



Submission No 4

**Inquiry into Slavery, Slavery-like conditions and People  
Trafficking**

**Organisation:** University of Queensland

**Professor Andreas Schloenhardt**

PhD (Adel)  
Director of International Relations

The University of Queensland  
TC Beirne School of Law  
Brisbane Qld 4072  
Australia

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*Submission to the Inquiry into Slavery, Slavery-Like Conditions and People Trafficking*

Dear Committee Members

Thank you for invitation to provide a submission to the *Inquiry into Slavery, Slavery-Like Conditions and People Trafficking*. Please find attached the submission that my research team and I prepared. The submission focuses specifically on the following points:

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By way of background, I am Professor of Criminal Law at The University of Queensland TC Beirne School of Law in Brisbane, and hold a PhD in Law from The University of Adelaide. My principal areas of research include criminal law, organised crime, migrant smuggling, trafficking in persons, narcotrafficking, terrorism, international criminal law, and immigration and refugee law. I am a consultant to the United Nations Office on Drugs and Crime (UNODC) in Vienna, Austria, and Islamabad, Pakistan, and have worked extensively in research and teaching capacities with the Australian Federal Police (AFP) and other law enforcement agencies.

At The University of Queensland, I coordinate the Human Trafficking Working Group, a research initiative set up in March 2008, comprising academics and students from the TC Beirne School of Law and the School of Political Science & International Studies. The Working Group provides a complete and comprehensive analysis of the phenomenon of trafficking in persons, especially women and children, and of the exploitation of foreign workers in the sex industry and other forms of forced labour in Australia. For further information, please visit [www.law.uq.edu.au/humantrafficking](http://www.law.uq.edu.au/humantrafficking).

I would like to acknowledge the significant contribution Mr Jarrod M Jolly made to this submission.

Thank you for considering our submission.

Yours sincerely

ANDREAS SCHLOENHARDT

## **PART A: AUSTRALIA'S EFFORTS TO ADDRESS PEOPLE TRAFFICKING, INCLUDING THROUGH PROSECUTING OFFENDERS AND PROTECTING AND SUPPORTING VICTIMS**

### **A.I Visa for Victims of Trafficking in Persons in Australia**

Many victims of trafficking have entered or reside illegally in the country in which they are apprehended and are often in fear and/or at risk of deportation if they are found by government authorities. Exposure to immigration authorities is indeed one weapon in the hands of traffickers to threaten and exploit their victims. Additionally, it is often the case that victims have experienced severe physical and psychological trauma and face the prospect of further harm or may be re-trafficked if returned to their country of origin. It is thus an unfortunate reality that victim testimony is often necessary to secure the conviction of a trafficker. For these reasons, it is important that genuine victims of trafficking are provided with simple and accessible avenues to legalise their status temporarily or permanently. It should be noted, however, that it is often the case that victims do not, at least initially, want to remain in Australia or participate in investigations and prosecutions.

As a Signatory to the *Protocol to Prevent Suppress and Punish Trafficking in Persons, especially Women and Children* [hereinafter the *Trafficking in Persons Protocol*], Australia has certain obligations in relation to the protection of foreign trafficked persons identified in Australia. Article 7(1) of the *Trafficking in Persons Protocol* calls on States Parties to consider adopting legislative or other appropriate measures that permit foreign trafficked persons to remain in the territory of the host country, temporarily or permanently, in appropriate cases. In implementing such measures, Article 7(2) calls on States Parties to give appropriate consideration to humanitarian and compassionate factors. 'Humanitarian factors' refer to rights that are established in international human rights instruments. 'Compassionate factors' refer to personal circumstances such as 'family situation, age, common-law relationship and other factors that should be considered on an individual and case-by-case basis.'<sup>1</sup> The Australian Government made the following declaration upon signing the Protocol in 2002 and ratifying it in 2005:

The Government of Australia hereby declares that nothing in the Protocol shall be seen to be imposing obligations on Australia to admit or retain within its borders persons in respect of whom Australia would not otherwise have an obligation to admit or retain within its borders.

This statement evinces the restrictive approach to the protection of foreign victims of trafficking that has developed over the last decade – and that largely remains current today.

Prior to 2004, there was no specialised visa regime in Australia that was available to victims of trafficking. To the contrary, a federal parliamentary inquiry in 2004 reported that victims of trafficking were routinely detained and promptly deported by government agencies with 'no regard for their condition as victims of crime.' It was also found that while a victim could be granted a Criminal Justice Stay Visa in order to participate in an investigation and trial, it was likely that the victim would be deported if no longer considered useful or once proceedings were completed. Significantly, it has been suggested that there were tensions between the jurisdictional roles of the Australian Federal Police (AFP) and the Department of Immigration until at least October 2003. During this period the Department reportedly took on a 'lead agency approach' whereby compliance with immigration law was the fundamental concern. The task of the Department was to detain and deport unlawful non-citizens from the country in accordance with the mandatory detention provisions of the *Migration Act 1958* (Cth) and not to develop a prosecution under the criminal law.<sup>2</sup> These deficiencies in the

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<sup>1</sup> UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, UN Doc A/AC.254/4/Add.3/Rev.6 (4 Apr 2000) 10 nn [55].

<sup>2</sup> Parliamentary Joint Committee of the Australian Crime Commission, Parliament of Australia, *Inquiry into the trafficking of women for sexual servitude* (2004) 1-2 [1.4], 26 [3.18], 34 [3.56]-[3.58], 43 [3.102]-[3.105]; Kathleen Maltzahn, *Trafficked* (2008) 41 quoting Christopher Payne, a retired Detective Sergeant of the AFP.

immigration system clearly resulted in lost opportunities to prosecute traffickers and, more importantly, offer protection to victims of trafficking.

The ‘People Trafficking Visa Framework’ was introduced on January 1, 2004 as part of the *Australian Government’s Action Plan to Eradicate People Trafficking*, a set of measures announced in October 2003. This visa framework was explicitly designed to ‘facilitate the investigation of possible trafficking offences’ and ‘allow for more effective prosecutions’.<sup>3</sup>

A number of amendments were made to the framework in July 2009 in response to ‘sustained advocacy’ from NGOs and academics, and following a review by the Department of Immigration that commenced in 2007.<sup>4</sup> Despite these changes, a strong criminal justice approach has remained entrenched. The Department describes the current visas in the framework as

designed to enable foreign nationals without a valid visa who are identified by the police as suspected victims of trafficking to remain lawfully in Australia to receive support and assist in the investigation and prosecution of trafficking offences.<sup>5</sup>

To this end, there has been a slight refocusing of the framework to recognise the importance of victim support. Holding any valid visa, regardless of whether it is granted under the visa framework, now allows access to support services under the so-called Support for Victims of People Trafficking Program (which are not further examined in this submission). The grant of certain visas under the trafficking visa framework entitles the holder to other rights and types of support, in addition to that offered under the Support Program generally.

In 2004, the visa framework included four visa types, three of which were new: the Bridging F Visa; the (pre-existing) Criminal Justice Stay Visa; the Witness Protection (Trafficking) (Temporary) Visa; and the Witness Protection (Trafficking) (Permanent) Visa. The Witness Protection (Trafficking) (Temporary) Visa was removed as part of the amendments passed in 2009. The following sections detail each of these visas as they have developed and highlight remaining criticisms. While it is possible, and intended, that a victim of trafficking will pass from one visa to another in the order they are presented below, each visa also operates independently.

### **A.I.1 Bridging F Visa**

The Bridging F Visa (Class WF) (subclass 060)<sup>6</sup> is a visa class designed to offer short-term protection to suspected trafficked persons in order for them reside legally in Australia, receive initial support and decide whether to cooperate with any criminal investigation or prosecution. Prior to the reforms made in 2009, the Bridging F Visa conferred 30 days of lawful presence in Australia to persons ‘of interest’ to law enforcement in relation to a to an offence, or alleged offence, of people trafficking, sexual servitude or deceptive recruiting. The visa was required to access the Support Program but could be cancelled at any time; indeed, there is anecdotal evidence that some victims were deported days after the granting of a Bridging F Visa where it was determined there was insufficient evidence to proceed with an investigation or prosecution.<sup>7</sup> In its original form the Bridging F Visa was sharply criticised due to its short duration, lack of certainty or transparency and the fact that eligibility for the visa (and thus access to the Support Program) was overly dependent on the apparent capabilities of the applicant as a witness, rather than his or her status as a victim of crime.

<sup>3</sup> Australian Government, *Australian Government’s Action Plan to Eradicate Trafficking in Persons* (2004) 13.

<sup>4</sup> Jennifer Burn and Frances Simmons, ‘Prioritising protection – A new visa framework for trafficked people’ (2009) 41 *Immigration Review* 3, 3.

<sup>5</sup> DIAC, *Procedures Advice Manual 3: Migration Act – Compliance and Case Resolution – Case Resolution – People Trafficking*, 15 August 2011, 5.

<sup>6</sup> *Migration Regulations 1994* (Cth) sch 1 item 1306.

<sup>7</sup> Jennifer Burn & Frances Simmons, ‘Rewarding Witnesses and Ignoring Victims: an evaluation of the new trafficking visa framework’ (2005) 24 *Immigration Review* 1, 7.

Since July 1, 2009, the Bridging F Visa is now valid for an initial 45 days and may be granted to an unlawful non-citizen that has been identified by the AFP or State or Territory police force as a ‘suspected victim of trafficking’. The visa is available regardless of whether the victim is willing or able to assist with an investigation and prosecution of a people trafficking offence. A law enforcement officer must, however, provide a support statement to the Department of Immigration confirming the identification of the applicant as a suspected victim and that ‘suitable arrangements have been made for the care, safety, and welfare of the applicant for the proposed period of the visa.’ A Bridging F Visa may also be granted to a ‘member of immediate family’.<sup>8</sup> Holders of the visa are entitled to access the Support Program, as are any valid visa holders, but are not entitled to work or receive social security benefits.<sup>9</sup>

A second Bridging F Visa may, in some circumstances, be granted for a further 45 days on a case-by-case basis, where a person is ‘willing but not able to assist police because of their current mental, physical or emotional state’.<sup>10</sup> While there is no further official guidance on how this is applied in practice, the AFP has stated that:

[T]he victim's interests are paramount at all times. So if they do not wish to participate—and you have to remember that they have just come out of a very traumatic situation—in those circumstances we are guided by the expertise of the support program providers. They are eligible immediately for another 45 days, and we would gently explain to them about the process that is involved—how to go about things. They do not necessarily have to go all the way through to a court process; they can provide intelligence to law enforcement.

But at some stage we have to make assessments on the information that they do provide us with. We have had circumstances, for example, where people have used false identities and made up stories in order to manipulate the system. So we are alive to that as well. It is just trying to get that middle ground right.<sup>11</sup>

The Bridging F Visa may also be granted, at the invitation of the Minister for Immigration, to a suspected victim of trafficking or immediate family member outside of Australia in order to return to Australia temporarily. Similarly, the Minister may grant the visa to a suspected victim of trafficking who holds a Criminal Justice Stay Visa in order to enable them to travel overseas for compelling and compassionate reasons and then return to Australia (by invitation).<sup>12</sup>

The visa may be valid until a set date (up to 45 days) or cancelled if the Department of Immigration is given written advice by a relevant police force that the visa holder is no longer identified as a suspected victim.<sup>13</sup> At the expiry or cancellation of the visa a suspected victim may be granted one of the other two visas outlined below, or deported from Australia. If deported from Australia, the victim may receive some assistance in returning and reintegrating into their country of origin

Despite the increase in the duration of the Bridging F Visa and the removal of the ‘of interest’ requirement, there remains some criticism of this visa class. Access to the visa is still largely contingent on the support of the police, who are required to confirm to the Department of Immigration that the applicant is a suspected victim of trafficking. The AFP has conceded that a mistrust and misunderstanding of law enforcement may result in some victims not seeking the Bridging F Visa. To

<sup>8</sup> A ‘member of immediate family’ is defined as a spouse or de facto partner, a dependent child, or a parent (if the BVF applicant is under 18 years old): *Migration Regulations 1994* (Cth) reg 1.12AA.

<sup>9</sup> *Migration Regulations 1994* (Cth) sch 1 item 1306.

<sup>10</sup> *Migration Regulations 1994* (Cth) sch 1 item 1306(3)(ii)(c); DIAC, *Procedures Advice Manual 3: Migration Act – Compliance and Case Resolution – Program visas – Bridging F visas*, 15 August 2011, s 2.2.

<sup>11</sup> Evidence to Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 29 August 2012, 33 (Commander Chris McDevitt, Manager, Special References, AFP).

<sup>12</sup> *Migration Regulations 1994* (Cth) pt 2 div 2.5 regs 2.20(14)-(15), 2.20B(2).

<sup>13</sup> *Migration Regulations 1994* (Cth) sch 2 cl 060.5.

this end, the AFP has stated that it sees a ‘significant role for NGOs’ in this field and appears cautious about changes that may remove the ability of the AFP to assess victims.<sup>14</sup> The definition of ‘trafficking in persons’ can also be difficult to apply in practice. There is also a risk that a genuine victim of trafficking not identified by law enforcement as meeting this definition will not be eligible for even the initial 45 days of protection.

