

**Human Rights and Human Trafficking:  
A Preliminary Review of Australia's Response**

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(Refereed paper)**

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<sup>1</sup> This paper has been written in the author's private capacity. The views expressed herein are strictly her own.

## **Introduction**

Human trafficking has been recognized as an international legal issue for well over a century.<sup>i</sup> However, the international legal landscape as it applies to trafficking changed forever in December 2002 when representatives from more than eighty countries adopted the Convention against Transnational Organized Crime and its associated protocols on Trafficking and Migrant Smuggling.<sup>ii</sup> Perhaps the most significant change was the first-ever articulation of a clear definition of both trafficking and migrant smuggling. Thanks to these new treaties, we now know that smuggling is, simply, the unlawful movement of people across national borders for profit. Trafficking, on the other hand, is the much more sinister buying, selling and movement of persons within or between, countries through (in the case of adults) a range of means such as coercion and deception, for the express purpose of exploiting them.

The Trafficking Protocol did not just create a definition. It also set out, in considerable detail, the steps to be taken by States Parties in preventing and dealing with this crime. Some of these are couched in the language of legal obligation. Others, including most of those related to protecting the rights of victims, are more equivocal. Since its adoption however, the Protocol has been supplemented by a number and range of international and regional agreements and instruments which, with only a few exceptions, add considerably to our understanding of the “wrong” of trafficking. These include a set of Principles and Guidelines on Human Rights and Human Trafficking adopted by the UN Economic and Social Council in 2002,<sup>iii</sup> and a European Convention against trafficking adopted in May 2005.<sup>iv</sup> Sub-legal regional and bilateral agreements have also been concluded<sup>v</sup> and many countries have developed special laws on trafficking. While there is still considerable room for debate and discussion regarding the relevant primary rules, there can be no doubt as to the existence of such rules: of a core of obligations, enshrined in and protected by international law.

The Australian government has only recently become involved in the issue of trafficking. This paper focuses on the Australian response with a view to making a preliminary determination of the extent to which Australia is moving towards meeting international obligations including the key ones related to criminalization of trafficking and protection of victims. An effort is also made to identify areas where legislative, policy or other changes could bring Australia more closely in line with international standards and emerging best practice.

### **1. Overview of the Australian situation and recent response<sup>vi</sup>**

Australia is a country of destination for trafficked persons. No Australian has ever been positively identified as a victim of trafficking either at home or abroad. Thailand appears to be the principal country of origin for trafficked victims into Australia with victims also coming from other Asian countries including China and the Republic of Korea. Several victims from countries of Central and Eastern Europe have recently been identified although this group is clearly in the minority. Estimates of the number of persons trafficked into Australia each year range from less than one hundred to over a thousand.<sup>vii</sup> At this point, much trafficking into Australia appears to be for the purpose of sexual exploitation and is directly linked to debt bondage practices. The existence of organised criminal involvement is suspected although the extent of such involvement, particularly on the exploitation side in Australia, remains unclear. There is no evidence of official Australian complicity in trafficking.

In 2003, after having fervently denied for the past two or so years that individuals were trafficked into Australia, the authorities openly admitted that this was indeed a possibility. Prior to this time, no distinction was made, in theory or practice, between illegal migrants on the one hand, and sub-groups such as trafficked persons or smuggled migrants on the other. A

law against sexual slavery, enacted in 1999, only indirectly dealt with the specific trafficking phenomenon and has been used in only a very few prosecutions, the first occurring in 2004. Once it was forced to confront clear evidence of the existence of a problem, the Australian Government reacted swiftly. In June 2003, a parliamentary commission was established to “inquire into and report on the Australian Crime Commission’s response to the emerging trend of trafficking in women for sexual servitude.”<sup>viii</sup> Later that year, in October, the Government announced the creation of package of measures to respond to trafficking. These included the setting up of a Task Force within the Federal Police and the development of plans for a cooperation network between law enforcement and victim support agencies. The need for a new law covering trafficking offences was agreed and a draft was released for public discussion in late 2004.

Australia also began, around this time, to take a more active role in promoting bilateral and regional cooperation on trafficking. AusAID, the development assistance arm of the Australian government is involved in a number of initiatives in South-East Asia to strengthen criminal justice responses to trafficking and to support successful return and reintegration of victims from Australia. The Federal Police have established strong contacts with their counterparts abroad, especially in Thailand. Today, the issue of trafficking is firmly on the agenda of the Australian Government in relation to both domestic and foreign policy. While it resisted, unsuccessfully, the inclusion of Australia into the US TIP Report,<sup>ix</sup> the Government no longer argues against the existence of a problem. Australia ratified the Organized Crime Convention and Migrant Smuggling Protocol in May 2004 and has indicated an intention to ratify the Trafficking Protocol shortly.

## **2. Criminalization of Trafficking**

The obligation to criminalize trafficking when committed intentionally is contained in Article 5 of the Palermo Protocol and is a central and mandatory provision of that instrument<sup>x</sup>. All other international and regional agreements echo this requirement.<sup>xi</sup> In terms of *what* is to be criminalized, the definition contained in the Palermo Protocol, representing, as it does, the general legal consensus, is an essential aspect of this obligation for States parties and non-parties alike.

