

# Australia's Response to Human Trafficking

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## Abstract

This article argues that the link made between migration control and security in developed countries is damaging. Australia, a 'high destination' country for trafficking victims, is responsible for orchestrating a shift of the anti-trafficking paradigm away from the human rights perspective, into a border control agenda. While the sovereign right of each country to control its borders and design its own migration policies cannot be contested, international law dictates that such measures not be prejudicial to the rights of individuals. Australia has ratified the *Trafficking Protocol*, therefore, it is obliged to criminalize trafficking offences as defined under Article 3(a). This paper analyses whether Australia's response to human trafficking offences complies with the *Trafficking Protocol*. Australia's conceptualisation of trafficking is inconsistent with the *Trafficking Protocol*. Trafficking and people smuggling offences are conflated, with an inappropriate focus on trafficking for sexual purposes. Trafficking for labour exploitation is overlooked. Law enforcement efforts and migration policies need to give greater priority to protecting and supporting trafficking victims.

## I INTRODUCTION

Human trafficking violates fundamental and non-derogable human rights and freedoms, breaches migration and employment laws, and poses a threat to the security of states.<sup>1</sup> Thus, it has become a serious challenge of our time. Although gauging the true extent of human trafficking may be very difficult, if not impossible, much of the literature highlights the global and insidious nature of the problem, and with virtually no country immune from it. It is ranked as the third most; but the fastest growing;

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<sup>1</sup> Anna Gekht, 'Shared but Differentiated Responsibility: Integration of International Obligations In the Fight against Trafficking in Human Beings' (2008) 37 *Denver Journal of International Law and Policy* 29.

lucrative illicit criminal activity (exceeded only by drugs and arms trafficking) generating an illicit income of over US\$32 billion a year.<sup>2</sup>

Australia is not exempt from this global problem. For instance, the United Nations Office on Drug and Crimes (UNODC) has identified Australia as one of the high destination countries.<sup>3</sup> The United States Department of State Trafficking in Persons annual report details that Australia is among the major destination countries for trafficked people, mainly from Southeast Asian countries.<sup>4</sup> Regrettably, despite knowledge of the existence of the problem for more than a century, anti-trafficking attempts have emerged only very recently.<sup>5</sup> Accordingly, it is only since the late 1990s that the issue has gained considerable momentum and has been discussed in important international, regional and national fora. In particular, the adoption of the *United Nations Trafficking Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol)* in 2000 is often referred to as a milestone in this regard.<sup>6</sup>

The level of awareness about trafficking in persons and existing counter trafficking efforts is increasing. Because criminalisation of trafficking and apprehension of the perpetrators is the prevailing paradigm in fighting the problem, most countries in the world have either enacted new criminal legislation, or amended their existing laws in a way that proscribes such practices.<sup>7</sup> Likewise, taking into account the gravity of the problem and with the intention of ratifying the protocol, in 2005 Australia amended its *Criminal Code* and introduced some other important measures. As a result, the phrase 'trafficking in persons' was introduced by the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth) and

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<sup>2</sup> International Labour Organization, *The Cost of Coercion: Global Report under the Follow up to the ILO Declaration on Fundamental Principles and Rights at Work* (2009) 1; United Nations Population Fund, *State of World Population Report 44* (2006) cited in Gekht above n 1, 31.

<sup>3</sup> The United Nations Office on Drugs and Crime (UNDOC) *Trafficking in Persons: Global Patterns* April 2006, 20, where Australia is listed among the 'top 21 high destination' country list.

<sup>4</sup> US Department of State, *Trafficking in Persons Report* (June 2010) <<http://www.state.gov/documents/organization/142979.pdf>>.

<sup>5</sup> Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Martinus Nijhoff, 2006) 3.

<sup>6</sup> Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking the Balances for More Effective Legislation' (2009) 17 *Cardozo Journal of International and Comparative Law* 101, 103; *Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children*, adopted on 15 Nov 2000, A/55/383 (entered into force on 25 Dec 2003). Australia ratified this protocol on 11 Sep 2005.

<sup>7</sup> Anne T Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (2008-2009) 49 *Virginia Journal of International Law* 789, 813, 829.

since, the practice has been declared criminal.<sup>8</sup> Yet, despite Australia's proclamation that it has developed the 'best anti-trafficking framework in the region' evidence attests that the problem continues growing in the country.<sup>9</sup>

This article will critically examine the Australian government's response to human trafficking. It will begin by briefly demonstrating the nature and extent of the problem. Then it will discuss the nexus between human trafficking and people smuggling offences to highlight how the conflation of the two offences is detrimental. After that, it will proceed to specifically scrutinise the gist of the definition of trafficking in persons offences as set out in the *Criminal Code vis-a-vis* the *Trafficking Protocol's* definition of trafficking. Following this, it will further assess Australian law enforcement efforts by briefly examining the effectiveness of investigations and prosecutions. The issues of jurisdiction and the extent of the penalties accorded to trafficking offences will also be dealt with.

Support and protection to human trafficking victims is a crucial component of any anti-trafficking effort, therefore, this paper will carefully examine what the Australian government is doing this regard. To this end, the visa frameworks that allow residency permits, and the victims' support programs will be closely reviewed. The article aims to illuminate the strengths and pitfalls of the country's anti-trafficking efforts, thereby highlighting avenues for further research that may even lead to legislative and policy reforms.

## II THE NATURE AND EXTENT OF HUMAN TRAFFICKING IN AUSTRALIA

Although the existence of human trafficking in Australia has never been doubted, due to factors such as its clandestine nature and the absence of proper research, there is no reliable data that reveals the true magnitude of the problem. Schloenhardt, Beirne and Corsbie note that 'any public figures on the level of trafficking in Australia are, at best, estimates, and are usually based on guesswork rather than the result of systematic data collection or comprehensive quantitative research'.<sup>10</sup> In its recent work, the Attorney- General's Department has noted that:

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<sup>8</sup> *The Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth).

<sup>9</sup> Marie Segrave and Sanja Milivojevic, 'Auditing the Australian Response to Trafficking' (2010) 22 *Current Issues in Criminal Justice* 63, 64; Fredette above n 6, 103.

<sup>10</sup> Andreas Schloenhardt, Genevieve Beirne and Toby Corsbie, 'Human Trafficking and Sexual Servitude in Australia' (2009) 32 *University of New South Wales Law Journal* 28, 30.

while trafficking into the sex industry has tended to be the most visible form of people trafficking; it is possible that women working in the sex industry are over-represented among statistics on identified victims of trafficking simply because other forms of exploitation are under-reported and under-researched.<sup>11</sup>

In any event, while reports of government agencies confine the number to a few hundred, non-government bodies on the other hand, elevate it to thousands. For instance, in 2004, the Parliamentary Joint Committee of the Australian Crime Commission reported the number of trafficking incidents to be a few hundred.<sup>12</sup> By contrast, Project Respect, a non-governmental organisation working on supporting trafficked women, estimated the number of women trafficked for prostitution in Australia during the same period to be around a thousand.<sup>13</sup> Admittedly, the absence of comprehensive data which is needed to comprehend the true extent and nature of the problem has stalled the adoption of effective laws and appropriate policies.<sup>14</sup>

As will be examined in Part V, anecdotal evidence suggests that the majority of trafficking allegations and investigations to date have been in relation to adult foreign national women trafficked for commercial sex activities.<sup>15</sup> Consequently, trafficking in Australia is often perceived as a problem of migrant female sex workers. Sadly, trafficking for purposes other than sexual exploitation, and domestic trafficking offences has been given merely negligible attention.<sup>16</sup>

One of the major drawbacks of anti-trafficking initiatives is the inability of clearly indentifying trafficking offences from other related practices. The following section will critically examine the nexus between human trafficking and people smuggling offences, and the impact of the fusion

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<sup>11</sup> Australian Government Attorney-General's Department, 'The Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protections', Discussion Paper, 6.

