



**Australian Government**  
**Attorney-General's Department**

## DISCUSSION PAPER

### **The Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protections.**

#### **How to make comment**

Interested stakeholders are invited to provide written submissions which put forward their views regarding the issues outlined in this paper. Written comments should be lodged by no later than **Friday 25 February 2011**. Submissions must include the author's name, the name of their organisation (if appropriate), email address and daytime telephone number.

Submissions should be forwarded to: [peopletrafficking@ag.gov.au](mailto:peopletrafficking@ag.gov.au). If you require assistance, please contact the Attorney-General's Department on (02) 6141 2778.

Please note: Submissions will be published on the Attorney-General's Department website. If confidential submissions are provided they should be sent separately from any public submission and clearly marked as confidential and not for publication. Submissions should not provide any information which identifies, or may identify, a victim(s) of people trafficking.

***Disclaimer:** This document is designed to inform discussion of issues that will be considered as part of the review. It does not necessarily reflect the views of the Commonwealth, or indicate a commitment to a particular course of action.*

## Contents

<b>DISCUSSION PAPER .....</b>	<b>1</b>
<b>1. Introduction.....</b>	<b>3</b>
1.1 Purpose of the Paper .....	3
1.2 How to make comment .....	4
<b>2. People Trafficking in Australia .....</b>	<b>5</b>
2.1 The Australian Government Response .....	5
2.2 Quantifying People Trafficking .....	5
<b>3. The Current Legislation and Frameworks.....</b>	<b>7</b>
3.1 International Legal Frameworks .....	7
3.2 Australia’s Domestic Legal Frameworks .....	8
Slavery .....	8
People Trafficking .....	9
Debt Bondage .....	10
3.3 Investigations and Significant Prosecutions .....	10
3.4 Challenges in the investigation and prosecution of people trafficking.....	11
3.5 Changes in Criminal Methodologies .....	11
3.6 Relevant Cases .....	12
R v Tang.....	12
R v Rasalingham; Fryer v Yoga Tandoori House.....	13
R v Kovacs and Kovacs .....	14
<b>4. The Criminal Justice Response to People Trafficking and Slavery.....</b>	<b>15</b>
4.1 Introduction.....	15
4.2 Forced Labour.....	15
ILO Definition of Forced Labour .....	15
4.3 Definitional differences with respect to forced labour .....	16
4.4 Harboring or receiving victims of people trafficking .....	17
<b>5. Threat and Exploitation .....</b>	<b>20</b>
<b>6. Reparation for Victims of People Trafficking.....</b>	<b>21</b>
6.1 Reparations under the <i>Crimes Act 1914</i> (Cth) .....	21
6.2 Questions and Issues .....	21
Discretionary nature of reparation orders .....	21
Loss must be a direct result of the offence .....	21
Defendant’s ability to pay .....	22
The order is a civil debt .....	23
<b>7. Protection for Vulnerable Witnesses.....</b>	<b>24</b>
7.1 Witness Protections in the Trafficking Protocol.....	24
7.2 International Guidelines in Witness Protections.....	24
7.3 Current witness protections in Commonwealth matters .....	24
7.4 Questions and Issues .....	26
The Suppression of Names and Identifying Material .....	26
Manner of Giving Evidence.....	27
Victim Impact Statements.....	28
<b>Annexure 1: A summary of relevant international frameworks .....</b>	<b>30</b>
<b>Annexure 2: Summary of relevant offences in the <i>Criminal Code</i> (Cth).....</b>	<b>31</b>
<b>Annexure 3: <i>Criminal Code</i> (Cth) Definitions.....</b>	<b>33</b>

# 1. INTRODUCTION

## *1.1 Purpose of the Paper*

1. Slavery and people trafficking are complex crimes, and a fundamental violation of human rights.
2. The Australian Government remains committed to combating these crimes in all their forms, and to working in partnership with government and non-governmental organizations here and abroad to prevent people trafficking, investigate and prosecute the perpetrators and protect and support the victims.
3. The Government has introduced industrial relations reforms and changes to the 457 Business (long stay) visa system to improve protections for vulnerable workers, including migrant workers. In 2009, the Government introduced important changes to the People Trafficking Visa Framework and to the Support for Victims of People Trafficking Program to provide more flexible assistance for victims and their families. The Government also put in place the Organised Crime Strategic Framework to enhance measures to prevent, investigate and prosecute organized criminal activity and recoup the proceeds of crime.
4. Since then, the Government has continued to work to ensure that Australia's anti-trafficking strategy remains relevant and responsive to emerging trends and issues.
5. While trafficking is often linked in popular commentary primarily with sexual servitude, we know that, globally, people are trafficked for exploitation in many settings, including forced labour in construction, hospitality, agriculture and domestic settings.
6. To date the great majority of victims of people trafficking identified in Australia have been trafficked for exploitation within commercial sex industry. However, over the past two years, Australian authorities have identified a number of men and women who have been trafficked for exploitation in other industry sectors. At the same time, investigations have indicated changes in the techniques used by traffickers to adapt to law enforcement activity, prosecutorial strategies and changes in migration regulations.
7. For these reasons, it is timely and appropriate to examine the Commonwealth slavery and trafficking in persons offences to ensure that law enforcement has the best tools available to investigate and prosecute the perpetrators.
8. The cooperation of suspected victims of trafficking is essential to the investigation and prosecution of people trafficking. This discussion paper also looks at a number of procedural issues with particular relevance for people trafficking prosecutions including protections available for vulnerable witnesses, the use of victim impact statements, and the availability of reparation orders in criminal proceedings.
9. This paper complements the Attorney-General's Department discussion paper on forced and servile marriage.

## ***1.2 How to make comment***

10. Interested stakeholders are invited to provide written submissions which put forward their views regarding the issues outlined in this paper. Written comments should be lodged by no later than **Friday 25 February 2011**. Submissions must include the author's name, the name of their organisation (if appropriate), email address and daytime telephone number.
11. Submissions should be forwarded to: [peopletrafficking@ag.gov.au](mailto:peopletrafficking@ag.gov.au). If you require assistance, please contact the Attorney-General's Department on (02) 6141 2778.
12. Please note: Submissions will be published on the Attorney-General's Department website. If confidential submissions are provided they should be sent separately from any public submission and clearly marked as confidential and not for publication. Submissions should not provide any information which identifies, or may identify, a victim(s) of people trafficking.

## **2. PEOPLE TRAFFICKING IN AUSTRALIA**

### **2.1 *The Australian Government Response***

13. Australia has taken a comprehensive, whole-of-government approach to combating people trafficking. Australia implemented its strategy to eradicate people trafficking in persons in late 2003. Since that time, and in addition to ongoing initiatives, the Government has committed more than \$50 million to support a range of anti-trafficking initiatives, including:
- specialist teams within the Australian Federal Police (AFP) to investigate trafficking and sexual exploitation offences
  - legislation to criminalise people trafficking and trafficking-related activities
  - a victim support program which provides individualised case managed assistance to eligible victims of trafficking, including access to accommodation, financial assistance, legal advice, training and social support
  - research into national and regional trafficking activities by the Australian Institute of Criminology (AIC)
  - an Australian Policing Strategy to Combat Trafficking in Persons
  - visa arrangements to enable suspected victims and witnesses of trafficking to remain in Australia and support the investigation and prosecution of trafficking offences
  - specialist immigration officers posted in Thailand, China and the Philippines, who focus on people trafficking issues and aim to prevent trafficking in source countries, and
  - reintegration assistance for trafficking victims who are returned to key source countries in the Asia-Pacific.
14. These initiatives reflect the four central pillars of Australia's anti-people trafficking strategy: prevention; detection and investigation; criminal prosecution; and victim support and rehabilitation. Together this suite of measures is intended to address the full cycle of trafficking from recruitment to reintegration and give equal weight to the critical areas of prevention, prosecution and victim support.

### **2.2 *Quantifying People Trafficking***

15. There is little reliable data about the nature and extent of people trafficking at a global, regional or domestic level. However, there is a general consensus that people trafficking affects almost every country in the world, whether as a source, transit or destination country – or a combination of these.
16. The nature of people trafficking varies from region to region. Its most visible form involves trafficking in women and children for sexual exploitation. But around the world men, women and children are trafficked for a wide range of other purposes, including: forced labour in industries such as hospitality, construction, forestry, mining or agriculture; domestic and sweatshop labour; illicit adoption; street begging; forced recruitment into militia or the armed forces; and the harvesting of body organs.
17. People trafficking occurs within and across national borders.
18. A range of people may be involved in the trafficking process, including those engaged in initial recruitment, arranging transportation and providing false documentation. There may also be a broker or a brothel owner, factory supervisor or household head who directly exploits trafficked people. Recruitment processes vary. Traffickers commonly recruit their victims by appealing to

their hopes, or that of their families, for a better life or escape from economic, social or political distress. A person may actively seek the assistance of the trafficker or their agent, but be deceived about the nature or conditions of work they will be doing in the destination country. Children may be sold to the traffickers by a parent or other family member.

