stay visa is prohibited from applying from any other visa exception a protection visa.¹² This restriction prevents trafficked persons, who often have complex immigration histories, from applying for other visas. For example, victims in genuine and continuing relationships with Australian citizens or permanent residents will be precluded from applying for a partner visa.

Witness Protection (Trafficking) Visas

When a CJSV has expired a person may be eligible for a Subclass 787 Witness Protection (Temporary) Trafficking Visa. The grant of this visa is discretionary. A person who has assisted a police investigation or prosecution in a trafficked matter may be granted this visa if:

- (a) the person is in Australia; and
- (b) the person holds a criminal justice stay visa; and
- (c) the Attorney-General has issued a certificate in relation to the person to the effect that:
 - (i) the person made a significant contribution to, and cooperated closely 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

¹¹ A CJSV is granted after the issue of a Criminal Justice Stay Certificate

¹² See ss46 and 61 of the *Migration Act* 1958. However, trafficking victims may be able to apply for and meet the criteria for a protection visa under s36 of the *Migration Act* 1958.

- (ii) the person made a significant contribution to, and cooperated closely with, an investigation in relation to which the Director of Public Prosecutions has decided not to prosecute a person who was alleged to have trafficked a person or who was alleged to have forced a person into exploitative conditions; and
- (d) the Attorney-General's certificate is in force; and
- (e) the person is not the subject of a prosecution for an offence that is directly connected to the prosecution mentioned in the Attorney-General's certificate; and
- (f) the Minister is satisfied that the person would be in danger if he or she returned to his or her home country; and
- (g) an offer of temporary stay in Australia is made to the person by an authorised officer; and
- (h) the person indicates, in writing, to an officer that he or she accepts the Australian Government's offer of a temporary stay in Australia.

If the CJSV holder meets the above criteria the person may be issued with a Subclass 787 visa for a maximum of 3 years. A permanent witness protection (trafficking) visa (subclass 852) may be granted if the person has held the corresponding temporary visa for at least 2 years and continues to meet the criteria.

Evaluating the new visa framework

The policy rationale for the witness protection (trafficking) visas appears to be, at least in part, that witnesses in trafficking cases are often reluctant to testify in a trafficking case if they fear that they may be required to return to their home country at the end of the trial, possibly to face their traffickers.¹³ However, for a number of reasons (discussed below), the new visa framework functions fails to allay the fears of trafficking victims.

A temporary Witness Protection (trafficking) visa can only be granted at the conclusion of the criminal justice process while the victim still holds a criminal justice stay visa.¹⁴ This approach fails to provide trafficking victims who are in the process of giving evidence with the feeling that their long term security is important to police. Instead, they are left on CJSV that could end whenever the law enforcement agency decides that the witness is no longer useful. A better way of supporting trafficking victims and building trust between trafficking victims and law enforcement agencies would be to allow trafficking victims to apply for Witness Protection visas while they are in the process of assisting authorities.

The grant of the witness protection (trafficking) visas is highly discretionary: there are no application forms enabling the applicant to apply for a visa.¹⁵ Trafficked persons

¹³ Supra n. 8

¹⁴ DIMIA has stated "The Witness Protection (Trafficking) visa allows trafficking victims to remain in Australia **following the conclusion of a criminal justice process where the victim has significantly contributed to the prosecution or investigation of people trafficking matters and who may be in danger if they return to their home country**". See DIMIA, Submission No. 16, Senate Legal and Constitutional Committee Inquiry in the Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 [2005].

¹⁵ See, *Migration Regulations*, Schedule 1, Item 1224AA. Witness Protection (Trafficking) (Temporary) Class UM) and Item 1133. Witness Protection (Trafficking) (Permanent) Class DH

must wait for the Minister of Immigration to exercise her discretion and offer the trafficking victims the chance to apply for the visa. The discretionary nature of the visas and absence of a transparent application process undermines the effectiveness of the visa system. A better approach would be to enable trafficked persons to apply for a witness protection (trafficking) visa instead of relying on the discretion of the minister. The visa application process should be open and accessible.