<sup>12</sup> Parliamentary Joint Committee on the Australian Crime Commission Inquiry into the Trafficking of Women for Sexual Servitude (2004), 22. The Committee estimated the number at 300 a year; Bernadette McSherry 'Trafficking in Persons: A Critical Analysis of the New Criminal Code Offences' (2006-2007) 18 *Current Issues in Criminal Justice* 385.

<sup>13</sup> Project Respect, *How Are Women Trafficked?* <[http://projectrespect.org.au/our\\_work/trafficking/why\\_trafficking](http://projectrespect.org.au/our_work/trafficking/why_trafficking)>.

<sup>14</sup> Schloenhardt, Beirne and Corsbie, above n 10, 27.

<sup>15</sup> Trafficking in Persons, The Australian Government Response, The Second Report of the Anti-people Trafficking Interdepartmental Committee, ('IDC Report'), (1 May 2009-June 2010), 25. During the first report which covers 2004-09, it was indicated that, the victims are predominantly Thai nationals followed by South Koreans. However, the second report (2009-2010) indicates that Malaysian nationals have taken the lead-31per cent and Thai nationals only constitute 10 per cent. This report also revealed that 38 investigations and assessments have been conducted in 2009-10 of which 70 per cent was trafficking for sexual exploitation purposes.

<sup>16</sup> Schloenhardt, Beirne and Corsbie, above n 10, 31 and 35.

of the two concepts. Such conflation is, arguably, one of the flaws of the Australia's response to human trafficking offences.

### III THE NEXUS BETWEEN HUMAN TRAFFICKING AND PEOPLE SMUGGLING OFFENCES

Human trafficking is often conflated with people smuggling offences. It is certainly the case that these offences share certain commonalities and sometimes the line between them is subtle and controversial.<sup>17</sup> Further, the United Nations Office on Drugs and Crime (UNODC) deals with both offences under the umbrella of transnational organised crime. This can be further buttressed by the fact that both the *Trafficking Protocol* and the *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime* ('*Migrant Protocol*') that deal with human trafficking and people smuggling offences, respectively, are supplementary to the *United Nation Convention against Transnational Organised Crime* ('*Convention*').<sup>18</sup> Nevertheless, as discussed below, they are indeed distinct offences and any conflation of the two concepts is damaging even though in practice the two are often indistinct.

Article 3(a) of the *Trafficking Protocol* defines trafficking in persons as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payment or benefits to achieve the consent of a person having control over another person for the purpose of exploitation (emphasis added).<sup>19</sup>

Accordingly, for an act to be regarded as a trafficking offence, three elements must be fulfilled cumulatively. They are: i) act: recruitment, transportation, transfer, harbouring or receipt; ii) means: threat, use of force, deception, inter alia; and iii) exploitation, which could be sexual or labour exploitation, among others.

On the other hand, Article 3(a) of *The Protocol* defines smuggling as:

'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

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<sup>17</sup> Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 21 *Human Rights Quarterly* 975, 1000.

<sup>18</sup> *United Nation Convention against Transnational Organised Crime A/55/383*, 15 Nov 2000, entered into force 25 Dec 2003). *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 15 Nov 2000, A/55/383, entered in to force on 25 Dec 2003.

<sup>19</sup> Article 3(1) of the *Migrant Protocol*.

which the person is not a national or a permanent resident' (emphasis added).<sup>20</sup>

The central element in this definition is the illegal entry of a non-national or non-resident, therefore, this protocol can be depicted as an instrument combating illegal migration.

The Human Smuggling and Trafficking Centre summarises the distinction between the two illicit practices as:

[U]nlike smuggling, which is often a criminal commercial transaction between two willing parties who go their separate ways once their business is complete, trafficking specifically targets the trafficked person as an object of criminal *exploitation*. The purpose from the beginning of the trafficking enterprise is to profit from the exploitation of the victim. It follows that *fraud, force or coercion* all play a major role in trafficking (emphasis added).<sup>21</sup>

Theoretically, the distinction between these two concepts is clear. Thus, while trafficking involves consent nullifying action(s), it is for the purpose of exploitation and it does not necessarily involve transnational elements. Smuggling, in contrast, is consensual in that the persons are free up on their arrival in the destination country and it must involve an illegal crossing/attempt to cross another country's border. As the exercise of the consent vitiating actions is so as to achieve the ultimate purpose of exploitation, the latter can be identified as the centrepiece of the distinction between trafficking and smuggling offences.

However, in practice the distinction between the two offences might be very blurred.<sup>22</sup> Gallagher cogently remarks that despite the fact that many people start their journey as smuggled persons and end up in unanticipated coercive and exploitative situations that would make them categorically fall within the ambit of the trafficking definition, such people are often not acknowledged as victims of trafficking. Gallagher's observation is reiterated by the UNHCR in its guidelines.<sup>23</sup>

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<sup>20</sup> Article 3(a) of *The Protocol*.

<sup>21</sup> Human Smuggling and Trafficking Centre, *Fact Sheet: Distinctions Between Human Smuggling and Human Trafficking* (2005) US Department of Justice <[http://www.justice.gov/crt/crim/smuggling\\_trafficking\\_facts.pdf](http://www.justice.gov/crt/crim/smuggling_trafficking_facts.pdf)>.

<sup>22</sup> Rebecca L Wharton, 'A New Paradigm for Human Trafficking: Shifting the Focus From Prostitution to Exploitation in the Trafficking Victims' Protection Act' (2010) 16 *William & Mary Journal of Women and the Law* 753, 770.

<sup>23</sup> Gallagher, above n 17, 1001; Human Smuggling and Trafficking Centre, *Fact Sheet: Distinctions between Human Smuggling and Human Trafficking* (2006), US Department of Justice, <<http://redlightchildren.org>>, 2; United Nations High Commissioner for Refugees, *Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of*

Trafficking offences are, arguably, considered more severe and tantamount to serious human rights violations. Hence, those who are identified as trafficked people are eligible for better assistance and protection than their smuggled counterparts.<sup>24</sup> The absence of a clear distinction between the two offences may be attributable to the reluctance of destination countries to acknowledge trafficking victims. Unfortunately, neither protocol imposes any meaningful obligation on the part of member states to undergo an effective identification process. Thus, the burden of proving their status is squarely left to each individual seeking protection. Consequently, with the view of avoiding or reducing a potential burden arising out of the treatment of such persons, states may be tempted into deliberately misidentifying trafficked persons as smuggled people. In this regard, Australia's response to human trafficking has been strongly criticised for its undue emphasis on combating irregular/illegal migration, which jeopardises *bona fide* refugees, asylum seekers and trafficked persons, among others.<sup>25</sup> As the focus is on intercepting, detaining and deporting illegal migrants, actual victims of human trafficking offences may be misidentified as smuggled persons and could risk deportation as opposed to receiving the appropriate support and protection.