Despite the 15-day increase in the duration of the visa, there remain concerns that the initial 45-day reflection period is insufficient. This is particularly so, given that trafficked persons often remain under the influence of their former captors and require a substantial period of re-adjustment in order to make decisions independently of this influence. Indeed, international best practice suggests that a victim is less likely to provide evidence under pressure.<sup>15</sup> Following her mission to Australia in 2011, the UN Special Rapporteur on Trafficking in Persons, especially Women and Children, Ms Joy Ngozi Ezeilo, relevantly observed that

the initial reflection period of 45 days is very short. Although an extended period of reflection is possible, in reality it was reported that a second Bridging Visa F will only be granted in situations where victims can evidence extreme trauma. A 45-day reflection period may not be an adequate time period for persons who have been trafficked to reflect and make critical decisions. An initial automatic reflection period of 90 days for all persons would be more appropriate and in accordance with article 6 of the Trafficking Protocol.<sup>16</sup>

Elizabeth Broderick has similarly argued that the Bridging F vVsa should be extended to three months on the basis that longer-term visas would assist law enforcement agencies in gaining the trust of traumatised persons, by providing them with greater security.<sup>17</sup>

### **A.I.2 Criminal Justice Stay Visa**

The Criminal Justice Stay Visa, a visa class not specifically created as part of the trafficking visa framework, allows the holder to stay in Australia for the purposes of the administration of criminal justice. It can be issued to the holder of the Bridging F Visa or any other person with or without a valid visa, where that person decides to assist police and prosecutors. Granting of this visa would, however, cancel any other substantive visa held by the person. The Criminal Justice Stay Visa may only be granted following the issuing of a Criminal Justice Stay Certificate, which the AFP must apply for. This certificate may be issued where the Commonwealth Attorney-General or an authorised official of the state or territory considers that the non-citizen should remain in Australia for the purposes of the administration of criminal justice. However, even if a certificate is in force, the Minister for Immigration still retains absolute discretion regarding the grant of a Criminal Justice Stay Visa. A holder of this visa is allowed to work, access Medicare, apply for Centrelink income support, and receive support under the Justice Support Stream of the Support Program. The visa holder is, however, prohibited from applying for any other visa (apart from the Protection visa under s 36 of the *Migration Act 1958* (Cth)) whilst they remain in Australia. Unlike the Bridging F Visa, dependents of victim’s are ineligible for the Criminal Justice Stay Visa.<sup>18</sup>

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<sup>14</sup> Evidence to Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 29 August 2012, 33 (Assistant Commissioner Ramzi Jabbour, National Manager, Crime Operations, AFP).

<sup>15</sup> Jennifer Burn & Frances Simmons, ‘Rewarding Witnesses and Ignoring Victims: an evaluation of the new trafficking visa framework’ (2005) 24 *Immigration Review* 6, 8.

<sup>16</sup> Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Addendum, Mission to Australia*, UN Doc A/HRC/20/18/Add.1 (18 May 2012) 14 [54].

<sup>17</sup> Elizabeth Broderick, ‘Trafficking: The Need for a Human Rights Based Approach’ (Speech at the Inaugural Anti-Trafficking Forum, University of Technology Sydney, 24 July 2008) <[http://www.hreoc.gov.au/about/media/speeches/sex\\_discrim/2008/20080724\\_trafficking.html](http://www.hreoc.gov.au/about/media/speeches/sex_discrim/2008/20080724_trafficking.html).

<sup>18</sup> *Migration Act 1958* (Cth) pt 2 div 4 sub-div (B)-(E).



Upon conclusion of the relevant investigation or prosecution, s 162 of the *Migration Act 1958* (Cth) requires the Commonwealth Attorney-General or the authorised state or territory official to cancel the Criminal Justice Stay Certificate, thus also cancelling the Criminal Justice Stay Visa.

The restrictive and discretionary nature of the process for the Criminal Justice Stay visa and the ineligibility of holders to apply for other visas (such as the Witness Protection Visa) can be seen as making the protection of trafficked persons overly (and perhaps unnecessarily) complicated.

### **A.I.3 Witness Protection (Trafficking) (Permanent) Visa**

The original trafficking visa framework introduced in 2004 included a two-stage visa process for victim-witnesses who had provided a ‘significant contribution’ to the prosecution by the Commonwealth Director of Prosecutions (CDPP) and would be in danger if they were returned to their country of origin. The former Witness Protection (Trafficking) (Temporary) Visa<sup>19</sup> ceased operation on June 30, 2009 and is now combined with the Witness Protection (Trafficking) (Permanent) Visa.<sup>20</sup> The temporary stage of the Witness Protection Visa process was not subject to an application process; its grant was contingent on the decision of both the Attorney-General and the Minister for Immigration; it was typically only granted after the conclusion of a police investigation or prosecution and was only valid for two years, at which point a decision regarding the grant of a further temporary or permanent visa had to be made. The changes in 2009 have had the effect of making all trafficking victims who qualify for witness protection, eligible for a permanent Australian visa. This offers greater security for these individuals as it removes the requirement for regular renewals of their temporary visas.

To grant a Witness Protection (Trafficking) (Permanent) Visa, the Commonwealth Attorney-General must certify that the victim of trafficking, who is in Australia, has met a number of criteria. If the victim can demonstrate that he or she would be in danger if returned to his or her home country, and that he or she has made a contribution to, and cooperated closely with, a prosecution or investigation of a person who is alleged to have trafficked a person or who was alleged to have forced a person into exploitative conditions, that individual may be invited to stay in Australia on this visa. The AFP may request a certificate up to 90 days after charging a suspect. Grant of the visa, however, does not depend on the completion or success of the prosecution, and may be made even if the CDPP decides not to prosecute the alleged trafficker. The applicant her or himself must also not be subject to any prosecutions in relation to trafficking offences. Immediate family members both inside and outside Australia are also eligible to apply for a Witness Protection (Trafficking) (Permanent) Visa.<sup>21</sup>

The visa entitles the holder to full work rights, eligibility for Medicare and income support, and access to the Justice Support Stream of the Support Program. The visa recipient can also travel to and enter Australia for five years after the visa is issued, after which they must apply for a resident return visa or gain citizenship if they wish to travel and re-enter Australia.<sup>22</sup>

In considering whether a person ‘would be in danger’ if returned to their home country, the Department of Immigration will consider the assistance the person has provided to law enforcement agencies, the probable capacity of the alleged trafficker or associates to exact retribution; the level of protection available in the applicant’s home country; and advice from relevant law enforcement agencies with expertise in trafficking matters, such as the AFP.<sup>23</sup>

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<sup>19</sup> Class UM, Subclass 787, under *Migration Regulations 1994* (Cth) reg 2.07 AJ.

<sup>20</sup> Class DH, Subclass 852, under *Migration Regulations 1994* (Cth) reg 2.07AK.

<sup>21</sup> *Migration Regulations 1994* (Cth) reg 2.07AK; AFP, *Practical Guide on Human Trafficking Investigations* (2012).

<sup>22</sup> *Migration Regulations 1994* (Cth) sch 2 subclass 852.511, reg 2.07AK.

<sup>23</sup> DIAC, *Procedures Advice Manual 3: Migration Act – Compliance and Case Resolution – Program visas – Witness Protection (Trafficking) (Permanent) visas*, 15 August 2011, s 7.



Prior to 2009 a victim was required to have made a ‘significant contribution’ to a trafficking investigation — an obligation which, at the time, was subject to severe criticism. This standard has been lowered to the provision of ‘a contribution’ to either an investigation or prosecution. It may be argued that this criterion is still too vague, incapable of offering a victim any sort of certainty as to whether he or she will receive appropriate protection after cooperating with authorities. The fact a victim cannot apply for this visa is also problematic, as the granting of protection is totally reliant on the discretion of law enforcement.

Importantly, this visa is now available before the conclusion of a relevant prosecution, after the activation of an ‘independent trigger’. A request may be triggered by ‘an event, such as the decision by the CDDP not to prosecute or by the expiry of a designated period of time related to the criminal justice process.’ Referral of a matter for prosecution to the CDDP or where the CDDP decides not to prosecute are prerequisites for the AFP to request a Witness Protection Certificate. The AFP may request a certificate up to 90 days from the date of the CDPP’s decision not to prosecute.<sup>24</sup> This ends the practice of forcing victims to await the conclusion of criminal trials before being able to access a permanent visa. Jennifer Burn and Frances Simmons suggest that eligibility for the permanent visa should be considered ‘six months after identification and every three months thereafter.’ They also recommend that the ‘[M]inister consider a recommendation from the AFP that a person be granted a permanent witness protection visa at any stage during the justice support stream’, such that a visa could be granted in ‘compelling circumstances’.<sup>25</sup>

#### **A.I.4 Evaluating the Australian Visa Framework**

The reforms made in 2009 were considered by many to be significant in improving access to support and protection for victims of trafficking. For example, Burn and Simmons, who led the criticisms of the 2004 framework, conclude that the framework now ‘prioritises the protection of trafficked people while strengthening the capacity of law enforcement to build relationships of trust with people who are willing to give evidence against their traffickers.’<sup>26</sup> Contrary to this assessment, it would appear a number of fundamental flaws remain, at least in the view of some commentators. The following sections examine these criticisms and highlight avenues for reform.

##### *A.I.4.1 Flaws in the criminal justice approach*

An emphasis on contact with law enforcement and participation in the criminal justice process clearly remains the underpinning feature of the trafficking visa framework. This criminal justice approach has been highlighted as problematic for three main reasons.

One of the core criticisms of the criminal justice approach is that it victims continue to be seen ultimately as tools for investigations and prosecutions, and not as victims of a serious crime. Jennifer Burn et al suggest that:

the danger of conceiving trafficking as a law enforcement problem instead of a human rights violation is that the status of the victim becomes less important than the ability of the victim to act as a witness in a criminal investigation or prosecution.<sup>27</sup>

To this end, it is often contended that right of victims to receive protection should be innate, rather than tied to their ability to participate and contribute to the criminal justice process.

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<sup>24</sup> AFP, *Practical Guide on Human Trafficking Investigations* (2012).

<sup>25</sup> Jennifer Burn and Frances Simmons, ‘Prioritising protection – A new visa framework for trafficked people’ (2009) 41 *Immigration Review* 3, 7-8.

<sup>26</sup> Jennifer Burn and Frances Simmons, ‘Prioritising protection – A new visa framework for trafficked people’ (2009) 41 *Immigration Review* 3.

<sup>27</sup> Jennifer Burn, Sam Blay and Frances Simmons, ‘Combating Human Trafficking: Australia’s Responses to Modern Day Slavery’ (2005) 79 *Australian Law Journal* 543, 549.

Secondly, there is a general discontent regarding the failure of the criminal justice approach to consider that the ability of victims to cooperate will often be limited by the trauma they have experienced, mistrust or misunderstanding of law enforcement, and a fear of reprisals against them or their family if they are returned to their country of origin. In relation to the fears of trafficked persons in engaging with law enforcement bodies, Marianna Leishman notes: 'because trafficking in its nature involves a significant abuse of trust and betrayal, cooperation with officials is a similar leap of faith and trust that can be particularly daunting.'<sup>28</sup> The way in which the framework calls on victims of trafficking to identify themselves to law enforcement in order to be granted the Bridging F Visa is clearly problematic in this sense. Furthermore, a trafficked person suffering severe trauma, who is unable to cooperate with law enforcement, may be able to stay in Australia for a maximum of 90 days on the Bridging F Visa. After this time, however, the victim will have no other option available under the trafficking visa framework but to return home or face a complicated and lengthy application process in order to seek a Protection visa.

Finally, the criminal justice approach risks further traumatising victims by making permanent protection largely contingent on involvement in investigations and prosecutions. The requirement for these persons to potentially testify in court if called upon exposes them to the risk of painful courtroom experiences, such as having their character and experiences questioned during cross-examination. The proceedings themselves can also be a source of confusion and fear for victims, especially if they are unfamiliar with judicial procedures. Lengthy criminal justice proceedings, or the repeated delay or rescheduling of proceedings, may also contribute to uncertainty about the victim's long-term legal and immigration status in Australia. Furthermore, the common reality of trafficking also puts victims and their families at risk of reprisal if they testify against their traffickers. It is thus somewhat illogical that victims, in order to receive protection, often need to expose themselves to the harm they are seeking protection from.

#### A.I.4.2 *Conflict with international best practice*

While the trafficking visa program meets the minimum requirements of the *Trafficking in Persons Protocol*, it fails to meet a range of international best practice material. For example, Principle 8 of the UN High Commissioner for Human Rights' *Recommended Principles and Guidelines on Human Rights and Human Trafficking* recommends that States ensure 'trafficked persons are protected from further exploitation and harm' and that 'such protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings.'<sup>29</sup> The UNODC *Model Law against Trafficking in Persons* similarly recommends that:

Trafficked persons who do not wish or do not dare to make a declaration as witnesses – or are not required as witnesses because they possess no relevant information or because the perpetrators cannot be taken into custody in the destination country – require equally adequate protection measures as trafficked persons who are willing and able to testify.<sup>30</sup>

#### A.I.4.3 *Rejecting the 'floodgate' argument*

There appears to be a belief held by the Department of Immigration and the AFP that a move towards offering permanent or temporary protection for all victims of trafficking, regardless of their level of cooperation, would be open to manipulation. Marianne Leishman and also Jennifer Burn et al refute the 'floodgate argument', noting that in countries where visas for trafficked persons are not linked to a

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<sup>28</sup> Marianna Leishman. 'Human trafficking and sexual slavery: Australia's response' (2007) 27 *Australian Feminist Law Journal* 193, 200.

<sup>29</sup> Office of the High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council*, UN Doc E/2002/68/Add.1 (20 May 2002) 1 [8].

