

Australia

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1. Introduction

Australian government officials are careful to tell you that human trafficking does not mean simply trafficking for sexual exploitation, and that trafficking is not the same as migrants engaging in prostitution, or human smuggling. The *Australian Government's National Action Plan to Eradicate Trafficking in Persons* uses the definition as set out in the UN Trafficking Protocol.

Australia is one of the few countries where prostitution has been regulated or decriminalised (except in the states of South Australia and Tasmania) and, therefore, it is easier for officials to draw a distinction between sex workers and trafficked persons, rather than assuming that all migrant sex workers have been trafficked. However, most of the literature available deals with trafficking of Asian women into the sex industry in Australia. Women are mainly identified as coming from Thailand, and to a lesser extent, from the Republic of Korea (South Korea) and China. Children are not reported to have been trafficked into the sex industry in Australia. Some of the women from Thailand have worked in the sex industry before and were not deceived as to the nature of the work awaiting them in Australia. What makes these cases trafficking is that some of these women are effectively in debt bondage until they can repay their substantial debt. Estimates of the debts owed by women trafficked into Australia's sex industry range from 50,000 to 80,000 Australian dollars (equivalent to between US\$39,000 and US\$62,000). The new anti-trafficking laws in Australia tend to reflect this common trend of debt bondage.

The distinction between smuggling and trafficking is reasonably clear on an operational level, since the process of entering Australia for trafficked and smuggled migrants tends to be different. Smuggled migrants often come on boats or using false passports, whereas the majority of trafficked people have tended to enter Australia legally on tourist, student or work visas, but ended up in situations of exploitation akin to debt bondage or forced labour. However at the policy level, trafficking and smuggling seem to frequently be dealt with together. For instance, Australia has appointed an Ambassador on People Smuggling who is also responsible for human trafficking issues.

For a long time Australia has been known for its hostile migration policy, which also impacts on trafficking. Historically (from 1901 up until 1973), Australia had a racially discriminatory policy which favoured immigration from certain countries, infamously known as the "white Australia policy" or officially as the *Immigration Restriction Act, 1901*. This Act prohibited prostitutes, criminals and anyone under a contract or agreement from performing manual labour within Australia, with some limited exceptions (Department of Immigration and Multicultural Affairs,

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2006). Different immigration rules applied for migrants coming from non-European backgrounds: they suffered restrictions on the types of work they could perform and in terms of their ability to obtain permanent residency.

The white Australia policy was abolished in 1973, yet an attitude of hostility towards migrants, particularly from non-white countries still pervades. The Department of Immigration and Multicultural Affairs¹ (DIMA) has a “dob in line”, which encourages Australian citizens to report to DIMA ‘suspicious’ migrants whom they suspect to be working or living illegally in Australia. Regular migration to Australia is strictly controlled and it is difficult for low-skilled migrants to enter Australia for work. Those arriving in Australia without documents, by boat or air, often to claim asylum, are regarded as ‘queue-jumpers’ or ‘boat people’ rather than as people fleeing persecution, an image carefully cultivated by the Howard Government. Asylum-seekers face mandatory detention and, since 2001, offshore processing zones have been set up as a further measure to deter unauthorised arrivals. By way of example, in 2001, when a Norwegian container ship, the *Tampa*, rescued more than 400 asylum-seekers from a sinking vessel, it was refused permission to land on Australian soil. Instead, soldiers entered the ship and escorted the asylum-seekers to Nauru for processing. The Australian government defended its actions on the grounds of deterring people from coming illegally to Australia and rewarding those who use the ‘proper channels’ (Australian Associated Press, 2002). The event occurred close to a federal election and played on fears of the Australian public, blurring the line between terrorism, crime and irregular migration. As far as trafficking is concerned, there is a reluctance to broaden the scope of who is considered trafficked and to afford equal protection and rights to all victims.

Trafficking is generally not as significant a problem as in other countries. There may well be more individuals involved than the figure reported by the Australian government of 100 reported cases per year (Commonwealth of Australia, 2004, 2), simply because that figure does not seem to take into account cases of labour exploitation. Trafficking for forms of exploitation other than commercial sexual exploitation (such as exploitation in forced labour) has been identified by the authorities, but only isolated cases. Discussions with trade unions, however, suggest that severe labour exploitation of migrant workers, both those working legally and illegally in Australia, is a growing problem. These cases in sectors other than the sex industry have not been identified as trafficking, or followed up by the authorities, despite reports by the media and trade unions.

Trafficking numbers are low primarily due to the geographical isolation of the country, combined with a very strict immigration and border control. There are legal channels for migration into the sex industry, which reduces the need for migrants to depend on organised crime syndicates or traffickers. Migrant women wishing to work in the sex industry still need a relevant work visa or working holiday visa in order to do so. Therefore, trafficking still does go on, because unskilled people from developing countries find it difficult to obtain a work visa for Australia.

Over the last five years, Australia has developed a comprehensive anti-trafficking response, firmly rooted in the criminal justice system and the need to prosecute traffickers. The government considers trafficking a crime to be detected and punished by the criminal justice system. Victim protection is seen as a necessary part of that criminal justice response, rather than an unequivocal human right. Comprehensive services and rights to remain in Australia are available to those who are seen to be potentially useful to the authorities and who might or do possess evidence to prosecute traffickers. Even in terms of reintegration, more comprehensive assistance is provided to those willing to cooperate with Thai or Australian authorities. The Federal Department of Families, Community Services and Indigenous Affairs’ Office for Women sub-contracts services for trafficked persons through a

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public tender process. This was won by a private company, Southern Edge Training. The fact that victim services in Australia are privatised has various implications. In particular, it means that many smaller NGOs have been marginalised in the trafficking debate and there are hardly any government funds directed towards them.

This report is based on a literature review supplemented by a series of interviews carried out in Sydney, Melbourne and Canberra by two representatives from GAATW in September 2006 with government officials, police, trade unions, NGOs, academics and trafficked persons. The main agency that provided services to trafficked persons, Southern Edge Training, declined to be interviewed due to a confidentiality agreement signed with the Australian government. When GAATW sought authorisation from the Office for Women to interview Southern Edge Training, the Office for Women explained that Southern Edge Training was not authorised to disclose any additional information to that provided by the government, and therefore an interview with them was unnecessary. GAATW representatives wished to discuss practical issues surrounding victim protection in Australia and how the programme met the changing priorities of trafficked women, questions which the Office for Women could not answer. Inability to access this kind of general information suggests a lack of transparency on the part of both Southern Edge Training and the government. Without such information about how victim services actually work in practice, it is unclear whether they really adhere to internationally recognised standards or not.

2. Current Frameworks to Address Trafficking

Prior to 2003, the government's response to trafficking was similar to its response to people smuggling: in most cases, simply to remove trafficked persons back to their country of origin as quickly as possible. In September 2003, the Australian government committed significant resources of A\$20 million (US\$15.5 million) to combat trafficking over a four-year period. In June 2004, it provided more details on how the money was to be spent, by launching the *Australian Government's National Action Plan to Eradicate Trafficking in Persons*. The Action Plan has four main components:

- Prevention. Through overseas development assistance (see below), providing training to police officers overseas as well as establishing a senior migration officer post in Thailand to prevent trafficking.
- Detection and investigation. Through funding a 23-person Australian Federal Police (AFP) Transnational Sexual Exploitation and Trafficking Strike Team to improve investigations into trafficking. Also by strengthening AFP operations in relevant countries abroad, and improving Australian anti-trafficking legislation.
- Criminal prosecution. By amending the migration regulations to permit trafficked persons to stay in Australia and introducing new anti-trafficking legislation.
- Victim support and rehabilitation. Providing comprehensive victim support to those who are trafficked, especially witnesses permitted to remain, as well as reintegration assistance for trafficked persons returning to South-East Asia (more details are in section 3 below); and also providing training for police and immigration officers coming into contact with trafficked persons, and raising community awareness of the issue, especially amongst those working in the sex industry, and via the media to inform the general public (Commonwealth of Australia, 2004, 4).

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The government commits itself to these activities through what it calls a “whole of government approach”. This means the coordinated involvement of various government agencies working at all levels: federal, state and local. By way of example, at national level, an InterDepartmental Committee has been established involving all agencies connected to trafficking, i.e. Department of Immigration and Multicultural Affairs (DIMA), AFP, Office for Women, Attorney General’s Department, Director of Public Prosecutions, Department of Foreign Affairs and Trade, and the Australian Agency for Foreign International Development (AusAID). This InterDepartmental Committee meets regularly to exchange information, discuss the impact of various anti-trafficking activities, as well as updating other agencies on concrete cases.

In relation to Australian initiatives abroad, Australia has played a leading role in developing regional cooperation and exchange on measures to combat smuggling and trafficking through the *Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime* (Bali Process), which began in 2002. Australia is the co-chair of the Bali Process, alongside the Government of Indonesia, and the Process involves some 50 countries across the Asia-Pacific region. The Department of Foreign Affairs and Trade appointed an Ambassador for People Smuggling who was also given a mandate on the issue of human trafficking. This Ambassador does not look at issues of trafficking or smuggling only within or to Australia, but how smuggling, trafficking and migration are more generally being dealt with in the region, and advocates “Australia’s interest in promoting effective and practical international cooperation to combat people smuggling and trafficking especially in the Asia-Pacific region” (Flanagan, 2006, 6).

AusAID funds various activities related to trafficking in South-East Asia. Most of the trafficking money has been spent on what the government terms ‘prevention’, though these activities are not directly related to prevent trafficking to Australia but as part of a broader development response. Activities aim to improve the criminal justice response to trafficking while ensuring adequate victim protection through Asia Regional Cooperation to Prevent People Trafficking and the second phase of this project, the Asian Regional Trafficking in Persons project, which currently works in Indonesia, Thailand, Myanmar, Cambodia and Lao PDR.

Australia also appears to see effective prevention largely as an issue of improving the law enforcement response to trafficking, and so the government supports collaboration between countries in order to improve the ability of other countries to detect cases of trafficking and improve their capacity to investigate and prosecute traffickers, and to protect trafficked persons largely in order to secure more effective prosecutions.²

3. Analysis of Relevant Laws and Policies

Criminal Laws

Australia’s legal response to trafficking has been formed in the last decade. The ratification of the UN Trafficking Protocol in September 2005 led to the Australian government introducing new offences of trafficking and debt bondage to cover some of the gaps in existing legislation. The new offences bring Australian legislation in line with the UN Trafficking Protocol. Prior to this, Australia had already introduced laws addressing trafficking into the sex industry, in the form of laws in 1999 to criminalise slavery and sexual servitude. However, there were few

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prosecutions of these offences. To cover the distinct crime of smuggling in persons, Australia introduced new smuggling offences in 2002.

All of these new offences have been reflected as amendments to Australia's *Criminal Code Act* (Commonwealth) (hereafter, Criminal Code), or in the case of the people smuggling offences, to the *Migration Act* (Commonwealth). The changes were adopted under federal law, rather than state law. As a point of note for foreign readers, Australia is a federation of six states (representing six former British colonies) and two territories. Under this system, power is divided between the federal (Commonwealth) government and the State and Territory governments. The federal government assumes responsibility for matters affecting the whole nation, and these issues are specified under the Constitution. It is possible for federal and state governments to make laws on the same issue, but where there is inconsistency, the federal law is followed.