Having discussed the definitions and the nexus between trafficking and smuggling offences as a background, the gist of the trafficking definition under the Australian *Criminal Code* will be discussed in the next section. The aim is to highlight how the *Code* is consistent with the definition set out in the *Trafficking Protocol*, and to explore how the trafficking-smuggling dichotomy impacts on Australia's response to human trafficking.

#### IV TRAFFICKING IN PERSON OFFENCES UNDER THE AUSTRALIAN CRIMINAL CODE

The *Trafficking Protocol* is acclaimed as the first international legal instrument to set out a binding definition of human trafficking.<sup>26</sup> Besides defining the concept and thereby setting a standard guideline, the *Trafficking Protocol* requires member states to criminalise trafficking offences as defined therein. Australia has amended its *Criminal Code* and

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*Trafficking or Persons at Risk of Being Trafficked*, UN Doc HCR/GIP/06/07 (7 April 2006), [10] ('*UNHCR Trafficking Guidelines*').

<sup>24</sup> Anne Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) 92.

<sup>25</sup> Susan Kneebone, 'Refugees, Crime and Security: The Trafficking- Refugee Nexus' (paper presented at the Refugees Futures Conference, 10-12 September 2009, Monash University Prato Centre, 9) 1.

<sup>26</sup> James Hathaway, 'The Human Rights Quagmire of "Human Trafficking"' (2008) 49 *Virginia Journal of International Law* 1, 11.

ratified the *Trafficking Protocol*. As a result the country has certain international obligations emanating out of such ratification. Therefore, analysing the consistency of the Australian *Criminal Code's* definition with the *Trafficking Protocol* is worthwhile.

It has been noted that for an act to be regarded as 'trafficking in human beings' pursuant to the *Trafficking Protocol* definition presented above, at least three factors should be fulfilled cumulatively. These are: 'act' such as, recruitment, transportation, harbouring, etc; 'means': threat use of force, deception, *inter alia*; and 'purpose' which is exploitation. The latter is also 'defined' as *inter alia* inclusive of sexual and/or labour exploitation.<sup>27</sup> Consequently, it goes without saying that, in the absence of one or more of the three elements, an action fails to meet the definition of trafficking and is therefore not criminal.

On the other hand, people trafficking as set out under different subsections of s 271 of the Australian *Criminal Code* can be discerned as:

'the trafficker *organises or facilitates* the transportation of a victim into, out of or within Australia, by *using force, threats or deception* or by *being reckless as to the exploitation* of the victim' (emphasis added).<sup>28</sup>

Seemingly, this definition is not consistent with the UN definition discussed above. The inconsistencies mainly stem from the fact that each proscription under the *Criminal Code* does not contain all the three key elements: act, means and exploitation cumulatively.<sup>29</sup> Sections 271.2(1) and (1A), for instance, state that *organising or facilitating* the entry/exit or proposed entry/exit, or receipt of another person *using a force or threat* (emphasis added) is regarded as a trafficking offence. Whereas, the two elements (act and means) exist, the third, and decidedly the most crucial element (exploitation) is absent in both the above provisions. Hence, exploitation, which is the centrepiece of the definition of trafficking under the protocol, does not seem to be considered as a mandatory element under the Australian *Criminal Code*.<sup>30</sup>

In a similar vein, ss 271.2(1B), (1C), (2) and (2A) do not embody the elements that pertain to 'means', such as; *inter alia* the use of force, coercion or deception. In this way, it appears that the *Criminal Code* has

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<sup>27</sup>Gallagher, above n 7, 811; However, Hathaway adds a fourth element called 'transnational' character to the above three elements, see Hathaway, above n 26, 9.

<sup>28</sup> IDC Report, above n 15, 23.

<sup>29</sup> McSherry, above n 12, 390.

<sup>30</sup> Ibid; see also Bernadette McSherry and Susan Kneebone 'Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights' (2008) 12 *International Journal of Human Rights* 67, 75. Among others, the exploitation of the victims is what distinguishes trafficking from smuggling and other irregular migrations.



adopted a very broad definition of trafficking in persons through prohibiting other practices that do not involve such means. Further, s 271.2(3)(1a) of the *Criminal Code* treats exploitation, which is considered as the key element under the protocol's definition, as an aggravating factor. Thus, the *Criminal Code's* ambit goes far beyond the *Trafficking Protocol* and criminalises certain practices which the protocol does not.

From the foregoing discussion it can be discerned that the common element available throughout the sections is what has been termed as 'act - organising or facilitating the entry/ exit or proposed entry/exit or the receipt of a person of a person (emphasis added). These words often pertain to the irregular movement of migrants. This, coupled with the omission of the key elements enshrined in the *Trafficking Protocol's* definition, lends support to the criticism that Australia's response to human trafficking offences unduly focuses on combating irregular/illegal migration. Moreover, it is arguable that security and border control sentiments are the linchpins of the country's anti-trafficking instrument, rendering the protection and assistance of victims as peripheral.<sup>31</sup>

As stated above, the two major distinguishing features between trafficking offences and those of people smuggling are the involvement of consent vitiating acts, and the exploitation or intention of exploiting the persons in the former. Any absence of these elements would have the negative repercussion of conflating the two distinct criminal activities. However, it should be noted that these inconsistencies do not exist in cases of trafficking in children.<sup>32</sup>

## V LAW ENFORCEMENT

Australia's current approach in combating human trafficking is predominantly based on law enforcement, also known as a criminal justice paradigm.<sup>33</sup> Such an approach mainly focuses on proscribing trafficking offences and apprehending and prosecuting perpetrators. This is evidenced by Article 5 of the *Trafficking Protocol*, which requires each member state to adopt national legislation that criminalises trafficking offences as defined under Article 3. In contrast, the *Trafficking Protocol's* clause with respect to the support and assistance to the victims is largely left to the discretion of states. However, this paradigm has been strongly

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<sup>31</sup> See Kneebone, above n 25, 1.

<sup>32</sup> See s 271.4 of the *Criminal Code* (Cth) where, unlike the other provisions, all the three elements are found cumulatively.

<sup>33</sup> Fredette, above n 6, 120.

criticised for giving less attention to the human rights and social concerns of victims.<sup>34</sup>

Human trafficking is a criminal activity that it is antithetical to the dignity and honour of human beings.<sup>35</sup> In addition to affecting states, it violates the human rights of the particular individuals subjected to it. Consequently, both law enforcement and human right paradigms are necessary to fight the problem. It follows that the inability and/or unwillingness of countries to enact and effectively enforce appropriate laws and policies can be attributed to the unprecedented growth of human trafficking. Andress and Belser remark that exploitative practices are more intense in private sectors that are accessed less by law enforcement authorities.<sup>36</sup> They add that, in terms of human trafficking offences, the failure is more about the lack of effective enforcement of appropriate laws and policies than the laws and policies being in place.<sup>37</sup> Still, as Skrivankova remarks, although prohibiting trafficking offences in all its forms is a necessary first step, combating trafficking should not simply be looked at as a 'law and order issue'.<sup>38</sup> Given that trafficking is both a 'cause and consequence' of human rights violations, the rights and welfare of the trafficked person must be at the heart of any counter-trafficking initiative.<sup>39</sup> In fact, as remarked by the International Labour Organisation, any law enforcement initiative will also benefit from the protection of victims, who are often the pivotal [if not the sole] witnesses in criminal proceedings against trafficking offenders.<sup>40</sup>

Generally, the Australian Government's response to human trafficking offences mirrors that of the UN in the sense that it is primarily tailored on

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<sup>34</sup> Elizabeth M Bruch, 'Models Wanted: The Search for an Effective Response to Human Trafficking' (2004) 40 *Stanford Journal of International Law* 1, 21. Normally, unlike human rights approaches to which the centrepiece is the protection of the rights of victims and provision of appropriate assistance to redress the wrongs as much as possible, law enforcement framework focuses more on the prosecution of actual perpetrators and deterrence of potential offenders. The crime is believed to have been committed against the state rather than an against an individual.