19. Traffickers may also use threats, force or abduction as a means of recruitment. Trafficking can occur whether people move by legal (that is, with valid travel documentation) or illegal means.
20. Victims of trafficking are not always physically detained; the level and nature of control that traffickers exert over victims can vary. Traffickers may employ a number of ways of preventing their victims from escaping, including debt bondage, intimidation, threatened or actual physical or sexual violence (against the victim or family members), detention, threat of denunciation to migration authorities, or withholding of personal identity documents.
21. Since Australia's whole-of-government anti-people trafficking strategy was established in 2003, the majority of identified victims in Australia have been found working in the legal and illegal sex industry. While trafficking into the sex industry has tended to be the most visible form of people trafficking, it is possible that women working in the sex industry are over-represented among statistics on identified victims of trafficking simply because other forms of exploitation are under-reported and under-researched. Further, public commentary on trafficking tends to conflate issues on trafficking, migrant labour, people smuggling and poor working conditions, and this may be one of the reasons that little is known about trafficking into industries other than the sex industry.
22. There is little reliable data about the nature and extent of labour trafficking both globally and within Australia. However, the International Labour Organization estimates at least 12.3 million people around the world are trapped in forced labour. Of this total, the ILO estimates some 2.4 million people are in forced labour as a result of human trafficking.
23. Increasingly, Australian authorities are becoming aware of trafficking victims identified in sectors other than the sex industry, including in the agriculture, construction, hospitality, domestic services and recreation industries.

### 3. THE CURRENT LEGISLATION AND FRAMEWORKS

#### 3.1 *International Legal Frameworks*

24. Australia's response to people trafficking reflects our obligations as a Party to the *United Nations Convention against Transnational Organized Crime* (since 2004) (UNTOC) and its supplementary *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (since 2005) (the Trafficking Protocol).
25. UNTOC and the Trafficking Protocol are the international legal frameworks to combat trafficking. The purposes of the Trafficking Protocol are: to prevent and combat trafficking in persons; to assist the victims of trafficking; and to promote cooperation among State Parties in order to meet those obligations. Under UNTOC and the Trafficking Protocol each State Party is required to establish criminal offences for trafficking in persons.<sup>1</sup>
26. The Trafficking Protocol is the most recent of a series of international instruments that deal with trafficking in human beings or related subjects, including slavery, debt bondage, forced labour and child labour. However, it is the first global legally binding instrument with an agreed definition of trafficking in persons. The Trafficking Protocol entered into force in 2003.
27. Article 3, paragraph (a) of the Trafficking Protocol defines trafficking in persons as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs
28. In shaping its national response to trafficking in persons, a country must also observe its binding legal obligations under other international instruments. A body of international human rights and labour treaties form part of the legal framework for trafficking, including:
  - *International Covenant on Civil and Political Rights*
  - *International Covenant on Economic, Social and Cultural Rights*
  - *Convention on the Elimination of All Forms of Discrimination against Women*
  - *Convention on the Rights of the Child*, and its Optional Protocols on: the sale of children, child prostitution and child pornography; and on involvement of children in armed conflict
  - *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*
  - *International Convention on the Elimination of All Forms of Racial Discrimination*
  - ILO Convention No. 29 on Forced or Compulsory Labour
  - ILO Convention No. 105 on Abolition of forced Labour
  - ILO Convention No. 182 on Worst Forms of Child Labour, and
  - *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.*
29. Annexure 1 contains greater detail about relevant Covenants, Conventions and Protocols.

---

<sup>1</sup> See UNTOC, articles 5, 6, 8 and 10; see also Trafficking Protocol, article 5.

### 3.2 *Australia's Domestic Legal Frameworks*

30. Slavery and trafficking offences are set out in Divisions 270 and 271 of the *Criminal Code* (Cth).
31. In framing the trafficking offences in the *Criminal Code* (Cth), a specific decision was made to take a broadly inclusive approach that would “fully and comprehensively criminalise trafficking in persons”. Therefore, the *Criminal Code* (Cth) (Divisions 270 and 271) takes a broad approach. It is intended to cover conduct which:
- occurs both across borders and within Australia – subject to constitutional limitations
  - is for a range of (unspecified) exploitative purposes
  - includes men, women and children as victims, and
  - takes place with or without the involvement of organized crime groups.

#### *Slavery*

32. Slavery in Australia has been a criminal offence since 1824 due to the application of the *Slave Trade Act 1824* (UK). In 1999, slavery offences were inserted into Division 270 of the *Criminal Code* (Cth). These offences apply to all persons, regardless of whether the conduct occurs within, or outside of, Australia. These offences have a maximum penalty of 25 years imprisonment.
33. Section 270.1 of the *Criminal Code* (Cth) defines the term ‘slavery’ as “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”. It is an offence under section 270.3(1) to:
- possess a slave, or exercise over a slave any of the other powers attaching to the right of ownership;
  - engage in slave trading;
  - enter into any commercial transaction involving a slave; or
  - exercise control or direction over, or provide finance for, any act of slave trading or any commercial transaction involving a slave.
34. Division 270 of the *Criminal Code* (Cth) also criminalises sexual servitude, which is defined 270.4(1) as “the condition of a person who provides sexual services and who, because of the use of force or threats: (a) is not free to cease providing sexual services; or (b) is not free to leave the place or area where the person provides sexual services”.
35. Under section 270.6 of the *Criminal Code* (Cth), it is an offence to intentionally or recklessly cause another person to enter into or remain in sexual servitude, or to conduct a business that involves the sexual servitude of another person(s). These offences have a maximum penalty of 15 years imprisonment, or 20 years if it is an aggravated offence.



36. Division 270 of the *Criminal Code* (Cth) also includes an offence of deceptive recruiting for sexual services. Section 270.7 of the *Criminal Code* (Cth) imposes up to 7 years imprisonment (9 if it is an aggravated offence) on any person who intentionally induces another person into an engagement to provide sexual services by deceiving that other person about any of the following:

- the fact that the engagement will involve the provision of sexual services, exploitation, debt bondage or the confiscation of the person's travel or identity documents;
- the nature of the sexual services to be provided;
- the extent to which the person will be free to cease providing sexual services or to leave their residence; or
- the amount or existence of any debt owed or claimed to be owed.

### *People Trafficking*

37. The *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* inserted new offences into the *Criminal Code* (Cth) that criminalise trafficking in persons activity, fulfilling Australia's legislative obligations under the Trafficking Protocol. The Act came into force on 3 August 2005. The offences are not limited to trafficking that involves sexual slavery or sexual servitude and instead provide coverage for trafficking in all its forms. The legislation provides for:

- people trafficking offences, where the trafficker organises or facilitates the transportation of the victim into, out of, or within Australia, by using force, threats or deception or by being reckless as to the exploitation of the victim. These offences have a maximum penalty of 12 years imprisonment or, in the case of an aggravated offence, 20 years imprisonment
- 'debt bondage' offences, to prevent traffickers from using unfair debt contracts and other similar arrangements to force victims into providing sexual services or other labour to pay off large debts. ('Debt bondage' is defined in the Act as occurring when a person pledges his or her services or the services of another person as security for a debt if the reasonable value of those services is not applied to repay the debt or if the length and nature of the services is not defined.) The debt bondage offences provide an alternative in cases where it may be difficult to prove the commission of one of the more serious offences. These offences attract a maximum penalty of 12 months imprisonment, or two years imprisonment where the victim is under 18 years of age, and
- specific trafficking in children offences, which criminalise organising or facilitating the transportation of a child into, out of, or within Australia, where the perpetrator intends or is reckless as to whether the child will be used to provide sexual services or will be exploited. (The elements of this offence are different to the elements of trafficking in adults as it does not require force or deception.) Trafficking in children offences are punishable by a maximum penalty of 25 years imprisonment.

38. With the exception of offences related to domestic trafficking, all these offence provisions have extended geographical jurisdiction, and can cover circumstances in which the crime has taken place in Australia and overseas, or where the crime has been committed outside Australia by an Australian company, citizen, or resident.