<sup>30</sup> UNODC & UN.GIFT, *Model Law against Trafficking in Persons* (2009) 75.

criminal justice process there has not been any significant abuse of trafficking visas by fraudulent claims.<sup>31</sup> Burn and Simmons argue that wider protection for victims can be advantageous as

[s]tates who issue temporary residence permits have a higher rate of success prosecuting traffickers than states that do not; the success rate is more pronounced if the residence permits are available to all trafficking victims, not simply those willing to testify against traffickers.<sup>32</sup>

#### A.I.4.4 *Definitional issues*

Mary Crock and Laurie Berg highlight how the complex ‘definition of trafficking in persons’ is problematic in the context of the trafficking visa framework:

[T]he definitional thresholds of ‘trafficked persons’ tend to entrench certain artificial distinctions (such as consent/coercion, smuggling/trafficking, free labour/exploitation) which can fail to capture the complex reality of the lives of many migrant workers. For instance, social support and permanent visa status may be available to a migrant who has been coerced into exploitative work without consent, but denied a migrant who felt compelled to voluntarily accept exploitative work. Support and status may be given to a migrant transferred into Australia for the purpose of exploitation by denied a migrant who travelled to Australia independently and found herself working in abusive conditions. [...] [T]he dominance of this paradigm has meant that many marginalised migrants are relegated into categories that allow some to slip unfairly through the protection net. Seen first and foremost as ‘victims’, or witnesses assisting a prosecution, some will be eligible for social assistance. However, those characterised as consenting ‘economic migrants’ who have submitted to voluntarily exploitative working conditions find themselves ineligible for social or legal support. Often, the line between ‘victim’ and ‘villain’ can become blurred in the context of irregular migration.<sup>33</sup>

#### A.I.4.5 *Recommendations for reform*

Recommendations for reform to the Australian visa system are generally founded on a desire to institute a generalist visa program for all victims that does not require criminal justice participation as a precondition for assistance. For example, Amnesty International criticises the extent of the 2009 reforms, noting that the requirement for victims to make ‘a contribution’ to a criminal investigation in order to receive a permanent visa is inappropriate, due to the trauma suffered by victims of this crime.<sup>34</sup> Others, such as Burn and Simmons, seem to be satisfied that the 2009 reforms have delivered greater protection to victims while recognising that law enforcement needs to be able to assess the legitimacy of victims and garner their cooperation.<sup>35</sup>

It is more likely that this middle ground approach will prevail in Australia due to concerns from the AFP and Department of Immigration that the generalist approach is open to manipulation and fraud. It should be considered, however, whether the risk of fraud could be countered with adequate screening (as is done in relation to a wide range of other visa classes) such that protection can be offered to a wider range of victims. It seems unlikely that de-linking the requirement of participation in the criminal justice process will lead to an unmanageable rise in fraudulent claims for protection. The

<sup>31</sup> Jennifer Burn, Sam Blay and Frances Simmons, ‘Combating human trafficking: Australia’s responses to modern day slavery’ (2005) 79(9) *Australian Law Journal* 543, 551; Marianna Leishman, ‘Human trafficking and sexual slavery: Australia’s response’ (2007) 27 *Australian Feminist Law Journal* 193, 201.

<sup>32</sup> Jennifer Burn & Frances Simmons, ‘Rewarding Witnesses and Ignoring Victims: an evaluation of the new trafficking visa framework’ (2005) 24 *Immigration Review* 6, 11, citing Jenna Demir, *Trafficking of Women for Sexual Exploitation: A Gender-Based Well-Founded Fear?* (2003) 40.

<sup>33</sup> Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (2011) 435 [14.79].

<sup>34</sup> Amnesty International ‘New permanent visas still do not fully protect trafficking victims’ (19 June 2009) <[www.amnesty.org.au/news/comments/21207](http://www.amnesty.org.au/news/comments/21207)>.

<sup>35</sup> Jennifer Burn and Frances Simmons, ‘Prioritising protection – A new visa framework for trafficked people’ (2009) 41 *Immigration Review* 3.

convoluted and legally complex alternative pathways to protection under refugee law suggest that a streamlined approach to protection claims for victims of trafficking is needed.

There are, however, some less fundamental changes that should be considered. The Australian Human Rights Commission has rightly argued that the framework should be amended ‘to ensure every person who is identified as a victim of child trafficking and who would face danger if returned to their country of origin is eligible for a permanent visa, regardless of whether they participate in law enforcement processes.’<sup>36</sup> The UN Special Rapporteur has also noted that there is some concern associated with the visa titles, which

specify the trafficked status of the holder, potentially stigmatize victims by affecting their ability to find employment and integrate into an Australian community. A human rights-based approach requires placing the needs of all victims at the core of any response, and visa titles should be adjusted accordingly so as not to inhibit victims’ recovery and rehabilitation.<sup>37</sup>

As previously stated, a number of commentators have also pushed for an increase in the duration of the Bridging F Visa to three months to ensure victims have an appropriate amount of time to recover and reflect on options for their future. Finally, allowing victims to initiate the application process for a Witness Protection (Trafficking) (Permanent) visa (as opposed to waiting for an invitation) or implementing standard and regular reviews of the status of the victim with a view to whether a protection visa is required should also be considered.

## A.II The Role of Non-governmental Organisations in Australia

The following outline and analysis is based on a recent review on ‘The Role of Non-Governmental Organisations in Australia’s Anti-Trafficking in Persons Framework’ conducted by Andreas Schloenhardt and Rose E Hunt-Walsh and published in the *University of Western Australia Law Review*, Volume 36, Issue 1, pages 57–91.

This analysis focuses exclusively on the work of Australian NGOs in Australia. While it is recognised that some NGOs conduct activities overseas to prevent trafficking in persons to Australia, the emphasis here is on the work that can be accounted for and analysed in the domestic context of Australia’s role as a destination for trafficking.

### A.II.1 Key Actors

The following analysis focuses on eight NGOs that actively conduct anti-trafficking work in Australia. These are:

- The Australian Red Cross;<sup>38</sup>
- The Salvation Army: bearing an evangelical, Christian-based mandate to provide community assistance services that cover a broad range of social issues;<sup>39</sup>
- Anti-Slavery Australia (formerly Anti-Slavery Project): a specialist legal centre focusing on slavery, trafficking, and extreme labour exploitation that is part of the Faculty of Law at the University of Technology, Sydney;<sup>40</sup>

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<sup>36</sup> Australian Human Rights Commission, *A Human Rights Approach to Trafficking in Persons: Australian Human Rights Commission Submission to the UN Special Rapporteur on Trafficking in Persons Especially Women and Children, Australian Mission, 17-29 November 2011* (2011), 10 [24].

<sup>37</sup> Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Addendum, Mission to Australia*, UN Doc A/HRC/20/18/Add.1 (18 May 2012) 15 [58].

<sup>38</sup> Australian Government, *Anti-Human Trafficking Community Resource* (AFP, 2011) 8.

<sup>39</sup> The Salvation Army, *Our Services* (2012) <<http://salvos.org.au/about-us/our-services>>; The Salvation Army, *Our Mission* (2012) <<http://salvos.org.au/about-us/overview/our-mission.php>>; Australian Government, *Anti-Human Trafficking Community Resource* (AFP, 2011) 39.

- Child Wise: the Australian branch of ECPAT (End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes) International that specialises in preventing child sexual abuse and exploitation;<sup>41</sup>
- The Josephite Counter-Trafficking Project (JCTP): a congregational project of the Sisters of St Joseph of the Sacred Heart which was established in 2005 to promote the spiritual, physical and emotional development of people who have been trafficked into Australia;<sup>42</sup>
- Australian Catholic Religious Against Trafficking in Humans (ACRATH): an organisation incorporated into Catholic Religious Australia that undertakes lobbying and information campaigns on trafficking issues;<sup>43</sup>
- Scarlet Alliance: the peak body representing sex workers in Australia with a focus on defending the self-determination and human rights of migrant sex workers in Australia;<sup>44</sup> and
- Project Respect: a community-based organisation that seeks to empower and support women in the sex industry, which includes work with women trafficked into Australia.<sup>45</sup>

Other NGOs may conceivably come into contact with victims of trafficking in Australia and thus take part in anti-trafficking activities. This may include, for instance, as sexual assault refuges,<sup>46</sup> sex-worker advocacy organisations,<sup>47</sup> and immigration advice and advocacy services.<sup>48</sup> Such organisations are not further included into this analysis as they do not explicitly include trafficking as an organisational priority.

## A.II.2 Provision of Victim Assistance: Outline

### A.II.2.1 Cooperative measures with the Australian Government

The most significant and most visible means by which the Australian Government and NGOs cooperate to provide victim assistance is through the Australian Red Cross, which has been commissioned to deliver on-the-ground case management services for the Australian Government's Support for Victims of People Trafficking Program. This Program is administered through the Office for Women, a federal government department. Obtained through a tender process in March 2009, the Australian Red Cross provides a 24-hour a day, 7 days a week 'national response' across Australia to assist victims of trafficking referred to them by the AFP. Support consists of an individualised case management, accommodation assistance, counselling and mental health support, medical treatment,

<sup>40</sup> Australia, Anti-People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government's Response 1 June 2010–30 June 2011* (Commonwealth of Australia, 2011) 45-46; Australian Government, *Anti-Human Trafficking Community Resource* (AFP, 2011) 1-2.

<sup>41</sup> Child Wise, *Child Wise Annual Report 2009/2010, Protecting Children's Future* (Child Wise, 2010) 1.

<sup>42</sup> Sisters of Saint Joseph of the Sacred Heart, *What We Are Doing: Josephite Counter-Trafficking Project* (2009) <<http://www.sosj.org.au/what-we-are-doing/index.cfm?loadref=78>>; Margaret Ng, *Direct Services and Support of Trafficking in Australia* (2011) JCTP <[http://www.sosj.org.au/uploads/\\_cknw/files/TRAFFICKING%20IN%20AUSTRALIA.pdf](http://www.sosj.org.au/uploads/_cknw/files/TRAFFICKING%20IN%20AUSTRALIA.pdf)> 4–5.

<sup>43</sup> ACRATH, *About Us* (2011) <<http://acrath.org.au/about>>; Australian Government, *Anti-Human Trafficking Community Resource* (AFP, 2011) 4-5.

<sup>44</sup> Scarlett Alliance, 'Briefing Paper October 2010 – Trafficking Prevention in Australia' (2010) <[http://www.scarletalliance.org.au/library/migration\\_briefing2010b](http://www.scarletalliance.org.au/library/migration_briefing2010b)>; Australian Government, *Anti-Human Trafficking Community Resource* (AFP, 2011) 40.

<sup>45</sup> Australia, Anti-People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government's Response 1 June 2010–30 June 2011* (Commonwealth of Australia, 2011) 49; Australian Government, *Anti-Human Trafficking Community Resource* (AFP, 2011) 35-36.

<sup>46</sup> For example, Canberra Emergency Accommodation Service, NSW Women's Refuge Resource Centre, Victorian Centre Against Sexual Assault, and Women's Domestic Violence Crisis Service of Victoria.

<sup>47</sup> For example, Sex Worker Outreach Projects (SWOP) in NSW, ACT and Northern Territory, South Queensland Crimson Coalition, United Sex Workers North Queensland, South Australian Sex Industry Network (SIN), Tasmanian Scarlet Alliance CASH Project, Resourcing Health and Education in the Sex Industry (RhED), and Western Australian Magenta.

<sup>48</sup> For example, the Refugee and Immigration Legal Centre and Asylum Seeker Resource Project.



income support, legal advice, skills development training, and social support. The Australian Red Cross also provides referrals to other relevant support services, legal advice, and training services.<sup>49</sup> Prior to March 2009, support to victims of trafficking in persons was provided by BSIL Southern Edge Training. Since the inception of the Government's Support for Victims of People Trafficking Program in January 2004 until June 30, 2011, 184 persons, including 165 women and 16 men, have received assistance under this program.<sup>50</sup>

Project Respect also receives funding to provide victim support services, including shelter, peer support activities, case management, and education, on behalf of the Victorian Government.<sup>51</sup> It is not clear whether these services are provided independently by Project Respect or provided in cooperation with government agencies. Other NGOs may receive referrals from government departments and law enforcement agencies, especially if a client of the Support for Victims of People Trafficking Program requires specialised assistance.<sup>52</sup>

### A.II.2.2 Housing

There are two shelter operations currently run by Australian NGOs providing emergency accommodation to victims of trafficking. Samaritan Accommodation is a dedicated safe-house in Sydney that is jointly operated by the Salvation Army and JCTP.<sup>53</sup> It provides apartment-style housing for up to twelve months with a capacity for ten single migrant women over 18 years of age who have experienced trafficking in persons.<sup>54</sup> The total number of victims who have been assisted this way is not available, though in August 2010 it was reported that 47 individuals have received housing assistance since the facility opened in January 2008.<sup>55</sup> An organisation named Starfish Ministries is currently seeking funding to set up a second accommodation centre for trafficked women in Sydney and provide accommodation for up to two years.<sup>56</sup> Project Respect runs an accommodation service in Melbourne for women who have been trafficked in Victoria and is able to accommodate four women at any one time, who stay for an average of four months.<sup>57</sup> The staff at Samaritan Accommodation and Project Respect also provide specialised, comprehensive and culturally appropriate casework assistance to shelter residents.<sup>58</sup> Other community crisis shelters for men and

<sup>49</sup> Australia, Anti-People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government's Response 1 June 2010–30 June 2011* (Commonwealth of Australia, 2011) 30-31; Australian Red Cross, *Support for trafficked people* (2012) <<http://www.redcross.org.au/support-for-trafficked-people.aspx>>.

