

THE INCOMPATIBILITY OF PROSTITUTION LAWS WITH INTERNATIONAL HUMAN RIGHTS

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ABSTRACT:

This paper looks at the States due diligence obligation of preventing harm from occurring to the common person, but particularly for victims of human trafficking, and how under international human rights law, the considerations of harm have shifted from only public to also the private spheres, and how this may be relevant to a commercial transaction of purchasing a sexual service, especially if that service is fraught with gender based violence.

I INTRODUCTION

In this paper I will first cover the extent of human trafficking, with a focus on how human trafficking is a gendered violation of rights. I will be looking at women as victims in the sex trade, how the legalisation and decriminalisation of prostitution are incompatible with international human rights law, women's rights and gender equality, and I will be proposing the Nordic Model as a fourth option solution to prostitution laws moving forward - as an alternative to the current legislative

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approaches of criminalisation, legalisation and decriminalisation regulated models of prostitution laws, which are all fraught with problems.¹

This will be looked at in the context of the States due diligence obligations to prevent women from violence and protect them from future harms, as understood by, especially the *Convention on the Elimination of all forms Discrimination Against Women* and the *Declaration of the Elimination of Violence Against Women*.

In looking at the Nordic Model as a solution moving forward, I will also propose that this model applies the principles of due diligence, and reduces the harms of exploitation, slavery and trafficking of vulnerable women and girls, especially in the sex industry.

II THE EXTENT OF SLAVERY, TRAFFICKING AND EXPLOITATION

The majority of the slaves in the world today are women and girls, trafficked predominantly for sexual servitude.

We know from studies such as the Global Slavery Index that 85% of the 45.8 million known slaves in the world today are women and girls exploited in ways that men are often not.

Vulnerable women and girls are often exploited through the prostitution industries globally.

In allowing legalised and decriminalised prostitution to continue, Australia is expressly encouraging this trade for human flesh, and Australia are in direct violation

¹ Julie Bindel and Liz Kelly, "A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden" Child and Woman Abuse Studies Unit, London Metropolitan University, 2003, at:<http://www.glasgow.gov.uk/CHttpHandler.ashx?id=8843>

of their obligations under international human rights law to prevent harms of exploitation and sexual abuse, and to protect those who are victim to it.

It is well known that sexual slavery, servitude, exploitation and trafficking exists within the pornography, prostitution and adult industries as a whole. Many survivors have powerfully attested to this fact.

Pornography, prostitution and sexual exploitation through slavery, trafficking and through the commodifying of flesh have two major traits in common: gender based violence and demand.

It is in addressing the prevalence of gender based violence in pornography, prostitution and the sex trade, and through curbing it's demand that we know the Nordic Model policy approach has been successful in cutting human trafficking by half, and almost eradicating prostitution altogether - in several countries already.

There is also evidence to suggest that violence decreases overall under the Nordic Model which impacts social normalisation behaviours towards women in a positive way.²

The Nordic Model policy approach criminalises the demand for the purchase of flesh, while at the same time decriminalising its victims. It also provides exit rehabilitation programs for the women getting out of the sex trade, and provides law enforcement, community and 'Johns' education awareness training of this gender equal human rights standard.

If we are to abolish human trafficking and slavery in our world today, we need to look at exploitation in the sex industry more closely, for the greatest form of human trafficking and slavery exists within the sex industry.

² For a summary of the data and reporting on this, go to the Feminist Current Blog titled: New research shows violence decreases under Nordic model: Why the radio silence? at:<http://www.feministcurrent.com/2013/01/22/new-research-shows-violence-decreases-under-nordic-model-why-the-radio-silence/>

III THE EXTENT OF THE CRIME OF HUMAN TRAFFICKING AND THE PREVALENCE OF EXPLOITATION

Human trafficking has been declared as one of the greatest human rights challenges of this century.³ According to the Global Slavery Index, there are 45.8 million slaves in the world today, and 85% of those slaves are women and girls, and 50% of them are children!⁴

78% of these 45.8 million slaves live in the Asia region, including Australia.⁵

Whether a person is trafficked for labor, as a child bride, through adoption, or for sexual exploitation, they often all experience sexual violence and exploitation.

In fact, sexual exploitation makes up 79% of identified forms of human trafficking, including forced prostitution, stripping, massage services and pornography.⁶

Not only are most of the slaves today trafficked into the sex industry for sexual exploitation and abuse, an estimated 30,000 victims of sex trafficking die each year from abuse, disease, torture, and neglect⁷. It is estimated that there are over 4,300 people living in modern day slavery in Australia today⁸, with the majority trapped in the sex trade.

³ Cited by the United Nations, as well as global leaders such as Hilary Clinton.

⁴ Global Slavery Index 2016 Findings Report, at: <https://www.globallslaveryindex.org/findings/>

⁵ Global Slavery Index 2016 Findings Report, at: <https://www.globallslaveryindex.org/findings/>

⁶ United Nations Office on Drugs and Crime Global Initiative to Fight Human Trafficking 2009.