39. The term 'exploitation' is defined in the dictionary in the *Criminal Code* (Cth) to include a number of circumstances. One of those circumstances is where a person (the victim) will be exploited by another if the latter's conduct causes the victim to enter into forced labour. The term 'forced labour' is defined in the dictionary to the *Criminal Code* (Cth) by reference to

section 73.2 of the *Criminal Code* (Cth) as meaning ‘the condition of a person who provides labour services (other than sexual services) and who, because of force or threats:

- (a) is not free to cease providing labour or services; or
- (b) is not free to leave the place or area where the person provides labour or services.’

[*emphasis added*]

40. It follows that for there to be exploitation, constituted by ‘forced labour’, force or threats must present. The term ‘threat’ is defined in section 271.1 of the *Criminal Code* (Cth) as:

- (a) a threat of force; or
- (b) a threat to cause a person’s removal from Australia; or
- (c) a threat of any other detrimental action;

unless there are reasonable grounds for the threat of that action.

### *Debt Bondage*

41. Debt bondage offences are found in Division 271. Debt bondage is defined in the dictionary in the *Criminal Code* (Cth) as occurring when a person pledges their services or the services of another person as security for a debt if the reasonable value of those services is not applied to repay the debt, or the length and nature of the services is not defined.

42. The offences of slavery and debt bondage are significantly different in nature and degree, which is reflected in the difference of penalty. The maximum penalty for a conviction on a slavery offence is 25 years’ imprisonment, whereas maximum penalty on conviction for debt bondage is 12 months’ imprisonment (or two years imprisonment where the victim is under 18 years of age which constitutes aggravated debt bondage).

43. The debt bondage offences provide an alternative in cases where it may be difficult to prove the commission of one of the more serious offences.

44. The offence of debt bondage is a summary offence and the offence of aggravated debt bondage is an indictable offence.<sup>2</sup>

45. An offence of aggravated debt bondage is nonetheless capable of being dealt with summarily.<sup>3</sup> In order to be dealt with summarily, both the prosecution and the defendant must consent to that course.

46. An offence of debt bondage, unlike aggravated debt bondage, is not able to be included on an indictment containing counts for more serious offences such as slavery. This precludes a jury deliberating in relation to a slavery charge, for example, returning a verdict on the less serious offence of debt bondage. The offence of debt bondage must be dealt with in the Magistrates Court; and, if a plea of not guilty is entered, a summary trial must ensue.

### **3.3 Investigations and Significant Prosecutions**

47. Since January 2004, the AFP Transnational Sexual Exploitation and Trafficking Team (TSETT) have undertaken over 270 investigations and assessments of allegations of trafficking-related offences.

48. This has led to 39 matters being referred to the Commonwealth Director of Public Prosecutions (CDPP). Most were for matters related to sexual servitude; a smaller number of investigations involved labour exploitation as the primary criminal conduct. The majority of these matters

---

<sup>2</sup> *Crimes Act 1914* (Cth), section 4G.

<sup>3</sup> *Crimes Act 1914* (Cth), section 4J.

have resulted in charges under Division 270 being laid for slavery and sexual servitude offences.

### **3.4 Challenges in the investigation and prosecution of people trafficking**

49. The AFP has investigated a significant number of people trafficking allegations. A much smaller percentage of those matters have been referred to the CDPP for a determination, in accordance with the *Prosecution Policy of the Commonwealth*, about whether or not to institute a prosecution. Some matters have not proceeded to prosecution due to a lack of evidence. Other matters have resulted in proceedings being commenced but, for a variety of reasons, have had to be discontinued at some point during the court process.
50. The cooperation of suspected victims is essential to the investigation and prosecution of people trafficking. The major impediment to prosecuting trafficking-related offences is the reluctance of people to give evidence of the offence, particularly as they (or their families) may have been the subject of violence or threats of violence either in Australia or their country of origin.
51. Because the evidence of individual victims is heavily relied upon in people trafficking prosecutions, corroboration of this evidence is often necessary to meet the high standard of proof required in criminal proceedings. Corroboration of this evidence is often challenging. The CDPP has discontinued the prosecution of trafficking offences against a number of defendants due to insufficient evidence. Whilst not exclusively an issue in people trafficking matters, language and literacy skills, present another challenge.
52. Moreover, the credibility of witnesses is subject to vigorous testing by defence counsel. This is a basic element of our adversarial system. Thus, victim-witnesses in trafficking matters have been challenged for giving prior inconsistent statements, or for having been involved in visa fraud or income tax offences. Prosecutors have had to deal with community stereotypes regarding foreign sex workers. Counsel may also argue that witness testimony has been 'bought' or tainted by inducements (e.g. access to victim support or visa arrangements) offered by the authorities.
53. Equally challenging has been the task of convincing juries that a given circumstance constitutes slavery or servitude. Many victims in Australia do not conform to the popular image of people trafficking involving abduction, violence and physical restraint. Often people trafficking victims are subjected to more subtle forms of coercion and control.

### **3.5 Changes in Criminal Methodologies**

54. In Australia, cases of trafficking for sexual exploitation have largely involved small crime groups, rather than large organised crime groups. The small crime groups use family or business contacts overseas to facilitate recruitment, movement and visa fraud. People trafficking matters have also generally involved other crime types, including immigration fraud, identity fraud, document fraud and money laundering.
55. People trafficking offenders are sophisticated and flexible enough to adapt to law enforcement activity, prosecutorial strategies and changes in migration regulations. People trafficking investigations have revealed changes in the techniques used by traffickers, and in the conditions experienced by their victims. For example, investigations suggest that it is increasingly unusual for a victim of trafficking to be physically restrained (locked up) or overtly controlled, or to have their passport or identification papers confiscated. Many victims of trafficking have greater freedom of movement and, in some cases, access to mobile phones. In 2009–10, the AFP received only eight reports of people trafficking in which passports were seized as a method of control.

56. People traffickers are alert to matters raised in court by investigations and prosecutors, and to red-flag indicators discussed in open-source publications. In response, people trafficking syndicates are changing their modus operandi to avoid detection and, if detected, to make the elements of the offence harder to prove to the standard that satisfies the court and a jury. For example, in 2009–10, the AFP received only one report of people trafficking in which physical confinement was used as a method of control.<sup>4</sup>

### 3.6 *Relevant Cases*

#### *R v Tang*

57. *R v Tang* is significant as it not only provides the first consideration by the High Court of the slavery offences contained in the *Criminal Code* (Cth) but it also clarified the application of the general principles of criminal responsibility contained in Chapter 2 of the *Criminal Code* (Cth).<sup>5</sup>

58. Ms Tang was convicted in 2006 of five counts of intentionally possessing a slave and five counts of intentionally exercising a power of ownership over a slave, contrary to section 270.3(1)(a) of the *Criminal Code* (Cth). She was sentenced to 10 years' imprisonment, with a non-parole period of six years. Ms Tang was the first person convicted under the anti-slavery laws, introduced in 1999. The charges related to five women, all Thai nationals, who had come to Australia voluntarily to work in the sex industry.

59. The Court of Appeal of the Supreme Court of Victoria held that the directions given to the jury were inadequate, quashed each conviction, and ordered a new trial on all counts. It held that the jury should have been instructed that the prosecution had to prove that Ms Tang had the knowledge or belief that the powers being exercised were through ownership, as well as proving an intention to exercise those powers. The prosecution appealed to the High Court and Ms Tang sought special leave to cross-appeal on three grounds against the order for a new trial rather than an acquittal.

60. The High Court allowed the appeal by a 6-1 majority restoring the convictions and overturned the order for a new trial. It held the prosecution had made out the required elements of the offences and did not need to prove what Ms Tang knew or believed about her rights of ownership. The prosecution did not need to prove she knew or believed that the women were slaves.

61. The High Court determined that the critical powers Tang exercised were:

- the power to make each woman an object of purchase
- the capacity to use the women in a substantially unrestricted manner for the duration of their contracts
- the power to control and restrict their movements, and
- the power to use their services without commensurate compensation.

62. The Court unanimously granted Ms Tang special leave to cross-appeal on the first two grounds concerning the meaning and constitutional validity of section 270.3(1)(a) but dismissed the cross-appeal. It held that Parliament had the power to make laws with respect to external affairs,

---

<sup>4</sup> One further allegation of human trafficking involving physical confinement was received but found to be unsubstantiated.