<sup>35</sup> Fredette, above n 6, 102. Fredette describes human trafficking as a 'humanitarian crisis'.

<sup>36</sup> Beate Andress and Patrick Belser, *Forced Labour: Coercion and Exploitation in the Private Economy*, (Lynne Rienner, 2009) 3.

<sup>37</sup> *Ibid.*

<sup>38</sup> Klara Skrivankova, 'Combating Trafficking in Human Beings' (2006) 20 *International Review of Law Computers and Technology*, 229, 230; see also McSherry, above n 12; Fredette, above n 6, 102.

<sup>39</sup> European Commission, Report of the Experts Group on Trafficking in Human Beings, Brussels: Directorate General, Freedom, and Security (2004) 137, cited in Malpani Rohit, 'Criminalising Human Trafficking and Protecting the Victim' 129, 142, cited in Andress and Belser, above n 36.

<sup>40</sup> International Labour Office, 'General Survey Concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention', 1957 (No. 105): International Labour Conference 96th Session, (Geneva, 2007), 45.

the criminal law platform.<sup>41</sup> Prior to the introduction of its anti-trafficking initiatives in 2003, Australia's policy was to try to combat the problem through deporting trafficked persons to their country of origin as soon as possible.<sup>42</sup> Consequently, many trafficking victims identified by authorities had been simply deported as illegal migrants. However, with the advent of a slight policy reform and the amendment of the *Criminal Code* in 2005 substantial changes have been witnessed. To mention a few, the amendment to the *Criminal Code* opened up an avenue to specifically deal with human trafficking offences and proscribe certain offences which were not regarded as criminal under the previous legal regimes. Further, the scope of sexual servitude offences has been broadened to include deceptive recruitment.

Regarding law enforcement actions on the ground, the Anti People Trafficking Interdepartmental Committee recently reported that, as of June 2010, the Australian Federal Police (AFP) has conducted 270 investigations and assessments pertaining to trafficking offences. Of this number, 39 were referred to the Commonwealth Director of Public Prosecutions (CDPP) and charged, leading to nine convictions and five cases still pending before the courts. In comparison, only four convictions relating to sexual servitude, slavery and trafficking offences were obtained between 1999 and April 2009.<sup>43</sup>

These statistics show that there has been a recent increase in Australia's law enforcement efforts in this field. Furthermore, the government has allocated a considerable amount of resources to assist various counter-trafficking activities and its endeavours to cooperate with international as well as regional initiatives are also notable.<sup>44</sup> Despite these commendable measures and achievements, the fact that these measures are primarily based on a criminal law paradigm seriously hinders the effectiveness of the country's counter-trafficking initiatives.

Among others, they have been attacked for over emphasising the criminalisation of offenders and being mere instruments of border control

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<sup>41</sup> Steel Sarah, 'Trafficking in People: The Australian Government's Response' (2007) 32(1) *Alternative Law Journal* 18.

<sup>42</sup> The Hon Brendan O'Connor, Minister for Home Affairs and Justice, 'The Government's Response to People Trafficking', statement to the Parliament made on 22 November 2010, 4.

<sup>43</sup> Schloenhardt, Beirne and Corsbie, above n 10, 39.

<sup>44</sup> Ibid; the Hon Brendan O'Connor's statement, above n 43, indicates that, since 2004, approximately 270 investigations and assessments have been conducted by the AFP, leading to 9 convictions. Since 2003, \$50 million has been allocated for trafficking programs, and 175 instances of assistance were provided under the victims' assistance program, 21 permanent visas, 15 bridging visas and 11 criminal justice stay visas have been granted pursuant to the visa framework. Australia has played a paramount role in the international and regional arena, such as co-founding and co-chairing the 'Bali Process' on combating people smuggling and human trafficking, amongst others.

and responses to its security concerns. As a result, the human rights and other basic needs of the victims are obscured or at least lacking appropriate attention.<sup>45</sup> As Kneebone notes, 'trafficking in Australia is seen as a crime against the state not against the person, and the trafficked persons are seen as witnesses and victims of crime rather than victims of human rights violations'.<sup>46</sup> These constructions are detrimental both to the victims and the effectiveness of anti-trafficking initiatives in general.

Anti-trafficking attempts that are largely criminal law centred, such as that of Australia's, do not readily offer redress for the wrongs done to the victims. They are, therefore, less appealing and helpful in ameliorating the immediate needs of the victims.<sup>47</sup> This is not to say that law enforcement initiatives are irrelevant, but to highlight that by focusing more on the apprehension and prosecution offenders, the human rights concerns of the victims may be neglected. Therefore, the Australian government should consider a review of its approach so that the human rights violations of the victims can be brought to the fore. Victim assistance programs, such as rehabilitation and residency permits must be properly considered alongside the criminalisation of the practices and apprehension of offenders.

#### A *Brief Overview of Law Enforcement Measures*

Reports on law enforcement activities reveal that, as at November 2010, there had been 270 investigations and allegations pertaining to human trafficking offences in Australia.<sup>48</sup> Consequently, nine convictions were achieved, six of which were obtained in 2009-10. A further six cases pending before the courts. The first conviction for a trafficking offence was handed down on 23 December 2008, in which a Mr Dobie was charged with deceptively recruiting four women to work in his brothel as prostitutes in breach of s 271.2(2B) of the *Criminal Code*. He was found guilty and sentenced to five years imprisonment.<sup>49</sup>

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<sup>45</sup> Kneebone, above n 25, 1; McSherry, above n 12.

<sup>46</sup> Susan Kneebone, 'The Trafficking Dialogue: Women as Agents, Victims and Refugee', in F Crepeau et al (eds), *La Dynamique Complexe des Migrations* (De l'Université de Montréal, 2009)11.

<sup>47</sup> *Ibid.* Unlike human rights approaches, for which the centrepiece is the protection of the rights of victims and the provision of appropriate assistance to redress the wrongs as much as possible, law enforcement framework focuses more on the prosecution of actual perpetrators and deterrence of potential offenders. The crime is believed to have been committed against the state not against the particular person (victim). To this end, Gallagher criticises the *Protocol* for failing to establish mandatory protective and assistance measure on states.

<sup>48</sup> See generally, IDC Report, above n 15, 31.

<sup>49</sup> *R v Dobie* [2010] QCA 34.

On the other hand, as at June 2009, there had only been two labour trafficking charges.<sup>50</sup> They are: the *Rasalinagam* case, which concerned a breach of s 271.2(1B);<sup>51</sup> and the *Kovacs*' case, concerning s 270.3(1)(a).<sup>52</sup> While the former was acquitted, the latter resulted in a conviction. Mr Zoltan Kovacs pleaded guilty and was sentenced to eight years imprisonment. However, Ms Melita Kovcas' case is still pending as she appealed against the four year sentence.