Australia’s principal legislative response to trafficking is the *Criminal Code Act (1996)* as amended by the *Criminal Code Amendment (Slavery and Sexual Servitude) Act, (1999)*. The 1999 amendment created a range of offences relating to trafficking including slavery, sexual slavery, sexual servitude and deceptive recruiting. The offences of sexual servitude<sup>xii</sup> and deceptive recruiting<sup>xiii</sup> would appear to cover the majority of trafficking cases which have subsequently presented themselves in Australia although, as noted further below, their limitations are considerable. Maximum custodial penalties range from seven years (deceptive recruitment of an adult) to 10 years (for sexual servitude involving a minor). The Code also criminalizes certain aspects of “people smuggling” although it reflects an inadequate appreciation of the difference between the two offences. For example, it creates the offence of “aggravated people smuggling” in which the exploiter’s conduct causes the victim to enter into sexual slavery or servitude.<sup>xiv</sup> Australia has criminalized slavery, forced labour and child labour and forbids discrimination of a wide range of grounds including race and sex.

There is considerable room for improving Australia’s current legislative framework. While component offences are more or less covered, existing legislation only addresses certain of the possible exploitative outcomes of trafficking and even these in an extremely limited way.<sup>xv</sup> It does not criminalize trafficking per se and in fact does not even recognize the “movement” aspects such as recruitment, transportation and transfer. It also does not recognize aspects of migration fraud associated with trafficking. In summary, and as recognized by the Government’s own enquiry, existing criminal laws do not adequately reflect the realities of the trafficking trade<sup>xvi</sup> and fall far short of international standards.

Australia is currently in the process of developing a specialist anti-trafficking law as part of its preparations to ratify the Palermo Protocol. The current draft of this legislation indicates that the definition set out in the Protocol will be adopted, but not in its entirety. For example, only certain of the listed “means” will be included; debt bondage will be treated separately; <sup>xvii</sup>an element of “consent” will be introduced into certain offences; and certain end-purposes such as non-commercial sexual exploitation and servile marriage will not be covered. <sup>xviii</sup> Despite these problems, it can be expected that the new law will go some considerable way towards meeting minimum international requirements by: adopting the main elements of the Palermo Protocol definition; criminalizing trafficking in accordance with that definition; criminalizing related conduct such as debt bondage; and by providing for adequate and appropriate penalties. <sup>xix</sup> However, a final determination on this point can only be made once the new legislation is finalized and adopted.

### **3. Identification of Victims of Trafficking**

The obligation to actively identify victims of trafficking is the foundation upon which all other obligations with respect to victims rests. It is also essential when it comes to investigation and prosecution of traffickers because of the necessarily heavy reliance on victim cooperation and testimony. <sup>xx</sup> The obligation of identification is not contained within the Trafficking Protocol but is reflected in both the European Convention <sup>xxi</sup> and the UN Principles and Guidelines <sup>xxii</sup>. The chapeau to Guideline 2 explain, very clearly why identification of victims is so important and why it is an obligation: “*A failure to identify a trafficked person correctly is likely to result in a further denial of that person’s rights. States are therefore under an obligation to ensure that such identification can and does take place*”.

Australia’s refusal to recognize the existence of a trafficking problem meant that government agencies or individuals who might have come into contact with trafficked persons had received no training to distinguish trafficking from smuggling. It is therefore not surprising that no identifications took place until 2003 and even then only after a media-led public outcry over the death, in immigration detention, of a drug-addicted Thai woman, apparently trafficked to Australia many years earlier. Since that time, measures have been taken to ensure that identification of victims of trafficking (from within the larger pool of illegal or smuggled migrants) can and does take place. These have included training of law enforcement and migration officials and the development and application of identification criteria. <sup>xxiii</sup> In 2004, according to AFP statistics, a total of 22 trafficked persons were officially identified in Australia. <sup>xxiv</sup> While this number is widely regarded as only representing a small percentage of the total, it is apparent that training and organizational change is indeed resulting in an increase in trafficked persons being identified. The extent to which active identification measures continue to be developed and implemented, and the results they obtain, will ultimately determine whether the obligation of identification is being fully met.

### **4. Investigation and Prosecution of Trafficking cases**

The UN Principles and Guidelines declare unequivocally that: “States have a responsibility under international law to act with due diligence to ... investigate and prosecute traffickers” <sup>xxv</sup> This is a reiteration of a basic principle of international law relating to state responsibility for violations of his human rights. <sup>xxvi</sup> How does one measure whether a State is taking seriously its obligation to investigate and prosecute? The worst case will naturally be the easiest to decide. A State which doesn’t even bother to have a law against trafficking, which fails to investigate *any* cases of trafficking; which fails to protect *any* victims or to prosecute *any* perpetrators when there is reliable evidence available of the existence of a trafficking problem will clearly not pass the due diligence test. In less egregious cases, it is necessary to evaluate whether the steps taken evidence a seriousness on the part of the State investigate and prosecute trafficking.

Unlike the situation in many other countries, all relevant components of Australia's criminal justice system are adequately resourced and sufficiently empowered to meet the challenge of investigating and prosecuting trafficking. However, the long-standing failure to recognize the existence of a problem and the related absence of : (i) an adequate legal framework to deal with trafficking; and (ii) an administrative one to identify victims quickly and accurately have impacted negatively on Australia's ability to discharge the investigation and prosecution obligation. Put simply, it is extremely difficult to investigate and prosecute traffickers properly when the problem is not recognized, victims are not identified, and the law is inadequate. It is therefore not surprising that there has never been a single successful prosecution for the offences of sexual slavery and deceptive recruitment which are currently the only legislative avenues through which traffickers can be pursued in Australia. Australian criminal justice agencies have never identified a case of trafficking-related exploitation outside the sex sector.