⁷ Allison Chawal, *The Disturbing Reality of Human Trafficking and Children*, Huff Post - The Blog, 18 December 2016, at: http://www.huffingtonpost.com/allison-chawla-/disturbing-reality-human-trafficking_b_8831834.html

⁸ Global Slavery Index - Country Study, State Findings at: <http://www.globallslaveryindex.org/country/australia/>

According to United Nations Children's Fund (UNICEF), over the past 30 years, over 30 million children have been sexually exploited through human trafficking.⁹

The youngest child known to be trafficked for sexual servitude was a mere 5-month-old!¹⁰

So, whether it is pornography, prostitution or human trafficking, there are often two common denominators present: gender based/sexual violence and demand.¹¹

IV WOMEN AS VICTIMS OF EXPLOITATION IN THE SEX TRADE

Melissa Farley's research tells us that 89% of women in prostitution if asked, would do anything else. The reality is: the majority of women working in prostitution want to get out.¹²

So, why are we as a society not facilitating the exit of vulnerable women who are abused and degraded daily, and have expressed they do not want to be there - from their circumstances of trauma, exploitation - and slavery?

Calling sexual exploitation and slavery 'work' therefore becomes problematic.

⁹ United Nations Children's Fund, Child trafficking, at: https://www.unicef.org/ceecis/protection_3974.html

¹⁰ Known from conversations had with the Australian Federal Police Child Protection Team and intel from NGO's.

¹¹ Pornography drives demand for sex trafficking, End Sexual Exploitation, at: http://endsexualexploitation.org/articles/pornography-drives-demand-for-sex-traffickingoption=com_content&task=view&id=31&Itemid=74&jumival=14917

¹² Melissa Farley and Dorchen A. Leidholdt, Prostitution and Trafficking in Women: An Intimate Relationship, *Journal of Trauma Practice (The Haworth Maltreatment & Trauma Press'*, an imprint of The Haworth Press, Inc.) Vol. 2, No. 3/4, 2003, at: <http://www.prostitutionresearch.com/Leidholdt%20Prostitution%20and%20Trafficking%20in%20Women.pdf>

We know from media reports and from survivors' stories that women in prostitution experience abuse, assault, bashings, degradation, rape and threats on a weekly basis - which would never be acceptable in any other "work place".

We also know that prostitutes live with Post Traumatic Stress Disorder and are deeply traumatised by experiencing daily physical and sexual abuse and violence in their 'workplaces'.¹³

When society legalises prostitution, we do not facilitate and support women who want to get out of the industry - in fact - we facilitate their entrapment and discriminate against them when they try to leave.

According to survivors of the sex trade, for a lack of a Resume and a lack of experience working in an office, women wanting to exit the industry are time and time again discriminated against by not only potential employers but also potential landlords.¹⁴

How are they meant to get out of the cycle of abuse and trauma they face daily?

For the approximately 20,000 women in prostitution in Australia¹⁵, the legalised, decriminalised or regulated systems of prostitution does not work, for we know that the majority of women do not want to be there.

There is an undeniable link between the legalisation of prostitution and the rate of trafficking of persons¹⁶ - which has been discussed and proven by evidence in various international academic, legal and social research papers, conferences and forums.¹⁷

¹³ Melissa Farley, PhD Howard Barkan, Dr PH, *Prostitution, Violence and Post Traumatic Stress Disorder*, Women 8: Health, Vol. 27(3), 1998 by The Haworth Press, Inc. at: [http://www.prostitutionresearch.com/Farley%26Barkan %201998.pdf](http://www.prostitutionresearch.com/Farley%26Barkan%201998.pdf)

¹⁴ Known from personal stores of victim survivors of the sex trade accessing Project Respect services in Victoria - wanting to transition out of prostitution.

¹⁵ State Institute of Criminology, The State sex industry, at: http://www.aic.gov.au/publications/current%20series/rpp/121-140/rpp131/05_aus_industry.html

The demand for such a service is predominantly what allows the trafficking, exploitation, slavery and gender based violence and abuse in the industry to keep occurring.

Australia is currently out of step with international norms as well as international policy developments in prostitution law reform.

A truly progressive society encourages the equality and dignity of all women, not the purchase and renting of women's bodies - who are then abused and often tortured¹⁸.

Legally, the definition of torture under international human rights law refers to¹⁹ severe pain or suffering at the hands of a public official for a specific purpose.²⁰ Although this is a narrow definition, the principle still applies. It could also be argued that the definition of torture extends to sexual slaves, as they are clearly persons

¹⁶ Seo-Young Cho; University of Marburg - School of Business & Economics, Axel Dreher; University of Heidelberg, Eric Neumayer; London School of Economics and Political Science (LSE), *Does Legalised Prostitution Increase Human Trafficking?* World Development, 41 (1), 2013, pp. 67-82, Date Written: January 16, 2012 at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1986065

¹⁷ See Melissa Farley, CATW International, Nordic Model Now Paper and presentations.