In practice, the standard of evidence that suspected trafficking victims need to provide to obtain visas and gain access to victim support services has proved too arduous. At the BVF and Criminal Justice Stay Visa stages suspected trafficking victims have been told their evidence is “not good enough”. *The Australian* reported that a woman was placed in immigration detention despite providing police with the names of traffickers. *The Australian* reported that the woman would be removed from Australia, despite fears for her safety if she returns to Thailand, because the information she had provided had not led to a prosecution.¹⁶ This treatment acts as a disincentive for other victims to come forward and assist police investigations and prosecutions.

The authors of this submission are of the view that trafficking visas should not be tied to the criminal justice process. However, in the event that visas and victim support for trafficking victims remains contingent on trafficking victims’ providing assistance in police investigations or prosecutions the level of assistance trafficking victims are required to provide to gain access to visas and victim support should be reassessed.

For both the temporary and the permanent Witness Protection (trafficking) visas, the question of what constitutes a “significant contribution” is a matter that will be resolved by ministerial discretion on a case by case basis. The words “significant contribution” and “cooperated closely with” are unduly onerous and undermine the fact that any trafficking victim who undertakes to assist police in anyway is undertaking a psychologically difficult and potentially dangerous task. If trafficking visas continue to be contingent on victims providing assistance to police investigations or prosecutions, the words “significant contribution” and “cooperated closely with” should be removed and replaced by the requirement that the person provided reasonable assistance to police investigations or prosecutions to the best of their ability.

However, ultimately, the best way to allay the fears of trafficking victims is to provide protection and support on the basis of their status as victims, not their ability as witnesses.

Protection for victims, not just witnesses

Protection for trafficking victims should not be contingent on their capacity to act as witnesses in a criminal investigation or prosecution. The vagaries of criminal investigations and prosecutions mean that, for a multitude of reasons that have nothing to do with the person’s status as a trafficking victim, a trafficking victim’s evidence may not be deemed to be useful. The Human Rights and Equal Opportunity

¹⁶ “Use and Abuse” *The Australian*, 12 January 2005, p. 11.

Commission has observed making visas and victim support contingent on the standard of evidence provided could backfire in criminal proceedings:

...[if] a person's evidence is required to be of a sufficient standard to allow them to receive support, it could well be argued during criminal proceedings that the evidence was fabricated in order to achieve that standard.¹⁷

This submission that visas and victim support for trafficking victims is consistent with the UN *Recommended Principles and Guidelines on Human Rights and Human Trafficking* which states that that the human rights of trafficked persons should be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims. In particular, recommendation 8 states:

States shall ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care. Such protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings.¹⁸

The UNHCR High Commissioner has stated:

....[trafficking victims] should be entitled to adequate protection under any circumstances irrespective of any decision to instigate judicial proceedings.¹⁹

A visa system where the protection and support of trafficking victims conditional on victims' being both able and willing to make a "significant contribution" to a criminal investigation or prosecution fails to meet our moral obligation to those who have suffered gross human rights abuses on our shores. It leaves open the possibility that trafficking victims will not be protected: women who are so psychologically terrified that the thought of giving evidence can not even be contemplated will be deported; the same fate awaits those willing witnesses whose evidence is deemed "not enough". The visa package needs to provide access to a victim support program for all trafficked persons NOT simply a witness protection scheme.

While DIMIA has stated:

It is not reasonable to expect that every person who claims to be trafficked should be allowed to stay in Australia and it is very difficult to test such claims if there is no judicial process. Some trafficking claims have not been substantiated and in some cases people may have been both trafficked and participated in trafficking. Allowing ready access to residence may facilitate trafficking or increase the level of fraudulent claims, diverting criminal justice resources.²⁰

¹⁷ Ms Sally Moyle, HREOC, Senate Legal and Constitutional Committee Inquiry into the Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 [2005] p 9

¹⁸ United Nations, Recommended Principles and Guidelines on Human Rights and Human Trafficking. Recommendation 8

¹⁹ As quoted in ECPAT "Briefing on a proposal for European Council Directive (COM (2002) 71 FINAL) on the Short-Term Residence Permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who co-operate with the competent authorities, 2002.

²⁰ DIMIA, Submission No. 16, Senate Legal and Constitutional Committee Inquiry in the Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 [2005].