Although trafficking offences could be both domestic and transnational, all the trafficking investigations and prosecutions in Australia so far pertain to only transnational trafficking offences.<sup>53</sup> This indicates that further efforts in researching the existence of domestic trafficking offences is required before excluding the possible existence of domestic trafficking offences in the country.

### B *The Treatment of Different Types of Human Trafficking Offences*

Trafficking offences may occur for various forms of exploitation. However, the two major forms of trafficking offences are those occurring for sexual or labour purposes. The following sections will explore how the Australian anti-trafficking framework responds to these types of trafficking offences.

#### 1 *Trafficking for Sexual Exploitation*

Until recently, trafficking has been associated exclusively with prostitution and related other sexual activities.<sup>54</sup> Hence, the majority of anti-trafficking measures have been designed to eradicate these particular types of trafficking offences.

Anecdotal evidence suggests that the majority of human trafficking offences in Australia are for sexual exploitation purposes.<sup>55</sup> Consequently, most anti-trafficking laws and initiatives are tailored to address the trafficking offences for such purposes.<sup>56</sup> Wharton argues that the possible reasons why trafficking offences for sexual exploitation purposes have gained more attention than other trafficking offences, is the horrifying nature of certain abuses and their appeal to the media and

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<sup>50</sup> Australian Institute of Criminology, 'Transnational Crime Brief: Labour Trafficking: Prosecutions and Other Proceedings' (2008), 1.

<sup>51</sup> *R v Yogalingam Rasalingam* (Unreported, District Court of New South Wales, Judge Puckeridge, 10–11 October 2007).

<sup>52</sup> *R v Kovacs* [2008] QCA 417.

<sup>53</sup> IDC Report, above n 17, 22.

<sup>54</sup> Obokata, above n 5, 13.

<sup>55</sup> Schloenhardt, Beirne and Corsbie, above n 10, 30. In the event that other trafficking offences are not well researched and not given equal appreciation, the credibility of the reports would highly be questionable and appear biased.

<sup>56</sup> McSherry and Kneebone, above n 30, 74.

politicians. However, she remarks that an undue focus on sex trafficking victims may have a negative repercussion on the fight against labour trafficking by limiting the attention and resources that would have been otherwise allocated.<sup>57</sup> Indeed, as Munro highlighted, making a distinction between labour trafficking and trafficking for sexual exploitation purposes is not always easy. Hence, especially in the cases where certain sex work such as prostitution is legal, distinguishing sexual exploitation from labour exploitation is very controversial, and the type of exploitation faced by sex workers in such legalised industries might not be considered as 'sexual' *per se*.<sup>58</sup>

The Australian *Criminal Code* addresses trafficking offences in all forms. Although labour trafficking is not defined, sexual services are defined as 'the commercial use or display of the body of the person providing the service for the sexual gratification of others'.<sup>59</sup> Therefore, there is strong suggestion that the *Criminal Code*'s prime concern is fighting trafficking offences for sexual exploitation, not trafficking in all forms.<sup>60</sup> This is evidenced by the fact that the phrase '*sexual exploitation*' is repeatedly mentioned in most of the sections, without equivalent references to labour exploitation. As discussed in detail below, the fact that trafficking for other exploitative purposes is covered under the ambit of the *Criminal Code* can only be discerned by referring to the definition of the term 'exploitation'.<sup>61</sup> Further, while five of the eight sections on transnational trafficking deal with trafficking for sexual exploitation purposes, only three of them cover other exploitive purposes including forced labour.

## 2 *Trafficking for Labour Exploitation*

While human trafficking may be perceived as a problem predominantly associated with sexual exploitation, recent reports and research indicate that the majority of the trafficking offences in the world occur for the purpose of labour exploitation.<sup>62</sup> Additionally, some of the abuses faced due to trafficking for labour exploitation are reported to be more egregious than those faced as a result of sexual activities.<sup>63</sup> Yet, the

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<sup>57</sup> Wharton above n 22, 770.

<sup>58</sup> V Munro, 'A Tale of Two Servitudes: Defining and Implementing a Domestic Response to Trafficking of Women for Prostitution in the UK and Australia' (2005) 14 *Social and Legal Studies* 91, 96, cited in Australian Institute of Criminology, 'Transnational Crime Brief; Labour Trafficking: Key Concepts and Issues' (2009) 1.

<sup>59</sup> *Criminal Code* (Cth) s 271.4.

<sup>60</sup> McSherry, above n 12, 391.

<sup>61</sup> Human Trafficking Working Group, *Trafficking in Persons: A Critical Appraisal of Criminal Offences in Australia* (2010) *University of Queensland* 5, 34 <[www.law.uq.edu.au/humantrafficking](http://www.law.uq.edu.au/humantrafficking)>.

<sup>62</sup> US State Department, 'Trafficking in Persons Report' (Report, 2009), 14 <<http://www.state.gov/documents/organization/123357.pdf>>.

<sup>63</sup> Wharton, above n 22, 772.

majority of labour trafficking cases are frequently perceived as employment law issues.<sup>64</sup>

As Wharton persuasively notes, drawing a distinction between trafficking for sexual exploitation and labour trafficking *per se* is not condemnable. However, what is worrisome is where such distinction amounts to the denial of attention to labour trafficking due to an incorrect perception of labour trafficking as less heinous than sex trafficking. Accordingly, the existing misperception of human trafficking as predominantly a sex trafficking issue has resulted in the misguided view that anti-prostitution efforts alone would be sufficient to solve the problem. Such an approach is detrimental to those whose enslavement occurs for various exploitative purposes other than the sex industry. Unfortunately, as is the case with many other countries, Australia fails in providing the appropriate attention to labour trafficking offences.<sup>65</sup>

The foregoing discussion reveals that Australia's criminal justice response to trafficking in persons offences seemingly addresses both trafficking for sexual services and labour exploitation. In fact, as Byrnes noted, 'while forced labour is expressly included as a form of exploitation for the purposes of the trafficking in person offences, there is no stand alone criminal offence of forced labour in the *Criminal Code*.'<sup>66</sup> Equally, trafficking for forced labour purposes has not received the appropriate attention at the law enforcement level either. For example, although a special team to investigate Transnational Sexual Exploitation and Trafficking (TSETT) was established within the AFP in 2003, this team was renamed to the Human Trafficking Teams (HTT) on 30 May 2011 to deal with the issue broadly.<sup>67</sup> This indicates how labour trafficking is obscured as a result of legislative and law enforcement being preoccupied by trafficking for sexual purposes. Accordingly, while it could be true that sex trafficking is the most prevalent and heinous form of trafficking deserving a prompt response, this should not undermine the necessity to mobilise effort to suppress other forms of trafficking offences as well.

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<sup>64</sup> Andreas Schloenhardt and Jarrod Jolly, 'Honeymoon from Hell: Human Trafficking and Domestic Servitude in Australia' (2010) 32 *Sydney Law Review* 671, 678.

<sup>65</sup> Ibid 758. Schloenhardt and Jolly cite America as an example. In this regard, the Australian counterpart is often criticised for leaving labour trafficking offences in the periphery.