¹⁸ The definition of torture as: "*the action or practice of inflicting severe pain on someone as a punishment or in order to force them to do or say something*" may refer to the rape, sexual abuse/assault, slavery, exploitation and gender based violence that women and girls may face in prostitution or the sex trade in general.

¹⁹ Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is the internationally agreed legal definition of torture:

"Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

²⁰ This definition contains three cumulative elements:

- the intentional infliction of severe mental or physical suffering
- by a public official, who is directly or indirectly involved
- for a specific purpose.

subjected to severe pain or suffering for a 'specific purpose' - being commercial exploitation. The 'public official category is not satisfied here legally, although 'public officials' legalese the industry that holds them captive.

V THE LEGALISATION AND DECRIMINALISATION OF PROSTITUTION IS INCOMPATIBLE WITH INTERNATIONAL HUMAN RIGHTS LAWS, WOMEN'S RIGHTS AND GENDER EQUALITY PRINCIPLES

There is clear evidence that the legalised models of prostitution in New South Wales and the decriminalised model of prostitution in Victoria have simply not worked. In fact, evidence shows us that the decriminalisation and legalisation models of prostitution have created a safe harbour for traffickers, it has encouraged criminality throughout the industry, including links to bkie gangs, it has entrapped many vulnerable women and girls into debt bondage, it has further victimised vulnerable women and it has encouraged gender based and sexual violence in our communities.²¹

This is reinforced by the multiple accounts of violence, rape and even murder experienced by women who have worked in prostitution, and the stories of various survivors.²²

Studies have shown that 78% of women working in the brothels of Victoria as single mothers trying to feed their babies, 50% are there because of homelessness like circumstances and 80% have experienced childhood sexual abuse and assault.²³

²¹ See NSW Inquiry into Brothels and into Human Trafficking Submissions here: <https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=250#tab-submissions>

²² Including from the recent Book published by survivors of the sex trade in prostitution: Caroline Norma and Melinda Tankard Reist (Eds) *Prostitution Narratives - stories of survival in the sex trade*, Spinifex Press, 2016.

Where is voluntariness and the choice to enter the sex trade of any of these women?

Where is their voluntariness exercised to exit an industry that leaves them abused, traumatised and exploited?

Through violent pornography, male sexual entitlement behaviours, through coercion, force, fraud and debt bondage, women are being groomed and subjected to a life of gender based and sexual violence in the sex trade - facilitated by legalised and decriminalised policy approaches to prostitution laws.²⁴

The current legalisation and decriminalisation models of prostitution are incompatible with Australia's said National agenda to combat violence against women²⁵ and it is totally out of step with our international obligations to the rights of women and as signatories to the *Convention on the Elimination of all forms of Discrimination Against Women*²⁶.

Australia's current prostitution laws are out of step with international best practices, they are not compliant with international human rights standards and in fact - they are

²³ Project Respect - a support and referral service for women trafficked for sexual exploitation and women in the sex industry, at: <http://www.projectrespect.org.au> as well as stories of survivor recorded in *Prostitution Narratives - stories of survival in the sex trade*, Caroline Norma and Melinda Tankard Reist (Eds), Spinifex Press, 2016.

²⁴ Project Respect - a support and referral service for women trafficked for sexual exploitation and women in the sex industry, at: <http://www.projectrespect.org.au>

²⁵ The National Plan to Reduce Violence against Women and their Children 2010 – 2022 at: <https://www.dss.gov.au/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children-2010-2022>

²⁶ The *CEDAW* at: <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>

in direct violation of the *Declaration of the Elimination of Violence Against Women*.²⁷

Article 2 of the *Declaration on the Elimination of Violence Against Women* clearly States that violence against women is understood to include not only the trafficking of women but also forced prostitution.²⁸

The *Trafficking Protocol*²⁹ explicitly States that prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community.³⁰

Article 16 of the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of others*³¹ calls member States to adopt a human rights approach to preventing, protecting and redressing trafficking in persons, including providing an exit program for women working in brothels who wish to access other forms of employment and require rehabilitation and support.

²⁷ Article 2 of the *Declaration on the Elimination of Violence Against Women* clearly states that violence against women is understood to include not only the trafficking of women but also forced prostitution.

²⁸ Art. 2, DEVAW, A/RES/48/104, 85th plenary meeting, 20 December 1993, 48/104., at: <http://www.un.org/documents/ga/res/48/a48r104.htm>

²⁹ The *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*, supplementing the United Nations Convention against Transnational Organised Crime at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>

³⁰ 'United Nations Convention Against Transnational Organised Crime and the Protocols Thereto', at: <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

³¹ 'Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others', Approved by General Assembly resolution 317 (IV) of 2 December 1949, Entry into force: 25 July 1951, in accordance with article 24, at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/TrafficInPersons.aspx>

In fact, the international community's standards in relation to gender equality is that States have a due diligence obligation to protect and prevent harm from occurring, as a part of their mandate for equal protection to both men and women under the law.³²

VI. THE GENDERED DIMENSIONS OF SEX TRAFFICKING

It is important to acknowledge and identify violence, especially sexual violence in pornography, prostitution and human trafficking as a gender based violence issue - it requires a human rights preventative and diversionary approach for all of community.