To what extent then, is Australia meeting its due diligence obligation to investigate and prosecute traffickers? It would not be unfair to say that until the present time, the due diligence standard set out above has not been met. For a criminal justice system as sophisticated and advanced as Australia's, there have been far too few investigations, far too few arrests and far too few prosecutions.<sup>xxvii</sup> While there will continue to be natural limits on investigative and prosecutorial capacities until new legislation is in place, recent improvements will hopefully contribute to a more effective criminal justice response. In October 2003, the Federal Government unveiled a "Commonwealth Action Plan to Eradicate Trafficking in Persons".<sup>xxviii</sup> This strategy included the establishment of a 23 member Specialist Unit within the Australian Federal Police (AFP) to investigate trafficking and sexual exploitation. The members of this Unit have received training from local and overseas experts and appear to have both the powers and the resources to do their job. The Government has also sought to make the investigation and prosecution of traffickers easier by amending its migration regulations to create incentives for victims to cooperate through provision of special visas (discussed further below). It is still too early to tell whether these measures are having a positive impact.

## **5. Victims Support and Protection**

The gold standard for victim treatment is set out in the UN Principles and Guidelines. Principle 8 requires States to: "ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care [which] shall not be made conditional on the capacity or willingness of trafficked persons to cooperate in legal proceedings". The Palermo Protocol acknowledges the importance of victim support and assistance but in most cases shies away from imposing specific, detailed obligations, preferring to encourage rather than require States help victims of trafficking. However, taking the various international, regional and national instruments together, and drawing strength from a perceptible trend towards detailed articulation of victims rights and concomitant state duties<sup>xxix</sup>, it is possible to identify a growing consensus around the following core obligations when it comes to protecting and supporting victims of trafficking: (1) protection from further harm; (2) provision of emergency shelter, primary health care and counseling; (3) assistance with legal proceedings; (4) safe and, where possible, voluntary return; and (5) access to remedies.

Australia is one of a small group of wealthy destination countries yet to recognize, in law and in practice, an obligation to provide support, assistance and protection to victims of trafficking. This situation no doubt reflects a continuing link, in the mind of legislators, policy-makers, criminal justice officials and the community, between trafficking and illegal migration. In short, there is a widely-held belief that individuals who have been trafficked are somehow complicit in their own misfortune and a threat to Australian security and public

order. It follows logically from this view that only those who are willing to help prosecute their recruiters and exploiters should be given the assistance necessary to facilitate such cooperation. Those who are no use to an investigation or who do not want to cooperate should not be sent home as quickly as possible.

The Australian legislative and regulatory framework both supports and advances this position. The new visa regime for victims of trafficking, introduced as part of anti-trafficking measures in 2004, is directed solely towards securing prosecutions,<sup>xxx</sup> it does not recognize a fundamental right of victims to receive care and support. A victim of trafficking in Australia (assuming she or he has been accurately identified in the first place<sup>xxx</sup>, and assuming she is identified by law enforcement authorities as a “person of interest”), gets 30 days of high quality support including a safe place to live, medical assistance, access to counseling and even a case manager. After this period is up, the victim is not legally entitled to any further assistance or help beyond that required to be provided to any illegal immigrant pending deportation. Any extension of the right to stay, as well as access to recovery and support programs is restricted to those who undertake to assist in the investigation of traffickers *and* whose contribution is considered to be valuable. Decisions taken under this regime are not transparent and there is no provision for their review.<sup>xxxii</sup>

All victims of trafficking, once they have finished being of use in an investigation or prosecution, are subject to the regime under applicable to their immigration status. For the vast majority, this will mean a return to the previous system (albeit after some delay) involving automatic application of the mandatory detention provisions of the Migration Act and rapid deportation through the regular channels used for smuggled migrants and other “illegals”.<sup>xxxiii</sup> In relation to repatriation, there is no requirement in place for victims to be protected from harm including retaliation from their recruiters and exploiters.<sup>xxxiv</sup> Minimal informal assistance is available to protect against re-trafficking.<sup>xxxv</sup> In relation to remedies, there have been no civil cases brought by trafficking victims against their exploiters and there have been no awards from existing criminal victim compensation funds. The new draft law on trafficking does not contain any special provision on remedies to victims of trafficking. It is not yet clear whether identified victims are being given information on possible avenues to access remedies or assistance in commencing such actions.

Whether or not Australia is meeting the international standard on victim support will depend, to a great extent, on the way in which the new regime is implemented in practice. For example, procedures should be in place for the rapid and accurate identification of victims to ensure those entitled to help are in a position to take up this entitlement. The initial 30-day period of assistance should be made available to *all* victims *and* suspected victims of trafficking irrespective of whether or not they are “of interest” to criminal justice authorities. While a subsequent link could conceivably be justified with reference to broader public policy considerations, there should be no connection, at this early point, between provision of assistance and willingness or capacity to assist authorities in an investigation. Victims’ privacy should be respected and their identity protected where necessary. A victim of trafficking should preferably only be sent back voluntarily but should not be repatriated to a situation which endangers her or her family. It is vital that special measures be taken to ensure the safety of a returning victims who have already cooperated with Australian authorities. All victims of trafficking should have access to effective remedies including compensation.