<sup>5</sup> The Court held that the prosecution had made out the required elements of the offences. The prosecution did not need to prove that she knew or believed the women were slaves. The critical powers she exercised were the power to make each woman an object of purchase, the capacity to use the women in a substantially unrestricted manner for the duration of their contracts, the power to control and restrict their movements, and the power to use their services without commensurate compensation.

in this case by Division 270 giving effect to Australia's obligations under the Slavery Convention. The Court refused special leave on the third ground, that the Court of Appeal failed to hold that the jury's verdicts were unreasonable or could not be supported by the evidence. Because the Court of Appeal allowed the appeal against conviction, it did not deal with Ms Tang's sentence, so the High Court remitted that question to the Court of Appeal for its consideration.

63. On 17 August 2009 the Court of Appeal rejected all of the grounds of appeal against sentence save one and rejected the argument that the sentence imposed was manifestly excessive in the circumstances as they were known to the sentencing judge. The Court was, however, satisfied that the effect of the sentence imposed was, impermissibly, to punish Ms Tang twice for the same conduct and that that sentencing error had the effect of reopening the sentencing discretion, which the Court held must be exercised afresh by it. In resentencing, the Court held that developments since sentence was first imposed gave rise to additional mitigating factors which were not known to the sentencing judge. Consequently, taking those matters into account, the Court concluded that the total effective sentence should be 9 years, with a non-parole period of 5 years.

*R v Rasalingham; Fryer v Yoga Tandoori House*

64. *R v Rasalingham* represents the first labour exploitation matter prosecuted in Australia.
65. The defendant was an Australian citizen who owned and operated four Indian restaurants in the Blue Mountains. The victim was introduced to the defendant in India. It was alleged that during this meeting the defendant offered the victim employment in his restaurants in Australia. The employment arrangement involved the victim working 365 days a year, without payment for the first year, but during this time the defendant would provide money to the victim's family each time he returned to India. The victim arrived in Australia on 1 June 2006 and the defendant took possession of his passport, ticket and other documents. The victim was required to work long hours at the restaurants owned by the defendant and was not allowed any days off. He did not receive any payment for his work and there was no evidence to suggest any payments were made to his family in India.
66. By the time the victim was located, he had been working for the defendant for approximately one month. The defendant was charged with one offence of organising or facilitating the entry or receipt of a person into Australia being reckless as to whether that person would be exploited after entry into Australia contrary to section 271.2(1B) of the *Criminal Code* (Cth), and one offence of submitting to the Department of Immigration and Citizenship (DIAC) a document with the intention of dishonestly influencing a Commonwealth public official in the exercise of the official's duties as public official contrary to section 135.1(7) of the *Criminal Code* (Cth).
67. Following a trial in the District Court of NSW, the defendant was found guilty of dishonestly influencing a Commonwealth public official. There were issues at trial in relation to whether the circumstances involved exploitation as defined by the *Criminal Code* (Cth). The jury found the defendant not guilty of the people trafficking offence. On the remaining offences, the defendant was sentenced to 4 months' imprisonment to be released forthwith upon entering a recognisance in the sum of A\$5,000 to be of good behaviour for 12 months.
68. The matter was subsequently prosecuted by the then Workplace Ombudsman in *Fryer v Yoga Tandoori House* for failure to meet minimum standards of pay and entitlement. The Yoga Tandoori House Pty Ltd – the sole director of which is Yogalingham Rasalingham – was fined for eight breaches of the applicable restaurant award in the Federal Magistrates Court. Rasalingham was also required to rectify the \$A11,500 in underpayment of wages.

69. On 6 December 2007, Queensland couple Zoltan Kovacs and his wife were convicted of possessing and exercising a power of ownership over a person under the slavery provisions of the *Criminal Code* (Cth) and sentenced to eight years imprisonment (with a non-parole period of three years and nine months) and four years imprisonment (with a non-parole period of 18 months) respectively.
70. The defendants allegedly formed a plan to bring a Filipina woman to Australia to work in their shop and to provide domestic services. Zoltan Kovacs and a friend were to travel to the Philippines to identify a suitable woman. Part of their proposal was for the friend to marry the selected person to entitle her to enter Australia. The woman was then to apply for a visa and come to Australia where she would be made to work for the defendants, both in their takeaway shop at Weipa and in their residence as a child minder and housekeeper, until the debts for the travel to Australia were paid. There was a suggestion that this would take five years. The marriage was a sham, and evidence from the victim was called at the trial. Evidence was also called from the person she purportedly married, who had by then pleaded guilty to breaches of the *Migration Act 1958* (Cth) arising from the sham marriage.
71. When the victim arrived in Australia, she was met by Zoltan Kovacs and driven to Weipa where she was put to work in the shop, working 12-hour days for five and a half days per week. When she returned to the residence of the defendants (where she lived), she was required to care for three small children and do household duties. She was paid little for her duties; there was some evidence that a small amount of money had been sent to her family on her behalf. She tried to escape on one occasion, running away to the residence of a person with whom she worked, but Zoltan Kovacs' wife took her home; taking her passport from her. The victim spoke very little English and was isolated culturally. Eventually, when both of the defendants were away, she was able to make her escape from Weipa to Cairns.
72. On 23 December 2008, the Queensland Court of Criminal Appeal set aside their convictions and ordered a retrial on the grounds that the trial judge erroneously admitted evidence having failed to correctly direct the jury to ignore evidence pursuant to section 21A(8) of the *Evidence Act 1977* (Qld). On 18 February 2010, Zoltan Kovacs entered a plea of guilty and was resentenced to eight years imprisonment (with a non-parole period of 15 months, taking into account time spent in custody and also sentences to be served on other unrelated charges). Following a retrial in the Cairns Supreme Court, Zoltan Kovacs' wife was again found guilty and subsequently resentenced to four years imprisonment (with a non-parole period of 291 days). On 15 March 2010, she sought leave to appeal her sentence in the Supreme Court, and the matter is ongoing.

## 4. THE CRIMINAL JUSTICE RESPONSE TO PEOPLE TRAFFICKING AND SLAVERY

### 4.1 Introduction

73. The Australian Government has put in place a significant range of practical and legislative measures to detect, investigate and prosecute instances of people trafficking, and to protect victims. As this paper has identified, trafficking into the sex industry has tended to be the most visible form of people trafficking; it is probable that other forms of exploitation are under-reported.
74. It has been 11 years since the Commonwealth Parliament first enacted Division 270 of the *Criminal Code* (Cth), and five years since the introduction of Division 271. As outlined in section 3.2, in framing the trafficking offences in the *Criminal Code* (Cth), a specific decision was made to take a broadly inclusive approach that fully and comprehensively criminalised trafficking in persons. To date the Commonwealth has prosecuted a range of slavery and trafficking offences involving exploitation in a range of industry sectors. For this reason, it is arguable that existing legislative measures are sufficient to provide coverage for the range of likely offences.
75. However, as more cases of labour trafficking come to light, it is timely to revisit these provisions to determine whether the *Criminal Code* (Cth) sufficiently covers all forms of exploitation when dealing with practices similar to slavery, such as forced labour, deceptive recruiting for labour services, and offences relating to receiving and harbouring persons who are trafficked, and to also consider some of the unexpected or unintended results of the legislation.

### 4.2 Forced Labour

76. The response to labour exploitation should provide for a mixture of civil and criminal remedies. The Australian Government's criminal justice response to labour trafficking considers the criminal law response to exploitative conditions which amount to forced labour or slavery.

#### *ILO Definition of Forced Labour*

77. ILO Convention No. 29 on Forced or Compulsory Labour (ILO C29) defines forced labour as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'. The words 'menace of any penalty', contained in the ILO definition, can include 'criminal sanctions ... coercion such as threats, violence, the retention of identity documents, confinement, or non-payment of wages ... a loss of rights or privileges.'<sup>6</sup>

---

<sup>6</sup> For more information see International Labour Organization, *Combating Forced Labour – A Handbook for Employers & Business*, Geneva, 2008.

78. Under the ILO concept, forced labour is:

- determined by the nature of the relationship between a person and the employer, and not the type of activity performed
- a menace of penalty may be a loss of a right or a privilege, or a punishment
- involuntary because it is brought about by coercion or deception
- the person cannot terminate the employment
- wages are not paid regularly, not paid at all, or are significantly less than the community standard, and
- the person may be free to return to his or her living quarters each night, but is otherwise restricted in his or her movements.

79. The ILO has also identified six elements as pointing to a forced labour situation, with usually two or more of the elements imposed upon the worker:

- physical or sexual violence
- restriction of movement on the worker
- debt bondage or bonded labour
- withholding wages or the refusal to pay the worker at all
- retention of passports and identity documents, and
- threat of denunciation to authorities.