The *World Health Organisation* cites that 1 in 3 women throughout the world experience physical and/or sexual violence by a partner or sexual violence by a non-partner.³³ Australia is no different, with women victims of domestic violence being murdered weekly - on record last year.³⁴

Violence against women and their children affects us all - we all need to focus on prevention as a community. Australia needs to take the lead on this important human right and womens rights agenda in light of our *Sustainable Development Goals*³⁵ and international obligations.

It is incompatible to say that as a Nation, we seek to have a zero-tolerance approach to domestic violence - which is an expression of gender based violence, and ignore a commercialised industry that perpetuates it.

³² The *Convention on the Elimination of All Forms of Discrimination against Women*, Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, at: <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>

³³ The *World Health Organisation Violence Against Women Journal Article*, at: <http://www.who.int/reproductivehealth/publications/violence/articles/en/>

³⁴ Our Watch - Facts and Figures here: <https://www.ourwatch.org.au/Understanding-Violence/Facts-and-figures>

³⁵ SDG 5: gender Equality; SDG 10: Reduce Inequality, and SDG 16: Peace, Justice and Strong Institutions, at: <http://www.un.org/sustainabledevelopment/sustainable-development-goals/>

As noted above, because the majority of human trafficking victims (85%) are women and girls, human trafficking becomes a gendered issue - with sexual exploitation in the sex trade as the major form of trafficking for the purposes of exploitation - the gender based violence prostitutes experience daily cannot be ignored. Neither can the States due diligence obligation to prevent the harms of sex trafficking, and protect its victims be ignored in a society that facilitates this international crime through the legalisation and decriminalisation of prostitution.

The trafficking of human beings is widely recognised as a human rights issue³⁶, it is transnational in nature, and it is often linked to international organised crime, within the context of exploitation and gender based violence, perpetuating male sexual entitlement behaviours.

In 1979, the *Convention on the Elimination of Discrimination Against Women* (CEDAW)³⁷ was adopted by the United Nations General Assembly and heralded as

³⁶ See for instance, Reports of the Secretary General on Trafficking in Women and Girls, E/CN.4/2002/80 and E/CN.4/2003/74; Informal Note by the United Nations High Commissioner for Human Rights, A/AC.254/16; and Note by the Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund and the International Organisation for Migration on the Draft Protocols Concerning Migrant Smuggling and Trafficking in Persons, A/AC.254/27; Global Alliance Against Trafficking in Women (GAATW), *Human Rights and Trafficking in Persons: A Handbook* (Bangkok:GAATW) (2001); S. C. Inglis, 'Expanding International and National Protections against Trafficking for Forced Labour Using a Human Rights Framework' (2001) 7 *Buffalo Human Rights Law Review* 55; K. Corrigan, 'Putting Brakes on the Global Trafficking of Women for the Sex Trade: An Analysis of the Existing Regulatory Schemes to Stop the Flow of Traffic' (2001) 25 *Fordham International Law Journal* 151; K. C. Ryf, 'The First Modern Anti-Slavery Law: The Trafficking Victim Protection Act 2000' (2002) 34 *Case Western Reserve Journal of International Law* 45; T. Hartsough, 'Asylum for Trafficked Women: Escape Strategies Beyond the T Visa', (2002) 13 *Hastings Women's Law Journal* 77; T. Obokata, 'Human Trafficking, Human Rights, and the Nationality, Immigration and Asylum Act 2002', (2003) *EHRLR* 410; and J. Murray, 'Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Participation of the United Nations Civilian Police in Trafficking of Women in Post-Conflict Bosnia and Herzegovina' (2003) 34 *Columbia Human Rights Law Review* 475.

³⁷ *The Convention on the Elimination of All Forms of Discrimination against Women*, Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, at: <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>

the "*international bill of rights for women*," containing provisions meant to end discrimination toward women.³⁸

It was not until several years later that international bodies began to acknowledge the connection between violence against women and discrimination, acknowledging also that the CEDAW did not explicitly address the issue of violence against women. More needed to be done.

Statements and resolutions on violence in the family were issued by the UN *Economic and Social Council*, the *UN General Assembly*, and a *UN Expert Group Meeting on Violence in the Family*³⁹ held in 1986. These documents drew attention to the international character of violence against women, asking States to develop action plans to address domestic violence, which led to further studies.

In 1989, the UN released a report on *Violence Against Women in the Family* which argued that domestic violence is not random, but "*associated with inequality between women and men.*"⁴⁰

In 1992, thirteen years after CEDAW's adoption, the Committee on the *Elimination of Discrimination Against Women* incorporated violence against women into its reading of the CEDAW by adopting General Recommendation 19. This

³⁸ See *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 34/180, at pt. 1, art. 1, U.N. GAOR, 34th Sess., 107th plen. mtg., U.N. Doc. A/RES/34/180 (Dec. 18, 1979) [hereinafter CEDAW] (defining "discrimination" as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field"). See also U.N. Div. for the Advancement of Women, Dep't of Econ. & Soc. Affairs. <http://www.un.org/womenwatch/daw/cedaw/> (last visited Dec. 7, 2008) (referring to the Convention on the Elimination of All Forms of Discrimination Against Women as an international bill of rights for women).