<sup>66</sup> 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, Melbourne, 9 November 2009), [64] <[http://www.humanrights.gov.au/about/media/speeches/sex\\_discrim/2009/20091109\\_trafficking.html](http://www.humanrights.gov.au/about/media/speeches/sex_discrim/2009/20091109_trafficking.html)>.

<sup>67</sup> Australian Federal Police, *Stopping Human Trafficking* <<http://www.afp.gov.au/policing/human-trafficking.aspx>>.

## VI THE ISSUE OF JURISDICTION

The issue of determining jurisdiction always arises when an offence involves a foreign element. As all trafficking charges in Australia thus far have involved a transnational element,<sup>68</sup> it is worthwhile to examine how jurisdiction is determined.

As mentioned above, s 271 of the *Criminal Code* proscribes eight different scenarios of transnational human trafficking offences. The exercise of jurisdiction to these offences is described under s 271.10 as what is known as 'Category B' Jurisdiction. Pursuant to this, the Australian courts will have jurisdiction if any of the offences are committed by an Australian citizen or a permanent resident.<sup>69</sup>

Accordingly, for all trafficking offences committed outside Australia, Australian courts do not have jurisdiction over suspected foreign nationals who are not permanent residents of Australia. These people are excluded despite the fact that they might organise and/or facilitate the entry/exit of trafficking victims into/from the country. Further, given that other offences such as terrorism, genocide and crime against humanity are considered as serious crimes that fall under 'Category D' offences, which involve universal/extended jurisdiction, the legislature appears to regard human trafficking offences as less serious.<sup>70</sup> This assertion can be further substantiated by the Attorney General's response, which plainly states that 'Category D' offences are limited to the most serious offences.<sup>71</sup> McSherry criticises this for being contrary to both the purpose of the *Trafficking Protocol* and the International Criminal Tribunal's view which asserts the possibility of trafficking offences being considered as crimes against humanity.<sup>72</sup> Consequently, the present author urges the government and other stakeholders to consider future amendments to rectify this flaw.

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<sup>68</sup> IDC Report, above n 15, 22.

<sup>69</sup> McSherry, above n 12, 394. Jurisdiction is generally divided into four categories: A, B, C and D. See sections 15.2-15.4 of the *Criminal Code* (Cth). Residents are defined under the *Shipping Registration Act 1981* (Cth), section 254 of the *Migration Act 1958* (Cth) as 'a person whose permanent abode is in Australia'.

<sup>70</sup> *Ibid.* This is against the arguably current understanding that human trafficking is as serious as other most serious offences, such as crimes against humanity, as argued by Obokata, above n 5, and affirmed by the International Criminal Tribunal's decision in *Prosecutor v Kunarac (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001). See also Article 7(2) of the *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

<sup>71</sup> Criminal Code Amendment (Trafficking In Persons Offences) Bill 2004 (Cth).

<sup>72</sup> McSherry, above n 12, 394.



## VII THE EXTENT OF THE PENALTY

Trafficking in human beings is generally considered by the international community as a serious illicit criminal activity.<sup>73</sup> In the case of *Prosecutor v Kunarac*, the International Criminal Tribunal for the Former Yugoslavia affirmed that a trafficking offence might be identified as a crime against humanity, which is one of the few serious offences that attain customary international law status.<sup>74</sup> In any event, once an act is identified as a criminal offence, the next requirement is to stipulate a proportionate penalty with the aim of both deterring potential perpetrators and rehabilitating convicted offenders.

Needless to say, mere criminalisation of trafficking offences does not suffice to halting the problem. Fredette observes that one of the main reasons for the steady growth of human trafficking offences is the failure of states to be strict in prosecuting and punishing offenders.<sup>75</sup> Unfortunately, the issue of the extent of the penalty appears not to have gained appropriate attention from the international community. In this regard, even *The Protocol* does not discuss the issue; rather, it appears that the issue of setting the appropriate penalty is left to the discretion of each state.<sup>76</sup> In comparison, it is worth noting that the *European Convention* sets out a minimum of eight years imprisonment against trafficking perpetrators.<sup>77</sup> Article 23.1 of the *European Convention* sets out that penalties should be 'effective, proportionate, and dissuasive' including sentences that give rise to extradition.<sup>78</sup> Even though it might be difficult to set a common parameter for what is referred to as 'effective, proportionate, and dissuasive', it is my contention that setting a minimum penalty and having such guidelines would help in adopting a consistent and appropriate penalty.

The Australian *Criminal Code* deems almost all trafficking offences to be indictable offences, with most attracting a penalty of up to 12 years

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<sup>73</sup> See the preambles of the Protocol, above n 6; *Council of Europe Convention on Action Against Trafficking in Human Beings*, opened for signature 16 May 2005, CETS 197 (entered into force 1 February 2008); Mohamed Y Mattar, 'Incorporating the Five Basic Elements of a Model Anti-trafficking in Persons Legislation in Domestic Laws: from the United Nations Protocol to the European Convention' (2005-2006) 14 *Tulane Journal of International and Comparative Law* 357, 359.

<sup>74</sup> *Prosecutor v Kunarac (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001).

<sup>75</sup> Fredette, above n 6, 121.

<sup>76</sup> *Ibid.*

<sup>77</sup> Council Framework Decision 2002/629/JHA, Combating Trafficking in Human Beings, Art 3 (2002) O.J (L203) 1, 1 (WC), cited in Fredette, above n 6, 121.

<sup>78</sup> Anne Gallagher and Paul Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line' (2008) 18 *International Criminal Justice Review* 318, 322; Skrivankova, above n 41, 230.

imprisonment.<sup>79</sup> Furthermore, aggravated offences could carry a maximum of 20 years of imprisonment and trafficking offences committed against children attract up to 25 years imprisonment (as set out under ss 271.3, 217.6; 271.4 and 271.7 respectively).<sup>80</sup> Notwithstanding other points, this is commendable as indicative of the government's strong stance towards combating the problem through imposing proportionate penalties.<sup>81</sup>

### VIII IMMIGRATION PROTECTION AND SUPPORT PROGRAMS TO TRAFFICKING VICTIMS

So far this article has discussed Australia's response to human trafficking from the law enforcement/criminal law perspective. Furthermore, it has been argued that the problem of human trafficking cannot be effectively eradicated through the criminal justice system alone, but requires addressing the human rights and other needs of the victims in order to effectively combat human trafficking. The following sections will examine the Australian Government's support and assistance made available to victims of trafficking offences which is also crucial. In particular, the different visa categories for trafficking victims and the requisite eligibility criteria will be scrutinised.

Taran and Chammartin argue that restrictive migration policies that do not consider the labour supply and demand factors that fuel markets for smuggling and trafficking offences.<sup>82</sup> Prior to 2003, the Australian government's policy in relation to trafficked persons was to simply detain and then promptly deport them to their country of origin.<sup>83</sup> Flaws within this system are evidenced by the example of Puangthong Simaplee, who was found dead in a detention centre. It was evident that Ms Simaplee had originally been trafficked from Thailand to Malaysia and then re-trafficked to Australia. After being freed from a brothel in Sydney, she was detained at Villawood Detention Centre where she was found dead. Besides her testimony, there was additional circumstantial evidence

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<sup>79</sup> Fiona David, 'Trafficking of Women for Sexual Purposes' (Research and Public Policy Report Series No 95, Australian Institute of Criminology, July 2008) 39.

<sup>80</sup> *Criminal Code* (Cth) ss 271.3 and 271.6; 271.4 and 271.7.