80. The ILO has taken the position that the offence of trafficking has three elements: deceptive or coercive recruitment, movement of the person from one place to another, and forced labour exploitation at the place of destination.

81. The ILO treats forced or compulsory labour as a form of slavery.

#### ***4.3 Definitional differences with respect to forced labour***

82. The definition of forced labour under the *Criminal Code* (Cth), as outlined above in section 2.2 of this paper, applies the language of the Trafficking Protocol. It is distinguishable from ILO C29 definition of forced labour by the omission of the elements of recruitment by deception or coercion, and a movement to a destination.

83. A further relevant distinction between ILO C29 definition of forced labour and the *Criminal Code* (Cth) definition of forced labour is that, under the ILO definition, it is not necessarily the case that the person is not free to leave the workplace. There is also a distinction to be drawn between use of force and threats under the *Criminal Code* (Cth) and ILO C29 terminology of a menace of penalty. The case of *Fryer v Yoga Tandoori House Pty Ltd* (above) is useful in examining the scope of the various definitions of forced labour to analyse how these differing definitions might apply. Are the facts of the Rasalingham case captured by the definitions of debt bondage, forced labour as defined under ILO C29, and or forced labour as defined by the *Criminal Code* (Cth)? A jury was not satisfied that the victim in the Rasalingham case was in a situation of forced labour, in particular that they were under any express or implied threat.



### Questions to consider:

- What is the appropriate response to this type of case?
- Do the existing provisions in relation to debt bondage, slavery and forced labour as defined by exploitation in the *Criminal Code* (Cth) suffice?
- Should the offence of debt bondage be made an indictable offence?
- What are the perceived benefits, if any, of having a specific offence of forced labour in the *Criminal Code* (Cth)?
- If there is a need for such a forced labour offence, how should it be defined in the *Criminal Code* (Cth)?

#### 4.4 Harboursing or receiving victims of people trafficking

84. The prosecution in *Tang's case* commenced before amendments dealing with people trafficking were inserted into the *Criminal Code* (Cth); however, this case raises the question as to whether those provisions which refer to people who 'organise or facilitate a person's entry ... or the receipt ... into Australia', would extend to a person who receives a trafficked person where that person had already been received into Australia by their 'owners'.
85. As an example, in relation to s 270.3 of the *Criminal Code* (Cth), judges have ruled that the prosecution must prove that the person was already in the state or condition of slavery at the time the accused possessed or used the person, rather than that the person was rendered into the state or condition of slavery because of the conduct of the accused. Is legislative amendment needed to clarify this issue?
86. The Trafficking Protocol definition of trafficking in person includes the harboursing or receipt of persons for the purpose of exploitation.
87. Section 6 of the *Crimes Act 1914* (Cth) makes it an offence for any person to receive or assist another person who, to their knowledge, is guilty of an offence against a law of the Commonwealth in order to assist that other person escape punishment or dispose of the proceeds of the offence. The maximum penalty is imprisonment for 2 years. Some Commonwealth offences contain specific 'accessory' provisions; however, the offences in Divisions 270 and 271 of the *Criminal Code* (Cth) are not within that category. These offence provisions are primarily concerned with the conduct of the person who organised or facilitated the entry into, or exit from, Australia of the people trafficking victims.
88. Do the existing offence provisions, where they refer to 'organises or facilitates the entry or exit of [a trafficked person]', sufficiently address the concept of harboursing or receiving? Consider for example the circumstance in *Tang* of a Madam agreeing to accept a woman into her brothel from the 'owner' that arranged the woman's entry into Australia for sex work.
89. The Victorian Parliament Drugs and Crime Prevention Committee is proposing an offence of 'knowingly or recklessly obtaining sexual services from a trafficked woman'. Similar offences have been enacted elsewhere. This approach imposes a responsibility onto a third party which is additional to the other trafficking offences. It must be recalled the Victorian Parliament was concerned with people trafficking issues in the sex industry. Commonwealth legislation covers all forms of people trafficking. While there is merit in the offence proposed by Victoria, were

the Commonwealth to enact an offence of this type—that is, on which liability would be transferred onto third parties—it would need to do so in respect of both sex and other forms of exploitation including forced labour.

90. At present the *Migration Amendment (Employer Sanctions) Act 2007* (Cth) gives principal contractors a level of indemnity when a sub-contractor engages an illegal worker, provided the contract between the principal contractor and sub-contractor explicitly shifts the responsibilities to the sub-contractor. The same holds for businesses using labour-hire intermediaries.
91. In relation to labour hire companies, sponsorship of subclass 457 visa holders can only occur through a Labour Agreement, to which more rigorous employer bona fide assessment and monitoring provisions apply. While not all labour hire companies have concluded Labour Agreements, those with Agreements account for a notable proportion of the industry in terms of employment numbers. It should be noted:
  - (i) bona fide and monitoring provisions for Labour Agreements include migration and workplace relations compliance checks
  - (ii) there have been reports and investigations of labour hire companies in relation to:
    - (a) organised work itineraries for working holiday visa holders (which is inconsistent with the purpose of visa grant)
    - (b) placement of illegal workers, and
    - (c) placement of visa holders in breach of visa conditions (eg tourists with no work right).
92. There is no data on the proportion of the labour hire sector involved in this type of activity or what proportion of the reports relate to action initiated by the Australian labour hire sector (as distinct from off-shore companies with representation in Australia who may not be amenable to Australian prosecution or remedial action for non-compliance).
93. Consider how the following circumstances are captured by existing criminal law, whether under the trafficking or slavery provisions of the *Criminal Code* (Cth), the *Migration Amendment (Employer Sanctions) Act 2007* (Cth), Commonwealth, State or Territory labour laws, or the general criminal law of the States and territories.
  1. A labour-hire firm specialises in arranging workers in vulnerable industries, which international experience demonstrates include the fishing, agricultural and forestry industries. The labour-hire firm has a small number of clients with whom the firm has a long established relationship. The labour-hire firm arranges workers for those client employers. The labour-hire firm has contacts who arrange the workers for the hire-firm. The client employer asks no questions. The labour firm does not inquire into the terms and conditions of the workers. The labour-hire firm makes no inquiry of its contacts (but has its suspicions) as to how the contact is able to supply workers so readily who are prepared to accept less than the market rates of pay.
    - (i) Does the situation change if the labour-hire firm also directly trafficks illegal workers as well as obtaining workers by legitimate means?
  2. The labour-hire firm is the sole provider of labour to the employer. The employer is in a remote locality, the nearest town being 50 kilometres away from the place of work. The employer never inquires as to where or how the labour hire firm recruits the workers. The workers are all migrant men of mixed nationalities. The men are paid fortnightly by the employer at a rate somewhat less than the industrial award standard, and are given two sets of work clothes. They are provided with dormitory-style accommodation on site with kitchen

and washing facilities. The employer busses the workers into town once a week so they can buy their own food and other personal items for the next week. They work a 10-hour day and have Sunday off. They are not restrained in any way from leaving the worksite. The men retain their own travel and identification documents. What if:

- (i) the men receive no wages, and are paid in kind with their accommodation, food and clothes, and are paid pocket money, and their travel documents are retained by the employer?
- (ii) the men's documents are retained, and they have acknowledged a significant debt for their travel to Australia and for their food and accommodation. Wages are paid but withheld until the debt is repaid. They are given a portion of their wages for their everyday needs.
- (iii) adding to (ii) above, what if the arrangement is that the men can never trade out of the debt?

3. Non-resident workers are required to work up to 15 hours per day, seven days per week. Their duties are to clean the boss's house, cook meals for the boss and his family, massage them, and serve them in a variety of other (non-sexual) ways. They do some landscaping and gardening, and are engaged in household construction for the boss. They are denied vacations, and all live in the boss's home. The workers have almost no education, are unskilled, speak very little, if any English, and have never otherwise been outside their country of origin before coming to Australia. They have no friends and nowhere to go. Although they receive higher wages than they would in their country of origin, their wages are well below the Australian minimum wage. Most workers at this site are in Australia illegally, being brought to Australia by the boss who compelled them to surrender their passports and return air tickets, and required them to work in their employ in order to repay the costs of their transport to Australia.

Do these circumstances give rise to forced labour exploitation or are they merely harsh working conditions?

**Questions to consider:**

Do the existing offence provisions, where they refer to 'organises or facilitates the entry or exit of [a trafficked person]' sufficiently address the concept of harbouring or receiving?

What difficulties, if any, have been encountered in prosecutions for offences against section 270.3(1)(a) of the *Criminal Code* (Cth) in relation to proving that the person was already in the state or condition of slavery at the time the accused possessed or used the person?