## **6. Special protection for child victims**

Children are naturally included in generally applicable rules and standards set out above. However, it is now widely accepted that the particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation requires that they be dealt with separately from adult trafficked persons in terms of laws, policies and programmes. This approach is validated by international human rights

law which explicitly recognises the special position of children and thereby accord to them special rights.

What then, are States required to do as a matter of law when it comes to child victims of trafficking? The core rule is derived from the obligations contained in the Convention on the Rights of the Child: in dealing with child victims of trafficking, the best interests of the child (including the specific right to physical and psychological recovery and social integration) are to be at all times paramount<sup>xxxvi</sup>. This position, affirmed by the UN Principles and Guidelines, means that States cannot privilege other considerations, such as those related to immigration control or public order, over the best interests of the child victim of trafficking.<sup>xxxvii</sup> In addition, because of the applicability of the Convention on the rights of the Child to all children under the jurisdiction or control of a State, child victims of trafficking are entitled to the same protection as nationals of the receiving State in all matters including those related to protection of their privacy and physical and moral integrity.

Apart from the anomaly of detention of juvenile illegal migrants, Australia has a strong record when it comes to children in the administration of justice. Of particular note is the attention which has been given to investigation and prosecution of individuals exploiting children abroad.<sup>xxxviii</sup> In view of the likelihood that children in such situations have been trafficked, Australia's actions in this regard should be considered as contributing to fulfillment of its obligation to protect children from trafficking. In terms of what happens at home, little attention has been given to the issue as it relates to children—no doubt due to what is generally agreed to be an extremely low rate of trafficking of minors into the country.<sup>xxxix</sup> Given current global and regional trends, it is unlikely Australia will continue to be spared in this way. This makes it all the more important that any action taken, especially in terms of law and policy, is as forward looking and proactive as possible. The current (and proposed future) legislative framework around trafficking does not appear to fully reflect the special needs and vulnerabilities of children and the special rights to which they are entitled under national and international law. Most importantly, the principal trafficking-related crime (sexual servitude) contains elements of both consent and force/deception and therefore does not meet the internationally accepted definition of child trafficking. There is also no provision for special measures in the judicial process which would shield children from further trauma, protect their privacy and minimize the risk of retaliation from traffickers.<sup>xl</sup>

It is clear that Australia could do more to ensure that laws, policies and procedures are in place to protect and support child victims of trafficking and that all measures taken are in the child's best interests. It will be especially important that the new legislation reflects fully the letter and spirit of the international definition of child trafficking which requires only an action and intent to exploit and does not require evidence of any force, deception or coercion. Additional measures should include: revision of victim identification tools to ensure rapid and accurate identification of children who have been trafficked;<sup>xli</sup> specific provision for the application of special protection measures for children in the judicial process; and legislative confirmation of the principle that children who have been identified or are presumed to be victims of trafficking will be treated in a manner which is in their best interests and will not, under any circumstances, be criminalized through detention or any other means.

## **7. Preventing Trafficking**

International law recognises an obligation of prevention on the State in relation to trafficking. The obligation can be identified in one of two ways: first, as a consequence of the recognition of trafficking as a violation of human rights law. States have an international legal obligation to prevent human rights violations through the application of measures which are to be evaluated with reference to the standard of due diligence (which, in the present context, has been translated into the terms "reasonable and appropriate"). The obligation of prevention when it comes to trafficking can also adduced from its inclusion in all the principal

international instruments on trafficking including the Palermo Protocol, the European Convention and the UN Principles and Guidelines.<sup>xlii</sup>

A determination of whether or not a State has met the “reasonable and appropriate” standard of prevention will depend on its individual circumstances and its place in the trafficking chain. A poor country of origin may meet the necessary standard by enacting legislation; taking steps to deal with public sector complicity; ensuring that laws, policies and practices currently in force do not make particular groups (e.g. female children or ethnic minorities) more vulnerable to trafficking; cooperating with development assistance agencies in community awareness and related initiatives; and developing effective cooperation with authorities and victim support agencies in the country of destination. For a developed country of destination such as Australia, the bar would be set much higher. In such cases, reasonable and appropriate prevention measures would include an effective, victim-centred criminal justice response; criminalization of reckless or knowing use of the services of trafficked persons - as well as education programmes aimed at the end users of such services; appropriate training of public officials; legislation and regulation / supervision of industries associated with trafficking such as brothels; and effective cooperation with authorities and victim support agencies in the country of origin. In relation to any State, failure to take known preventive measures when this is both *possible* and *practical* should be considered sufficient grounds for establishing a violation of the obligation of prevention.

Certain aspects of Australia’s overall legal and policy response to trafficking address the issue of prevention. For example, attempts to establish a strong investigative and prosecutorial response to trafficking if successful, should contribute towards it becoming a genuine deterrent for traffickers and their accomplices. Australia’s vigorous pursuit of overseas sex offenders is also an important preventive strategy. Low rates of corruption; an effective and independent criminal justice system and comparatively low levels of community tolerance for violence including violence against women are additional factors which have probably been operating successfully as preventive measures against trafficking into Australia for many years. Overall however, Australia has generally avoided recognizing or implementing an obligation to stop future acts of trafficking from occurring. The national action plan on trafficking does not even mention prevention. Apart from some of its overseas aid efforts, no other aspect of the Government’s new policy can be characterized as actively preventative. It is clear that more will need to be done before preventive measures in Australia reach the international standard of “reasonable and appropriate” set out above.