³⁹ See, e.g., U.N. Econ & Soc. Council [ECOSOC] Res. 1984/14, 19' plen. mtg., U.N. Doc. E/RES/1984/14 (May 24, 1984); G.A. Res. 40/36, TT 1-7, U.N. Doc. A/RES/40/36 (Nov. 29, 1985).

⁴⁰ The U.N. Work on Violence Against Women, available at <http://www.un.org/womenwatch/daw/news/unwvaw.html>

recommendation established a robust definition of violence against women and mandated that;

*full implementation of the Convention required States to take positive measures to eliminate all forms of violence against women.*⁴¹

In so doing, there was a shift in the acknowledgement of gender based violence in not only public, but also private - as the due diligence obligation of States to prevent and protect.

The document also identified the "*due diligence*" standard for determining whether States have fulfilled the objectives of the Recommendation. This standard, recognised as international customary law - suggests that CEDAW's Member States have a particular obligation to ensure the elimination of violence against women.

The 2002 *Special Rapporteur Recommendation* articulates the due diligence standard, noting that Member States should; “[r]ecognise that States have an obligation to exercise due diligence to prevent, investigate and punish acts of violence, whether those acts are perpetrated by the State or private persons, and provide protection to victims”, identifying several "*necessary*" provisions, including public education, media training, treatment and assistance for victims, intervention for the perpetrators

⁴¹ *Commission on the Elimination of Discrimination Against Women*, General Recommendation No. 19: Violence Against

Women, 11th Session, 4, U.N. Doc. A/47/38 (1993), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>; see also id 7 ("Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include: (a) The right to life; (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict; (d) The right to liberty and security of person; (e) The right to equal protection under the law; (f) The right to equality in the family; (g) The right to the highest standard attainable of physical and mental health; (h) The right to just and favourable conditions of work").

of violence, as well as particular reforms to criminal law, civil law, and judicial proceedings.⁴²

In the same way, gender based violence experienced by women in the sex trade, through human trafficking and in legalised and decriminalised prostitution gives rise to Australia's due diligence obligation to preventing these crimes, and a responsibility within a human right framework to protect the victims of sexual abuse, assault, trafficking, slavery, exploitation in the sex trade - to the full extent of their rights under the law.

VII. AUSTRALIA'S DUE DILIGENCE OBLIGATION TO PREVENT GENDER BASED VIOLENCE AND SEXUAL VIOLENCE

Australia's due diligence obligation to prevent the existence of gender based violence within the context of exploitation in the sex trade and the crime of human trafficking under international law is well recognised.

The obligation to protect from the crime of human trafficking is evident and explicitly stipulated in the *Convention for Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* 1949⁴³ and the *Optional Protocol on Sales of Children, Child Prostitution and Child Pornography* 2000⁴⁴ of the *Convention on the Rights of the Child*⁴⁵.

⁴² U.N. Econ. & Soc. Council, Comm'n on Human Rights, Special Rapporteur on Violence Against Women, its Causes and Consequences, Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women: The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, 29 (Jan. 20, 2006) (prepared by Yakin Erturk in accordance with Commission on Human Rights Resolution 2005/41) [hereinafter 2006 Due Diligence Report], at 6-49.

⁴³ Articles 16, 17 and 19, 96 UNTS 271.

⁴⁴ Articles. 8, 9, and 10, A/RES/54/253 (2000).

⁴⁵ The United Nations *Convention on the Rights of the Child* at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

The concept of "due diligence" regarding State responsibility for non-State acts was first developed in case law in *Velasquez Rodriguez v. Honduras*⁴⁶ a case heard by the Inter American Court of Human Rights (IACHR) in 1988.

For the first time, the Court considered State responsibility for enforced disappearances under the *American Convention on Human Rights*⁴⁷.

The Court found that an illegal act "*which violates human rights and which is initially not directly imputable to a State ... can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [American Convention on Human Rights]*"⁴⁸, and that the existence of a legal system is not enough; the government must also "*conduct itself so as to effectively ensure*" the enjoyment of rights.⁴⁹

The cases of: *Bevacqua and S. v. Bulgaria*⁵⁰ and *Opuz v. Turkey*⁵¹ held national governments responsible for failing to exercise due diligence to adequately protect individuals from domestic violence.

The decisions in these cases not only affirm the use of the due diligence standard as a tool for assessment, but also clarifies the practical obligations of protecting victims from domestic violence and preventing, investigating, and prosecuting such violence.

⁴⁶ *Velasquez Rodriguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, T 172 (July 29, 1988).

⁴⁷ The *American Convention on Human Rights* at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

⁴⁸ *Velasquez Rodriguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, T 172 (July 29, 1988), at 172.

⁴⁹ *Velasquez Rodriguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, T 172 (July 29, 1988), at 167.