<sup>81</sup> McSherry, above n 12, 394. In this regard, it should be noted that the McSherry contends that the Australian government missed the opportunity to consider human trafficking offences as one of the most serious 'international' crimes.

<sup>82</sup> Taran and Chammartin, *Getting at the Roots: Stopping Exploitation of Migrant Workers by Organised Crime* (Geneva International Labour Office, 2003) 5, cited in Jacqueline Joudo Larson, 'Migration and People Trafficking in Southeast Asia' (Trends and Issues in Crime and Criminal Justice No 401, Australian Institute of Criminology, November 2010) 3.

<sup>83</sup> Janet Phillips, 'People Trafficking: An Update on Australia's Response' (Research Paper No 5, Parliamentary Library, Parliament of Australia, 2008) 6.

which demonstrated that she was a trafficking victim. Nevertheless, in disregard of this evidence, authorities sent her to an immigration detention centre. This was one of the major instances which triggered significant anger regarding Australia's responses to human trafficking.<sup>84</sup>

The Australian Government has made few policy changes subsequent to Simaplee's horrifying death. Accordingly, in 2004 the Department of Immigration And Citizenship has introduced four visa categories - Bridging F visa; Criminal Justice visa; Witness Protection visa (temporary) and Witness Protection visa (permanent). This visa provides a residency permit as well as other assistance to victims of trafficking that are 'willing and able' to assist the criminal justice system.<sup>85</sup> Some amendments were made on 30 June 2009, increasing the flexibility and availability of visa options.<sup>86</sup> Regrettably, however, as discussed in detail in the subsequent sections, these visas are still contingent on an alleged victim's ability to cooperate with authorities in the criminal investigation and following proceedings.

## A Visa Frameworks

### 1 Bridging Visa F

This visa category is applicable to persons identified as suspected victims of trafficking who cannot access other valid visas to allow them to legally stay in Australia. Initially, Bridging Visa F was granted for only 30 days during which the suspected victim's ability and willingness to assist the criminal justice system could be assessed. The amendment, however, extended the duration of the validity of the visa to 45 days, with the possibility of further extending it to another 45 days.<sup>87</sup> The holders of this visa would receive intensive assistance under the Support for Victims of People Trafficking Victims Program, but they do not have the right to work.

### 2 Criminal Justice Stay Visa

Sometimes the victims' presence in Australia may be necessary for an investigation and/or prosecution even after the lapse of the Bridging Visa

<sup>84</sup> Ibid; see also Deputy State Coroner (NSW) Carl Milovanoich, 'Inquest in to the Death of Puongtong Simaplee' 24 April 2003, cited in Marianna Leishaman, 'Human Trafficking and Sexual Slavery: Australia's Response' (2007) 27 *Australian Feminist Law Journal* 193, 193; see also Miranda Devine, 'Are You One of the Men Who Helped Kill Puongtong?', *Sydney Morning Herald* (online), 3 May 2003, <<http://www.smh.com.au/articles/2003/05/03/1051876898039.html>>, cited in McSherry and Kneebone, above n 32, 73.

<sup>85</sup> Phillips, above n 83.

<sup>86</sup> Australian Government Attorney-General's Department, *Changes to Anti People Trafficking Strategy* (2009) <[http://www.ag.gov.au/www/agd/agd.nsf/Page/PeopleTrafficking\\_PeopleTrafficking](http://www.ag.gov.au/www/agd/agd.nsf/Page/PeopleTrafficking_PeopleTrafficking)> 2.

<sup>87</sup> Ibid.

F. In this case, the investigating police officer or the public prosecutor may request the grant of a Criminal Justice Stay visa that would allow the person to legally stay in Australia for the duration of the investigation or prosecution.<sup>88</sup> This visa category stems out the desire to maintain the suspect's presence in Australia during this period. Whilst, arguably, the primary beneficiaries might be law enforcement authorities, the significance to those eligible is also notable. For example, it is remarkable that holders of this visa receive assistance from the government and have the right to work.<sup>89</sup>

### 3 *Witness Protection Visa (Trafficking)*

Prior to the amendment in 2009, the witness protection visa category was divided into temporary and permanent visas. As a result, holding the former visa for at least three years was a condition precedent to be eligible for the latter visa.<sup>90</sup> For a suspected human trafficking victim to be eligible for this visa, the Attorney-General has to issue a certificate asserting the person has made a contribution to, and *closely cooperate* with the prosecution (emphasis added). Ultimately, the Minister for Immigration and Citizenship must be satisfied that the person would be at risk of danger if returned to their country of origin.<sup>91</sup>

The introduction of the visa framework that allows victims to legally stay within the country is commendable. In fact, extending such protection through the granting of a residency permit is part of Australia's international obligations emanating from its ratification of the *Trafficking Protocol*.<sup>92</sup> Nevertheless, the visa framework for suspected trafficking victims has been strongly criticised for being contingent on the contribution and cooperation of the victims. In doing so, it renders the victims' rights peripheral. As a result, the visa systems are often depicted as mere instruments of the criminal justice system and as means of intensifying the country's immigration and border control agenda.

Human trafficking violates the human rights of the victims; therefore, the central concern of extending assistance and protection to the victims should be mending such violations as much as possible. To put it another way, while the roles of immigration control and criminal justice systems in fighting human trafficking offences cannot be denied, anti-trafficking

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<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.* A non-exhaustive list includes Social Security benefits, rent assistance, medical benefits, and job and language trainings, interpreting services.

<sup>90</sup> *Ibid.* 3; see also David above n 79, 10.

<sup>91</sup> *Ibid.* To be eligible it should be proved that the person must not be subjected for a prosecution for an offence directly involved with the prosecution.

<sup>92</sup> *Trafficking in Persons Protocol* art 7. One of the major objectives is to promote efforts among member states to provide protection and assistance through, amongst others, the granting of residency permits to victims.

initiatives should not over emphasise them in such a way that victims' rights are jeopardised. Consequently, any approach that renders the assistance secondary is contrary to the principle of protecting victims.

In this regard, the Italian system of 'Article 18 Permits' which allow the granting of residency permits irrespective of the suspected victims' cooperation could be taken as a good example.<sup>93</sup> According to this permit, a residency permit is granted to those whose life is threatened as a result of, amongst others, abuse or severe exploitation. Hence, as long as the exploitation and abuse is proven, the Italian system allows a permit to be granted regardless of the person's cooperation with law enforcement authorities.

As noted above, the Australian government has recently made a few changes to the trafficking visa framework. Nonetheless, despite some significant amendments, such as avoiding the link between support programs and progression of the case against alleged trafficker(s), regrettably, they have not removed the conditions for providing support and assistance that require victims' cooperation.<sup>94</sup> However, one of the crucial changes to the visa framework was the removal of the 'witness protection temporary visa', the result of which is that the numbers of available temporary visas have increased relatively ever since. For instance, from 1 January 2004 - 30 June 2009 119 Bridging Visa F, 76 Criminal Justice Visas, 17 witness Protection (temporary) visas and 2 witness Protection (permanent) visas were granted. In contrast, 15 Bridging Visa F, 11 Criminal Justice Visa and 15 Witness Protection (permanent) visas were granted between 1 July 2009 and June 2010.<sup>95</sup>

As demonstrated above, subsequent to the amendment, there has been an increase in the number of permanent visas granted. Indeed, the significant numerical increase witnessed during the 2009-10 fiscal year, which is far more than the number of visas that had been granted during the preceding five years, might be taken as indicative of the relative success of the amendment in terms of offering more protection to victims. Nonetheless, further amendments are worth considering, especially in terms of delinking the grant of residency permits from the cooperation of victims.