<sup>50</sup> Australia, Anti-People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government's Response 1 July 2010–30 June 2011* (Commonwealth of Australia, 2011) 33–34.

<sup>51</sup> Correspondence between Kelly Hinton, Project Respect and Rose Hunt, 25 May 2011.

<sup>52</sup> Australian Red Cross, *Support for trafficked people* (2012) <<http://www.redcross.org.au/support-for-trafficked-people.aspx>>; cf Margaret Ng, *Direct Services and Support of Trafficking in Australia* (2011) JCTP <[http://www.sosj.org.au/\\_uploads/\\_cknw/files/TRAFFICKING%20IN%20AUSTRALIA.pdf](http://www.sosj.org.au/_uploads/_cknw/files/TRAFFICKING%20IN%20AUSTRALIA.pdf)> 4–5.

<sup>53</sup> Sisters of Saint Joseph of the Sacred Heart, *What We Are Doing: Samaritan Accommodation* (2009) <<http://www.sosj.org.au/what-we-are-doing/index.cfm?loadref=131>>.

<sup>54</sup> Jade Lindley & Kristen Davis, *Pacific Trafficking in Persons Forum, 2–4 September 2009, Wellington* (2009) Australian Institute of Criminology, <[http://www.aic.gov.au/events/aic%20upcoming%20events/2009/~media/conferences/2009-peopletrafficking/ptp\\_outcome\\_report.pdf](http://www.aic.gov.au/events/aic%20upcoming%20events/2009/~media/conferences/2009-peopletrafficking/ptp_outcome_report.pdf)> 59; Newtown Neighbourhood Centre Inc, *Supported Accommodation* (1 Feb 2010) <[http://www.newtowncentre.org/\\_pdfs/supported\\_accom.pdf](http://www.newtowncentre.org/_pdfs/supported_accom.pdf)> 4; Lauren Martin, 'A Safe Haven' (May 2008) *Pipeline* 28, 29.

<sup>55</sup> Jenny Stanger, 'Trafficking in Persons 101 & Samaritan Accommodation' (Presentation at the *NSW Council of Social Services 75<sup>th</sup> Annual Conference*, Sydney, 5 August 2010).

<sup>56</sup> Starfish Ministries Australia, *Transition Centre for Trafficked Women* (undated) <<http://www.starfishministries.org.au/index.php?page=transition-centre-for-trafficked-women>>.

<sup>57</sup> Project Respect, *Our Work* (2008) <[http://projectrespect.org.au/our\\_work](http://projectrespect.org.au/our_work)>; Drugs and Crime Prevention Committee, Parliament of Victoria, *Inquiry into People Trafficking for Sex Work* (2010) 202.

<sup>58</sup> Jade Lindley & Kristen Davis, *Pacific Trafficking in Persons Forum, 2–4 September 2009, Wellington* (2009) Australian Institute of Criminology,



women may also provide emergency accommodation for victims of trafficking, however, none reported or advertised as such.

### A.II.2.3 *Counselling and information about legal rights*

Project Respect, Samaritan Accommodation, JCTP, and ACRATH all purport to provide counselling services, information, and referrals about other assistance providers to victims of trafficking.<sup>59</sup> JCTP's counselling, mentoring, and 'accompaniment' services are specifically provided by 'Asian women, or other women who have had long experience in Asia or in working in cross-cultural situations [...] to women of Asian origin who have been trafficked into Australia.'<sup>60</sup> It is not clear how many individuals these services are provided for or, in the instance of ACRATH, where the services are provided.

Anti-Slavery Australia is currently the only specialist legal service, also including qualified solicitors and migrant agents, that provides trafficked persons with advice about their rights under Australian immigration, criminal, civil, and labour law and assists victims with legal representation.<sup>61</sup> It has been reported that in 2010–11, Anti Slavery Australia assisted more than 70 individuals.<sup>62</sup> 'Salvos Legal', a full-service law firm established in 2010 as part of The Salvation Army, also provides advice to victims in criminal, immigration, civil, and family law matters on a pro bono basis.<sup>63</sup>

### A.II.2.4 *Medical, psychological, and material assistance*

From the available open-source information, it appears that no NGO in Australia provides psychological or medical assistance specifically for victims of trafficking in persons. Some victims of trafficking may be able to access a network of NGOs that provide health services to workers in the sex industry throughout Australia, however, these are not specifically targeted at trafficked persons.<sup>64</sup>

Project Respect and The Salvation Army provide some material assistance to victims of trafficking, though the nature and extent of such assistance are not further specified.<sup>65</sup> Such assistance may conceivably be offered by NGOs in the course of providing other victim support services such as housing or casework assistance; this is, however, not explicitly stated by these organisations.

<[http://www.aic.gov.au/events/aic%20upcoming%20events/2009/~media/conferences/2009-peopletrafficking/ptp\\_outcome\\_report.pdf](http://www.aic.gov.au/events/aic%20upcoming%20events/2009/~media/conferences/2009-peopletrafficking/ptp_outcome_report.pdf)> 59; Project Respect, *Our Work* (2008) <[http://projectrespect.org.au/our\\_work](http://projectrespect.org.au/our_work)>; Drugs and Crime Prevention Committee, Parliament of Victoria, *Inquiry into People Trafficking for Sex Work* (2010) 202.

<sup>59</sup> Anti-Slavery Australia, *Fact Sheet #12: What is the Community Response to Human Trafficking?* (2011) <<http://www.antislavery.org.au/resources/fact-sheets/212-fact-sheet-12-what-is-the-community-response-to-human-trafficking.html>>; Jade Lindley & Kristen Davis, *Pacific Trafficking in Persons Forum, 2–4 September 2009, Wellington* (2009) Australian Institute of Criminology, <[http://www.aic.gov.au/events/aic%20upcoming%20events/2009/~media/conferences/2009-peopletrafficking/ptp\\_outcome\\_report.pdf](http://www.aic.gov.au/events/aic%20upcoming%20events/2009/~media/conferences/2009-peopletrafficking/ptp_outcome_report.pdf)> 59; Sisters of Saint Joseph of the Sacred Heart, *What We Are Doing: Samaritan Accommodation* (2009) <<http://www.sosj.org.au/what-we-are-doing/index.cfm?loadref=131>>; ACRATH, *What we do* (1 Mar 2011) <<http://acrath.org.au/about/what-we-do/>>.

<sup>60</sup> Sisters of Saint Joseph of the Sacred Heart, *What We Are Doing: Josephite Counter-Trafficking Project* (2009) <<http://www.sosj.org.au/what-we-are-doing/index.cfm?loadref=78>>.

<sup>61</sup> Anti-Slavery Australia, *About Us* (2011) <<http://www.antislavery.org.au/what-we-do/about-us.html>>.

<sup>62</sup> Australia, Anti-People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government's Response 1 July 2010–30 June 2011* (Commonwealth of Australia, 2011) 46.

<sup>63</sup> Salvos Legal, *About Us* (2012) <<http://salvos.org.au/salvoslegal/about-us/>>.

<sup>64</sup> Fiona David, *Trafficking of Women for Sexual Purposes* (Australian Institute of Criminology, 2008) 19.

<sup>65</sup> Project Respect, *Annual Report 2009/2010* (2010) <[http://projectrespect.org.au/sites/projectrespect.org.au/files/PR\\_AnnReport10\\_Final\\_sml.pdf](http://projectrespect.org.au/sites/projectrespect.org.au/files/PR_AnnReport10_Final_sml.pdf)> 16; Australian Government, *Anti-Human Trafficking Community Resource* (AFP, 2011) 39

### A.II.2.5 *Employment and training opportunities*

Some NGOs are currently seeking to develop and implement alternative skills and vocational programs for individuals recovering from trafficking situations. Project Respect has received seed funding to establish a ‘noodle bar’ staffed by former trafficked women in Melbourne. ACRATH is seeking to support micro-financing projects for trafficked persons in Australia.<sup>66</sup> JCTP offers English language, computer training, and beauty therapy courses.<sup>67</sup>

## A.II.3 **Provision of Victim Assistance: Assessment**

### A.II.3.1 *Strengths of NGO assistance*

The Australian Red Cross provides a non-governmental façade to a government-funded operation and, in doing so, makes the Australian Government’s Support for Victims of People Trafficking Program more approachable for and empathetic towards victims of trafficking. Given the apprehensiveness, fear, or lack of trust that victims of trafficking often have in government agencies, an appearance of independence is a more appropriate means of delivering services and offering assistance and to victims. It also ensures that the assistance measures are complemented by a depth of expertise in issues of trafficking which NGOs obtain through their ongoing involvement with victims of trafficking.<sup>68</sup> This is imperative insofar as stigmatisation, stereotyping, and lack of knowledge about trafficking can impact significantly on how victim recovery services are provided.<sup>69</sup> Although the Australian Red Cross has only offered these services on behalf of the Government since 2009 (services were previously provided by a private contractor), the organisation has a long history of providing appropriate and sensitive care to the most vulnerable members of the community<sup>70</sup> and is part of a global network of national Red Cross organisations that have extensive experience in addressing trafficking in persons.<sup>71</sup> A difficulty faced by the Australian Red Cross is its inability to publically lobby the government for changes to the Support for Victims of Trafficking Program.

NGOs also have the ability to provide a nuanced approach to assisting victims of trafficking individually and independently. For example, Project Respect’s close relationship with sex workers means it uses its understanding of the complexities of sex work to provide ‘friendly, non-judgmental’ counselling.<sup>72</sup> The degree of cultural sensitivity and language competence provided by some frontline NGOs can also build trust and rapport with victims of trafficking and bring an added dimension to accommodate the particularities of their cases; one example are the counselling services provided for Asian victims of trafficking in Australia by Asian JCTP staff in their first language.<sup>73</sup>

Furthermore, the instinctive ideological positioning of many NGOs – a common thread amongst the NGOs studied in this article is a humanitarian imperative to their work – means they are also in a position to provide a human rights based or ‘victim oriented’ approach to assisting victims of

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<sup>66</sup> Drugs and Crime Prevention Committee, Parliament of Victoria, *Inquiry into People Trafficking for Sex Work* (2010) 205.

<sup>67</sup> Margaret Ng, *Direct Services and Support of Trafficking in Australia* (2011) JCTP <[http://www.sosj.org.au/uploads/\\_cknw/files/TRAFFICKING%20IN%20AUSTRALIA.pdf](http://www.sosj.org.au/uploads/_cknw/files/TRAFFICKING%20IN%20AUSTRALIA.pdf)> 5.

<sup>68</sup> Fiona David, *Trafficking of Women for Sexual Purposes* (Australian Institute of Criminology, 2008) 70.

<sup>69</sup> *Ibid* 66.

<sup>70</sup> Australian Red Cross, *About Us* (2012) <[http://www.redcross.org.au/aboutus\\_default.htm](http://www.redcross.org.au/aboutus_default.htm)>.

<sup>71</sup> See, for example, Claudia Aradau, *Good Practices in Response to Trafficking in Human Beings: Cooperation Between Civil Society and Law Enforcement in Europe* (Danish Red Cross, 2005) <[http://www.ungift.org/docs/ungift/pdf/knowledge/1088\\_drk\\_human\\_manual\\_web%20\(2\).pdf](http://www.ungift.org/docs/ungift/pdf/knowledge/1088_drk_human_manual_web%20(2).pdf)>.

<sup>72</sup> Project Respect, *Support for Women* (2008) <[http://projectrespect.org.au/our\\_work/support](http://projectrespect.org.au/our_work/support)>.