⁵⁰ *Bevacqua v. Bulgaria*, App. No. 71127/01, Eur. Ct. H.R. (2008), available at: <http://cmiskp.echr.coe.int/tkpl97/view.asp?item=1&portal=hbkm&action=html&highlight=Bevacqua%20%7C%20v>

⁵¹ *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009), available at http://cmiskp.echr.coe.int/tkpl97/view.asp?action=html&documentId=851046&portal=hbkm&source=externalbydo_cnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

The *European Court of Human Rights* highlighted the need for enforceable measures of protection and a legislative framework that enables criminal prosecutions of domestic violence in the public interest in its decision making of these cases.⁵²

Significantly, the decision in *Opuz v. Turkey* recognised that a State's failure to exercise due diligence to protect women against domestic violence is gender-based discrimination, violating women's right to equal protection of the law.⁵³

The obligation to protect derives from a general duty to ensure rights and provide remedies⁵⁴.

Article 2(3)(a) of the *International Covenant on Civil and Political Rights* stipulates in this regard that States are under an obligation to ensure that '*any person whose rights and freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity*'⁵⁵.

This human rights shift occurred in the 1980's and 1990's in international human rights law in understanding that a States due diligence obligation to protect and

⁵² As per the Article by Lee Hasselbacher titled: State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection, 2010 by Northwestern University School of Law Northwestern Journal of International Human Rights, Volume 8, Issue 2 (Spring 2010).

⁵³ *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009), available at <http://cmiskp.echr.coe.int/tkpl97/view.asp?action=html&documentId=851046&portal=hbkm&source=externalbydoCnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, at 191.

⁵⁴ J. Moore, 'From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents', (1999) 31 Columbia Human Rights Law Review 81, at. 92, 93 and 96.

⁵⁵ It is worth noting that the Human Rights Committee, in relation to prohibition against torture, Stated that '*it is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against acts prohibited by Art. 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity*'. General Comment No. 20 (Torture, Inhuman or Degrading Treatment and Punishment) (1992), para. 2, Compilation of General Comment 999 UNTS 171.

prevent harms from occurring extended to the ‘private spheres’, including domestic violence, wife rape and other ‘private’ matters.

It is under this basis upon which the State can, under international human rights law intervene in matters such as female genital mutilation, child marriage, wife rape and domestic violence in the ‘private sphere’. This development in law is necessary to protect the vulnerable “behind closed doors”, and this principle logically therefore also extends to the private contract between a prostitute exchanging money for sex behind the closed doors of a brothel.

The development in case law in various human rights jurisdictions led to creating customary international law to cite that when a States due diligence obligation to protect and prevent harm from occurring is not realised, it is seen as not only a violation of obligations, but that it is also gender-based discrimination, and a direct violation of women’s rights to equal protection of the law.

This is an extremely significant shift in placing the burden onto a State to not legalise an industry that is fraught with gender based violence, trafficking, slavery and exploitation - namely, the legalisation and decriminalisation of prostitution.

These international human rights standards and customary law have unfortunately not been implemented in domestic and state-based legislation - where prostitution laws vary significantly from jurisdiction, to jurisdiction in Australia. These inconsistencies in laws also enables domestic trafficking to thrive in Australia - without the authorities being alerted, as there are no records kept of where vulnerable women in the sex trade have been forced to work as they are moved around from state to state.

The *Special Rapporteur on Sales of Children, Child Prostitution and Child Pornography*⁵⁶ went further to argue that ‘international human rights law has long

⁵⁶ More about the Special Rapporteur here:

<http://www.ohchr.org/EN/Issues/Children/Pages/ChildrenIndex.aspx>

imposed direct obligations on the private sector'.⁵⁷ This private sector would extend to traffickers, brothel owners, pimps and 'Johns' - those purchasing flesh - whether it be 'legally', illegally or otherwise.

This is consistent with *Article 2 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of others* 1949⁵⁸ which criminalises anyone who keeps, or manages or knowingly finances or takes part in the financing of a brothel, or knowingly lets or rents a building or other place for the purpose of the prostitution of others.

VIII AUSTRALIA'S DUE DILIGENCE OBLIGATION TO PROTECT WOMEN FROM EXPLOITATION, SLAVERY AND TRAFFICKING

Existing principles and jurisprudence offer a foundation on which to build a due diligence standard of protection for trafficked women. Most obviously, general guiding principles can be found in ECOSOC's *Recommended Principles and Guidelines on Human Trafficking*.⁵⁹ This United Nations document explains that "*States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons.*"⁶⁰

⁵⁷ Report of the *Special Rapporteur on Sales of Children Child Prostitution and Child Pornography*, E/CN.4/2001/78, para. 52.

⁵⁸ *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, Approved by General Assembly resolution 317 (IV) of 2 December 1949, Entry into force: 25 July 1951, in accordance with article 24, at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/TrafficInPersons.aspx>

⁵⁹ U.N. Econ. & Soc. [ECOSOC], Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add. 1, 13 (May 20, 2002).