Should section 270.3(1)(a) of the *Criminal Code* (Cth) be redrafted so as to make each sub-paragraph a distinct type of conduct thus avoiding any suggestion that a defendant does not know what is alleged against them?

## 5. THREAT AND EXPLOITATION

94. The Trafficking Protocol addresses the recruitment, transportation, transfer, harbouring or receipt of persons for the purpose of exploitation. Exploitation is stated to include forced labour or services. The methods by which such exploitation can occur are ‘the threat or use of force or other forms of coercion ... fraud, ... deception, ... the abuse of power, or [the abuse] of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.’ Clearly, this is a wider variety of conduct than merely ‘force or threats’.
95. An issue for government is whether or not the circumstances in which a person may be exploited in a forced labour context needs to be reviewed, and if so what changes are necessary. The difficulty in that task is identifying at what point the conduct of an employer should attract a criminal sanction.
96. This paper noted above the difficulty in convincing juries that a given circumstance constitutes slavery or servitude when the situations of many victims in Australia do not conform to the popular image of people trafficking involving abduction, violence and physical restraint. The Australian experience is that more subtle forms of coercion and control have been involved. How does the definition of force or threat capture those behaviours which may not have an element of violence attached?

### **Questions to consider:**

How do existing criminal law provisions capture conduct such as forced labour and deceptive recruiting for labour services? Is there a need for this to be revisited?

How do existing criminal law provisions capture behaviours which enable people trafficking activities, such as harbouring and receiving? Is there a need for this to be revisited?

How do existing criminal law provisions capture the elements of coercion and exploitation? Is there a need for this to be revisited?

## 6. REPARATION FOR VICTIMS OF PEOPLE TRAFFICKING

### 6.1 *Reparations under the Crimes Act 1914 (Cth)*

97. Reparation is a broad term used to describe any attempt to make amends for a wrong or injury<sup>7</sup>.
98. Section 21B of the *Crimes Act 1914* (Cth) is the main provision enabling judicial officers to make reparation orders when sentencing federal offenders. Such reparation orders are in addition to the sentence imposed and are enforced by way of civil enforcement action such as the seizure and sale of property, registration of a charge on land, or garnishee of wages.
99. Section 21B(1)(c) of the *Crimes Act 1914* (Cth) provides that a judicial officer may order a federal offender to make reparation to the Commonwealth, or to a public authority under the Commonwealth, for any loss suffered or expense incurred by reason of the offence. Section 21B(1)(d) of the *Crimes Act 1914* (Cth) provides that a judicial officer may order a federal offender to make reparation to a person who has suffered loss as a direct result of the offence.
100. The *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* states that offenders should, where appropriate, make fair restitution to victims, their families or dependants. It also provides that victims of crime should be able to obtain redress through judicial and administrative procedures that are expeditious, fair, inexpensive and accessible.
101. Reparation orders are an established and effective way of recognising the interests and needs of victims of crime. Empowering a court to make reparation orders provides victims of crime (whether individuals or institutions) with a statutory remedy that aims to restore victims to the position they were in prior to the offence, in so far as money can do so. It also promotes the effective use of judicial resources by eliminating the need for separate civil and criminal proceedings in relation to the same conduct.
102. However, where a court is considering making a reparation order in favour of a person (cf. the Commonwealth or a public authority under the Commonwealth), the proximity of the offending conduct and the resultant loss must be narrower. People will only be entitled to take the benefit of a reparation order in respect of ‘loss suffered ... as a direct result of the offence’. A procedure is in place whereby a reparation order is treated as a final judgment of the court and can be enforced accordingly.<sup>8</sup>

### 6.2 *Questions and Issues*

#### *Discretionary nature of reparation orders*

103. Under section 21B of the *Crimes Act 1914* (Cth) reparation orders are a discretionary order by the court. There is no guarantee that courts will order reparation orders for trafficking victims in any case.

#### *Loss must be a direct result of the offence*

104. Part IB of the *Crimes Act* allows reparation orders to be made in respect of loss suffered or, in some cases, expense incurred as a result of a federal offence. It does not explicitly provide that a reparation order may be made in respect of non-economic loss such as pain and suffering, loss of amenities or loss of expectation of life. However, some provisions of Part IB implicitly accept that injury, which may give rise to non-economic loss, may result from the commission of a federal offence. Section 16A(e) provides that the court is to take into account any ‘injury, loss or damage’ resulting from the offence when sentencing a federal offender, and s 16A(f)

---

<sup>7</sup> See ALRC Report 103 *Same Time, Same Crime: The Sentencing of Federal Offenders*

<sup>8</sup> *Crimes Act 1914* (Cth), section 21B(3).

provides that the court is to take into account the degree to which a person has shown contrition for an offence by taking action to make reparation for any injury, loss or damage resulting from the offence.

105. Clearly offences such as child sex tourism and trafficking may result in individual victims suffering non-economic loss, and there seems no intrinsic purpose in distinguishing between economic and non-economic loss suffered as a result of such an offence.
106. However, under s 21B(1)(d) of the *Crimes Act 1914* (Cth) a person may be ordered to make reparation to any person in respect of any loss suffered as a direct result of the offence. In *Davies v Taylor* (1996) 140 ALR 245, Slicer J considered the words ‘direct result of’ and ‘by reason of’ to be synonymous. While in *R v Foster* [2008] QCA 90, McMurdo P (Mackenzie AJA and Chesterman J agreed) considered the meaning of the words ‘as a direct result of’, and stated, at paragraph 67:
107. It is clear enough from the terms of s 21B that for a court to make a reparation order under s 21B(1)(d) in favour of “any person” requires a closer connection between the offence and the loss than for a court to make a reparation order under s 21B(1)(c) in favour of the Commonwealth. The clear legislative intent in enacting s 21B(1)(d) is as follows. Federal offenders who through their offending have caused a loss to others should be liable to compensate those who have suffered that loss, where there is sufficiently direct connection between the offence and the loss.
108. McMurdo J further noted that, unlike s 21B(1)(c), the words in s 21B(1)(d) suggest that a reparation order cannot be made in favour of a person suffering a secondary loss by way of a ripple effect.
109. There would need to be clear evidence of a direct loss suffered by the victim by reason of the offending. This will depend on the facts of the case, but it is foreseeable it may be difficult to show that any loss occasioned by a victim of people trafficking occurred as a direct result of the commission of an offence.

#### *Defendant’s ability to pay*

110. While Part 1B of the *Crimes Act 1914* (Cth) does not require the Court to consider the defendant’s financial circumstances when making a reparation order, in deciding cases brought under s 21B of the *Crimes Act 1914* (Cth) courts have generally found that the defendant’s financial means are a relevant consideration in the exercise of the discretion to make a reparation order. In the case of *Vlahov v Commissioner of Taxation*<sup>9</sup>, the Full Court of the Supreme Court of Western Australia said that:

... the Court has a discretion whether or not to make a reparation order. That discretion is, of course, to be exercised judicially. In the exercise of that discretion, the Court may have regard to the personal circumstances and means of the offender.
111. Accordingly, the amount ordered may not reflect the loss suffered as a direct result of the offending.

---

<sup>9</sup> (1993) 26 ATR 49; 93 ATC 4501.

*The order is a civil debt*

112. If a reparation order is made in favour of a victim, what they have been awarded is a civil debt, which then may need to be enforced through the civil courts if the defendant does not pay the reparation order.

**Questions to consider:**

Does section 21B of the *Crimes Act 1914* (Cth) adequately provide for reparation orders to be made for victims of people trafficking?

If no, what measures could be introduced to permit greater access to reparation orders by victims of people trafficking?

## 7. PROTECTION FOR VULNERABLE WITNESSES

### 7.1 *Witness Protections in the Trafficking Protocol*

113. Article 6(1) of the Trafficking Protocol requires States Parties to, in appropriate cases and to the extent possible under its domestic law, protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.
114. Article 6(2) of the Trafficking Protocol requires States Parties to ensure that domestic legal or administrative systems contain measures that provide to victims of trafficking in persons, in appropriate cases:
- (a) Information on relevant court and administrative proceedings
  - (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

### 7.2 *International Guidelines in Witness Protections*

115. The UN High Commissioner for Human Rights' *Recommended Principles and Guidelines on Human Rights and Human Trafficking* urges countries to ensure that trafficked persons are effectively protected from harm, threats or intimidation by traffickers and associated persons, and recommends that protections for witnesses are provided for in law. This includes by ensuring there is no public disclosure of the identity of trafficking victims and their privacy is respected and protected to the fullest extent possible. The principles note also that this needs to take into account the right of an accused person to a fair trial. It also warns against providing false or unrealistic expectations given the inherent difficulties in protecting identities.
116. The United Nations Office on Drugs and Crime's (UNODC's) *Good practices for the protection of witnesses in criminal proceedings involving organized crime* outlines a number of specific measures that can be taken during the hearing of testimony in sensitive cases, including people trafficking. These measures are designed to prevent the revictimisation of victim-witnesses, and include:
- use of a witness's pre-trial statements instead of in-court testimony
  - presence of an accompanying person for psychological support
  - testimony via closed-circuit television or videoconferencing
  - voice and face distortion
  - removal of the defendant or the public from the courtroom, and
  - anonymous testimony.