## **8. International Cooperation**

In most cases, successful investigation and prosecution of trafficking cases requires cooperation between national criminal justice authorities in countries of origin and destination. The lack of a tradition of criminal justice cooperation between countries, even those sharing a common border, is a key obstacle to the development of meaningful, effective responses to trafficking. Cultural, linguistic and political differences often work to prevent the development of a habit of cooperation. Even in situations where contacts at the highest levels of government are both frequent and substantive, operational links between governmental agencies (e.g. between national police forces or other parts of the national criminal justice process) tend to be much less developed. Traditional cooperation mechanisms such as mutual legal assistance arrangements, where they do exist, are generally unsuited to the type and quality of collaboration required for successful investigation of trafficking cases. All key legal agreements and policy documents on trafficking recognize the critical importance of international cooperation.<sup>xliii</sup>

As detailed above, Australia arrived at the issue of trafficking by way of a broader and much deeper concern over the smuggling of migrants into the country. Engagement with other countries on trafficking has tended to grow out of relationships and structures which were



initially concerned with smuggling. This has not stopped it from developing an expansive vision of cooperation and mutual assistance. Australia participated actively in the drafting process for the Palermo Protocol. Australia also initiated and has, along with Indonesia, substantially led the *Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime*. This process has involved a series of Ministerial level conferences as well as numerous smaller workshops relating, in particular, to strengthening operational level cooperation as well as domestic legislation and law enforcement capacities. Under Australia's stewardship, the Bali Process has evolved to include serious consideration of trafficking as well as of smuggling. The international development agency of the Australian Government, AusAID, has also actively promoted international cooperation and facilitated the provision of support and assistance to countries in South-east Asia. The centerpiece of AusAID's work is a highly regarded project working with national criminal justice systems in South-East Asia to strengthen their individual and collective responses to trafficking (in terms of both prosecutions and justice for victims).<sup>xliv</sup> The Australian federal law enforcement agency has established strong contacts with their overseas counterparts on the issue of trafficking, particularly in Thailand. This has facilitated operational level cooperation on a number of significant cases.<sup>xlv</sup>

On balance, it appears that Australia is currently meeting its international obligation of cooperation in relation to trafficking. Australia's imminent ratification of the Palermo Protocol will be an important step forward in providing a framework within which such cooperation can, in the future, take place.

## **Conclusion**

Australia's response to trafficking is still very young and for that reason, should perhaps not be judged too harshly. At the same time, this is a country already in possession of the knowledge, skills and resources to be able to fight trafficking *and* secure justice for its victims. In developing its counter-trafficking strategy so late, Australia was able to borrow from the best that the rest of the world had to offer. Unfortunately, in at least some respects it seems to have chosen a minimalist and overly cautious path which lacks the spark of outrage common elsewhere and which accordingly fails to place victims at the centre, or even on the edge of the response. As noted by one commentator: "... trafficked women are placed within the criminal justice system and reconfigured as evidence, as prosecutorial 'tools' who have legitimacy and legal status in Australia only through the criminal justice system and only while they are in that system".<sup>xlvi</sup> To the extent that it fails to investigate and prosecute traffickers and their accomplices; to the extent that it ignores or trivializes its own role in the exploitation which defines trafficking; to the extent that it perpetuates or fails to address the human rights violations experienced by victims, then Australia must itself assume the legal and moral burden of responsibility for these violations.

There are, however, some positive signs. Once it is adopted, the new legislation will likely represent an enormous improvement over what exists at present and should provide Australian authorities with the clarity and authority to pursue an appropriately aggressive criminal justice response. There is sufficient flexibility in the new visa regime to ensure that, in theory at least, immediate protection and support can be made available to all victims of trafficking on the basis of need. Australia's excellent record in pursuing its own citizens who misbehave overseas is another strong point and one which will no doubt stand it in good stead as trafficking patterns and flows evolve in different directions over the next years. Similarly, its federal police agency, with a strong reputation for dealing with complex transnational crimes, excellent contacts in the NGO community at home and with foreign police forces abroad, is fully capable of becoming a major resource both within and outside Australia in the fight against trafficking. Of special significance is Australia's work in the area of regional policy development and overseas technical assistance. By taking its leadership obligation to cooperate seriously, Australia is contributing substantially towards the development of

common understandings between countries as well as a general elevation in standards, particularly in the criminal justice area.

In the final analysis, much remains to be done. Australia is responsible for the human rights and other international legal violations associated with trafficking to the extent that it is failing to fully meet the obligations detailed above. Of particular importance in remedying this situation will be an improvement in victim protection and support along with recognition and implementation of the right of victims to access remedies. Australia also needs to look carefully at its obligation to prevent trafficking – an obligation which can be only partially met through increased attention to border controls and criminalization. In the current context, prevention will require a genuine recognition of the various forces, including those implicating countries of destination such as our own, which compel women to take unthinkable dangerous migration decisions. It will also require the development of strategies aimed at reducing domestic demand for the products of trafficking, primarily cheap, foreign and exploitative sex. While outsiders are clearly involved in trafficking of human beings into this country, we should never forget that the real exploitation happens here - in Australian territory and involving Australian citizens. International law is right in recognizing a duty on the State to do something about this.