⁶⁰ U.N. Econ. & Soc. [ECOSOC], Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add. 1, 13 (May 20, 2002), at 2.

While the UN Protocol advances some notions of protection for trafficked women, it leaves the decisions and actions to be taken to the State's discretion. This is clearly seen in Article 6 of the *Protocol* regarding "assistance to and protection of victims of trafficking in persons," which reads in part:

*Each State Party shall consider implementing measures to provide the physical, psychological and social recovery of victims of trafficking in persons.*⁶¹

And:

*In addition to taking measures pursuant to Article 4 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in person to remain in its territory, temporarily or permanently, in appropriate cases.*⁶²

Vivian Waisman argues that a due diligence standard to protect trafficked women starts with legal residency as a minimum threshold.⁶³

Examining legal obligations under this scheme demonstrates that States must have a framework in place to offer legal residency so that women who have been trafficked - and thus are vulnerable to severe human rights violations - ensuring that they have access to remedies and to protection from further human rights violations.

Of course, Australia's 45-day maximum protection visa for trafficked persons⁶⁴ falls way short of the minimum international standard of six months.

⁶¹ Article 6, *United Nations Convention against Transnational Organised Crime: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25/Annex II (Nov. 15, 2000) [hereinafter UN Protocol on Trafficking].

⁶² Article 7, *United Nations Convention against Transnational Organised Crime: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25/Annex II (Nov. 15, 2000) [hereinafter UN Protocol on Trafficking].

⁶³ Viviana Waisman, 'Human Trafficking: State Obligations to Protect Victims' Rights, the Current Framework and a New Due Diligence Standard, (2010) 33 *Hastings International & Comparative Law Review* 385, at 411.

⁶⁴ More about Australia's Visa regimes for trafficked persons at our Parliamentary website here:

This analysis of human rights in human trafficking reaffirms one of the fundamental principles that all human rights are indivisible and interdependent. The practice affects economic, social, cultural as well as civil and political rights. At a theoretical level, this calls for a comprehensive analysis of trafficking which embraces all human rights.

Australia is a demand nation for trafficked persons and consumers of child sexual exploitation material both online and as sex tourists, as consumers of pornography, live sex shows via webcam and prostitution - and Australia's demand is on the rise.

The international best practice model for curbing human trafficking, addressing gender based violence through a human right compliant framework - the Nordic Model - is the only legislative solution to address these serious crimes, in step with the due diligence obligation of governments to preventing harm, abuse and the crime of trafficking from occurring - and to protect the victims thereof.

The Nordic Model is the best alternative to the failed legalised and decriminalised policy approached of prostitution that has seen an increase in criminality, exploitation, abuse, trafficking and slavery in the industry.

IX. AUSTRALIA'S SOLUTION MOVING FORWARD - THE NORDIC MODEL

Australia has no other option but to implement the international best practice model which has seen a reduction of human trafficking by half, an abolition of

involuntariness in prostitution and has turned criminal enterprise in the industry away.⁶⁵

It has been so successful in fact, that this policy approach to prostitution has been implemented by: Sweden, Norway, Iceland, Finland, Korea, Canada, France, Northern Ireland and endorsed by the European Parliament, and is being considered by: Italy, Israel, Luxemburg and Scotland.⁶⁶

Australia has no other option but to implement the Nordic Model that curbs the demand of human trafficking and addresses gender based violence from a human rights and women's rights perspective, by criminalising demand and providing preventative and exit pathways for vulnerable women, while at the same time providing education to community, law enforcement and front line organisations as to the standards of respecting and protecting women as having freedoms and rights.

For the approximately 20,000 women in prostitution in Australia⁶⁷, the legalised, decriminalised or regulated systems of prostitution does not work, for we know that the majority of women do not want to be there, that they do not have exit pathways out of the industry, and that they are faced with extreme forms of gender based violence on a daily basis.

Are we to continue buying and selling flesh like an archaic people from the Stone Age? Will we continue to commodify women that enables, encourages and facilitates violence and especially sexual violence against women and girls? *As survivors have said: "prostitution is paid rape"*.

⁶⁵ For a comprehensive analysis of the Nordic Model, it's benefits, impacts and reforms, refer to the *Coalition Against Trafficking in Women 2017 Report* here: <http://www.catwa.org.au/wp-content/uploads/2017/03/NORDIC-MODEL-2017-booklet-FINAL-single-page.pdf>

⁶⁶ Mentioned also in the *Coalition Against Trafficking in Women 2017 Report* here: <http://www.catwa.org.au/wp-content/uploads/2017/03/NORDIC-MODEL-2017-booklet-FINAL-single-page.pdf>

⁶⁷ State Institute of Criminology, The State sex industry, at: http://www.aic.gov.au/publications/current%20series/rpp/121-140/rpp131/05_aus_industry.html

X IT IS A CRIMINAL ACT TO TAKE PART IN MANAGING BROTHELS
UNDER INTERNATIONAL LAW

Furthermore, *Article 2 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of others* 1949⁶⁸ criminalises anyone who keeps, or manages or knowingly finances or takes part in the financing of a brothel, or knowingly lets or rents a building or other place for the purpose of the prostitution of others.