### 7.3 *Current witness protections in Commonwealth matters*

117. There are some Commonwealth provisions which are designed to protect classes of witnesses in certain circumstances. For example, Part 1AD of the *Crimes Act 1914* (Cth) and Divisions 272 and 273 of the *Criminal Code* (Cth) afford protections for child witnesses in proceedings for specified offences including child-sex tourism and people trafficking matters.
118. The *Crimes Act 1914* (Cth) recognises that child victims and child witnesses are particularly vulnerable because of their age and the nature of sexual, people trafficking and slavery offences.



119. Part 1AD of the *Crimes Act 1914* (Cth) requires a child witnesses' evidence to be given by closed circuit television unless the facilities are not available, the child is sixteen or over and chooses not to give evidence by this means, or the court orders that the child is not to give evidence by this means, because it is not in the interests of justice to do so. If a child witness under sixteen gives evidence in a courtroom, the court must make arrangements to restrict contact (including visual contact) between the child and defendant and may make arrangements to restrict contact between the child witness and members of the public. One or more adults may accompany a child who is giving evidence in a proceeding (whether via closed circuit television or otherwise). The adult/s must not prompt the child or otherwise influence the child's answers or disrupt the questioning of the child.
120. The *Crimes Act 1914* (Cth) also allows, with leave of the court, the tender of a video recording of a police interview of a child witness as evidence-in-chief in proceedings for sexual, people trafficking and slavery offences, on condition that the child witness is made available for cross-examination and re-examination.
121. The *Crimes Act 1914* (Cth) prevents self represented defendants from directly questioning a child complainant, only allows such defendants to directly question other child witnesses (aside from the complainant) with leave of the court and disallows the inappropriate or aggressive cross-examination of children by any person.
122. Evidence of a child's sexual reputation or sexual experiences is inadmissible in proceedings without written leave of the court. If evidence of the child's sexual reputation is admitted into evidence, it must not be treated as relevant to the child's credibility. Evidence of a child's sexual experiences will only be admissible if the court is satisfied that the evidence is substantially relevant to the proceedings and, if the evidence relates to the credibility of a child witness, the evidence has substantial probative value. A judge must not suggest to a jury in proceedings involving child witnesses that the law regards children as an unreliable class of witness or that the law requires greater or lesser weight to be given to evidence that is given by closed circuit television, video recording or in the presence of an accompanying adult.
123. It is an offence to publish, without leave of the court, any matter that identifies or is likely to lead to the identification of a child witness or complainant.
124. Divisions 272 and 273 of the *Criminal Code* (Cth) also provide protections for children involved in proceedings for child sex offences committed outside Australia. Witnesses in these types of proceedings can give evidence by video link. This is not an automatic procedure but instead relies upon an application made by a party to a proceeding.<sup>10</sup> The ability to take evidence by video link does not detract from other laws about the taking of evidence from a witness outside Australia.<sup>11</sup>
125. Currently, no provision is made for the taking of evidence from children in other Commonwealth proceedings. Nor are there any protections available when vulnerable adult witnesses give evidence in Commonwealth proceedings.
126. Most States and Territories have enacted provisions intended to protect the identity of a witness in appropriate circumstances and to assist vulnerable witnesses giving evidence. Although State and Territory provisions can apply to Commonwealth proceedings via section 68 of the *Judiciary Act 1903* (Cth), there are distinctions in practices and powers between, and within, jurisdictions. The States and Territories provide a range of protections for vulnerable witnesses. These include provisions for the giving of evidence by vulnerable

---

<sup>10</sup> *Criminal Code* (Cth), section 272.21 and 272.22.

<sup>11</sup> *Criminal Code* (Cth), section 272.26.

witnesses including in the form of a recording or by CCTV, or proceedings to be held in camera and prohibition of the publication of a complainant's identity. Other protections include disallowing evidence pertaining to a witnesses' sexual history in a trial for a sexual offence<sup>12</sup> and precluding an unrepresented accused from cross examining sexual assault victims.<sup>13</sup> Some States place restrictions on the manner in which evidence can be given following a retrial in certain matters.<sup>14</sup>

127. The general sentencing principles contained in section 16A(2) of the *Crimes Act 1914* (Cth) provide that, in addition to any other matters, the court must take into account where relevant and known to the court, the personal circumstances of any victim of the offence, as well as any injury, loss or damage resulting from the offence.
128. The Commonwealth Director of Public Prosecutions has established a *Victims of Crime Policy*, which implements certain measures for victims of Commonwealth offences. These measures include a requirement to treat victims with dignity and respect, and take into account the victim's views, when appropriate, in making decisions about a prosecution.
129. In proceedings other than those involving sexual offences, the Commonwealth generally relies on provisions in State and Territory law to protect vulnerable witnesses involved in Commonwealth matters. However, where Part 1AD of the *Crimes Act 1914* (Cth) applies, those provisions are relied upon.

#### **7.4 Questions and Issues**

##### *The Suppression of Names and Identifying Material*

130. It is not unusual for witnesses in people trafficking matters to be reluctant to give evidence unless, at the very least, it is prohibited for their names to be published. People trafficking victims are often fearful for their personal safety or that of their families, should they give evidence. It is well documented that victims of sexual assault are often embarrassed about giving evidence, and should be entitled to have their names withheld from the public.
131. As outlined above, in general terms the Commonwealth currently relies on the application of State and Territory laws for the suppression of witness names in Commonwealth matters. In the context of the capacity to make orders for the suppression of names and identifying material, the laws are inconsistent both between the jurisdictions, and also within many jurisdictions.
132. The Commonwealth reliance on State and Territory provisions with respect to the application of non-publication orders in Commonwealth matters may also lead to inconsistencies. For example, it is possible for a Magistrate in one State to make a non-publication order in relation to the identity of a witness under a provision of that State, and for newspapers in other States and Territories to then publish the witness' name and photograph.
133. Consider the matter of *R v Kwok, Ong, Tan and Yoe* (15/7/2005, NSW CCA). This was a people trafficking matter with nine victim-witnesses whom it was alleged had been trafficked from Southeast Asia to work in the sex industry. The Crown successfully applied for a non-publication order of the name and identity of one victim-witness on the basis that she was an 'informer'. The trial judge refused to make non-publication orders with respect to the other eight witnesses on the basis that he had no implied power to do so and that the Crown's material in support of the application was insufficient to ground the application.

---

<sup>12</sup> See *Criminal Procedure Act 1986* (NSW), section 293. See also *Crimes Act 1914* (Cth), sections 15YB and 15YC.

<sup>13</sup> See *Criminal Procedure Act 1986* (NSW), section 294A. See also *Crimes Act 1914* (Cth), sections 15YF and 15YG.

<sup>14</sup> See *Criminal Procedure Act 1986* (NSW), Chapter 6, Part 5, Division 3 – Special provisions relating to retrials of sexual offence proceedings.

134. The NSW Court of Criminal Appeal found that the District Court had an implied power to grant a non-publication order where it was necessary for the administration of justice. The Court granted the non-publication orders and went on to say that the categories of matters where names can be suppressed are not closed, but that only in the most serious of matters will there be an exception to the general principles of open justice.
135. It is clear that legislative provisions across State, Territory and Commonwealth jurisdictions that empower courts and tribunals to make suppression orders are often inconsistent and ad hoc. However, this may soon change.
136. The Standing Committee of Attorneys-General has developed model provisions on suppression and non-publication orders. The model provisions provide a basis for nationally consistent laws for suppression orders. They set out the grounds on which an order can be made, including a 'public interest' ground and a ground 'to protect the safety of a person'.
137. In May 2010 the Standing Committee of Attorneys-General endorsed the model provisions, and the Ministers agreed to consider implementing them in their jurisdictions. The Attorney-General is currently considering a proposal to implement the provisions in the Commonwealth jurisdiction.