Some states in Australia have introduced sexual servitude laws as well, however, till now no state has amended its state criminal code to make trafficking an offence. It is likely that this will happen in at least some states in the near future. Since 2005, when the new trafficking offences were added, Australia has a raft of measures throughout the Criminal Code with which to prosecute traffickers. However, serious gaps remain regarding the critical element of exploitation, since the thrust of the new trafficking provisions seems to be more on the aspects of movement. Australian criminal law still lacks offences of outright forced labour and exploitation, which might be an easier tool for the police and prosecutors to use than the current trafficking provisions.

Changes to the criminal laws were largely to bring Australia in line with its international legal obligations, and as part of the worldwide increased focus and response to the human trafficking issue. Media pressure was also a factor leading to these changes in law and policy – especially in drawing attention to the treatment of trafficked persons, and the need for victim protection (see section, Protection and Assistance to Trafficked Persons). The relationship between the United States and Australia in the wake of the 'war on terror' and the US Department of State's Trafficking in Persons Report also had a role to play.

Slavery and sexual servitude

The 1999 offence of slavery uses the UN definition of slavery from the Slavery Convention as its starting point, "the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised *including where such a condition results from a debt or contract made by the person*". The part in italics was added to the UN definition in Australia's law to deal with the prevalent phenomenon in Australia of so-called contract women. The term *contract women* is commonly used to describe trafficking of women into the sex industry under conditions of debt bondage. Slavery and slavery-related offences (section 270.3 of the Criminal Code) attract penalties ranging from 17 to 25 years' imprisonment.

Sexual servitude is defined as, "the condition of a person who provides sexual services and who, because of the use of force or threats is not free to cease providing sexual services or is not free to leave the place or area where the person provides sexual services". In this section, *threat* is construed widely enough to include not only threats of force but also threat to cause a person's deportation or an unreasonable threat of any other 'detrimental' action. Thus the threat is wide enough to include psychological coercion over a trafficked person and is in line with the UN Trafficking Protocol. Sexual servitude offences (section 270.6 of the Criminal Code) attract a penalty of 15 to 19 years' imprisonment.

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Deceptive recruitment

The 2005 legislative changes on trafficking also revised one of the 1999 offences regarding sexual servitude, the offence of “deceptive recruiting for sexual services” under Section 270.7 of the Criminal Code. Under the 1999 offence, deceptive recruiting was inducing someone to provide sexual services by deceiving them about whether they would provide services of a sexual nature or not. The 2005 amendment broadened the offence in scope to also cover deception as to the *nature* of the sexual services provided, for example, deceiving someone about their working conditions. As amended in 2005, deceptive recruiting also covers deception concerning the extent of freedom of movement, freedom to cease providing sexual services, the amount or existence of debt owed or the involvement of exploitation, debt bondage or confiscation of the person’s travel or identity documents.

In terms of proving deception, judges and juries can consider the economic relationship between the person and the alleged offender, verbal or written contracts or agreements made between them, and the personal circumstances of the victim, including legal status and ability to communicate in English and the extent of the person’s social and physical dependence on the alleged offender.

Trafficking

The new crime of trafficking in persons (under section 271.2 of the Criminal Code) has broken trafficking down into eight individual cross-border offences, each punishable by a maximum of 12 years’ imprisonment. Four of the eight offences deal with trafficking *into* Australia and the other four deal with trafficking *out* of Australia³ – so in essence, there are four different sets of circumstances used to characterise trafficking. Domestic trafficking is also covered in four separate offences, which use the same language and carry the same penalties as the cross-border trafficking offences.

The convoluted nature of the definition of trafficking in the UN Trafficking Protocol means that when it comes to defining offences related to trafficking in national law, it is quite reasonable and appropriate for offences related to trafficking not to be based narrowly on the UN Protocol definition. However, the result of the breaking down of trafficking into eight separate criminal offences is that the scope of these offences is slightly broader than that of the UN Trafficking Protocol’s definition. It is worth noting that the draft Bill on trafficking only contained two such scenarios, but others were added because the Legal and Constitutional Legislation Committee expressed concern that the proposed offences did not meet the requirements of the UN Protocol (McSherry, 2006, 7). Under the Protocol, for trafficking in adults to occur, there needs to be three core elements of facilitated movement (recruitment, harbouring etc.), plus means (deception, coercion, abuse of vulnerability etc.), plus exploitation or the intention to subject someone to exploitation (forced labour, servitude etc.). However, some of the Australian trafficking offences extend more broadly and cover only two of these elements without always requiring the third, and so there is a gap in requiring both the *means* involved (deception, coercion etc.) and *exploitation* to be proven. All of the standard offences concerning trafficking in persons (section 271.2(1)-(2C)) are punishable by imprisonment for up to 12 years. This report looks at only four of the offences, since the other four are simply ‘mirror’ provisions dealing with trafficking out of (rather than into) Australia.

Under section 271.2(1)⁴ of the Criminal Code, cross-border facilitated movement or receipt of a person accompanied by force or threats, resulting in a person complying to enter Australia is enough to constitute trafficking. This provision is broader than the UN Protocol definition of trafficking, in so far as there is no

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requirement that proof be presented that the ‘other person’ (the trafficked person) was subjected to exploitation or that there was an intention to subject her or him to exploitation (McSherry, 2006, 8). One reason it may have been left out is because such intention to subject a person to exploitation was considered too difficult to prove.

Section 271.2(1B) of the Criminal Code⁵ captures two of the three core elements of the UN Trafficking Protocol: the process of facilitated entry, plus the final element of exploitation, since one has to prove the person facilitating the entry is “reckless as to exploitation”. The definition of exploitation given in the Criminal Code Dictionary is in line with Article 3 of the UN Trafficking Protocol. Exploitation occurs where a person causes a victim to enter into slavery, forced labour or sexual servitude, or where there is unauthorised removal of organs. The requisite means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits, is completely absent.

Section 271.2(2) of the Criminal Code⁶ is more in line with the UN Trafficking Protocol because it involves the process of facilitated entry, plus deception⁷ about whether the person will provide sexual services, be exploited, be in debt bondage or whether the person’s travel or identity documents will be confiscated. This section of the law can be used to prosecute a trafficker who deceives a person into working in the sex industry, by making them believe they will be involved in some other form of work. It does not cover the situation of women who enter Australia knowing they will perform sexual services, but are deceived as to conditions. Such cases are covered under section 271.2(2B) below.

Section 271.2(2B) of the Criminal Code⁸ deals with trafficking for sexual services only. It includes facilitated entry and takes into account that there initially may have been some consent of the trafficked person to engage in sex work in Australia. The third element required for this offence to be proven is deception as to various key factors and conditions relating to the nature of the work, freedom of movement, and debt – all of which go to the heart of exploitation. This provision is in line with the UN Trafficking Protocol. However, it is unclear why section 271.2(2B) limits these conditions only to those who knowingly enter Australia to work in the sex industry, and why these provisions could not also be applied to people trafficked for labour, especially since sex work is recognised as work in most parts of Australia.

Under section 271.3, there is a separate offence of aggravated trafficking in persons for cases in which a trafficker subjects the victim to cruel, inhuman or degrading treatment, causes serious harm or danger of death to the victim, or is reckless as to that danger. This is punishable by 20 years’ imprisonment.

Trafficking in children

There is also a separate offence of trafficking in children (section 271.4 of the Criminal Code), punishable by 25 years’ imprisonment (three provisions dealing with trafficking into and out of Australia and within Australia). This section is in line with the UN Protocol’s definition of trafficking in children.

Debt bondage

Alongside the specific offences of trafficking introduced in 2005, is the new offence of debt bondage. Debt bondage is defined in the Criminal Code Dictionary as:

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The status or condition that arises from a pledge by a person:

- (a) of his or her personal services; or
- (b) of the personal services of another person under his or her control;
as security for a debt owed, or claimed to be owed, (including any debt incurred, or claimed to be incurred, after the pledge is given), by that person if:
(ba) the debt owed or claimed to be owed is manifestly excessive; or
- (c) the reasonable value of those services is not applied toward the liquidation of the debt or purported debt; or
- (d) the length and nature of those services are not respectively limited and defined.

The definition is based on the *UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (1956), (signed and ratified by Australia in 1958) with a short addition in italics, that the debt owed or claimed to be owed is manifestly excessive. The intent of the debt bondage offence is to cover both written and oral contracts with trafficked persons that are manifestly unfair, and to provide another tool in order to prosecute traffickers, where crucial evidence of deception or exploitation may be lacking.⁹

In determining a situation of debt bondage, the court or jury may consider the economic relationship between the first person and the second person; the terms of any written or oral contract or agreement between them or another; and the personal circumstances of the victim of debt bondage, especially legal status, ability to speak, write and understand English or the language in which the deception or inducement occurred, and the extent of the second person's social and physical dependence on the first person (section 271.8 of the Criminal Code).

Since the offence of debt bondage covers various situations broader in scope than trafficking, such as oral or written contracts where people are forced to work as a result of even moral or family obligations, debt bondage may be regarded a summary offence, and therefore the penalty for debt bondage, at only 12 months' imprisonment, is rather light.¹⁰

There is also an offence of aggravated debt bondage under section 271.9 of the Criminal Code, which deals not with the same aggravating circumstances as in the trafficking offences, but rather confusingly with debt bondage of trafficked persons below the age of 18, the punishment for which is two years' imprisonment.

Forced labour

Since forced labour is included in the definition of exploitation, it also merits its own definition within the Australian Criminal Code Dictionary. Forced labour is not defined in the exact terms used in the ILO Convention Number 29 on Forced Labour (1930), but as:

A condition when a person provides labour or services (other than sexual services) and who, because of the use of force or threats is not free to cease providing labour or services; or is not free to leave the place or area where the person provides labour or services.

The definition of forced labour is restricted only to forced labour in sectors other than the sex industry, presumably to avoid people being tried under sexual servitude and forced labour offences simultaneously. Interestingly, there

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is no general criminal offence of forced labour in the Criminal Code; it is only defined in relation to it being an element of exploitation – vital for the smuggling and trafficking offences.

Analysis of Investigation and Prosecution of Traffickers

Since the anti-trafficking offences were only introduced in August 2005, by the end of 2006 no one had yet been convicted of these crimes. According to press articles, the first individuals to be charged under the new offences in July 2006 were involved in two separate cases, one involving the trafficking of Thai women into the sex industry (Braithwaite, 2006), and the other pertaining to the trafficking of an Indian man to work in a restaurant under slavery-like conditions (Arlington, 2006).