<sup>73</sup> Fiona David, *Trafficking of Women for Sexual Purposes* (Australian Institute of Criminology, 2008) 65; Sisters of Saint Joseph of the Sacred Heart, *What We Are Doing: Josephite Counter-Trafficking Project* (2009) <<http://www.sosj.org.au/what-we-are-doing/index.cfm?loadref=78>>; Marianna Leishman, ‘Trafficking in Persons and Sexual Slavery: Australia’s Response’ (2007) 27 *Australian Feminist Law Journal* 193, 203.

trafficking in persons.<sup>74</sup> This is in contrast to the victimisation and criminalisation focus that tends to pervade efforts by government and law enforcement agencies.<sup>75</sup> The victim oriented approach involves moving away from viewing trafficked persons as objects, potential witnesses or helpless victims, and instead treating them as autonomous individuals bearing human rights and civil liberties.<sup>76</sup> It is widely recognised that treatment of victims emanating from this approach – such as helping them retake control of their lives,<sup>77</sup> respecting their decisions and choices,<sup>78</sup> and providing victim recovery services that fit with the immediate needs and rights of individuals rather than the needs of a criminal investigation<sup>79</sup> – are positive benchmarks for victim support programs. Recognising and prioritising the needs of victims contributes to the success of and propensity for criminal investigations as it increases the willingness of victims to engage with the criminal justice system.<sup>80</sup> It may also ultimately prove less costly than dealing with the needs of victims at a later stage, especially where child victims are concerned.<sup>81</sup>

Links and referrals between government services and NGO-provided services are encouraging a multi-faceted response to providing victim assistance. This is important because the individual needs of

- <sup>74</sup> Elizabeth Broderick, ‘Trafficking: the Need for a Human Rights Based Approach’ (Speech delivered at the *Inaugural Anti-Trafficking Forum*, University of Technology Sydney, 24 July 2008) <[http://www.hreoc.gov.au/about/media/speeches/sex\\_discrim/2008/20080724\\_trafficking.html](http://www.hreoc.gov.au/about/media/speeches/sex_discrim/2008/20080724_trafficking.html); Elizabeth Broderick, ‘Slavery in 21st Century Australia: a Human Rights Challenge’ (Speech given at the seminar *Modern Day Slavery in Australia: The Queen v Wei Tang*, 16 October, 2008) <[http://www.hreoc.gov.au/about/media/speeches/sex\\_discrim/2008/20081014\\_slavery.html](http://www.hreoc.gov.au/about/media/speeches/sex_discrim/2008/20081014_slavery.html)>; Marie Segrave & Sanja Milivojevic, ‘Sex Trafficking: A New Agenda’ (2005) 24(2) *Social Alternatives* 11, 12; Sarah Steele, ‘Trafficking in People: The Australian Government's Response’ (2007) 32(1) *Alternative Law Journal* 18, 20; Jade Lindley & Kristen Davis, *Pacific Trafficking in Persons Forum, 2–4 September 2009, Wellington* (2009) Australian Institute of Criminology, <[http://www.aic.gov.au/events/aic%20upcoming%20events/2009/~media/conferences/2009-peopletrafficking/ptp\\_outcome\\_report.pdf](http://www.aic.gov.au/events/aic%20upcoming%20events/2009/~media/conferences/2009-peopletrafficking/ptp_outcome_report.pdf)> 59.
- <sup>75</sup> Shivaun Scanlan, ‘The Identification of Trafficked Persons in the Face of Conflicting Agendas’ (Paper presented at the conference *Assistance to Victims of Trafficking: We Can Do Better*, OSCE, Vienna, 10–11 September 2007) <<http://www.osce.org/what/trafficking/60585>> 2; Sarah Steele, ‘Trafficking in People: The Australian Government's Response’ (2007) 32(1) *Alternative Law Journal* 18, 20; Jennifer Burn & Frances Simmons, *The Anti-Slavery Project Submission to the National Consultation on Human Rights* (Anti-Slavery Project, University of Technology Sydney, 2009) 28.
- <sup>76</sup> Ann D Jordan, ‘Human Rights or Wrongs? The Struggle for a Rights-Based Response to Trafficking in Human Beings’ (2002) 10(1) *Gender and Development* 28, 30; Marianna Leishman, ‘Trafficking in Persons and Sexual Slavery: Australia's Response’ (2007) 27 *Australian Feminist Law Journal* 193, 198.
- <sup>77</sup> Ann D Jordan, ‘Human Rights or Wrongs? The Struggle for a Rights-Based Response to Trafficking in Human Beings’ (2002) 10(1) *Gender and Development* 28, 30; Marie Segrave et al, *Sex Trafficking: International Context and Response* (Willan Publishing, 2009) 95.
- <sup>78</sup> Fiona David, *Trafficking of Women for Sexual Purposes* (Australian Institute of Criminology, 2008) 30–31; Marie Segrave, ‘Surely Something is Better than Nothing? The Australian Response to the Trafficking of Women into Sexual Servitude in Australia’ (2004) 16(1) *Current Issues in Criminal Justice* 85, 87.
- <sup>79</sup> Jade Lindley & Kristen Davis, *Pacific Trafficking in Persons Forum, 2–4 September 2009, Wellington* (2009) Australian Institute of Criminology, <[http://www.aic.gov.au/events/aic%20upcoming%20events/2009/~media/conferences/2009-peopletrafficking/ptp\\_outcome\\_report.pdf](http://www.aic.gov.au/events/aic%20upcoming%20events/2009/~media/conferences/2009-peopletrafficking/ptp_outcome_report.pdf)> 59; Marie Segrave et al, *Sex Trafficking: International Context and Response* (Willan Publishing, 2009) 95–96.
- <sup>80</sup> UN Conference of the Parties to the United Nations Convention against Transnational Organised Crime, *Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime: consolidated information received from States for the second reporting cycle*, UN Doc CTOC/COP/2006/6/Rev.1 (9 Sep 2008) 7; Marianna Leishman, ‘Trafficking in Persons and Sexual Slavery: Australia's Response’ (2007) 27 *Australian Feminist Law Journal* 193, 203; UNODC, *Model Law Against Trafficking in Persons* (UN, 2009) 44.
- <sup>81</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (UN, 2004) 283.

victims of trafficking are highly variable and complex on account of the degree to which control, physical violence, and psychological abuse have been exerted upon them.<sup>82</sup> It is indeed unrealistic for one service provider alone to try and meet the needs of the very diverse types of victims and adequately respond to great range of experiences they encountered. Furthermore, through building strong links with the Australian Government's victim support response, the community-run services will be better able to provide services currently not offered by government services.<sup>83</sup>

It is evident that in Australia, NGOs are filling particular gaps left by the Australian Government's Support for Victims of People Trafficking Program. Importantly, NGOs provide assistance to individuals who are unable or unwilling to access the official government support scheme.<sup>84</sup> Persons who are suspected to be victims of trafficking can access the Assessment Stream of the government's support program for 45 days.<sup>85</sup> To receive assistance past that period, victims must be willing or able to cooperate with the AFP in prosecution of their traffickers. If they agree to do so, victims will be able to obtain assistance under the Justice Support Stream of the program, for 'until the investigation and prosecution of a people trafficking matter is finalised'.<sup>86</sup> There are numerous reasons why victims choose to not to cooperate with law enforcement agencies and not participate in the prosecution of their traffickers, born out of fear of retaliation, trauma, a desire to go home or get on with their lives, wanting to avoid intrusive questions, or an inability and unwillingness to describe – and thus relive – their experiences.<sup>87</sup> Other victims may be willing to assist police, but may not be able to provide relevant or sufficient evidence. Official statistics published by the Australian Government in 2010 state that to this day, 80 percent of suspected victims were willing and able to assist in an investigation or prosecution,<sup>88</sup> though it is difficult to gauge just how representative this figure truly is. Moreover, even if these figures can be believed, they still leave 20 percent, or one in five, identified victims with very limited assistance from government sources beyond the 45-day Assessment Stream period. This is where the significance of independent NGO-provided victim assistance program is most evident.<sup>89</sup> Figures provided by The Salvation Army also support this observation: In June 2009, Samaritan Accommodation had provided shelter services for 37 individuals, out of which only 11 were concurrently supported by the Government's Support for Victims of People Trafficking Program.<sup>90</sup> In

<sup>82</sup> Nancie Palmer, 'The Essential Role of Social Work in Addressing Victims and Survivors of Trafficking' (2010) 17(1) *ILSA Journal of International and Comparative Law* 43, 48.

<sup>83</sup> Fiona David, *Trafficking of Women for Sexual Purposes* (Australian Institute of Criminology, 2008) 66.

<sup>84</sup> Ibid 31; Anti-Slavery Australia, 'Fact Sheet #15: Where can trafficked and exploited people get help?' (2011) <<http://www.antislavery.org.au/resources/fact-sheets/209-fact-sheet-15-where-can-trafficked-and-exploited-people-get-help.html>>.

<sup>85</sup> Australia, Anti-People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government's Response 1 July 2010–30 June 2011* (Commonwealth of Australia, 2011) 31.

<sup>86</sup> Ibid.

<sup>87</sup> Elizabeth Broderick, 'Slavery in 21st Century Australia: a Human Rights Challenge' (Speech given at the seminar *Modern Day Slavery in Australia: The Queen v Wei Tang*, 16 October, 2008) <[http://www.hreoc.gov.au/about/media/speeches/sex\\_discrim/2008/20081014\\_slavery.html](http://www.hreoc.gov.au/about/media/speeches/sex_discrim/2008/20081014_slavery.html)>; Ann D Jordan, 'Human Rights or Wrongs? The Struggle for a Rights-Based Response to Trafficking in Human Beings' (2002) 10(1) *Gender and Development* 28, 30; Marina Tzvetkova, 'NGO Responses to Trafficking in Women' (2002) 10(1) *Gender and Development* 60, 64; Fiona David, *Trafficking of Women for Sexual Purposes* (Australian Institute of Criminology, 2008) x, 31; Jennifer Burn & Frances Simmons, *The Anti-Slavery Project Submission to the National Consultation on Human Rights* (Anti-Slavery Project, University of Technology Sydney, 2009) 26; JCTP, *Summary of History and Involvement in Counter-Trafficking: Providing Support to Survivors of Trafficking* (2011, copy held by authors) 1; Anne Gallagher, *Recommended Principles and Guidelines on Human Rights and Trafficking in Persons: Commentary* (UN OHCHR, 2010) 156.

<sup>88</sup> Australia, Anti-People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government's Response 1 May 2009–30 June 2010* (Commonwealth of Australia, 2010) 25.

<sup>89</sup> UNODC, *International Framework for Action to Implement the Trafficking in Persons Protocol* (UN, 2009) 10.

<sup>90</sup> Fiona David, 'Building the Infrastructure of Anti-Trafficking: Information, Funding, Responses' (2010) 9(2) *Criminology and Public Policy* 235, 238.



response to these concerns, an Extended Assessment Stream providing support for a further 45 days in individual cases has been introduced.<sup>91</sup> Access to this extended period is decided on a case-by-case basis, where a person is ‘willing but not able to assist police because of their current mental, physical or emotional state’. A victim in this position will thus be able to access the Support Program for up to 90 days from the date of entry into the program.<sup>92</sup>

Access to government-provided victim assistance must result from a referral by the AFP or other relevant law enforcement agency to the Australian Red Cross, the provider of the Support Program.<sup>93</sup> This set up crucially ignores those individuals who do not want to make themselves known to the police – because of a mistrust of authorities or for fear that they will be seen as criminals for having entered the country illegally and subsequently repatriated.<sup>94</sup> This referral process is in sharp contrast to ‘no questions asked’ services, such as those provided by Project Respect, Samaritan Accommodation, and JCTP, which provide potential victims with a range of options for responding to their situation without the involvement of the police or other government entities.<sup>95</sup> The role of NGOs thus ensures that victims of trafficking in persons in Australia can obtain support and protection regardless of whether they choose to work with the police and irrespective of their traffickers being charged.<sup>96</sup>

NGO programs are complementing the Support for Victims of People Trafficking Program where the Government’s services are insufficient. For example, the NGO-run safe-houses also take on individuals in the official Program as affordable and safe accommodation is frequently difficult to find for Program case workers at short notice.<sup>97</sup> Furthermore, the Support Program only offers three hours of legal advice to each client,<sup>98</sup> which may be insufficient to cover the complex workplace, immigration, civil, and criminal matters that are intersecting in situations of trafficking.<sup>99</sup> In this context, an important role of NGOs is the provision of independent legal advice to victims of trafficking before they contact law enforcement or other government agencies. Anne Gallagher, for instance, remarked that individuals who have been trafficked are ‘unlikely to have a full understanding of the rights to which they are entitled and will rarely be in a strong position to pursue those rights without help. The provision of legal assistance to trafficked persons can best be viewed as a

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<sup>91</sup> Australia, Anti-People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government's Response 1 July 2010–30 June 2011* (Commonwealth of Australia, 2011) 31.

<sup>92</sup> As of 30 June 2010, only 5 individuals out of the 155 total clients that had accessed the SVPTP since its inception in 2004 had received this level of assistance: Australia, Anti-People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government's Response 1 May 2009–30 June 2010* (Commonwealth of Australia, 2010) 13.

<sup>93</sup> Australian Red Cross, *Support for trafficked people* (2012) <<http://www.redcross.org.au/support-for-trafficked-people.aspx>>.

<sup>94</sup> Fiona David, *Trafficking of Women for Sexual Purposes* (Australian Institute of Criminology, 2008) 63; Fiona David, *Law Enforcement Responses to Trafficking in Persons: Challenges and Emerging Good Practice* (Australian Institute of Criminology, 2009) 2.

<sup>95</sup> Fiona David, *Trafficking of Women for Sexual Purposes* (Australian Institute of Criminology, 2008) 65.

<sup>96</sup> Elizabeth Broderick, ‘Slavery in 21st Century Australia: a Human Rights Challenge’ (Speech given at the seminar *Modern Day Slavery in Australia: The Queen v Wei Tang*, 16 October, 2008) <[http://www.hreoc.gov.au/about/media/speeches/sex\\_discrim/2008/20081014\\_slavery.html](http://www.hreoc.gov.au/about/media/speeches/sex_discrim/2008/20081014_slavery.html)>; UNODC, *Model Law Against Trafficking in Persons* (UN, 2009) 46.

<sup>97</sup> Australia, Anti-People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government's Response 1 May 2009–30 June 2010* (Commonwealth of Australia, 2010) 15.

<sup>98</sup> Elizabeth Broderick, ‘Slavery in 21st Century Australia: a Human Rights Challenge’ (Speech given at the seminar *Modern Day Slavery in Australia: The Queen v Wei Tang*, 16 October, 2008) <[http://www.hreoc.gov.au/about/media/speeches/sex\\_discrim/2008/20081014\\_slavery.html](http://www.hreoc.gov.au/about/media/speeches/sex_discrim/2008/20081014_slavery.html)>. More recent information on this point was not available at the time of writing.