#### *Manner of Giving Evidence*

138. Again, there are distinctions in practices and powers within some jurisdictions.
139. All States and Territories have the capacity to hear evidence from vulnerable witnesses (including children), by way of closed circuit television. For example, in Queensland, no child who is the victim of a State-based offence gives evidence 'live' before a Court (see Division 4A *Evidence Act 1977* (Qld)). Rather, the child's evidence is video-taped, and a hearing is conducted by way of closed circuit television with evidence in chief and cross examination. The tape is then the evidence used at trial.
140. It is unclear whether these Queensland provisions, for example, would apply to children who are victims of Commonwealth child sexual offending which is not covered by Part 1AD of the *Crimes Act 1914* (Cth) or Divisions 272 and 273 of the *Criminal Code* (Cth)<sup>15</sup>, for example child trafficking. Again, this raises the possibility of an inconsistency in the application of Commonwealth criminal law.

---

<sup>15</sup> Part 1AD of the *Crimes Act 1914* (Cth) applies to proceedings for various offences including those under Divisions 270, 271, 272 and 273 of the *Criminal Code* (Cth). The protections provided by Part 1AD of the *Crimes Act 1914* (Cth) are directed to children. A 'child' is defined in section 15YA of the *Crimes Act 1914* (Cth) as a person under 18.

**Questions to consider:**

Should the Commonwealth enact specific provisions to deal with the manner in which evidence can be given by vulnerable adult witnesses in people trafficking matters?

Are current witness protections concerning the manner in which evidence can be given by vulnerable witnesses in people trafficking matters provided by Commonwealth, State and Territory legislation, or those which form part of the courts' inherent jurisdiction, adequate?

If no, what measures could be introduced to ensure adequate protection for vulnerable witnesses in relation to the manner in which evidence is given in people trafficking matters?

Should the Commonwealth enact a provision which defines 'vulnerable witness'?

*Victim Impact Statements*

141. A victim impact statement is a written or oral statement about the impact that a crime has had on the victim, once an offender has been convicted and is to be sentenced. It may be the only opportunity a victim has to tell the court how a crime has affected them. Information on the effects of the crime may be taken into account when considering the sentencing of the convicted person.
142. Part IB of the *Crimes Act 1914* (Cth) does not make provision for victim impact statements. There are differences between State and Territory laws concerning the availability, content, form and use of victim impact statements.
143. Commentators point to the restorative justice benefits of victim impact statements in giving victims of crime a voice in sentencing. However, others have noted that such statements raise expectations regarding sentencing outcomes, and lead sentencers to give disproportionate weight to the impact of a crime on a victim, to the detriment of other relevant considerations.

**Questions to consider**

Should provision be made for victim impact statements in Commonwealth people trafficking matters and in what circumstances should they be used?

What presentation methods should be available to provide a victim impact statement? (for example, read aloud by the victim or someone else, read via closed circuit television)

Should victims be able to express a view about sentence?

What protections need to be in place for offenders?

## **Annexure 1: A summary of relevant international frameworks**

- *United Nations Convention against Transnational Organized Crime (UNTOC)*
- *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Trafficking Protocol)*
- *International Covenant on Civil and Political Rights*  
Refer to Articles 2, 3, 7, 8, 9, 12, 14, 23 and 26
- *International Covenant on Economic, Social and Cultural Rights*  
Refer specifically to Articles 2, 3, 6, 7, 10, 11 and 12
- *Convention on the Elimination of All Forms of Discrimination against Women*  
Refer specifically to Articles 2, 6, 9, 11, 12, 14, 15 and 16
- *Convention on the Rights of the Child*  
Refer specifically to Articles 7, 16, 19, 28, 31, 32, 34, 35, 36, 37 and 39
- *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*  
Refer specifically to Articles 1, 2, 3 and 8; and
- *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*  
Refer specifically to Articles 1 and 4
- *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*  
Refer specifically to Articles 1, 3, 13 and 14
- *International Convention on the Elimination of All Forms of Racial Discrimination*  
Refer specifically to Articles 2, 5 and 6
- *ILO Convention No. 29 on Forced or Compulsory Labour*  
Refer specifically to Articles 1, 2 and 6

- ILO Convention No. 105 on Abolition of forced Labour
- ILO Convention No. 182 on Worst Forms of Child Labour  
In particular Article 3(1)
- *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*  
Refer specifically to Articles 1, 3, 5, 6 and 7<sup>16</sup>.

---

<sup>16</sup> In addition to such universal instruments, States may also be party to regional and sub-regional instruments on people trafficking, including the Council of Europe Convention on Action against Trafficking in Human Beings which entered into force in February 2008, and the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution adopted by the States members of the South Asian Association of Regional Cooperation in 2002.

**Annexure 2: Summary of relevant offences in the *Criminal Code (Cth)***

**Table 1: *Criminal Code (Cth)* - Divisions 270 and 271**

<b>Section</b>	<b>Offence</b>	<b>Maximum Penalty</b>
270.3(1)	Possess or exercise right of control over a slave	25 years
270.3(2)	Commercial transactions involving a slave	17 years
270.6(1)	Causing another person to enter into or remain in sexual servitude (see s270.4 (1) for definition of sexual servitude)	15 years 20 years*
270.6(2)	Conducting a business involving the sexual servitude of another (see s270.6(3) for definition of conducting a business)	15 years 20 years*
270.7(1)	Intentionally inducing another person to enter into an engagement where the other person is deceived about providing sexual services, the nature of the sexual services to be provided, extent to which the person will be free to leave or cease providing sexual services, involvement of exploitation or debt bondage or confiscation of travel or identity documents (see s270.6(2) for definition of sexual service and s271.1 for definition of deceive)	7 years 9 years*
271.2(1), (1A), (1B), (1C)	Trafficking offences involving the use of force or threats, or recklessness as to whether the trafficked person will be exploited (see s271.5 for domestic trafficking offences)	12 years 20 years <sup>#</sup>
271.2(2), (2A)	Trafficking offences where trafficked person is deceived about providing sexual services or involvement of exploitation or debt bondage or confiscation of travel or identity documents	12 years 20 years <sup>#</sup>

Section	Offence	Maximum Penalty
271.2(2B), (2C)	Trafficking offences where there is an arrangement for the trafficked person to provide sexual services but is deceived about the nature of those sexual services, freedom to leave or cease providing sexual services, or any debt owed in connection with the arrangement	12 years 20 year <sup>#</sup>
271.4(1), (2)	Trafficking in children offences where there is intention for or reckless as to whether the child will be used to provide sexual services or be otherwise exploited (see s271.7 for domestic trafficking in children offences)	25 years
271.8(1)	Intentionally causing another person to enter into debt bondage	12 months 2 years*

\* aggravated sexual servitude/deceptive recruiting/debt bondage offences refer to an offence committed against a person under 18 years (see s270.8, s271.9)

# aggravated trafficking offences are where the offender intended the victim to be exploited by the offender or another person or subjected the victim to cruel, inhuman or degrading treatment or the offender is reckless as to a danger of death or serious harm to the victim (see s271.3 and s271.6)



### **Annexure 3: Criminal Code (Cth) Definitions**

#### **Slavery**

Slavery is defined in section 270.1 as 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.

#### **Forced labour**

Forced labour is defined in section 73.2(3) to mean the condition of a person who provides labour or services (other than sexual services) and who, because of the use of force or threats:

- a) is not free to cease providing labour or services; or
- b) is not free to leave the place or area where the person provides labour or services.

#### **Debt bondage**

Debt bondage is defined in the Dictionary as meaning 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.

#### **Exploitation**

Under the *Criminal Code* (Cth) exploitation, of one person (the *victim*) by another person (the *exploiter*), occurs if:

- (a) the exploiter's conduct causes the victim to enter into slavery, forced labour or sexual servitude; or
- (b) the exploiter's conduct causes an organ of the victim to be removed and:
  - (i) the removal is contrary to the law of the State or Territory where it is carried out; or
  - (ii) neither the victim nor the victim's legal guardian consented to the removal and it does not meet a medical or therapeutic need of the victim.

#### **Deceive**

Deceive is defined in section 271.1 as meaning mislead as to fact (including the intention of any person) or as to law, by words or other conduct.

**Threat**

Threat is defined in section 271.1 as meaning:

- (a) a threat of force; or
  - (b) a threat to cause a person's removal from Australia; or
  - (c) a threat of any other detrimental action;
- unless there are reasonable grounds for the threat of that action.