From the introduction of the new slavery and sexual servitude offences in 1999 to the end of June 2005, DIMA had formally referred 126 people trafficking matters to the AFP for assessment, of which 116 involved sex trafficking and 10 involved trafficking for other forms of exploitation (DIMA, 2005a, and DIMA, 2005b, 96). By the end of October 2006, a total of 23 people had been charged with trafficking-related offences, with only four convictions under the 1999 slavery and sexual servitude laws (two for possessing or exercising control over a slave and two for possessing or exercising control over a slave and sexual servitude offences).¹¹

With regard to criminal trials, to the author's knowledge, as at November 2006, only five cases have been brought to trial using the 1999 offences. Of the three completed court cases, two have resulted in guilty verdicts, *Regina (Crown) v. Wei Tang* (in Melbourne) and a more recent joint trial initiated against defendants Yotchomchin and Sieders (judgment unavailable). The Wei Tang trial was initiated against two co-accused. The conviction was recorded against Wei Tang only, upon appeal. The other was acquitted and dismissed on all counts.

In terms of failed prosecutions, cases involving four accused were dismissed due to lack of sufficient evidence: *Regina (Crown) v. Kwok*; *Regina (Crown) v. Ong*; *Regina (Crown) v. Tan*; *Regina (Crown) v. Yoe* (Commonwealth Director of Public Prosecutions, 2006, 30). The jury acquitted or could not reach a verdict on the sexual servitude charges in the case against Sally Cui Mian Xu, Lin Qi and Ngoc Lan Tran in 2005.

*Regina (Crown) v. Wei Tang*¹²

The first jury conviction of slavery offences under the Criminal Code involved a female Chinese brothel-owner (Wei Tang) and five women brought from Thailand to work in a legal brothel, under conditions of debt bondage. The women, who testified as victim witnesses, had all worked in Thailand's sex industry and had consented to come and work in the sex industry in Australia. Each owed the defendant A\$45,000 (US\$35,000) for arranging the travel and work. They worked six days per week, earning nothing in cash. Their 'cut' of the earnings was 45 per cent but used entirely to pay back their debt. Only on the seventh day of the week, they were given an option of working and keeping the day's earnings for themselves. The brothel-owner had possession of their passports. Two of the women who testified had in fact paid off their debt in a period of seven to eight months, and continued to work in the brothel, whereas the other three women were arrested mid-contract. Interestingly, there were no allegations of the use of force, violence or deception to control the victims.

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The sentence of 10 years' imprisonment seems quite severe given the absence of force or deception and especially considering that the judge took note of the fact that the women were not maltreated. The trial is considered a landmark case, since previous prosecutions had failed due to a lack of understanding on the part of both the juries and judges of how modern slavery can exist without physical imprisonment, and in the form of psychological coercion and debt bondage. The Australian Federal Police noted that the increased focus on law enforcement and prosecutions was showing results:

The trials and increased law enforcement approach has had an impact because now you see the brothel-owners do pay the girls some money and usually give them back their passports; they now use more subtle forms of control. They might threaten the women with deportation but not with threats of violence. We don't tend to see cases now of physical violence being used against victims.¹³

However, since the time of writing the report i.e. in June 2007, the conviction against Wei Tang has been overturned. Her appeal was allowed on the grounds that the previous judge's definition of slavery (in his direction to the jury) needed to make it clear that Tang must be proved to have acted with the knowledge that she was dealing with victims as though they were (her) property (Gregory, 2007).

Obstacles to successful prosecutions

As mentioned above, the federal government has invested heavily in resources for the police to investigate crimes of trafficking, slavery and sexual servitude. The additional resources, as well as media attention on the trafficking issue, has meant an increased focus by the police on securing trafficking convictions. NGOs confirm that the investigation process is smoother as a result and that the AFP, in general, are sensitive to the needs and rights of victim witnesses. However, the number of successful prosecutions so far has been quite low – only four convictions in the seven years that the slavery and sexual servitude offences have been in force.

One of the main reasons for few convictions is still a lack of evidence to prosecute traffickers. Despite the new visa regime, few trafficked persons are willing to participate in the programme because of the way in which it is applied and closely ties residency status to the criminal justice process.¹⁴

Other reasons may include the fact that crimes of a sexual nature are difficult to prosecute successfully, and trafficking for sexual exploitation is no exception. A study by the Australian Institute of Criminology analysed a sample of 149 sexual assault prosecutions in Australia over the period 1999 to 2001. The study noted that 38 per cent of the cases were withdrawn from prosecution (due to victims being unwilling to proceed or prosecutors' discretion) and 33 per cent of the cases were finalised with a guilty plea, mostly through reduction of charges or sentencing (Lievore, 2004, 43). Of the mere 29 per cent of cases that proceeded to trial, only 38 per cent resulted in a guilty verdict (Lievore, 2004, 43). The reasons given for the low success rate were: lack of evidence, lack of credibility of the complainant, lack of scientific evidence because the woman had not reported the rape straight away, issues of consent, issues with the jury system and proof beyond a reasonable doubt, and the way in which judges direct juries.¹⁵ No doubt cases involving trafficking, particularly sex trafficking, face the same obstacles. Additional complexities of race and cross-cultural issues mean that convictions are extremely difficult to obtain.

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Incongruence between state and federal laws in Australia might pose further reasons for the few prosecutions to date. States are being strongly encouraged to adopt laws in line with the federal ones, and so far six states have adopted laws on sexual servitude, but none yet on trafficking. At the state level, prosecutions have been few. There have been efforts to train the state police alongside the Australian Federal Police on trafficking issues. However, the state police are less attuned to the issues of trafficking and are unlikely to identify labour cases as trafficking and refer them to the AFP.¹⁶

While there has been additional focus on training and resources for the police and investigations, less attention has been paid to training and resources for federal prosecutors. This is equally important, especially as the Director of Public Prosecutions had, until very recently, no experience of prosecuting crimes against people (involving victims), but only experience of prosecuting crimes against the state.¹⁷ More work is required with federal prosecutors and the Director of Public Prosecutions, as so far they have not been substantially involved in developing the anti-trafficking response.

The Director of Public Prosecutions has commented in a public inquiry that unsuccessful prosecutions were rather due to the fact that juries also were not used to these sorts of crimes and did not perceive the women involved to be victims (Commonwealth, 2005, 8). The police have also observed that prosecutors should call for testimony from expert witnesses on trafficking to describe the more subtle methods of control and coercion used by traffickers, as well as to explain to juries the cultural differences for victims from South-East Asia.¹⁸

Protection and Assistance to Trafficked Persons

Residency status for trafficked persons in Australia: the new visa regime

A new category of visas was established on 1 January 2004 to enable trafficked persons willing and able to assist with investigations or prosecutions of traffickers to stay in Australia. Previously, the Australian government had maintained its policy of immediate removal for most trafficked persons. With regard to a few prosecutions under the 1999 sexual servitude legislation, only 12 visas for suspected victims were issued in the period from 1999 until 31 December 2003 (DIMA, 2005a).

The second reason for the new visa measures was in response to intense media and community pressure and public outcry over the treatment of trafficked persons, especially their detention in immigration centres and swift deportation. The death of a Thai woman, Puongtong Simaplee, in an Immigration Detention Centre in 2001 raised serious concerns about inadequate care by the detention centre authorities and their failure to seek hospital treatment for a sick detainee before it was too late (Milovanovich, 2003, 13). At the inquest, facts emerged that the detention authorities had been told by Simaplee that she had first been trafficked into the sex industry at the age of 12. NGOs raised the issue of Simaplee being trafficked in order to provoke the court into recommending that detention staff should be trained to deal with victims of sexual violence and trafficking in a more appropriate manner (Milovanovich, 2003, 14). While no such recommendation was made, there was extensive publicity from the case about how a trafficking person could be brought into Australia, and when discovered by the authorities, detained and left to die. Another case of a wrongful deportation of an Australian citizen, Vivian Alvarez Solon, to the Philippines also added to the outcry about the policy of deporting trafficked persons. A government inquiry reported that fabricated evidence of Solon being a victim of trafficking was used to persuade her swift deportation to the Philippines (Comrie, 2005, 15).

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Only those victims of trafficking authorised to stay through the criminal justice visa regime qualify for specialised services and assistance from the government. These services are organised by the Office for Women, formerly under the Prime Minister's Office but now under the Department of Families, Community Services and Indigenous Affairs. The company Southern Edge Training that won the government tender for services provides individual case management for each trafficked person. By the end of August 2006, 65 women had received services from Southern Edge Training, 33 of whom were still receiving assistance.¹⁹

30-day Bridging Visa F

The 30-day Bridging Visa F is issued to suspected trafficked persons who are likely to have information useful to aid in investigations or prosecutions as determined by law enforcement officials. In the first phase of the 30-day Bridging Visa F, Southern Edge Training organises what it considers to be 'suitable' accommodation (usually in a hotel or serviced apartment close to the AFP), financial assistance for living expenses and access to counselling, medical benefits and legal services. Under this visa, the trafficked person has no right to work. Southern Edge Training has stated that this 30 days is a period in which trafficked persons can begin to take back control over their lives and decide whether they want to assist the authorities, remain in Australia or return home.²⁰ However, although the visa is for a maximum period of 30 days, it can, in fact, be revoked by authorities any time before then, if the victim is no longer of interest to the police.

Between 1 January 2004 and 30 June 2006, Bridging Visa F was granted to 52 adults, mostly Thai women working in the sex industry.²¹ Despite requests to the DIMA, no breakdown was provided regarding how many of the 52 visas were granted to trafficked persons in the sex industry and other work sectors, or by nationality or sex.

Criminal Justice Stay Visa

Once a Bridging Visa F expires, trafficked persons who choose to remain in Australia and assist the police in investigations or participate in a prosecution may be granted a Criminal Justice Stay Visa. These are requested by the police and authorised by the Attorney General's Department. By September 2006, 43 Bridging Visa F had been converted into Criminal Justice Stay Visas.²² The length of stay is granted for as long as the person is required to assist law enforcement authorities. For those under the Criminal Justice Stay Visa, Southern Edge Training provides assistance to secure long-term accommodation, access to medical benefits and legal services, employment and training (if desired) and to social support including English language training, budgeting skills, counselling and vocational training, where appropriate. Trafficked persons on this visa are permitted to work. They are entitled to a maximum of three appointments for legal advice through both phases of the programme (Office for Women, Fact Sheet: Support for Victims of People Trafficking). Additional advice on immigration issues is provided by DIMA officers, and on criminal matters through the Director of Public Prosecutions.

Witness Protection (Trafficking) (Temporary) Visa

The Witness Protection (Trafficking) (Temporary) Visa may be granted to trafficked persons after a person has held the Criminal Justice Stay Visa. This visa is issued by the Attorney General, certifying that the victim has made a major contribution to and cooperated closely with the prosecution of a trafficker *or* made a successful contribution

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and cooperated closely with an investigation in relation to which the Director of Public Prosecutions (DPP) has decided not to prosecute an alleged trafficker. The victim must not be the subject of any related prosecutions and the Minister for Immigration and Multicultural Affairs must be satisfied that the person would be in significant personal danger were he/she to return to the home country (DIMA, undated). Thus the test is quite stringent. By September 2006, not one Witness Protection (Trafficking) (Temporary) Visa had been granted, though several were in the process of being certified.