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<sup>i</sup> For an overview of international legal developments relating to trafficking see Anne Gallagher: *background paper for the International Committee of Jurists* **complete citation**

<sup>ii</sup> United Nations Convention Against Transnational Organised Crime, [Hereafter: Organised Crime Convention]; Protocol on Prevention, Suppression and Punishment of Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, [hereafter: Palermo Protocol]; Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, [hereafter: Migrant Smuggling Protocol].

<sup>iii</sup> Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report of the High Commissioner for Human Rights to the Economic and Social Council, UN Doc. E/2002/68/Add.1. [Hereafter: UN Principles and Guidelines].

<sup>iv</sup> Council of Europe Convention on Action against Trafficking in Human Beings, [Hereafter: European Convention].

<sup>v</sup> For example, the *SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*, adopted by the South Asian Association for Regional Cooperation in January, 2002; and the *Memorandum Of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region*, adopted on 29 October 2004 by ministerial representatives of from Cambodia, China, Lao PDR, Myanmar, Thailand and Vietnam. [Hereafter: COMMIT MOU].

<sup>vi</sup> For a detailed overview of the situation and response in Australia see: Australian Parliament, Joint Committee on the Australian Crime Commission, *INQUIRY INTO THE TRAFFICKING OF WOMEN FOR SEXUAL SERVITUDE*, June 2004. [Hereafter: ACC Inquiry Report]. Available from: [http://www.aph.gov.au/Senate/committee/acc\\_ctte/completed\\_inquiries/2002-04/sexual\\_servitude/report/c01.htm](http://www.aph.gov.au/Senate/committee/acc_ctte/completed_inquiries/2002-04/sexual_servitude/report/c01.htm) See also the various submissions to the enquiry available from (**insert website address**).

<sup>vii</sup> See: AUSTRALIAN GOVERNMENT'S ACTION PLAN TO ERADICATE TRAFFICKING IN PERSONS, (2004) [Hereafter: Australian Action Plan]: "The number of people trafficked into Australia is estimated to be well below 100" (*Id* at 6). Compare with: Roxon, n, Maltzahn, K & Costello, G, *ONE VICTIM OF TRAFFICKING IS ONE TOO MANY: COUNTING THE COST OF HUMAN TRAFFICKING*, Project Respect, (2004) estimating that one thousand women are trafficked just into the Australian sex industry each year. See also, ACC Inquiry Report, *supra* note 6 at p. viii (noting tabled estimates ranging from 300 to 1,000 victims per year).

<sup>viii</sup> Parliamentary Joint Committee On The Australian Crime Commission,(2003) Terms of Reference, [http://www.aph.gov.au/Senate/committee/acc\\_ctte/completed\\_inquiries/2002-04/sexual\\_servitude/terms\\_of\\_reference.doc](http://www.aph.gov.au/Senate/committee/acc_ctte/completed_inquiries/2002-04/sexual_servitude/terms_of_reference.doc).

<sup>ix</sup> In 2000, the United States (Department of Justice) released its first annual report on the situation of trafficking worldwide. The report examines the national response to trafficking in all countries (except its own) where the number of trafficking victims is estimated to be greater than one hundred. Australia was included in the report for the first time in 2004. The reports are available from [www.state.gov](http://www.state.gov)

<sup>x</sup> *Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organised Crime*, United Nations Office for Drugs and Crime, Vienna, 2004. [Hereafter: Protocol Legislative Guide] at 17.

<sup>xi</sup> E.g. The European Convention, *supra* note 11, Article 18 and the UN Principles and Guidelines, *supra* note xx at **complete reference**.

<sup>xii</sup> The definition of sexual servitude (Section 270.4 of the *Criminal Code Amendment (Slavery and Sexual Servitude) Act, (1999)*, [Hereafter: Code] is especially relevant: "... 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."

<sup>xiii</sup> A deceptive recruiting offence is committed where: a person who, with the intention of inducing another person to enter into an engagement to provide sexual services, deceives that other person about the fact that the engagement will involve the provision of sexual services". (Code, *supra* note 12 at Section 270.7.).

<sup>xiv</sup> Code, *supra* note 12 at Section 268 (16).

<sup>xv</sup> For example, the offence of deceptive recruitment would not appear to cover the typical case of an individual being deceived about the circumstances and conditions of her work. (ACC Inquiry Report, *supra* note 6 at p. 51,

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citing submission 8 (International Commission of Jurists: Australia Section), page 6). See also: Marie Segrave, *Surely something is better than nothing? The Australian response to the trafficking of women into sexual servitude in Australia*, 16 CURRENT ISSUES IN CRIMINAL JUSTICE, 85 at 87 [Hereafter: Segrave]. Deception in the Australian context typically relates to conditions of work, the size of the debt incurred; and manner in which it is to be paid off. The deceptive recruitment offence is also limited only to sexual services and does not cover recruitment into slavery-like conditions or other non-sexual forms of exploitation. See World Vision Australia (et al), *Submission on the Criminal Code Amendment (Trafficking in Persons) Bill 2004*, 17 February 2005 at pp 5-6. [Hereafter: World Vision Submission]. There is also doubt as to whether the definitions contained in the current draft bill are sufficiently broad to encompass other end-purposes of trafficking such as forced marriage, begging, and illegal adoption.