### B *Support for Victims of People Trafficking Program*

In addition to the residency permits discussed above, identified trafficking victims are eligible to receive assistance under the Support for Victims of People Trafficking Program. This program, which commenced

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<sup>93</sup> Law on Immigration, Decreto Legislativo July 25, 1998, 286, Article 18, cited in Malpani Rohit, 'Criminalising Human Trafficking and Protecting the Victim', 143 in Andress and Belser, above n 36, 129.

<sup>94</sup> Segrave and Milivojevicabove, above n 9, 69.

<sup>95</sup> IDC Report, above n 15, 9.

in 2004, is funded by the Commonwealth Department of Families, Housing Community Services and Indigenous Affairs.<sup>96</sup> The Australian Government has allocated over \$50 million to support various counter trafficking in person initiatives, including the support and protection program.<sup>97</sup> So far, 175 suspected victims of trafficking have received support under this program, comprising 132 women who have been trafficked into the sex industry.<sup>98</sup>

The Interdepartmental Committee's report indicates that there is an increasing trend in the number of suspected trafficking victims who are entering the support program. To this end, there were 42 clients during 2005-06; 48 during 2006-07; 60 during 2007-08; 59 during 2008-09 and 65 suspected clients who were in the support program during the 2009-2010 financial year.<sup>99</sup> All of these efforts are indeed commendable. Regrettably, as briefly demonstrated above, the support program is contingent on victims' usefulness to the criminal justice machinery. This contingency contravenes the underlining principle that the prime concern of any support and protection program for trafficking victims should be their welfare.

Initially, only holders of one of the trafficking visas were eligible for this program. However, following the July 2009 review, the support program has been partly delinked from the visa framework.<sup>100</sup> Consequently, eligibility to enter the first stage of the support program does not presuppose the holding of any of the trafficking visas, nor the victim's willingness to cooperate with authorities. Segrave and Milivojevi have precisely noted the negative repercussions of linking victim support with the holding of the nominated visas.<sup>101</sup>

Yet, unless they are willing and able to cooperate, support will be withheld upon the lapse of the initial stage (known as the 'Assessment Stream'), which normally is for a period of 45 days. In other words, only the holders of the Criminal Justice Stay Visa can be advanced into the next, and relatively longer and better supported stage- under the 'Justice

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<sup>96</sup> Ibid 8-9 and 11; see also David, above n 79, 36.

<sup>97</sup> Hon Brendan O'Connor, Response to People Trafficking statement, above n 42, 3-4.

<sup>98</sup> See generally, IDC Report, above n 15, 12-14.

<sup>99</sup> Ibid 13. It is indicated that 42 victims during 2005-06; 48 during 2006-07; 60 victims during 2007-08 and 59 during 2008-09 and 65 during 2009-2010 have been provided with the support under this program.

<sup>100</sup> Australian Government Attorney General's Department, Changes to Anti People Trafficking Strategy (2009); Andreas Schloenhardt, 'Support Scheme for Victims of Trafficking in Persons, (2009) Australia Human Trafficking Working Group, *the University of Queensland*, 2.

<sup>101</sup> Segrave and Milivojevi, above n 9.

Support Stream'.<sup>102</sup> Therefore, practically speaking, the Australian government's support program for trafficking victims is not accessible to those who for different reasons are not able to assist an investigation and/or prosecution. Given that any inability of trafficked persons' to assist and cooperate with authorities could be attributable to certain extraneous reasons, such as not knowing the name and/or identity of their trafficker(s) or fear of reprisal against themselves or family members, denying them protection without taking into account reasons is unfair.

Such linkage is antithetical to the central theme of 'victims' support' and Australia's international obligations as a party to the Palermo Protocol and other international human right instruments. Leishman convincingly highlights that:<sup>103</sup>

[T]he conditionality of victim support upon investigation assistance is contrary to the Australia's international obligation under Article 7 of the UN Trafficking Protocol and Principle 8 of the High Commissioner for Human Rights' recommended Principles and Guidelines.

Removing the connection between victims' helpfulness from the support is crucial in fostering the confidence of victims to participate as witnesses. This promotes the effectiveness of law enforcement efforts. Therefore, it is strongly recommended that the Australian Government consider modifying its support program to prioritise meeting the human rights and other needs of the victims.

## IX CONCLUSION

The Australian government has acknowledged that human trafficking is a contemporary illicit criminal activity that should be eradicated promptly. It has made some significant efforts to eradicate the problem. Such efforts include ratifying the *Trafficking Protocol*, amending the *Criminal Code* and allocating considerable funds to assist various national and regional anti-trafficking initiatives. These efforts are indeed commendable. Nevertheless, exacerbated by its clandestine nature, the absence of reliable and comprehensive data on the extent and nature of the problem hinders both the appreciation of the true magnitude of the problem and the making of appropriate policies and legislative reforms.

The proscription of trafficking in persons offences under the *Criminal Code* and other germane laws is undeniably the first step in combating the

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<sup>102</sup> Ibid 5. Indeed, the assessment stream which was formerly known as phase one is for 45 days, with the possibility of extending to another 45 days under certain circumstances.

<sup>103</sup> *United Nations Economic and Social Council Recommended Principles and Guidelines on Human Rights and Human Trafficking* U.N. Document E/2002/68/Add.1 (20 May 2002) 3, 10, cited in Marianna Leishman, 'Human Trafficking and Sexual Slavery: Australia's Response' (2007) 27 *Australian Feminist Law Journal* 193, 200.

problem. A law enforcement approach that hinges on the apprehension and punishment of perpetrators plays a pivotal role in this regard. However, the scope of the laws and the extent of the penalties accorded, and their effective implementation, has hindered the success of the initiatives. Further, given that human trafficking offences inherently violate the human rights of the victims too, an effective counter trafficking initiative should not be limited only to criminal law concerns.

The Australian government's approach to combating human trafficking has been strongly criticised for being a mere instrument of controlling illegal migrants and giving less attention to the human rights of trafficked victims. This can be evidenced from the elements of the definition of trafficking offences set out in the *Criminal Code*, which is both inconsistent with the *Trafficking Protocol* and conflates human trafficking with people smuggling offences. Therefore, further legislative reform should be considered promptly to adopt a better definition and take human rights concerns into account. Any such reforms should also consider the allocation of proportionate attention and resources to both sexual and labour trafficking offences.

It is noteworthy that the Australian Government has adopted a visa framework to grant residency permits to victims of human trafficking. Nevertheless, making such permits contingent on the ability and willingness of the victims to cooperate with criminal justice authorities both contravenes the country's international obligations and has the effect of rendering the human rights needs of victims merely secondary. Consequently, the links between granting residency permits and the associated victims' support programs should be delinked, and instead be primarily tailored at addressing the human rights needs of the victims. In doing so, the government would meet its obligations; provide more effective assistance to the victims, and in turn, assist its law enforcement activities. This paper also recommends that the scope of the jurisdiction of courts be broadened to make non-citizens and non-residents, who organise or facilitate trafficking offences into or from Australia subject to Australian courts.