The visa regulations do not specify at which point in time the Witness Protection (Trafficking) (Temporary) Visa should be granted. However, the way it has been interpreted by the authorities is that the temporary visa is to be made available to victims after the criminal case in which they are cooperating has concluded (i.e. post-trial).

Witness Protection (Trafficking) (Permanent) Visa

A Witness Protection (Trafficking) (Permanent) Visa is available to those who have held the temporary visa for at least two years, provided they continue to meet the criteria for the Witness Protection (Trafficking) (Temporary) Visa (DIMA, undated).

Failure to provide attention to humanitarian and compassionate factors when authorising victims of trafficking to stay

As high-level officials of the Australian government frankly admit, the new visa system “certainly has an emphasis on cooperation with an investigation or a prosecution... we did not want a situation where the people could simply assert they have been trafficked, and thus provide a basis for remaining in Australia”.²³ Since the visas are tied to the criminal justice process, trafficked persons remain in a great deal of anxiety and stress because they have no long-term security as to whether they can remain in Australia.

Currently the Witness Protection (Trafficking) (Temporary) Visa is available only post-trial of the trafficker. This thwarts the aim of a *protection* visa, if the aim is to protect victims and afford them security. Instead, victims are left in a state of perpetual anxiety over whether they can remain in Australia, as the trial may last a number of years.

In the Wei Tang case, the women were removed from the brothel in May 2003. However in September 2006, not one of the women had obtained a temporary visa. For more than three years their situation has been precarious, staying in Australia on Criminal Justice Stay Visas and being allowed to work, but with no long-term security about their residence status.

This woman, X, gave evidence at two trials. However, she still has not got the visa. She has probably given enough evidence for 10 full solid days straight, has spent weeks with the police, it resulted in a conviction but she has not even been offered the Witness Protection Visa. The police say these temporary visas should be offered to anyone who cooperates. But these women have cooperated to the utmost and still they remain on Criminal Justice Visas.²⁴

The Refugee and Immigration Legal Centre (RILC) in Melbourne terms it *witness bondage*. RILC believes the

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restrictive application of the temporary visa is because the primary concern of the police is to secure successful prosecutions and this takes precedence over the rights and interests of the women concerned.

The police don't want to lose the case; therefore, everything else is secondary. They don't want the defence to use it to say it was an incentive for women to testify – so scared are they of losing a case that they will not offer effective witness protection. It is the most appalling misuse of a visa system that simply compounds the exploitation of the victim. The visa is meant to provide protection: in fact, it does the absolute opposite; it causes more uncertainty and more trauma for the victim.²⁵

None of the visas have any application process, where a lawyer or migration agent can apply for the visa on behalf of a victim; instead, they are initiated through the request of the police or in the case of the Witness Protection Visas, upon the invitation of the Attorney General (Burn, *Immigration Review*). This further disempowers a category of people who have already faced substantial insecurity and abuse at the hands of traffickers and who are in vital need of being put back in control of their lives, rather than dangling at the end of a government official's yoyo!

Article 7 of the UN Trafficking Protocol states: "State Parties must consider adopting legislative or other means to permit victims to stay in the country temporarily or permanently in appropriate cases and that they should give consideration to humanitarian and compassionate factors." Furthermore, Principle 8 of the High Commissioner for Human Rights' Recommended Principles and Guidelines emphasises that "...protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings".

The linking of services and residency status to the victim's potential usefulness in criminal investigations and prosecutions indicates that Australia does not adhere to international standards. It also means that only a narrow category of trafficked persons can access appropriate support. While those 'non-useful' trafficked persons may seek alternative means to stay in Australia, such as applying for a protection visa (asylum), such victims do not have the same access to the specialised services available to others who cooperate.

Protection visas and asylum

For those trafficked persons who do not want to testify, it is possible to make an application for refugee status, which in Australia is termed a protection visa. The Australian government's DIMA has stated in comments to the UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) that trafficked persons who choose not to assist the police in investigating and prosecuting trafficking cases can still apply for a protection visa (CEDAW Summary of 716th Session, 2006, 3). Responding to a question by the CEDAW as to whether trafficked persons were made aware of this option, the Australian government's representative said that those who apply for asylum are entitled to legal advice, and victims are given legal advice about their immigration options. However, since independent advice is limited to a maximum of three appointments, it seems that few of those who are on Bridging Visa F have ever made an application for a protection visa. As the Refugee and Immigration Legal Centre notes,

Victims of trafficking are not generally regarded as refugees by the Australian government. There have been isolated cases of successful claims for protection... The government does not really

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support victims of trafficking getting protection visas. There has been no engagement of the government or statements on these issues. Few asylum applications are accepted on the basis of gender persecution. The Tribunal has quite an unsophisticated understanding of the Refugee Convention.²⁶

Reintegration assistance

Where trafficked persons are unwilling or unable to cooperate with authorities, they are generally repatriated to their country of nationality, unless they submit an application for a protection visa. Trafficked women repatriated to Thailand now benefit from a reintegration programme funded by AusAID, which works in collaboration with the International Organization for Migration (IOM) and the Royal Thai Government. According to AusAID, returnees can choose from three levels of support. Like the services for trafficked persons in Australia, the degree of support is dependent upon a willingness to collaborate with the authorities.

Trafficked persons who are willing to participate in the criminal justice process and to allow Australian agencies to share the information they have provided with officials from the Royal Thai Government can receive support from the Royal Thai Government, through the Thai Department of Social Development and Welfare. Those who are willing to cooperate with the Australian authorities if required, but are not willing to have their information shared with the Royal Thai Government, receive support from the Australian government and NGOs. Repatriated Thai women who do not want support are provided with 30 days worth of financial assistance, on the condition that they make contact with an NGO when they return to their home country. The aim of linking returnees up with NGOs is to ensure they receive information about training, additional funds and support, if they want it.

However, up till now, the main NGO assisting returnees in Thailand, the Foundation for Women located in Bangkok, has not received requests from any returnees from Australia. The numbers of victims identified are certainly small. According to figures provided by the Royal Thai Government Bureau Against Trafficking in Women and Children, by July 2006 there had been 34 victims of trafficking returned to Thailand from Australia over a period of four years (11 of these returned in 2005). These numbers are very low, whilst far higher numbers of migrant sex workers who are not identified as victims are removed each year. Various organisations on both ends of the sex work political spectrum believe that women trafficked into the sex industry indeed choose not to be identified as victims and would rather be simply deported as illegal migrants; there is no incentive for women who have suffered severe exploitation in the sex industry to claim they are trafficked.²⁷ Both the IOM and AusAID say the intention of the new programme is to target those women returnees who are not identified by the authorities as having been trafficked, through the wide dissemination of information materials in Thai in both Australia and Thailand and hoping that such women may contact Foundation for Women in order to obtain the basic level of assistance.²⁸

4. Laws, Policies and Practices on Immigration and to Prevent the Abuse of Migrant Workers

Since Australia has a strict border control policy, few trafficked persons are smuggled into Australia. Most trafficked persons enter Australia legally on a valid visa; however, they often breach the terms of that visa by

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engaging in work, be it in the service, construction, or sex industries, agriculture, domestic labour or other sectors. Migration to Australia is governed under the *Migration Act, 1958*. The Act prescribes the various visas which enable foreigners to come and live and work in Australia. For example, there are student visas and working holiday visas which permit migrants to work a certain number of hours per week, yet migrants sometimes work more than the permitted hours.

Although the white Australia policy was abolished some 30 years ago, its remnants continue to exist in more subtle forms. Like many other industrialised countries, Australia's migration policy tends to favour skilled migration from other medium and more developed countries (predominantly European). There are various procedures in place which have the effect of preventing unskilled and/or poorly educated workers from less developed countries from entering Australia. For instance, although limited unskilled work is permitted for adult migrants below the age of 30 under the working holiday visa, 15 of the 19 countries with whom Australia has reciprocal working holiday arrangements are European countries. The others are Hong Kong SAR (Special Administrative Region of the People's Republic of China), Japan, the Republic of Korea and Taiwan. Those applying for work permits are required to show they have sufficient funds for their stay, which prevents poor people from entering, or requires them to go into debt if they wish to do so. Women who are trafficked from Korea tend to enter either under working holiday or student visas.²⁹

Illegal Employment of Migrant Workers

In addition to tight legal restrictions regarding migrant employment, the government also views the issue of illegal employment, or working in breach of visa conditions, very seriously. However, while working illegally is an offence under section 235 of the *Migration Act*, there is no primary offence for employers or others who permit migrants to work illegally (Parliament of Australia, Migration Amendment, 2006, 3). Employers who hire irregular migrants³⁰ are never charged with the offence of concealing or harbouring 'unlawful non-citizens'. While there has been some discussion as to whether employers could be charged under section 11.2 of the Criminal Code for knowingly aiding and abetting commission of an offence, prosecutions under this section are extremely rare due to the evidentiary standards of proof and lack of witnesses (Parliament of Australia, Migration Amendment, 2006, 3). The difficulty with using such an offence to charge those who have exploited or trafficked workers is that the irregular migrant worker must also be prosecuted for the offence. In the trafficking context, using such a provision would therefore not be in accordance with international human rights standards, since victims should not be punished for crimes committed as a direct result of their trafficking situation (UNOHCHR, 2002, 8).

Hence, if an irregular migrant worker is *not* recognised to be a victim of trafficking, he or she is usually detained and then deported and sometimes subject to a fine, whereas there is no substantive penalisation of the employer. In such circumstances, employers are usually issued with a warning.

Employer Sanctions Bill (at time of writing still a Bill, now passed into a law in Feb.2007)

This gap in the law has been recognised, especially by Australian trade unions calling strongly for the penalisation of employers who exploit irregular migrant workers. In March 2006, a new federal bill was tabled to penalise employers, labour suppliers and others who knowingly or recklessly employ or supply illegal workers.

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Under the new offence, irregular workers will continue to be sanctioned, but so will employers. The new offence will criminalise both referring or employing a migrant worker without a work visa or being reckless to that fact. The punishment is two years' imprisonment and/or a fine. There is an additional aggravated offence where the worker is exploited and the labour supplier or employer knows, or is reckless to that fact. This is punishable by five years' imprisonment and/or a fine. For both of these offences, it is possible to simply pay a larger fine in lieu of the prison sentence and first time offenders may be given a written warning rather than be prosecuted.

Interestingly, the explanatory memorandum for the Bill says that one of the goals of the proposed law is “to capture non-traditional work-relationships found in the construction, taxi and sex industries where many illegal workers are found” (Explanatory Memorandum, *Migration Amendment (Employer Sanctions) Bill, 2006*, para. 4.4.9). The aim of this is to be broader than the traditional worker-employer relationships. So, for example, if a brothel-owner exploits an irregular sex worker, but tries to claim they only rent a room to her, rather than employing her, this work situation will be covered by the new law (Explanatory Memorandum, *Migration Amendment (Employer Sanctions) Bill, 2006*, para. 4.4.9). If the more serious (aggravated) offence under the Bill is adopted into law, it should fill a critical gap in terms of criminalising exploitation under the UN Trafficking Protocol.