The Australian Government has a due diligence obligation to uphold these standards and cease from engaging in the criminal act of allowing the buying and selling of persons, in facilitating brothel ownership, pimping and facilitating the sex trade.

In considering the States' due diligence obligations under international human rights standards and principles, the Australian Government is called upon to consider and implement the *Coalition for the Abolition of Prostitution Report on Prostitution under International Human Rights Law: An Analysis of State's Obligations and the*

⁶⁸ *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, Approved by General Assembly resolution 317 (IV) of 2 December 1949, Entry into force: 25 July 1951, in accordance with article 24, at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/TrafficInPersons.aspx>

*Best ways to Implement them*⁶⁹ in order to move towards a more gender equal, human rights compliant practice of industry and standards for all women in the workplace.

As a matter of urgency, Australia has to recognise its due diligence obligation under international human rights law and customary law to prevent the harms of gender based violence to women in prostitution, to cease from facilitating these violations of their rights through the legalisation and decriminalisation of prostitution - which facilitate their harms, and to implement protection through exit programs, rehabilitation pathways, re-skilling options, compensation schemes and residency rights.

Of course, prevention is always better - and more cost effective than the cure.

It goes without saying that the prevention of human trafficking, sexual slavery, exploitation and the prevalence of gender based violence through the commercialisation of prostitution by implementing the Nordic Model that protects victims, curbs demand and provides exit pathways and community education is the preferred approach.

If Australia wants to be a part of the solution to human trafficking in our vulnerable developing region, and to the predominantly vulnerable women and girls trafficked for the purpose of sexual exploitation, it needs to implement the Nordic Model to address the growing demand of gender based violence in prostitution, which develops and affects social and behavioural norms outside of one transaction in the brothels.

If Australia wants to reduce gender based violence, it needs to seek to curb the demand for it, through legalised and decriminalised prostitution. As the Swedish Minister at the most recent United Nations Security Council meeting in March 2017

⁶⁹ *The Coalition for the Abolition of Prostitution Report on Prostitution under International Human Rights Law: An Analysis of State's Obligations and the Best ways to Implement them at:* <http://www.cap-international.org/wp-content/uploads/2017/01/CAP-HR-paper-EN.pdf>

has declared: “*Prostitution can never be regarded as a job. Prostitution is exploitation.*”⁷⁰

In our conclusions, we have to take into consideration the evolving definition of the States due diligence obligations of preventing gender based, and especially sexual violence against women from occurring as including private relationships and question whether this extends to private transactions, such as the sexual service purchased by men, especially if that service is fraught with violence against predominantly women.

If indeed this development of international human rights law to protect women were to extend to the transaction of a man purchasing sex from a prostitute, this would lead a major reform of Australia’s various approaches to prostitution laws across our jurisdictions.

If indeed it is a criminal act to take part in managing brothels under international human rights law and the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of others*, States such as Victoria who have decriminalised prostitution, and New South Wales who have legalised it - would have to review their legislative approach, including giving due consideration to the fourth option approach to prostitution laws - which is the Nordic Model.

XI CONCLUSION

There is evidence to the fact that the criminalisation, legalisation and decriminalisation models of prostitution have not worked, and a fourth alternative needs to be considered. In ignoring these realities, Australians will find themselves

⁷⁰ Swedish Minister Asa Regner, United Nations Security Council, during 7898th meeting, 15 March 2017, at: <http://webtv.un.org/meetings-events/security-council/watch/part-1-trafficking-in-persons-in-conflict-situations-forced-labour-slavery-and-other-similar-practices-security-council-7898th-meeting/5360604475001>

with a continued growth in gender based violence, a demand for women in the adult industries, which in turn fuels the business of traffickers.

In the words of former Secretary-General Kofi A. Annan, sexual exploitation is one of the most egregious violations of human rights that the United Nations confronts⁷¹. The reality is, this egregious violation of human rights confronts us all - and not just the United Nations.

Addressing this human right violation has to include dealing with the demand for an industry that fuels the trafficking of vulnerable women and girls. This is the due diligence obligation of all persons who care about their fellow human, and see them as having inalienable rights and dignity.

⁷¹ Full text: *“I believe the trafficking of persons, particularly women and children, for forced and exploitative labour, including for sexual exploitation, is one of the most egregious violations of human rights that the United Nations now confronts. It is widespread and growing. It is rooted in social and economic conditions in the countries from which the victims come, facilitated by practices that discriminate against women and driven by cruel indifference to human suffering on the part of those who exploit the services that the victims are forced to provide. The fate of these most vulnerable people in our world is an affront to human dignity and a challenge to every State, every people and every community. I therefore urge the Member States to ratify not only the United Nations Convention against Transnational Organised Crime, but also the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which can make a real difference in the struggle to eliminate this reprehensible trade in human beings.”* Kofi A. Annan Secretary-General, UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANISED CRIME AND THE PROTOCOLS THERETO United Nations, New York, 2004.