<sup>xvi</sup> ACC Inquiry Report, *supra* note 6 at p. 52.

<sup>xvii</sup> While the draft adopts a similar definition of debt bondage to that accepted by international law, it does not reflect the fact that the exploitative aspect of such arrangements is generally related to the up-front contract amount rather than relation to how it is paid off. (information from the Australian Crime Commission) In addition, debt bondage is treated, in the draft, as a rather minor offence attracting a maximum penalty of 12 months imprisonment.

<sup>xviii</sup> Further on potential conflicts between the Palermo Protocol and the draft legislation, see Human Rights and Equal Opportunity Commission, submissions to the *Inquiry into the Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004*, 18 February, 2005; 1 March 2005.

<sup>xix</sup> Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004. [Hereafter; 2004 Draft Law (2004)].

<sup>xx</sup> Further on this, see Anne Gallagher (**development journal article**).

<sup>xxi</sup> Article 10 of the European Convention (*supra* note 4) requires States parties to make available persons who are trained and qualified in preventing and combating trafficking and to ensure that there is collaboration between different agencies “with a view to enabling an identification of victims”. (Art. 10.1. emphasis added). The draft Convention also places certain obligations on States parties if there are reasonable grounds to believe that a person has been a victim of trafficking (Art 10.2.). If there are reasons to believe that the victim is a child then there is to be a presumption that the victim is indeed a child (Art. 10.3.).

<sup>xxii</sup> UN Principles and Guidelines, *supra* note xx, (**complete citation**)

<sup>xxiii</sup> For example, the Australian Federal Police have developed a range of victim identification and assessment tools for use by trained members of its Transnational Sexual Exploitation and Trafficking Team. The Department of Immigration has also developed guidelines for officers participating in raids on brothels to help them identify possible victims of sexual servitude. (Documents on file with the author).

<sup>xxiv</sup> **Complete citation**

<sup>xxv</sup> Principles and Guidelines, *supra* note 3 at Principle xx. (**complete**)

<sup>xxvi</sup> The due diligence standard as it relates to investigation and prosecution is well established in cases of human rights violations. The duty to investigate and prosecute is applicable when there is an allegation of violation by state officials *and* when the alleged perpetrator is a non-State actor. These principles were established by the Inter-American Court of Human Rights (*Velasquez Rodriguez Case* (Honduras), 4 Inter-Am Ct. H.R. (Ser. C) at 173 (1988)) and have since been confirmed by numerous international and regional courts and tribunals.

<sup>xxvii</sup> In June 2004, Australian authorities were able to report 62 investigations (fifteen current), resulting in ten arrests and 35 charges. ACC Inquiry Report, *supra* note 6 at p. 46. Exactly one year later, there has still not been any successful prosecutions.

<sup>xxviii</sup> Australian Action Plan, *supra* note 7.

<sup>xxix</sup> The Statute of the International Criminal Court, for example, requires the court to “protect the safety, physical and psychological well-being, dignity and privacy of victims” as well as to permit the participation of victims at all stages of the proceedings as determined to be appropriate. The Statute also includes provisions on reparation, including restitution, compensation and rehabilitation. Statute of the International Criminal Court (**complete citation**). Note also, *The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni*,

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*submitted in accordance with Commission resolution 1999/33, UN Doc. E/CN.4/2000/62, January 2000:*” [v]ictims should be treated by the State and, where applicable, by intergovernmental and non-governmental organizations and private enterprises with compassion and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety and privacy as well as that of their families. The State should ensure that its domestic laws, as much as possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation”.

<sup>xxx</sup> Amendments to the Migration Regulations have created three new visas. The Bridging F visa is available for 30 days to individuals identified as being potentially useful to the investigation of a trafficking case and serves to prevent their immediate deportation. During the 30-day period, the holder is assessed to determine whether she is able and willing to assist criminal justice authorities in the prosecution of a trafficking offence. (There is no information publicly available on how an assessment of willingness and ability will be carried out). If the assessment is positive, the F visa is converted into a Criminal Justice Stay (CJS) Visa which will be valid for the period during which the assistance of the holder is required. Victims who are deemed to be at risk because of their cooperation in an investigation or prosecution *and* who have made a significant contribution to the prosecution of an alleged trafficker may be eligible for a temporary or permanent Witness Protection (Trafficking) Visa. In addition to being able to stay in Australia for a specified period, holders of all three classes of trafficking visas are, as discussed below, eligible for a range of assistance and support measures including accommodation, medical assistance, counseling and legal services Australian Action Plan, *supra* note 7.

<sup>xxxi</sup> As discussed above (Section 2), the question of whether a country is meeting its obligation to assist and support victims of trafficking will ultimately depend on the extent to which it is meeting its obligation to rapidly and accurately identify victims in the first place. Also note that new visa regime is currently operating within the existing legislative framework which does not actually recognise the concept of trafficking. It is therefore more accurate, in this context, to speak of a victim of “sexual servitude” or of “deceptive recruiting”. The restrictive scope of these two provisions, discussed above is likely to shrink the pool of potential victims eligible to benefit from this new protection regime.