Some trade unions such as the Construction, Forestry, Mining and Energy Workers Union (CFMEU), Australian Manufacturing Workers Union and the Liquor Hospitality and Miscellaneous Workers Union have drawn attention to the fact that documented migrants are also exploited and sometimes end up working in slavery-like conditions. These unions have assisted migrants by helping them change employers, filing cases against their employer for lost wages or workers' compensation or submitting complaints to the Human Rights and Equal Opportunity Commission. These unions have been willing to represent migrant workers, even if they are not members of the union, and some will even advise and assist undocumented workers. Some of the unions explained they had better working relations with DIMA, “because we help them out reporting illegals from time to time”. The interest that trade unions have in protecting migrants from exploitation and abuse is due largely to their concern about migrants undercutting market rates for workers in different industries and therefore threatening the jobs of Australian workers. However, their efforts to protect migrant workers are noteworthy and should be applauded.

Migrating for ‘Semi-skilled’ Employment

While Australia does not have an unskilled foreign guest worker system in place, in fact improper use of the Temporary Business (long stay) Visa (subclass 457) or so-called ‘457 Visa’ has filled this gap. For instance, there were 28,042 principal 457 Visas approved in the financial year 2004-05 (Australian Manufacturing Workers Union (AMWU), 2006, 37).

Officially, the 457 Visa allows approved employers to sponsor ‘highly’ skilled personnel to come to Australia to work for up to four years in sectors where there is a skills shortage. The sectors of employment range from more traditional ‘white collar’ work such as finance, education and property to ‘blue collar’ work such as catering, manufacturing, mining and construction (AMWU, 2006, 19). In 2001, the government abolished the requirement that the sponsored person's credentials need to be vetted by Australian accrediting authorities. Holders of the 457 Visa are paid the Australian minimum wage or the minimum authorised by the government, rather than the market rate, which is substantially higher in nearly all sectors. In reality, many migrants on 457 Visas, who

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possess qualifications in sectors such as hospitality, construction and aged care, are brought to Australia because they can be paid less than other workers and often end up performing low-skilled manual labour. Monitoring of worksites and employment conditions is negligible, and when it does occur, DIMA officials generally inform the employer beforehand. 457 Visa holders are permitted to change employers, but, after leaving a job, have only one month to find a new employer to sponsor them. Hence, there is a realm for exploitation of migrants on these visas, and cases of severe exploitation have been documented in the construction, hospitality and manufacturing sectors. While only some cases may be severe enough as to constitute trafficking, trade unions have noted a significant number of cases that seem to constitute debt bondage.

For instance, a printer, JZ from China was brought to Melbourne and owed A\$10,000 (US\$7,823) to his Australian employer, even after paying upfront A\$10,000 to a recruiter in Shanghai. After the employer made deductions for the debt owed, rent, tax and health benefits, JZ only earned A\$280 per week (US\$220), even though he worked 60 hours every week. He lived with other workers in a rundown house owned by the employer. JZ slept on a mattress on the floor of the scantily-furnished house which had no heating. After a year, JZ paid back the A\$10,000 but was told his work was not up to standard and so his contract was terminated and he was going to be deported. JZ contacted the immigration authorities and then contacted a local trade union that drew attention to his case.³¹

JZ's case indicates debt bondage under Australian criminal law. Despite being widely reported in the media (e.g. Bachelard, 2006), the case was not investigated by the AFP as a debt bondage offence. DIMA, although aware of it, did not seem to refer the case to the AFP. Government officials seem largely resistant to seeing the nexus between trafficking and migrant exploitation in industries such as manufacturing, construction and agriculture. As one AFP officer stated, JZ's case was not a case for the Transnational Sexual Exploitation and Trafficking Strike Team: "We don't deal with labour cases, we just don't have the resources, if we did we'd get all sorts of cases like from fruit pickers, there would be so many."

Migrating for Sex Work

In Australia, the sex industry is decriminalised in all states and territories except South Australia and Tasmania. Therefore, like all other forms of work, it is possible for migrants to enter and work illegally, such as by working whilst on a tourist visa. If they enter on a student visa, and are legitimately enrolled and studying an approved course, they are permitted to apply for work status for up to 20 hours per week. Such foreign students are permitted to work in any industry, including the sex industry. Some trafficked women enter under student visas, but do not study and are forced to work in the sex industry fulltime.

Deportation and Removal

Those deemed to be 'unlawful non-citizens' and working in breach of their visa conditions, not identified by immigration or the police as suspected victims of trafficking, are generally swiftly repatriated to their home countries. In the financial year 2004–05, 283 out of 290 migrant women found working illegally in the sex industry were deported, of whom 73 were from Thailand (DIMA, 2005b, 64). Such migrants may be placed in detention while awaiting removal.

Detention of Migrants

Any ‘unlawful non-citizen’ who is not immediately removed or deported is usually placed in an immigration detention centre. This includes those victims of trafficking who are unwilling or unable to cooperate with the authorities in investigations. Currently migrants who file claims for protection (i.e. asylum) and who are already in mainland Australia or awaiting removal, such as victims of trafficking, are generally kept in on-shore detention facilities, such as the Villawood Detention Centre.

Under section 209 of the *Migration Act*, all non-citizens are required to pay back to the Australian government the costs of detaining them. Costs vary according to the centre. Villawood Immigration Detention Centre near Sydney costs A\$111 (US\$86) per day and Maribyrnong Immigration Detention Centre (near Melbourne) costs A\$248 (US\$193) per day (DIMA, 2004). Non-citizens who are detained generally cannot return to Australia after their removal/deportation for three years, and not without making prior arrangements with DIMA to repay the costs of their detention (Rost, 2005, 25). Whilst not always enforced, this aims to deter those who have violated immigration laws from returning to Australia. A prominent Australian Queens’ Counsel and human rights advocate, Julian Burnside, has commented on Australia’s unique detention billing system:

Section 209 of the Migration Act holds that a person held in immigration detention is liable for the costs of their detention. It is a remarkable thing that an innocent person, who is incarcerated, is made liable for the financial cost of his own incarceration. No other country on earth makes innocent people liable for their own detention (Rost, 2005, 25).

Even those who successfully obtain temporary or permanent visas have been forced to pay back their detention costs (Parliament of Australia Senate, 2006, 206). There is no exception made for those who have been wrongfully detained, such as trafficked persons. Despite the fact that a Senate committee recommended that there be a presumption against imposing these costs on non-citizens, unless there has been an abuse of process or act of bad faith on the part of the applicant (Parliament of Australia Senate, 2006, 207), nothing had changed by the end of 2006.

5. The Human Rights Impact of Laws and Policies

Failure to Identify Cases of Trafficking Outside the Sex Industry

From 1999 until the end of June 2005, 159 individuals were identified as suspected victims of trafficking by DIMA and/or AFP (DIMA, 2005b, 96). Of this number, only 7.5 per cent of the victims (12 individuals) were in sectors other than the sex industry (DIMA, 2005a). This is despite the fact that irregular workers are far more commonly found in sectors such as hospitality, agriculture, manufacturing, retail trade and construction than in the sex industry.³²

The vast majority of visas issued to trafficked persons are issued to Thai women in the sex industry. Despite increasing media attention on cases where migrant workers have been severely exploited,³³ there is a failure by

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police and immigration officials to investigate labour abuse cases as trafficking in industries other than the sex industry. The majority of the trafficked persons identified by unions are men. The following are four such case examples that have been documented by trade unions:

SK³⁴

SK, aged 17, was recruited from the Cook Islands to work in Australia in the construction industry. Since the Cook Islands are a Protectorate of New Zealand, SK has a New Zealand passport and does not require a work permit to work in Australia. When he was recruited, SK was promised he would earn the standard Australian wage and that his employer was 'a good man'. For the 18 months that SK worked for his employer, he was subjected to severe beatings on a regular basis. He was punched repeatedly in the head, hit in the face and on the head, at times with a hammer. He was forced to work 12 hours per day, six days per week and paid A\$50 (US\$39) per month. He was warned that if he tried to escape, his employer would find him and kill him. Although SK had some freedom of movement, he did not try to escape because he was afraid of his boss and wanted to get paid.

When SK eventually managed to escape, he sought medical treatment for his injuries and filed a complaint at the local police station. The beatings were so bad that SK has suffered blindness in one eye, partial deafness, a broken jaw, nose and teeth, scarring and neurological damage. The police charged SK's employer with grievous bodily harm but did not offer SK any other assistance. SK's mother flew over from the Cook Islands to help her son. Through the Cook-Islander community in Sydney, SK's family came to know of a trade union, the CFMEU, which helped him to file workers' compensation claims and claims for his lost wages, as well as accommodation and vocational training. The complaint was filed with the police, but SK's family has received little information about the progress of the case.

SM³⁵

SM was brought from South Africa on a fraudulent business or 457 Visa. He worked 11- to 12-hour days, six days per week, but earned no wages. He slept on a piece of cardboard in the laundry of his boss' apartment. A fatal accident killed his employer and one of the other South African workers. SM was rushed to hospital. Six hours later, he was on a plane back to South Africa after the wife of the dead employer visited him.

GS³⁶

GS was a chef in the Philippines. He paid 100,000 pesos (US\$2,500) to a recruiter to arrange work in Australia legally on a 457 Visa. GS was promised an annual salary of A\$39,100 (US\$30,500), but the contract stated he would only receive A\$29,182 (US\$22,800).

When GS and his wife arrived in Australia with other workers from the Philippines, they were sent to Canberra instead of Sydney, which was where they had been told they would work. In Canberra, they worked in three different restaurants and lived together in the same house. They had to work as kitchenhands, not chefs, for a minimum of 60 hours a week for A\$400 (US\$313). When one of the other workers asked his employer to release him from his contract so he could look for another job, his employer told him, "I paid A\$6,000 (US\$5,000) for you and I haven't made enough out of you to let

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you go yet... you still owe me A\$3,000 (US\$3,500), so I need to make at least that before you can go.” They were not paid for overtime and, in some instances, were not permitted meal breaks. When GS tried to complain that the conditions were not what he had agreed to, he was threatened with deportation. So he contacted the Philippines Embassy and DIMA for advice.

Soon after going to DIMA, four men kidnapped GS and confiscated his passport. They warned others: “This is an example to the rest of you! GS is being deported.” GS escaped but none of the men were charged with kidnapping or any other offence. Soon after, GS and his wife returned to the Philippines.

*JK*³⁷

JK from Korea was working in a plastics factory. He lived at the factory and worked up to 18 hours a day, seven days a week. He was told he would be paid A\$10 (US\$7.8) per hour but often worked excessive hours that he was never paid for. He never received annual leave, sick pay, superannuation or overtime pay. JK lost his fingers in an accident at work, but his employer refused to call an ambulance, and so he sought assistance from strangers. The employer then tried to have him deported.

SK and GS were high-profile cases which received significant attention in the mainstream Australian media. In total, these four cases alone involve at least 14 possible trafficked persons.³⁸ However, not one was questioned by the police to verify if this might be the case. While most of these individuals may not need a Bridging Visa F, as they were able to remain in Australia on other terms, neither were they offered any of the package of services heralded by the government for victims of trafficking.