<sup>99</sup> Ibid; Fiona David, *Trafficking of Women for Sexual Purposes* (Australian Institute of Criminology, 2008) 38.

prerequisite to other important rights.<sup>100</sup> Advice and counselling prior to contact with the authorities may thus go some way to ensure that police interviews and questioning by immigration authorities are less traumatic<sup>101</sup> and that victims receive a genuine opportunity to consider their legal options before engaging with government officials.<sup>102</sup>

### A.II.3.2 Weaknesses in the assistance provided by NGOs

The majority of anti-trafficking NGOs operating in Australia are either faith-based organisations (such as The Salvation Army, JCTP, and ACRATH) or sex-worker support groups (Project Respect and Scarlet Alliance). It is debatable whether these orientations of NGOs working in this field is a benefit or detriment to broad-based efforts to prevent and suppress trafficking in persons and offer victims of trafficking in persons comprehensive and unreserved assistance and protection. There may be concern that the ideology or mission of an NGO can skew the delivery of victim support measures.

The involvement of NGOs and advocacy groups who work relentlessly to support sex workers and improve their status and rights has to be welcomed, especially in a country where, to this day, the vast majority of trafficking in persons cases has been uncovered in the commercial sex industry, including both legal and illegal brothels.<sup>103</sup> NGOs such as the Scarlett Alliance and Project Respect have a proven capacity to recognise exploitative practices in this industry, and assist victims, especially women, who may have experience sexual violence or threats by their traffickers or their clients.

Faith-based organisations, on the other hand, often tend to reframe trafficking in persons as a contravention of divine intent or sexual impropriety.<sup>104</sup> Moreover, a preoccupation with salvation and ‘rescuing’ individuals is patronising and their desire to do ‘God’s work’ can come across as seeking to convert victims.<sup>105</sup> By way of example, JCTP claims to assist in the ‘spiritual’ development of trafficked persons,<sup>106</sup> and Samaritan Accommodation provides ‘pastoral’ support.<sup>107</sup> This type of vocabulary, and perhaps this type of care, may be ill-suited, and in some instances unwanted or inappropriate for those victims who do not come from a Christian background.

Meanwhile, the prevalence of sex-worker organisations may have an impact on limiting the purview of victim assistance and support to (mostly female) victims of sex trafficking.<sup>108</sup> Among sex-worker organisations there are also diametrically opposed views on sex work and on the causes and

<sup>100</sup> Anne T Gallagher, *The International Law of Trafficking in Persons* (Cambridge University Press, 2010) 315.

<sup>101</sup> Jennifer Burn & Frances Simmons, *The Anti-Slavery Project Submission to the National Consultation on Human Rights* (Anti-Slavery Project, University of Technology Sydney, 2009) 26–27.

<sup>102</sup> Anne T Gallagher, *The International Law of Trafficking in Persons* (Cambridge University Press, 2010) 317.

<sup>103</sup> See further, Andreas Schloenhardt et al, ‘Human Trafficking and Sexual Servitude in Australia’ (2009) 32(1) *University of New South Wales Law Journal* 27, 31.

<sup>104</sup> Sanja Milivojevic, ‘Trafficking Reconsidered: A Gaze into a Crystal Ball and Ways Forward’, in Marie Segrave (ed), *Australian and New Zealand Critical Criminology Conference Proceedings 2009* (Monash University, 2009) 177; Yvonne C Zimmerman, ‘From Bush to Obama: Rethinking Sex and Religion in the United States’ Initiative to Combat Trafficking in Persons’ (2010) 26(1) *Journal of Feminist Studies in Religion* 79, 80.

<sup>105</sup> Shivaun Scanlan, ‘The Identification of Trafficked Persons in the Face of Conflicting Agendas’ (Paper presented at the conference *Assistance to Victims of Trafficking: We Can Do Better*, OSCE, Vienna, 10–11 September 2007) <<http://www.osce.org/what/trafficking/60585>> 9.

<sup>106</sup> JCTP, *Summary of History and Involvement in Counter-Trafficking: Providing Support to Survivors of Trafficking* (2011, copy held by authors) 1.

<sup>107</sup> Sisters of Saint Joseph of the Sacred Heart, *What We Are Doing: Samaritan Accommodation* (2009) <<http://www.sosj.org.au/what-we-are-doing/index.cfm?loadref=131>>.

<sup>108</sup> Sanja Milivojevic, ‘Trafficking Reconsidered: A Gaze into a Crystal Ball and Ways Forward’, in Marie Segrave (ed), *Australian and New Zealand Critical Criminology Conference Proceedings 2009* (Monash University, 2009) 177.



manifestation of trafficking in persons in Australia which may have implications for the delivery of their services. For example, Scarlet Alliance advocates for sex work to be recognised as a legitimate occupation wherein individuals should not face discrimination for their choice of livelihood.<sup>109</sup> Project Respect, on the other hand, believes that while women working in the sex industry have a right to safety, respect, and support, prostitution is ultimately harmful insofar as it ‘results from and strengthens gender inequality’.<sup>110</sup> The practical consequence of this view is that when determining just who is a ‘victim of trafficking’, Project Respect includes individuals subject to a debt bond, whereas Scarlet Alliance do not coalesce debt bondage and trafficking.<sup>111</sup>

### A.II.3.3 *Gaps in the assistance provided by NGOs*

There are a several gaps in the assistance provided by NGOs to victims of trafficking in Australia. For example, there is little in the way of support services available for, let alone directed at, male victims of trafficking. Although Samaritan Accommodation seems to offer ‘limited assistance to non-residential clients (including men)’<sup>112</sup> and JCTP extend their support services to men,<sup>113</sup> there is no mention anywhere else of any counselling, medical, psychological, material, housing, or training services aimed at male victims. Indeed, the vast majority of services offered outside the government’s Support Program explicitly only cater to ‘trafficked women’, though in some instances the term ‘trafficked persons’ is used. The focus on female victims may be explained by a demographical imbalance among identified victims in Australia who, to this day, have been predominantly female. Between 2004 and 30 June 2011 only about 10 percent, or 19 of the 184 persons referred to the Government Program were male.<sup>114</sup> These figures may, in turn, be explained by the emphasis government agencies and NGOs alike have placed on victims of trafficking for sexual purpose, including prostitution. Other forms of trafficking, such as labour trafficking, in which men might have a greater representation among victims, have not been equally explored. A comprehensive response to trafficking in persons should, however, cater for men and women alike and it may be necessary to extend available support services to address the specific situations and needs of male victims. It is also noteworthy there little or no reference is made by NGOs to the provision of medical assistance or material assistance which may be of concern for victims who are not able to access the Support for Victims of People Trafficking Program.

A further gap stems from the fact that the majority of services offered to victims of trafficking are located in Australia’s two main urban centres, Sydney and Melbourne. While early cases of trafficking in the late 1990s and early 2000s were all detected in these two cities, there is growing evidence of trafficking in persons in other parts of Australia, including regional and some remote

<sup>109</sup> Scarlett Alliance, ‘Submission to the National Consultation on Human Rights in Australia’ (June 2009) <[http://www.scarletalliance.org.au/library/humanrightsconsultation\\_09/](http://www.scarletalliance.org.au/library/humanrightsconsultation_09/)> 2.

<sup>110</sup> Fiona David, *Trafficking of Women for Sexual Purposes* (Australian Institute of Criminology, 2008) 20.

<sup>111</sup> Drugs and Crime Prevention Committee, Parliament of Victoria, *Inquiry into People Trafficking for Sex Work* (2010) 31.

<sup>112</sup> Jade Lindley & Kristen Davis, *Pacific Trafficking in Persons Forum, 2–4 September 2009, Wellington* (2009) Australian Institute of Criminology, <[http://www.aic.gov.au/events/aic%20upcoming%20events/2009/~media/conferences/2009-peopletrafficking/ptp\\_outcome\\_report.pdf](http://www.aic.gov.au/events/aic%20upcoming%20events/2009/~media/conferences/2009-peopletrafficking/ptp_outcome_report.pdf)> 59.

<sup>113</sup> JCTP, *Summary of History and Involvement in Counter-Trafficking: Providing Support to Survivors of Trafficking* (2011, copy held by authors) 2.

<sup>114</sup> Australia, Anti-People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government’s Response 1 July 2010–30 June 2011* (Commonwealth of Australia, 2011) 33; see further, Andreas Schloenhardt et al, ‘Human Trafficking and Sexual Servitude in Australia’ (2009) 32(1) *University of New South Wales Law Journal* 27, 31.

areas.<sup>115</sup> It is for this reason that international guidelines recommend that support and assistance be offered appropriately across the country.<sup>116</sup>

Contributing to this deficiency is the fact that there is no truly national, dedicated victim support service for victims of trafficking in persons. All of the NGOs examined here, with the exception of Project Respect, offer their anti-trafficking services ancillary to other work done by them, which is not related to trafficking. Project Respect, on the other hand, only operates in the state of Victoria. Moreover, the NGOs do offer assistance, support, and/or protection to victims of trafficking in person generally tend to focus their attention on a particular aspect or a particular type of service. But a genuine integration of these services is considered one of the most critical factors in assistance programs and the services will not produce the desired results if they operate in isolation.<sup>117</sup>

While the Australian Government's Anti-People Trafficking Inter-departmental Committee claims to be undertaking work to 'collaborat[e] with State agencies and NGOs to develop improved referral linkages and pathways',<sup>118</sup> the partnership between the Australian Red Cross and the Australian Government in providing the Support for Victims of People Trafficking Program (secured by tender) is presently the only formal referral mechanism. Other referrals or cooperation appears to proceed on an informal basis.<sup>119</sup> It may be desirable to formalise other relationships between government agencies and NGOs, and also among NGOs, to provide appropriate and rapid assistance and support. While a referral list is provided in the *Guidelines for NGOs Working with Trafficked People*, a genuinely multidisciplinary referral framework is still lacking.<sup>120</sup>

#### **A.II.4 Observations, Trends, and Recommendations**

This analysis suggests that NGOs are, by and large, fulfilling the expected role accorded to them in international law and best practice guidelines. Their work, expertise, cultural sensitivity, rapport with victims, and independence make an important contribution to Australia's efforts to prevent and suppress trafficking in persons. Nonetheless, some outstanding and inherently interrelated issues prevail. These observations also provide the basis for recommendations to improve the role of NGOs, the support they receive, and the services they deliver.

##### *A.II.4.1 Government Outsourcing*

It is clear that there are certain gaps in the Australian Government's anti-trafficking framework which are (intentionally and unintentionally) left for NGOs to fill. This is the case in situations in which there are no viable means by which official entities could effectively carry out particular measures, or in which the qualities and experience NGOs bring to anti-trafficking measures exceed those of government officials.

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<sup>115</sup> Andreas Schloenhardt et al, 'Human Trafficking and Sexual Servitude in Australia' (2009) 32(1) *University of New South Wales Law Journal* 27, 31.

<sup>116</sup> UNODC, *International Framework for Action to Implement the Trafficking in Persons Protocol* (UN, 2009) 30.

<sup>117</sup> UN Conference of the Parties to the United Nations Convention against Transnational Organised Crime, *Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime: consolidated information received from States for the second reporting cycle*, UN Doc CTOC/COP/2006/6/Rev.1 (9 Sep 2008) 7.

<sup>118</sup> Australia, Anti-People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government's Response 1 May 2009–30 June 2010* (Commonwealth of Australia, 2010) 53.

<sup>119</sup> Correspondence between Kelly Hinton, Project Respect and Rose Hunt, 25 May 2011; Drugs and Crime Prevention Committee, Parliament of Victoria, *Inquiry into People Trafficking for Sex Work* (2010) 203.

<sup>120</sup> A referral guide is provided in the Australian Government, *2010 Guidelines for NGOs Working with Trafficked People* (Commonwealth of Australia, 2<sup>nd</sup> ed 2010) 30–45 yet a genuinely multidisciplinary referral framework is lacking.

Welcome as the diverse and widespread involvement of NGOs in the official response to trafficking in persons in Australia may be, it does appear that the Australian Government is outsourcing some of its responsibilities – especially when millions of dollars have been provided to NGOs in recent years to carry out particular programs. While this is in keeping with requirements under the *Trafficking in Persons Protocol* which, as mentioned later in this submission, accord operator and co-operator roles to NGOs, this practice raises some important concerns.

#### A.II.4.2 *Lack of clear delineation of responsibility*

There is minimal active delineation of if and where NGOs are best placed to carry out the roles ascribed to them. Many of their operator roles appear to be taken up in a rather ad hoc manner. Although some progress has been made to have better coordination between government agencies and NGOs, and among NGOs, it is difficult to ascertain who is responsible for what. Reasons for handing certain responsibilities to particular organisations are also not clearly articulated. This situation deviates from international best practice guidelines which advocate that burden-sharing be formalised to maximise effectiveness and allow respective parties to focus on their core role.<sup>121</sup>

While this research provides a preliminary analysis of where the strengths and weaknesses in NGOs carrying out particular functions are, a more in-depth examination would be necessary to examine the mandate and capabilities of relevant government and non-government entities in depth and, based on that analysis, develop more comprehensive recommendations to appropriately assign responsibilities than can be done within the limitations of this article. To this end, it is recommended that the Anti-People Trafficking Inter-Departmental Committee and participants in the National Roundtable explore and determine which anti-trafficking measures which NGOs is best placed to carry out. This process would ensure that the best possible combination of strengths from government, law enforcement, non-governmental and the private sector are drawn upon to deliver the most robust anti-trafficking framework. It will also ensure that the gaps are identified on a systematic and ongoing basis – for example, picking up on a lack of victim support services outside Sydney and Melbourne, and, likewise, rationalise resources.