<sup>xxxii</sup> Georgina Costello, *Report of 2004 Donald Mackay Winston Churchill Fellowship to study people trafficking law and policy in Italy and the USA* at 19. (copy on file with the author).

<sup>xxxiii</sup> See Jennifer Burn, *Trafficking Sex*, 3(2) UTS (UNIVERSITY OF TECHNOLOGY SYDNEY) NEWS, May-June 2005, (recounting the story of “Mary” a victim of trafficking granted a CJS visa which was later revoked because “her story was too old, her boss could not be found, her evidence was simply not enough”. Mary was driven by the specialist trafficking police, to an immigration detention centre). See also: *Sex Slave Informant to be deported, case dropped*, THE AUSTRALIAN, 24 January 2005. Note that the Australian Government has publicly acknowledged that immigration detention will be a part of the new regime. An official announcement of the package identifies, as one of the new measures: “enhancement of arrangements, including access to additional support, for the *small number of potential* (sic) *victims who may be required to remain in immigration detention*” Minister of Justice and Customs: *Australian Government announces major package to combat people trafficking*, 13 October 2003.

<sup>xxxiv</sup> However, the Victim Assessment Tool produced and used by the AFP’s Transnational Sexual Exploitation and Trafficking Team (copy on file with the author), does make specific reference to risk assessment in the context of an identified victim wishing to return home. Officers are required to conduct such an assessment, and on the basis of its findings, to indicate whether it is safe for the victim to be repatriated. It is unclear what action is taken following a negative risk assessment.

<sup>xxxv</sup> For example, through a short-term project partly funded by AusAID. See ACC Inquiry Report, *supra* note 6 at p.28. The report notes that it is clear [these] arrangements ... are not capable of guaranteeing any meaningful levels of safety to returned women or their families”. *Ibid* at p. 44.

<sup>xxxvi</sup> The Convention on the Rights of the Child requires States parties to: “take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form”. Children are also to be protected from all forms of economic exploitation, sexual exploitation and sexual abuse. States parties are therefore also required to take all appropriate national, bilateral and multilateral measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity; the exploitative use of children in prostitution or other unlawful sexual practices; the exploitative use of children in pornographic performances and materials; and the illicit transfer and non-return of children abroad. The Convention further requires States parties to “take all appropriate measures to promote physical and psychological recovery and social integration of a child victim of ... any form of ... exploitation ... in an environment which fosters the health, self-respect and dignity of the child” (Convention on the Rights of the Child, Articles 32-39).

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<sup>xxxvii</sup> Principle 10 states, in relation to child victims, that: “[t]heir best interests shall be considered paramount at all times. Child victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs”. UN Principles and Guidelines, *supra* note 3.

<sup>xxxviii</sup> Australian law provides for the prosecution of nationals committing sexual offences against children abroad. Australian law enforcement authorities have worked hard to identify such offenders and to bring them to justice. A national register of child sex offenders has been another aspect of Australia’s proactive response to child sex tourism.

<sup>xxxix</sup> Such cases have, however, been recorded. One involved a 13 year-old Thai girl trafficked into a Sydney brothel. Another concerned a group of teenage boys being brought in from the Philippines, presumably for sexual exploitation. Cited in World Vision Submission, *supra* note 15 at pp 2-3.

<sup>xi</sup> Note that a precedent exists in both the *Crimes Act* (Part 1AD) and the *Child Sex Tourism Act* which provide that evidence given by a child is to be by video, that the child’s other sexual experiences cannot be used against her/him. They also disallow inappropriate cross-examination and mandate a range of measures aimed at protecting the privacy of the child including use of closed-circuit television, exclusion of people from the courtroom and a bar on publication of the child’s name or any names which would identify the child. Cited in World Vision Submission, *supra* note 15 at 7.

<sup>xii</sup> The victim assessment tools and guidelines produced by the AFP’s specialist police unit and the Department of immigration (for police and immigration compliance officers respectively, copies on file with the author) do indicate the existence of a different procedure for child victims but provide no guidance on how such victims are to be positively or presumptively identified in the first place; and what actions are to be taken upon such identification.

<sup>xlii</sup> Prevention is one of the main purposes of both the Palermo Protocol (*supra* note xx at Article 2.1.) and the European Convention, *supra* note xx at Article 1.1.). The Protocol also contains detailed mandatory provisions on prevention (Articles 9, 11, 12) as does the European Convention (*supra* note 4, Articles 29, 32). Prevention of trafficking is a strong underlying theme of the UN Principles and Guidelines (*supra* note xx at Principles 2, 4-6, Guideline 7).

<sup>xliii</sup> Palermo Protocol, *supra* note xx, Articles 2,9,10,13, Organized Crime Convention, *supra* note 2, Articles 16 and 18; European Convention, *supra* note 4,Articles 18,33, 34; UN Principles and Guidelines, *supra* note 3, Guideline 11.

<sup>xliv</sup> See further: [www.arcppt.org](http://www.arcppt.org). The project is expected to continue until 2011 and to expand its geographical reach to include most if not all ASEAN countries. For a listing of other AusAID initiatives related to trafficking see: Australian Action Plan, *supra* note 7 at pp 9-10

<sup>xlv</sup> There are however no formal arrangements or structures in place for information sharing on cases and mutual legal assistance procedures do not appear to have been used for purposes of exchanging evidence.

<sup>xlvi</sup> Segrave, *supra* note 15 at 88.