When questioned about whether such cases identified by trade unions might indeed be cases of trafficking, the InterDepartmental Committee responded, “If people have access to the unions, then it is generally not a trafficking case.”³⁹ In other countries, trafficking cases are indeed identified by unions or workers in the same industry who notice suspicious or exploitative behaviour in a workplace. Having access to a union, especially where it takes place after a worker has left the place of exploitation, does not automatically make someone less likely to be trafficked.

This is not to say all labour cases are routinely ignored. One case identified and promptly acted upon by the AFP involved an Indian man recruited and forced to work in a restaurant. The employer has been charged with trafficking and slavery offences. Prompt action in that case may have been due to the intervention of a prominent national human rights organisation.

The Right to Safe and Adequate Shelter and not to be held in detention

The policy changes in 2004 enabled those identified as possible victims and regarded as useful to the authorities to access accommodation that is not in detention centres. Some commentators have noted, “Ultimately unless trafficking victims make good witnesses the door to victim support services stays closed: detention and removal

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remain the reality” (Burn and Simmons, 2006, 7). According to NGOs working with trafficked women, it is not uncommon for some trafficked persons unwilling or unable to cooperate with the police to be sent to detention centres while awaiting deportation.⁴⁰

Burn and Simmons cite the example of one woman trafficked into the sex industry in Sydney (Burn and Simmons, 2006, 6). She eventually escaped from the brothel with the help of a client. She has been in Villawood Detention Centre twice in one year. The first time, she was identified as a potential trafficking witness and released from detention under the new Bridging Visa F before being granted a Criminal Justice Stay Visa. Despite divulging all she knew and identifying alleged traffickers, the AFP stated this evidence was simply not enough and an AFP officer drove her back to Villawood (Burn and Simmons, 2006, 6). This example indicates that appropriate housing and services were actually withdrawn from someone who was trafficked but deemed no longer useful to the authorities. The right acknowledged under international human rights standards to safe and adequate shelter is evidently not recognised in practice in Australia.

The government provided little information about the accommodation provided to those trafficked persons who do cooperate with authorities. According to the police and NGOs, accommodation is generally more than adequate in terms of the physical level of comfort, and tends to be in hotels or serviced apartments in the Bridging Visa F period. The service provider, Southern Edge Training, liaises with the AFP to ensure the environment meets both the needs of the client and any security measures judged necessary by the AFP.⁴¹

There is a question over whether hotel accommodation is really appropriate for those escaping severe exploitation and abuse, such as trafficked persons. Although physically comfortable, it is also isolating and not entirely culturally appropriate to stay alone. Some organisations dealing with trafficked women report that women feel insecure and anxious as a result of being left alone for long periods.⁴²

It is also not in the Asian way of thinking for women to be left alone to stay in a hotel like that. I wouldn't be surprised to hear that women put up in a hotel would flee after a few days – it is not the right type of environment.⁴³

A more empowering solution would offer people choices over the type of accommodation they would like to stay in, shared or alone, with or without cooking facilities. Furthermore, the accommodation provided is not organised in cooperation with NGOs, which is recommended in the UN High Commissioner for Human Rights' Recommended Principles and Guidelines (UNOHCHR, 2002, 14).

The Right to Appropriate Services (adequate physical and psychological care and legal assistance)

The Department of Families, Community Services and Indigenous Affairs document inviting organisations to tender to provide services to trafficked persons states:

Australian victim support programme is one of the first of its kind in the world. Governments in a number of countries fund NGOs that work with victims and provide some forms of assistance to victims. There are very few case management schemes and the level of support does not match that which is provided in Australia (Department of Family and Community Services, 2005, 2).

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Providing services to trafficked persons through the use of a private company, Southern Edge Training, certainly appears unique. Purely from a financial perspective, the programme is very generous and seems to offer autonomy to women. However, from a human rights perspective, it is difficult for the government to substantiate the claim that this means that the services are indeed better or even on a par with those provided in other countries where the services are provided by NGOs.

Those on the visa programme are entitled to access medical care and psychological and legal assistance. Southern Edge Training acts as a referral service and consists of individual case managers who are assigned specific cases (of victims) according to their geographical location. It does not have offices in each state; assistance is provided on an individual basis. As a result, the quality of the services seems to be largely dependent upon the individual case manager assigned to each case. Case managers encourage their clients to be independent, which may work well for some victims of trafficking but not for others. Whilst some victims are given appropriate levels of support, others seem to have insufficient services and protection to meet their needs.

Limiting legal assistance to a maximum number of three appointments throughout the entire process is very restrictive. Few trafficked persons will seek independent access to legal representation unless they happen to be aware of legal aid organisations that can assist them. After three appointments, victims tend to be referred to lawyers selected by DIMA, who are unlikely to give independent immigration legal advice.

No information was available on the quality of medical or psychological assistance provided. Regarding general case management issues, various organisations which had contact with women using the services of Southern Edge Training were concerned about the lack of sensitivity or inappropriate conduct of some staff, as well as other issues related to their lack of independence, being a government contractor.⁴⁴ For instance, one case manager allegedly asked a victim to pay for her costs herself and told her she would be reimbursed upon presenting receipts.⁴⁵ This does not seem an appropriate way to deal with someone without any money and who has been a victim of debt bondage.

Although trafficked persons have a 24-hour telephone number to contact their case manager, many women from South-East Asia would not generally do this unless their predicament became extremely serious. “It is not the way of most Asian cultures to call a stranger with your problem in the middle of the night. The women do not want to be a bother – they don’t have the sense that it is their right to call. Generally, the case workers have the right intentions but they lack cultural understanding and treat victims as if they are Australians with a certain level of knowledge about how things work here.”⁴⁶

Southern Edge Training was selected to provide these services in part due to its experience in assisting released prisoners and sex workers leaving the industry to find new forms of employment. They specialise in reintegration programmes for marginalised groups, vocational training and employment.⁴⁷ Southern Edge Training has also in the past provided training to security firms. Whilst vocational training and employment assistance are undoubted strengths of the company, it faces challenges in providing some more specialised services to women who have been trafficked. The government could encourage Southern Edge Training to work systematically with those in the community who have expertise in dealing with migrants and victims of trafficking or sexual violence. While contacts have occurred on an *ad hoc* basis, they could be strengthened and promoted.

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The Office for Women stated there had been no specific challenges in providing services to victims and that the programme is meeting the needs of trafficked persons.⁴⁸ Any analysis of victim services will remain somewhat incomplete if it is not complemented by interviews with the service provider or clients. It also reflects a lack of transparency in the system for managing victim protection. Some fear Southern Edge Training's reporting obligations to DIMA further compromise the company's independence and its ability to prioritise the rights of trafficked people.⁴⁹ One reason cited for prohibiting Southern Edge Training from discussing victim protection issues is to prevent any possible interference in the ongoing criminal prosecutions of traffickers and not wanting to compromise the security of the witnesses.⁵⁰ This seems to be an overly cautious and weak justification by the Australian government. It seems more likely that it is meant to avoid criticism of the programme and how it works in practice.

The Right to In-court Evidentiary Protection

In the trials that have taken place thus far, trafficked women giving evidence have, in general, been protected adequately. The trial process is explained to them by their case managers and, if they wish, they are shown the courtroom before they give testimony.⁵¹ They are usually accompanied to and from court by a social worker or case manager, though exceptions occur. In one instance, a trafficked person giving testimony allegedly travelled alone to the courthouse, from the secure accommodation to the courtroom using public transport.⁵² In another case, it was reported that women were staying very close to the courthouse and so it would have been easy for them to be followed on their way home and threatened. Victim witnesses giving testimony have not had their names released to the press, but have given testimony in open court. As is the case in other sexual crimes, the character of the witnesses is often called into question, such as the fact that they had previously been a sex worker.

Impact on Sex Workers and Migrant Sex Workers

Decriminalisation and legalisation of the sex industry reduces exploitation

The state government of New South Wales (which encompasses Sydney) has reported that the decriminalisation of sex work has reduced levels of exploitation of women who had previously worked for illegal and organised crime syndicates. As a result, the government reports that migrant women working in the sex industry enjoy safer working conditions and increased access to health services (Flanagan, 2006). Findings of a research study which compares the circumstances of Chinese and Thai sex workers in Australia in 1993 and 2003, before and after the sex industry was decriminalised in New South Wales support this.⁵³ The study showed a marked increase in safe sex practices, better education levels amongst Chinese and Thai sex workers and a decrease in sexually transmitted diseases (Pell et al, 2006, 157). Fewer women were working 'on contracts' i.e. in debt bondage (a reduction from 27.5 per cent in 1993 down to 9 per cent of the sample in 2003)⁵⁴ and the majority of sex workers were working in legally registered brothels or workplaces in 2003. Additional questions in the 2003 survey found that, among the 165 women who were questioned, 87.5 per cent were recruited into sex work through their own efforts, 4.8 per cent paid an agent in Australia, 2.4 per cent paid an agent in their own country and 4.2 per cent paid an agent both in Australia and at home. This suggests that by 2003, organised recruitment and trafficking of migrants into sex work in Australia was perhaps not as prevalent as claims by some organisations that approximately 1000 women are trafficked into the country each year (Project Respect, 2004, 2).

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Decriminalisation and legalisation of the sex industry in Australia has meant sex worker outreach groups are able to provide advice on issues to migrant women in the sex industry much more easily, such as information about laws, health and safety. As a result, it is easier to identify and assist those in trafficking or exploitative situations. Those who wish to move out of the sex industry can obtain information about their options and be linked with support groups, education courses or skills training programmes.

Repressive anti-trafficking measures negate the positive impacts of decriminalisation

Since the heightened government attention to trafficking which began in 2003 with media outrage over the Puongtong Simaplee case, sex worker outreach groups have reported an increased targeting of the sex industry by law enforcement officials, which has unfortunately had the effect of reducing the benefits that decriminalisation offered in terms of safer work conditions and health standards for migrant sex workers.

Government attention to trafficking, as far as sex workers are concerned, has meant increased immigration raids on brothels, harassment of Asian sex workers in particular and disruption of their work. Three sex worker organisations providing outreach to migrant sex workers stated that non-trafficked migrant sex workers working legally in Australia have been wrongly detained in raids at workplaces under the suspicion that they are trafficked.⁵⁵ Sex workers who are Australian citizens of Asian descent have also been subjected to increased harassment.