#### A.II.4.3 *Funding, support, and legitimacy accorded to NGOs*

Where an inquiry into the allocation of responsibilities results in an endorsement of an NGO carrying out certain anti-trafficking functions, the Australian Government has a duty to ensure that the functions are properly supported and implemented.<sup>122</sup> Anti-trafficking functions that have been outsourced to NGOs must have adequate levels of funding attached to them. Indeed, a lack of adequate funding is seen as a serious organisational challenge by some NGOs.<sup>123</sup>

Where an NGO is carrying out a role in lieu of government agencies, the safety of NGO personnel and victims alike needs to be assured. In this context, Paul Holmes stated that ‘it is difficult to overstate the sensitivity and potential risks that arise to the safety of trafficked victims and the NGO support

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<sup>121</sup> *Recommended Guidelines and Principles for Human Rights and Trafficking in Persons: Report of the United Nations High Commission for Human Rights to the Economic and Social Council*, UN ECSOR, subst. sess 2002, Addendum, UN Doc E/2002/68/Add.1 (2002), 44; Fiona David, *Trafficking of Women for Sexual Purposes* (Australian Institute of Criminology, 2008) 37.

<sup>122</sup> ‘UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 2004) 313.

<sup>123</sup> For example, Project Respect claim to be ‘severely underfunded’ and only receive project funding, thus finding it difficult to plan their work into the future: Correspondence between Kelly Hinton, Project Respect and Rose Hunt, 25 May 2011; Project Respect, *Annual Report 2009/2010* (2010) <[http://projectrespect.org.au/sites/projectrespect.org.au/files/PR\\_AnnReport10\\_Final\\_sml.pdf](http://projectrespect.org.au/sites/projectrespect.org.au/files/PR_AnnReport10_Final_sml.pdf)> 4.

personnel once a victim chooses to become a witness against [a] trafficker.<sup>124</sup> Law enforcement agencies involved in proceedings against traffickers should therefore undertake all necessary steps to ensure the safety of organisations and individuals that provide support services to victims throughout the course of the investigation, prosecution, and beyond.

The Australian Government must also ensure that the NGOs it is dealing with operate legitimately and transparently. It is important to note that NGOs, too, have limitations in their experience and knowledge. Importantly, they are often run by volunteers with little or no formal training to carry out certain functions. In contrast to official agencies, NGOs' legitimacy does not derive from a democratic mandate and they should not be seen as 'magic bullets' by virtue of their independent, non-government status.<sup>125</sup> Instead, qualities such as reputation, credibility, support, expertise, and participation in networks (of fellow NGOs and victim support services) should be looked to as indicators of an NGO's competency.<sup>126</sup>

#### A.II.4.4 *Accountability of NGOs*

Where NGOs receive public funds, it is imperative that NGOs take measures to fully account for how these funds are spent and are fully transparent about their ideological position (if any) in the context of trafficking in persons. This goes some way to ensuring maximum effectiveness and efficiency are derived from funds devoted to anti-trafficking measures.

There are obvious gaps in the services NGOs currently provide, but from the available, open-source material it is not clear whether this is primarily due to lack of funding, or whether inefficiency and lack of demand from victims explain the absence of certain support mechanisms.<sup>127</sup> The absence of more, and more up-to-date information on these questions is concerning. NGOs should ensure they make sufficient information available so that they can be accountable for funding they receive from government sources. This requires more than a balance sheet recording of where funds go; instead, notes Hugo Slim, 'NGOs must be able to show evidence of a well rounded performance that resonates with the values of human rights, not simply a result.'<sup>128</sup>

A further concern in this context is that the religious, ideological or other agenda of NGOs has the propensity to have an impact on the delivery of their role in anti-trafficking measures. This ideological positioning is not always made evident in the context of trafficking in persons. In order to be held accountable for their efforts, NGOs may have to become more transparent about the precise nature of their work and activism and how this is influenced by their agenda.<sup>129</sup>

<sup>124</sup> Paul Holmes, 'Law Enforcement Cooperation with Non-governmental Organisations, with Reference to Protection of Victims and Victims as Witnesses' (Paper presented at the Conference on Prevention of and Fighting Against Trafficking in Human Beings, Brussels, 18-20 September 2002) 23.

<sup>125</sup> Alnoor Ebrahim, 'Accountability in Practice: Mechanisms for NGOs' (2003) 21(5) *World Development* 813, 813.

<sup>126</sup> Hugo Slim, 'By What Authority? The Legitimacy and Accountability of Non-governmental Organisations' (Paper presented at the *International Council on Human Rights Policy International Meeting on Global Trends and Human Rights*, Geneva, 10-12 January 2002) <<http://www.gdrc.org/ngo/accountability/by-what-authority.html>>.

<sup>127</sup> For example, the absence of victim support services aimed at men may be due to the low incidences of men being trafficked into Australia.

<sup>128</sup> Hugo Slim, 'By What Authority? The Legitimacy and Accountability of Non-governmental Organisations' (Paper presented at the *International Council on Human Rights Policy International Meeting on Global Trends and Human Rights*, Geneva, 10-12 January 2002) <<http://www.gdrc.org/ngo/accountability/by-what-authority.html>>.

<sup>129</sup> *Ibid.*

#### A.II.4.5 Referrals and Formal Mechanisms for Cooperation

There is, at present, only limited evidence of formal referral and cooperation arrangements between NGOs and government agencies. Given the number and diversity of organisations involved, it would be beneficial to bring greater clarity to the ‘who is who’ in Australia’s anti-trafficking framework. A lack of clear articulation and delineation of responsibilities ‘can lead to duplication in efforts, inefficient use of resources, incoherent or contradictory interventions and [...] a less effective response’.<sup>130</sup>

Formal referrals are the first step in allowing victims to fully access the services needed to help them recover from their experiences, they ensure trafficked persons do not need to tell their stories twice, and can harmonise cooperative efforts surrounding criminal investigations and prosecutions.<sup>131</sup> Formal referrals have been effectively used in similar contexts for many years – for example, a number of State police services have memoranda of understanding in place with providers of sexual assault and domestic violence services – which suggests they could have utility in the provision of victim recovery services, too.<sup>132</sup> At a minimum, they should include:

[A] list of partners, clearly defined purpose of cooperation, principles of cooperation, target group, detailed definition of the distribution of responsibilities, details of the cooperation procedure between the partners, procedure of mutual communication of information... funding of the NGO cooperation partner ... [and] incorporate a holistic and multidisciplinary approach, [including] balance among the objectives of all stakeholders.<sup>133</sup>

The 2011 publication of the *Anti-Human Trafficking Community Resource* goes some way to outline the mandate of a great range of government and non-government actors in this field and to ensure more ‘strategic planning, division of responsibilities and sustainability of results’ in the future.<sup>134</sup>

<sup>130</sup> UNODC, *International Framework for Action to Implement the Trafficking in Persons Protocol* (UN, 2009) 12.

<sup>131</sup> Drugs and Crime Prevention Committee, Parliament of Victoria, *Inquiry into People Trafficking for Sex Work* (2010) 202; Project Respect, ‘Recommendations to the Australian Government for Reform of Support for Victims of Trafficking in Australia’ (March 2009) <[http://projectrespect.org.au/system/files/PR-recomm-traff-200903+\(1\).pdf](http://projectrespect.org.au/system/files/PR-recomm-traff-200903+(1).pdf)>; UNODC, *Model Law Against Trafficking in Persons* (UNODC, 2009) 68.

<sup>132</sup> Fiona David, *Law Enforcement Responses to Trafficking in Persons: Challenges and Emerging Good Practice* (Australian Institute of Criminology, 2009) 4-5.

<sup>133</sup> UNODC, *International Framework for Action to Implement the Trafficking in Persons Protocol* (UN, 2009) 46-47.

<sup>134</sup> *Ibid* 12; see also Fiona David, *Law Enforcement Responses to Trafficking in Persons: Challenges and Emerging Good Practice* (Australian Institute of Criminology, 2009) 4-5; UNODC, *Model Law Against Trafficking in Persons* (UNODC, 2009) 68.



## **PART B: INTERNATIONAL BEST PRACTICE TO ADDRESS ALL FORMS OF SLAVERY, SLAVERY-LIKE CONDITIONS, AND PEOPLE TRAFFICKING.**

International cooperation to prevent trafficking in persons and suppress the illicit sex trade dates back to the late 19<sup>th</sup> century. Throughout the 20<sup>th</sup> century, several international conventions were developed to combat the exploitation of persons, especially women and children, in the sex industry. In international law, the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*<sup>135</sup> became a reality in 2000. The creation of the *Trafficking in Persons Protocol* the United Nations marks the international community's most comprehensive effort to deal with trafficking in persons in its modern forms. The purposes of the Protocol, as stated in its Article 2 are:

- (a) to prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) to protect and assist the victims of such trafficking, with full respects to their human rights; and
- (c) to promote cooperation among States Parties in order to meet those objectives.

Unlike earlier treaties relating to trafficking and slavery, the Protocol reaches beyond sexual exploitation to cover all forms of trafficking regardless of the victim's age and gender. The Protocol aims to set out a uniform approach to trafficking to be taken by all States Parties, and to facilitate international cooperation among them. It divides its approach into the categories of prosecution, protection, and prevention (sometimes referred to as the '3 Ps').

Supplementing the *Convention Against Transnational Organised Crime*,<sup>136</sup> the Protocol conceives trafficking in persons as a form of organised crime,<sup>137</sup> requiring a coordinated international response including uniform anti-trafficking legislation and prosecution of offenders. The Protocol also contains provisions for the prevention of trafficking and for victim protection, although many of these provisions are perceived as subsidiary to those addressing prosecution and criminalisation.<sup>138</sup>

### **B.I Definition and Scope**

#### **B.I.1 A Common Definition**

The *Trafficking in Persons Protocol* is the first international instrument to provide a universal definition trafficking in persons. Under Article 3(a) of the Protocol:

‘Trafficking in persons’ shall mean 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.

This definition combines elements relating to the acts (recruitment, transportation, ...), means (threat or use of force or other forms of coercion, ...), and purpose (exploitation) of trafficking in persons. In

<sup>135</sup> Opened for signature 12 December 2000, 2237 UNTS 319, (entered into force 25 December 2003) [hereinafter the *Trafficking in Persons Protocol*].

<sup>136</sup> Opened for signature 12 December 2000, 2225 UNTS 209 (entered into force 29 September 2003).

<sup>137</sup> See Anne Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, New York, 2010) 71; see also Phyllis Coontz and Catherine Griebel, ‘International approaches to human trafficking: The call for a gender-sensitive perspective in international law’ (2004) 4 *Women’s Health Journal* 47, 49.

<sup>138</sup> See, Patrick Taran, ‘Human rights of migrants: Challenges of the new decade’ (2000) 38 *International Migration* 7, 8; Anne Gallagher, ‘Human rights and the new UN Protocols on trafficking and migrant smuggling: A preliminary analysis’ (2001) 23 *Human Rights Quarterly* 975, 991-992.



instances that involve the trafficking of minors, Article 3(c) states that ‘the recruitment, transportation, transfer, harbouring or receipt of a child is trafficking, even if one of the means above is not used’.<sup>139</sup>

During the development of Protocol, particular concerns were expressed regarding the relevance of victim consent to aspects of the trafficking process, especially in situations where the victim is voluntarily engaged in prostitution.<sup>140</sup> To remedy these concerns, Article 3(b) requires that the consent of the victim of trafficking in persons to the intended exploitation is to be considered irrelevant where any of the means (such as force, coercion, fraud, et cetera) have been used.<sup>141</sup>

The definition in Article 3(a) has found widespread adoption and has been credited with promoting consistency in international anti-trafficking efforts. It assists law enforcement agencies, other government authorities, and relevant stakeholders in numerous ways. Firstly, it has made trafficking a crime in countries that previously had limited or non-existent offences. Secondly, as a universal legal denominator, the definition facilitates extradition and mutual legal assistance between countries that would otherwise have to undertake time-consuming bilateral negotiations. Thirdly, a common definition assists in standardising research and allows for better comparisons of data on trafficking.

The content and elements of the definition have, however, received mixed reviews. On the one hand, the consideration of more subtle forms of coercion as a means of facilitating trafficking has been widely praised. For example, the phrase ‘abuse of a position of vulnerability’ takes into account the fact that trafficking in persons does not always occur by force, but often involves close family members pressuring or convincing the victim to partake in the activity. On the other hand, the definition has been criticised on a practical level as unwieldy and ill-suited for use in domestic criminal laws. A major criticism is that it contains too many elements, which complicates prosecution efforts. Furthermore, ambiguity in some of the language could lead to legal challenges by defendants in appellate courts.<sup>142</sup>

### B.1.2 Exploitation and Consent

A particularly controversial topic during the negotiations for the *Trafficking in Persons Protocol* related to the definition of ‘exploitation’. A group of NGOs, led by the Coalition Against Trafficking in Women and Equality, proposed that the definition in the *Trafficking in Persons Protocol* encompassed all forms of prostitution. Their argument was that the distinction between forced and free prostitution was meaningless as prostitution was by its very nature exploitative.<sup>143</sup> This position is underpinned by the view that any woman’s consent to undertake sex work is meaningless and as such,

<sup>139</sup> *Trafficking in Persons Protocol* art 3.

<sup>140</sup> It is noted that victims often consent to an aspect of the trafficking process such as to migration to work in another country, to carry false documents or to enter a country illegally. See UNODC, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations conventions against transnational organised crime and the protocols thereto* (United Nations, 2006) [hereinafter *Travaux Préparatoires*] 344. See also Ann Jordan, ‘Annotated Guide to the complete UN Trafficking Protocol’ (2002) *Human Rights Law Group*, Washington: International Human Rights Law Group <www.hrlawgroup.org>, 11.