There is no evidence to support the claim that if visas (and victim support) for trafficking victims are not contingent on the victim providing adequate assistance to a criminal investigation or prosecution, the floodgates will be opened to raft of fraudulent claims, diverting criminal justice resources. Many trafficking victims wish to be repatriated (although they may require victim support before repatriation). In other countries, such as Italy, where visas are not linked to a criminal justice process there is no evidence that there has been any significant abuse of trafficking visas by fraudulent claims²¹.

While many, trafficked victims want to go home, Australia has an obligation to ensure that the process of repatriation is safe and that trafficking victims receive victim support prior to repatriation, regardless of whether or not they are involved in assisting police investigations or prosecutions. An independent process is needed to assess when trafficking victims are safe to return home.

While recognising that some trafficking victims will wish to return home, others will not. The Parliamentary Joint Committee Australian Crime Commission into the trafficking of women into sexual servitude recommended:

...all trafficked women accepted onto the victim support program or receiving the Criminal Justice Stay Visa be exempt from compulsory return to their country of origin.²²

Until the visa framework is based on a person's status as a victim instead of their ability as a witness, criminals will not be prosecuted and victims will continue to be punished.

Review of trafficking visa package

Although the visa package was introduced in January 2004, it has received little public scrutiny and there have been no public moves by the Government to review the operation and administration of the visa package.

This submission supports the recommendation of the Legal and Constitutional Senate Committee Inquiry into *Criminal Code Amendment (Trafficking in Persons Offences)* [2004] (2005) that:

...further consideration ought to be given to the arrangements for the protection and support of victims of trafficking, especially in light of the imminent ratification of the ratification of the Protocol and its international obligations in area of victim support. The Committee notes that Australia is only one country among many dealing with this issue. It also notes DIMIA's advice that trafficking visa models of other countries were considered in the development of Australia's visa regime. The Committee believes there is merit in regular review of

²¹ See further discussion in Georgina Costello, *The Churchill Report*, May 2005, p14.

²² PJCA, *Inquiry into trafficking of women for sexual servitude*, June 2004, recommendation 8, p. 57

developments of other countries in their approaches to trafficking in persons.²³

Conclusions and Recommendations

In conclusion, this submission makes the following recommendations:

- (a) The Bridging Visa F should be granted for a **minimum** of 30 days. Correspondingly, all BVF holders should receive a minimum of 30 days victim support. Consideration should be given to extending this timeframe in order to provide trafficking victims with adequate reflection and recovery time.
- (b) Bridging Visa F should be available to all persons reasonably suspected of being trafficked regardless of whether or not police believe they will be able to assist a police investigation or prosecution into the offence of people trafficking, sexual servitude or deceptive recruiting.
- (c) Trafficking victims should be eligible for visas on the basis of their status as a victim of trafficking, their safety needs and their need for victim support. Protection for trafficking victims should not be contingent on victims ability to act as witnesses. The Witness Protection (trafficking) temporary visa and the Witness Protection (trafficking) Permanent visa should be revised to remove the requirement that the person has made a significant contribution to police investigations or prosecutions.
- (d) Trafficking victims should be empowered to be able to apply for a trafficking visa instead of relying on the discretion of the minister. The visa application process should be open and accessible.
- (e) Trafficking victims who cannot be safely repatriated should be able to be eligible for a visa which provides support for trafficking victims regardless of whether or not they are able or willing to assist police investigations or prosecutions.
- (f) Victim support should be available for persons who are granted a temporary protection visa on the basis that as a trafficked person, they have a reasonable fear of persecution if they return home.

Thank you for the opportunity to make this submission to the Committee.

Yours sincerely

Jennifer Burn*

Frances Simmons**

²³ Senate Legal and Constitutional Legislation Committee. *Report -The Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 [2005]*,

*Senior Law Lecturer, University of Technology Sydney.

Director, UTS Community Law Centre and Anti-Slavery Project

** Research Assistant, UTS. Frances Simmons is now working as a Legal Research Officer at the Human Rights and Equal Opportunity Commission. The opinions expressed in this submission are those of Frances Simmons and Jennifer Burn and not necessarily those of the Commission.