Brothels that employ Asian women have repeated, concentrated, disruptive visits from DIMA. They maintain they are not employing anyone who is forced, but it doesn't matter. The receptionists don't want to work there because of the raids, the clients don't want to go to such places, so a lot of brothels closed and only offer escort services. More women are now cut off completely; they have no one to negotiate for them, no system of protection like in brothels. Outreach workers have little access to women... The less experienced workers cannot talk to more experienced ones to know the tips of how to work safer, how to deal with bad clients and they are uninformed about what is the law and their rights. Women are unable to negotiate and not empowered, the clients have more power.⁵⁶

Those hardest hit by the anti-trafficking raids are migrant sex workers working illegally. A sex workers' service provider in Melbourne, Resourcing Health and Education in the Sex Industry (RHED), points out that undocumented workers are now more mobile, frequently moving to different cities in order to avoid detection. For outreach workers providing information to sex workers, this makes it more difficult to gain the women's trust. "Prior to 2003, we knew a lot of sex workers and brothel-owners well. They would confide in us and tell us if there was a woman who was being exploited or needed help, but they don't do that anymore."⁵⁷ Although raids are one way of identifying trafficked women, police can also obtain information in other ways, such as from clients or outreach workers who visit sex workers. The repressive response of law enforcement is reported to have made it harder for groups such as Sex Workers Outreach Project and RHED to identify women in exploitative working conditions.⁵⁸

Those who are 'unlawful non-citizens', i.e. without the visa rights to be working in Australia, have their visas cancelled and are deported – as has happened to some 283 out of 290 women identified as working illegally during raids in the year 2004/05 (DIMA, 2005b, 64). According to Scarlet Alliance, a national sex workers

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association, most of these women had little or no legal advice or support, little or no access to services and no 'cooling off' period, i.e. no access to the 30-day Bridging Visa F.

Increased raids have made migrant women working in the sex industry go 'underground', working in unregistered brothels or for escort services. As Scarlet Alliance states, "Our current legislative frameworks, by the creation of a criminal and underground industry, are providing more power to those agents who make such migration arrangements to exploit these women" (Scarlet Alliance, 2004, 10).

Impact on Migrant Workers (more generally)

With the spotlight on disrupting trafficking into the sex industry, there has been less impact of anti-trafficking policies on other migrant workers. This is because law enforcement officials have made virtually no attempts to detect trafficked workers in other industries, despite some cases of severe exploitation being identified.

An important question to consider in this context is whether and how migration policies contribute to trafficking. While the 457 Visa is meant to secure some level of protection for migrant workers, in fact, it can make it difficult for workers to leave exploitative work conditions, since the visa ties workers closely to their employers. This was so in the case of GS and other Filipinos working in Canberra restaurants. DIMA regulations state that one of the conditions for holders of the 457 Visa is that they must not stop working for the employer specified on their visa.⁵⁹ While it is possible for workers to change employers within 28 days of their visa status being revoked by their employer-sponsor (i.e. due to dismissal or resignation of the worker), in practical terms it can be difficult for workers to find a new employer willing to sponsor them and pay the costs of that sponsorship in the short timeframe. Unions report that DIMA officials have been unhelpful when addressing such situations.

We asked them to investigate the Filipino workers' claims, and to permit them to change jobs because they were being exploited. DIMA refused. They said they can't do that. They can't rush off and investigate the case, just because the unions allege this is happening. They were antagonistic and obstructive. They said the Filipinos can leave their jobs, but they will have to be deported. Only when it became a big media story did they come kicking and screaming to do something about it.⁶⁰

Trade unions commonly use the media to draw attention to such cases in order to pressurise DIMA officers to take action. Following media pressure, DIMA did inspect one of the worksites (though informing the employer the day before) and eventually granted the remaining workers permission to change employers. A report commissioned for DIMA surveying holders of the 457 Visa also found that several migrants felt their employers had exploited them by violating their contract or had taken advantage of their temporary status that is dependent on the employer's sponsorship, and the migrants were therefore liable to threats of withdrawal of that sponsorship if they made complaints (Khoo et al, 2005, 19 and 29). One way of overcoming this would be to permit migrants who have suffered exploitation or underpayment a longer time period in which to find a new employer.

One of the positive aspects of Australia's industrial relations policy is that there are reasonably strong protections for workers and simple procedures to claim lost wages and compensation. The procedures are fairly open, transparent and fast. Although there have been significant efforts to weaken trade unions under the Howard

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Government, trade unions in Australia are still remarkably strong when compared with other countries, and therefore their efforts to protect migrant workers have had a significant impact.

Unions have had some success in obtaining monetary compensation for migrant workers who have been exploited and/or injured at work, by lodging claims through the Office of Workplace Services (for wage complaints) and Workcover (for occupational health and safety and workers compensation); for instance, in the case of GS and the Filipino workers, for underpayment of wages, and in the case of SK, for workers compensation.

6. Conclusion

Australia's geographical isolation not only impacts upon its relatively small trafficking problem, it also has an impact on the extent to which the Australian government is influenced by others in the international community on the issue of trafficking. The Australian media has been noted throughout this report as the most significant pressure group that has provoked officials into taking action on cases and also to adopting anti-trafficking policies and practices. Influence by the international community has had significantly less effect, though the notable exception would be Australia's relationship with the United States. There is less regular engagement on issues of migration with other industrialised countries of destination (in Europe and North America) owing to a lack of common borders. In its region, amongst Asian and Pacific countries, Australia tries to position itself as a leader (for example, through the Bali Process). In terms of victim protection, the lessons learnt from other countries, while often reflected by NGOs and advocates on behalf of trafficked persons, have not been followed in Australian government policies.

Australia is ranked in Tier One of the US Department of State's Trafficking In Persons Report as a country which meets the minimum standards in combating trafficking. Its reported figure of less than 100 persons trafficked per year may have more to do with removing itself from the Report altogether, than reflecting accurately the scale of the problem or the extent to which Australia respects international standards with respect to people who have been trafficked. The Bush Administration's global anti-prostitution agenda does not seem to have had much impact on Australia's sex industry laws. Since the US government considers Australia an ally in the 'War on Terror', perhaps it has not sought to cause tension by trying to influence Australia in terms of changing its policies on prostitution.

Even if the Australian government does not engage closely with the international community and other countries on trafficking, it is certainly very sensitive to criticism. While it was cordial and prompt in responding to requests by GAATW's representatives and meetings at a federal level, there was a reluctance to facilitate contacts with those working directly with trafficked persons, in order to avoid 'mixed messages' coming from the government. Privacy and security of women who have been trafficked has also been used as an excuse to avoid criticism of government policies and further avoid openness and transparency.

The government could do more to ensure that community groups working on trafficking are an effective part of its anti-trafficking response and assistance programmes. The procedure of tendering to provide services to victims and for a national awareness raising campaign seems to favour larger consulting or private companies

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over smaller NGOs and service providers. This indicates that various NGOs and service providers with expertise on the issue have been sidelined.

Few organisations work directly with trafficked persons in Australia, but a number do advocate for victims' rights. It is difficult for NGOs in Australia to obtain funding to work on trafficking, either to provide services or to organise advocacy or research. As a result, some NGOs and academics have become very territorial about the information they acquire about specific cases of trafficking and are unwilling to share information with each other or with outsiders. Anti-trafficking advocates, as everywhere, are further split according to ideological differences concerning prostitution. Recently, however, there have been efforts to bring religious communities, sex workers groups and anti-trafficking and migration advocates together for strategic advocacy. Trade unions are yet to join this fray.

Although the recent efforts of the Australian government to deal with trafficking are to be commended, far more needs to be done. The government's weakest link is its narrow identification of those deemed suitable for assistance. The perspective of government officials from a range of departments has seemed to suggest that someone is a victim of trafficking only if they can prove it through a criminal prosecution. This is an extremely small quintile of cases. Imagine if the same methodology were to be applied in rape cases – that all victims of sexual assault must be willing to accuse their rapist in court in order to receive appropriate medical assistance and counselling! Such an approach would clearly not be an adequate way of protecting the rights of the women involved and would be rejected by both feminists and many others in Australia's electorate. However, women trafficked to Australia from abroad do not have a stake in the country's political system and their rights can be ignored with impunity.

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ENDNOTES

- ¹ The department responsible for immigration has undergone various name changes in recent years. Before DIMA it was called the Department of Multicultural and Indigenous Affairs (DMIA). In January 2007, DIMA changed its name again to Department of Immigration and Citizenship (DIAC).
- ² See for example, the explanation of prevention in the Briefing on the AusAID Response to Human Trafficking, 6 September 2006, provided to GAATW: “Preventing the trafficking of women and children involves a range of activities – warning potential victims about trafficking activities, enhancing countries’ capacity to enable investigations to be carried out successfully, ensuring the existence of appropriate and effective laws to enable suspected offenders to be charged, and ensuring that investigating and prosecuting agencies are appropriately trained and resourced to enable successful prosecutions to be achieved.”
- ³ In the case that Australian citizens or residents are trafficked, or indeed if Australia was used as a transit country for transporting victims to another country, such as New Zealand. For simplicity, this section refers only to the four provisions of trafficking *into* Australia, since the out-of-Australia provisions mirror the substantive language exactly regarding what constitutes the offence, the only change being “entry to” or “exit from” Australia.
- ⁴ Section 271.2 (1A) uses the same terms to address trafficking from Australia.
- ⁵ Section 271.2 (1C) uses the same terms to address trafficking from Australia.
- ⁶ Section 271.2 (2A) uses the same terms to address trafficking from Australia.
- ⁷ In Australian criminal law, the word *deceive* is defined as “to mislead as to fact (including the intention of any person) or as to law, by words or other conduct”.
- ⁸ Section 271.2 (2C) uses the same terms to address trafficking from Australia.
- ⁹ Interview, InterDepartmental Committee, Canberra, 7 September 2006.
- ¹⁰ Interview, InterDepartmental Committee, Canberra, 7 September 2006 (response by AFP).
- ¹¹ Written email communication, AFP as part of joint InterDepartment Committee response, received 21 December 2006.
- ¹² All facts of the case from the judgment *R v. Wei Tang* [2006] VCC 637.
- ¹³ Interview, AFP, Melbourne, 14 September 2006.
- ¹⁴ Confirmed in the interviews with Refugee and Immigration Legal Centre, Scarlet Alliance, AIDS Council of New South Wales and Project Respect.
- ¹⁵ Interview, Australian Institute of Criminology, Canberra, 7 September 2006.
- ¹⁶ Interview, Anti-Slavery Project, Sydney, 5 September 2006 and Interview, Scarlet Alliance and AIDS Council of New South Wales (ACON), Sydney, 5 September 2006. For instance, in the case of a Cook Island youth trafficked into the construction industry and suffering repeated beatings by his employer, when reported to the New South Wales State Police was not identified as a case of trafficking. No referral was made to the AFP. The case was charged as grievous bodily harm, and even to date, despite significant media attention on the case, actions by trade unions and support from a human rights organisation, no action has been taken to consider the case as one of trafficking.
- ¹⁷ Interview, Human Rights and Equal Opportunity Commission, 6 September 2006 and Interview, Brimbank Melton Community Legal Centre, Melbourne, 14 September 2006.
- ¹⁸ Interview, AFP, Melbourne, 14 September 2006.
- ¹⁹ Office for Women, written communication, 5 September 2006.

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- 20 Rowe, J., Victims of Trafficking Care and Support Program, Southern Edge Training, Power Point Presentation.
- 21 Interview, InterDepartmental Committee, Canberra, 7 September 2006 (response by DIMA).
- 22 Interview, InterDepartmental Committee, Canberra, 7 September 2006.
- 23 DIMA Executive Coordinator, Border Control and Compliance Division in Commonwealth of Australia, Official Committee Hansard, 2005, 12.
- 24 Interview, Refugee and Immigration Legal Centre (RILC), Melbourne, 14 September 2006.
- 25 Interview, Refugee and Immigration Legal Centre (RILC), Melbourne, 14 September 2006.
- 26 Interview, Refugee and Immigration Legal Centre (RILC), Melbourne, 14 September 2006.
- 27 Such as Resourcing Health and Education in the Sex Industry, Anti-Slavery Project and Project Respect.
- 28 Telephone Interview, AusAID, Bangkok, 20 November 2006 and Telephone Interview, IOM, Bangkok, 24 November 2006.
- 29 Likewise, Australia has a slightly different reciprocal Work and Holiday arrangements in effect with Iran, Thailand and Chile. This requires applicants to show they have sufficient funds for their stay and return home, be able to speak English at a functional level and hold relevant academic qualifications (minimum tertiary degree) as well as a letter of approval from their government agreeing to their stay in Australia. They can stay for one year and work for an employer for a maximum period of three months, and also study or train for up to four months. Due to these more stringent requirements, women trafficked from Thailand rarely go through these channels.
- 30 In this report, the term *irregular migrant* refers not only to those without documents, but those without the authorisation to work in a country, in accordance with the UN *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1990).
- 31 Interview, Australian Manufacturing Workers Union, Melbourne, 14 September 2006 and various press articles e.g. Bachelard, 2006.
- 32 Personal and other services (i.e. sex industry) only comprise 7.5 per cent of the total number of irregular workers apprehended by DIMA in the fiscal year 2004/5 (DIMA, 2005b, 60).
- 33 See for example, Bachelard, Michael, "Underpaid, sacked, evicted: guest workers who have had enough", *The Age*, 6 September 2006.
- 34 All names given in the case studies are fictitious in order to protect the privacy of the people involved. Source: Interviews with SK, SK's mother and CFMEU, Sydney, 15 and 18 September 2006, and supporting documentation such as filed police report.
- 35 Source: "Death Sites Under Construction," *Workers Online*, Issue No. 326, 29 September 2006.
- 36 Source: Interview, Liquor, Hospitality and Miscellaneous Union, Canberra, 6 September 2006 and supporting documentation filed to the Australian Capital Territory Human Rights Office.
- 37 Source: Interview, Construction, Forestry, Mining and Energy Union, Sydney, 8 September 2006 and supporting documentation.
- 38 The number of 14 is a very cautious estimate. SK was one of five Cook Islanders exploited by his employer; GS was one of twenty Filipinos brought to work, of whom at least six seemed to endure forced labour conditions; SM was one of two South Africans plus JK, the Korean.
- 39 Interview, InterDepartmental Committee, Canberra, 7 September 2006.

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- 40 According to Scarlet Alliance, AIDS Council of New South Wales (ACON), Anti-Slavery Project and Australian
Catholic Religious Against Trafficking in Humans.
- 41 Written communication from Office for Women, Canberra, 5 September 2006.
- 42 Interview, Australian Catholic Religious Against Trafficking in Humans, Sydney, 15 September 2006, and Interview,
Anti-Slavery Project, Sydney, 5 September 2006.
- 43 Interview, Australian Catholic Religious Against Trafficking in Humans, Sydney, 15 September 2006.
- 44 Such as AIDS Council of New South Wales (ACON), Anti-Slavery Project, Australian Catholic Religious Against
Trafficking in Humans, Project Respect, Refugee and Immigration Legal Centre and Scarlet Alliance.
- 45 Interview, Australian Catholic Religious Against Trafficking in Humans, Sydney, 15 September 2006.
- 46 Interview, Australian Catholic Religious Against Trafficking in Humans, Sydney, 15 September 2006.
- 47 Rowe, J., Victims of Trafficking Care and Support Program, Southern Edge Training, Power Point Presentation.
- 48 Written communication from Office for Women, Canberra, 5 September 2006.
- 49 GAATW Interview, Georgina Costello, New York, 12 September 2006.
- 50 Interview, InterDepartmental Committee, Canberra, 7 September 2006.
- 51 Interview, AFP, Melbourne, 14 September 2006.
- 52 Interview, Refugee and Immigration Legal Centre (RILC), Melbourne, 14 September 2006 and Interview, Australian
Catholic Religious Against Trafficking in Humans, Sydney, 15 September 2006.
- 53 Legalisation occurred in 1995 in New South Wales.
- 54 The sample size in the 1993 survey was 91 sex workers and in the 2003 survey was 165 sex workers.
- 55 Interview, Scarlet Alliance and AIDS Council of New South Wales (ACON), Sydney, 15 September 2007.
- 56 Interview, Scarlet Alliance and AIDS Council of New South Wales (ACON), Sydney, 15 September 2007.
- 57 Telephone Interview, Resourcing Health and Education in the Sex Industry, Melbourne, 22 September 2006.
- 58 Telephone Interview, Resourcing Health and Education in the Sex Industry, Melbourne, 22 September 2006.
- 59 <http://www.immi.gov.au/skilled/skilled-workers/sbs/obligations-employee.htm>
- 60 Interview, Liquor, Hospitality and Miscellaneous Union, Canberra, 6 September 2006.

AUSTRALIA

BIBLIOGRAPHY

Reports and Government documents

- Australian Manufacturing Workers Union. *Temporary skilled migration: A new form of indentured servitude*. Sydney, July 2006.
- Burn, Jennifer and Simmons, Frances. "Rewarding witnesses, ignoring victims: an evaluation of the new trafficking visa framework." *Immigration Review* 24 (2006): 6–13.
- Commonwealth of Australia. *Australian Government's National Action Plan to Eradicate Trafficking in Persons*. Canberra, June 2004.
- Commonwealth of Australia, Official Committee Hansard. *Joint Committee on the Australian Crime Commission, Reference: Trafficking in women for sexual servitude*. 23 June 2005, Canberra at aph.gov.au/Hansard/joint/commtee/J8461.pdf.
- Commonwealth Director of Public Prosecutions. *Annual Report 2005–2006*, Canberra, 2006 at cdpp.gov.au/AboutUs/AnnualReports/CDPP-AnnualReport-2005-2006.pdf.
- Comrie, Neil. *Inquiry into the Circumstances of the Vivian Alvarez Matter*. Commonwealth Ombudsman, Report Number 3, Canberra, 2005.
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). *Summary Record of 716th Session held on 30 January 2006*, New York, CEDAW/C/SR.716, 14 February 2006.
- Department of Family and Community Services. *Request for Tender: Tender for the Provision of Contract Services for the Management of the Support for Victims of People Trafficking Program*. Number: FACS/05/T470, 2005.
- Department of Immigration and Multicultural Affairs. *People Trafficking Referrals, Information Tabled to the Australian Crime Commission*. 23 June 2005, at aph.gov.au/senate/committee (cited as DIMA 2005a).
- Department of Immigration and Multicultural Affairs. *New People Trafficking Visa Regime*. Briefing Note, undated.
- Department of Immigration and Multicultural Affairs. Question Taken on Notice. 17 February 2004.
- Department of Immigration and Multicultural Affairs. *Fact Sheet 8: Abolition of the White Australia Policy*, 2006, at immi.gov.au/media/fact-sheets/08abolition.htm.
- Department of Immigration and Multicultural Affairs. *Managing the Border: Immigration Compliance*, Canberra, 2004–2005, Canberra, 2005, at immi.gov.au/media/publications/compliance/managing-the-border/ (cited as DIMA 2005b).
- Flanagan, Kerry. *Introductory Statement: Consideration of Australia's Combined 4th and 5th Report by the Committee on the Elimination of All Forms of Discrimination Against Women*. New York, 30 January 2006, at un.org/womenwatch/daw/cedaw/cedaw34/statements/AUSOpeningstatement.pdf.
- Khoo, Siew-Ean; McDonald, Peter and Hugo, Graeme. *Temporary Skilled Migrants in Australia: Employment Circumstances and Migration Outcomes*. DIMA, Canberra, 2005.
- Lievore, Denise. *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study*. Office of the Status of Women, Canberra, 2004.
- McSherry, Bernadette. "Trafficking in Persons: A Critical Analysis of the New Criminal Code Offences." Unpublished draft, 2006.

COLLATERAL DAMAGE

McSherry, Bernadette and Kneebone, Susan. "Trafficking in women and forced migration: Moving victims across the border of crime into the domain of human rights." Based on a paper presented at the 10th IASFM conference, York University, Toronto, June 2006.

Milovanovich, Carl (Deputy State Coroner). *Inquest Into the Death of Puongtong Simaplee*. Westmead Coroners Court, 24 April 2003.

Office for Women. *Fact Sheet: Support for Victims of People Trafficking*. Undated.

Parliament of Australia. *Migration Amendment (Employer Sanctions) Bill 2006*. Bills Digest No. 120 2005-06 at aph.gov.au/library/pubs/bd/2005-06/06bd120.htm.

Parliament of Australia Senate. *Administration and Operation of the Migration Act 1958*. The Senate Legal and Constitutional References Committee, March 2006 at aph.gov.au/senate/committee/legcon_ctte/Migration/report/report.pdf.

Pell, C., Dabhadatta, C., Harcourt, C., Tribe, K. and O'Connor, C. "Demographic, migration status and work-related changes in Asian female sex workers surveyed in Sydney, 1993 and 2003." *Australia and New Zealand Journal of Public Health* 30:2 (2006): 157-162.

Project Respect. *One victim of trafficking is one too many: counting the human cost of trafficking*. Melbourne, 2004.

Rost, Michaela. *Submission to Senate Inquiry into the Administration and Operation of the Migration Act 1958: The detention of international students*. Canberra, 15 August 2005.

Scarlet Alliance. *Submission to Commonwealth Attorney General's Department providing comment on Exposure Draft Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004*. Sydney, 2004.

UNANIMA International Congregation Sisters of the Good Shepherd International Association. *Australian NGO Shadow Report on Trafficked Women in Australia, submitted to the 34th Session of the Committee for the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)*. New York, 23 January 2006.

UN Office of the High Commissioner on Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*. Geneva, 2002.

Judgments

R v. Wei Tang [2006] VCC 637

Newspaper and web articles

Arlington, K. "Restaurant owner faces slavery charge." *Daily Telegraph*, 21 July 2006.

Australian Associated Press. "Government still stands by Tampa policy." 27 August 2002 at <http://tvnz.co.nz/view/page/425822/127084> (accessed on 15 May 2007).

Bachelard, Michael. "Underpaid, sacked, evicted: guest workers who have had enough." *The Age*, 6 September 2006.

Braithwaite, D. "Aussie charged with luring sex slaves." *Sydney Morning Herald*, 1 August 2006.

Davies, Lisa. "Frantic call from a 'desperate sex slave'." *Sydney Morning Herald*, 23 March 2005.

"Death Sites Under Construction," *Workers Online*, Issue No. 326, 29 September 2006 at workers.labor.net.au/326/death.html.

Gregory, Peter. "Sex slave owner wins conviction appeal." *The Age*, 27 June 2007.