<sup>141</sup> The requirement that one of these means by used to engage the victim ensures that practices which some consider inherently exploitative – in particular prostitution – is not considered trafficking when engaged in by fully consenting adults. This element involved reconciling a debate over whether an adult woman could ever consent to prostitution. For an outline of this debate, see, Anne Gallagher, ‘Human rights and the new UN Protocols on trafficking and migrant smuggling: A preliminary analysis’ (2001) 23 *Human Rights Quarterly* 975, 984-985.

<sup>142</sup> Ann Jordan, ‘Annotated Guide to the complete UN Trafficking Protocol’ (2002) *Human Rights Law Group*, Washington: International Human Rights Law Group <www.hrlawgroup.org>, 3.

<sup>143</sup> E Defeis, ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons – A New Approach’ (2004) 10 *ILSA Journal of International and Comparative Law* 485, 488.

sex work always satisfies the exploitation element for the purpose of trafficking.<sup>144</sup> These NGOs were supported by representatives from Argentina and the Philippines. On the other side of the debate were NGOs, such as the Human Rights Caucus, and countries that argued that the *Trafficking in Persons Protocol* should only include prostitution that was conducted under force or deception. In their view, voluntary adult sex work does not constitute exploitation for the purpose of trafficking.

A compromise was found by leaving the term ‘sexual exploitation’ and ‘exploitation for the prostitution of others’ undefined. These terms are ‘without prejudice’ as to how individual jurisdictions approach prostitution in their particular domestic laws.<sup>145</sup> An *Interpretative Note* further explains that the *Trafficking in Persons Protocol* takes no position on the treatment of non-coerced adult sex work and explicitly leaves its legal treatment to the discretion of individual governments.<sup>146</sup> This accommodates the seemingly irreconcilable views of countries with different regulatory schemes for prostitution. Those with liberal regimes are able to exclude voluntary prostitution from their national trafficking framework while countries with stricter prostitution laws are able to expand the scope of their offences. While this compromise resolved a major stumbling block in the negotiations, it is seen by some commentators as having repressive consequences, particularly for migrant sex workers.<sup>147</sup>

A secondary issue concerns the extent to which consent is offered and, in particular, whether a person who consents to illegally enter a country and work also consents to working in conditions of forced labour. The weight of academic opinion suggests that consent must be continuous.<sup>148</sup> A victim may consent to migrating, but that consent is non-existent or defective once any form of exploitation occurs.<sup>149</sup>

### B.I.3 Scope of Application

Article 4 of the *Trafficking in Persons Protocol* seemingly limits the definition of trafficking in persons to offences that are transnational in nature and involve an organised criminal group. These terms are to be read in conjunction with the *Convention against Transnational Organised Crime* which defines an ‘organised criminal group’ as a ‘structured group of three or more persons’, and a transnational offence as one ‘committed in more than one State.’<sup>150</sup>

<sup>144</sup> J Doezema, ‘Who gets to choose? Coercion, consent, and the UN Trafficking Protocol’ (2002) 10(1) *Gender & Development* 20, 21; Ann Jordan, ‘Annotated Guide to the complete UN Trafficking Protocol’ (2002) *Human Rights Law Group*, Washington: International Human Rights Law Group May. <[www.hrlawgroup.org](http://www.hrlawgroup.org)>, 4.

<sup>145</sup> Robyn Emerton, ‘Translating International and Regional Trafficking Norms into Domestic Reality: a Hong Kong Case Study’ (2004) 10 *Buffalo Human Rights Law Review* 215, 226.

<sup>146</sup> *Interpretative Note* 13 of the Protocol explains that the *Trafficking in Persons Protocol* takes no position on the treatment of non-coerced adult sex work and explicitly leaves its legal treatment to the discretion of individual governments.

<sup>147</sup> J Doezema, ‘Who gets to choose? Coercion, consent, and the UN Trafficking Protocol’ (2002) 10(1) *Gender & Development* 20, 25

<sup>148</sup> See for example, N Ollus, ‘The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children: a Tool for Criminal Justice Personnel’ (2008) *Resource Material Series No. 62*. <[http:// www.ungift.org/docs/ungift/pdf/knowledge/unafei\\_analysis.pdf](http://www.ungift.org/docs/ungift/pdf/knowledge/unafei_analysis.pdf)>; M Mattar, ‘Incorporating the Five Basic Elements of a Model Anti-trafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention’, (2006) 14 *Tulane Journal of International and Comparative Law* 357, 371.

<sup>149</sup> M Mattar, ‘Incorporating the Five Basic Elements of a Model Anti-trafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention’ (2006) 14 *Tulane Journal of International and Comparative Law* 357, 371.

<sup>150</sup> *Convention against Transnational Organised Crime* arts 2, 3.

This reference to an organised criminal group was seen as overlooking the widespread practice of two person trafficking operations (often involving husband and wife).<sup>151</sup> Likewise, restricting the operation of the Protocol to transnational crime was condemned for ignoring the wider phenomena of internal trafficking.<sup>152</sup> The *Travaux Préparatoires of the negotiations for the elaboration of the United Nations conventions against transnational organised crime and the protocols thereto* [*Travaux Préparatoires*], however, ‘indicate unequivocally that the transnational element and the involvement of an organised criminal group are not to be considered elements of those offences for criminalisation purposes’.<sup>153</sup> Accordingly, domestic offences should apply even where a crime is not transnational and where there is no involvement of an organised criminal group.<sup>154</sup>

#### B.I.4 Trafficking in Children

During the negotiations for the *Trafficking in Persons Protocol*, a group of UN agencies made a joint submission regarding the issue of child trafficking.<sup>155</sup> They called for an explicit acknowledgment that children had special rights under international law and a focus on the special needs of child victims of trafficking, including rights to physical and psychological recovery and social integration and the provision of non-discretionary assistance and protection.<sup>156</sup> The drafters of the *Trafficking in Persons Protocol* responded with the inclusion of Article 3(c), which reduces the standard formulation of a trafficking offence from the three elements of act, means, and purpose, to a two-pronged approach involving only act and purpose. Thus, proof of force, coercion or deception is not relevant if the victim is a child.

The section has been both criticised as falling far short of the standard expected by UN agencies,<sup>157</sup> and praised as a major step forward in the battle against child trafficking.<sup>158</sup> Commentators have noted approvingly that the removal of ‘means’ takes into account the special vulnerability of children, especially in situations where they are obeying orders from parents or important figures in their community.<sup>159</sup> This approach is based on the accepted assumption that children do not sufficiently understand their likely fate in order to give informed consent. Nonetheless, others have noted that a plan to increase the scope of the offence was rejected.<sup>160</sup> It was proposed that the second element of child trafficking – purpose – be expanded to include the contents of the International Labour Organisation’s *Worst Forms of Child Labour Convention* (1999).<sup>161</sup> However, in the final version of the *Trafficking in Persons Protocol*, the definition of exploitation remained unaltered. A stand-alone instrument to specifically address the global issue of child trafficking has been suggested,<sup>162</sup> but has not yet materialised.

<sup>151</sup> Ann Jordan, ‘Annotated Guide to the complete UN Trafficking Protocol’ (2002) *Human Rights Law Group*, Washington: International Human Rights Law Group <www.hrlawgroup.org>, 9.

<sup>152</sup> N Ray, ‘Looking at Trafficking through a New Lens’ (2006) 12 *Cardozo Journal of Law & Gender* 909, 916.

<sup>153</sup> *Travaux Préparatoires*, para 59. See also *Legislative Guides*, 258.

<sup>154</sup> *Legislative Guides*, 259, 275.

<sup>155</sup> UN High Commissioner for Human Rights (OHCHR), the International Organisation for Migration (IOM), the United Nations Children’s Fund (UNICEF), and the United Nations High Commissioner for Refugees (UNHCR).

<sup>156</sup> Anne Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 *Human Rights Quarterly* 975, 989.

<sup>157</sup> *Ibid.*

<sup>158</sup> L Kurbiel, ‘Implementing the UN Trafficking Protocol to Protect Children: Promising Examples from East Asia’ (2004) 24 *Children’s Legal Rights Journal* 73, 80.

<sup>159</sup> *Ibid.* 75.

<sup>160</sup> Anne Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 *Human Rights Quarterly* 975, 989.

<sup>161</sup> *Ibid.*

<sup>162</sup> N Ollus, ‘The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children: a Tool for Criminal Justice Personnel’ (2008) 62 *Resource Material Series* 23

## B.II Criminalisation

### B.II.1 Criminal Offences

Article 5(1) of the *Trafficking in Persons Protocol* requires that criminal offences be established to criminalise the conduct ‘set forth in Article 3, when committed intentionally’. The obligation is to ‘criminalise trafficking, either as a single criminal offence or a combination of offences that cover, at a minimum, the full range of conduct covered by the definition’.<sup>163</sup> Article 34(3) *Convention against Transnational Organised Crime*, with which the *Trafficking in Persons Protocol* must be read, provides that ‘each State Party may adopt more strict or severe measures’. Additionally, Article 5(2) *Trafficking in Persons Protocol* requires States Parties to criminalise ‘attempting to commit an offence’, ‘participating as an accomplice in an offence’, and ‘organising or directing other persons to commit an offence’.

There have been some concerns that the offences advocated by the Protocol may result in the criminalisation and punishment of victims of trafficking in persons.<sup>164</sup> The weight of opinion, however, suggests that the *Trafficking in Persons Protocol* does entrench the principle of non-criminalisation.<sup>165</sup> This principle guarantees that victims of trafficking will not be criminally liable for their unlawful entry into a State or for any acts that they were forced to commit while under the control of other persons. Whilst the Protocol does not explicitly provide for this, it does present trafficked persons as victims, and the legislative link between the Protocol and the UN *Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power* strongly indicates that the non-criminalisation principle applies.<sup>166</sup>

Whilst the Protocol requires States Parties to criminalise the offence of ‘trafficking in persons’ it does not impose any obligations with respect to related conduct.<sup>167</sup> The corruption of government officials has been singled out by some commentators as an area inadequately addressed, or perhaps overlooked, by the Protocol. Several authors have highlighted the fact that corruption is significant as many trafficking networks are dependent on corrupt officials who accept bribes to ignore illicit activities and tip-off networks before police raids.<sup>168</sup> Therefore, focusing on the act of trafficking and targeting

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(noting the International Human Rights Network’s joint NGO submission to the Ad-Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime).

<sup>163</sup> *Legislative Guides*, 267.

<sup>164</sup> Kelly E Hyland, ‘The impact of the protocol to prevent, suppress and punish trafficking in persons, especially women and children’ (2001) 8 *Human Rights Brief* 30, 37.

<sup>165</sup> Kalen Fredette, ‘Revisiting the UN Protocol on human trafficking: Striking balances for more effective legislation’ (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101, 129.

<sup>166</sup> See *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, GA/Res 55/25, Annex II at 35. UN Doc A/RES/55/25 (Jan 8, 2001); see also King, ‘Human Trafficking: Addressing the International Criminal Industry in the Backyard’ (2007-08) 15 *University of Miami International & Comparative Law Review* 369; Kalen Fredette, ‘Revisiting the UN Protocol on human trafficking: Striking balances for more effective legislation’ (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101, 129.

<sup>167</sup> This is in contrast to the other two supplementary Protocols to the Convention. The *Protocol against the Smuggling of Migrants* requires the criminalisation of enabling illegal residence and certain conduct in relation to travel or identity documents; and the *Protocol against the Trafficking in Firearms* requires the criminalisation of multiple offences in relation to illicit manufacturing and trafficking, as well as a further offence of tampering with serial numbers or other markings of firearms.

<sup>168</sup> E Bruch, ‘Models Wanted: The Search for an Effective Response to Human Trafficking’ (2004) 40 *Stanford Journal of International Law* 1, 21; K Fredette, ‘Revisiting the UN Protocol on Human Trafficking: Striking Balances for More Effective Legislation’ (Winter 2009) *Cardozo Journal of International and Comparative Law* 101, 121.

individual offenders is seen as unnecessarily limiting the Protocol and ignoring the critical role of public officials in facilitating and tolerating the crime.<sup>169</sup>

Some commentators have gone further and called for sanctions against states whose officials assist trafficking.<sup>170</sup> The rationale is that official corruption is often tolerated by states, which benefit from lucrative industries that rely on the trafficking trade. However, such an approach is unlikely to succeed as States would not be signatories to an agreement that would result in their punishment.

## B.II.2 Sanctions and Sentencing

Persons convicted of offences established in accordance with the *Trafficking in Persons Protocol* must be subject to ‘effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions’,<sup>171</sup> which ‘take into account the gravity of that offence’.<sup>172</sup> It is also a requirement that each State Party ‘ensure that its courts or other competent authorities bear in mind the grave nature of the offences [...] when considering the eventuality of early release or parole of persons convicted of such offences’.<sup>173</sup>

The Protocol has been criticised for its lack of explicit guidance on sanctions, and its failure to specify ‘minimum sentences which reflect the gravity of the crime’.<sup>174</sup> Comparisons have been drawn with the Council of Europe’s *Framework Decision on Combating Trafficking in Human Beings*<sup>175</sup> and the European Union’s *Convention on Action against Trafficking in Human Beings*.<sup>176</sup> These documents include similar requirements for sanctions to the *Trafficking in Persons Protocol* when read together with the *Convention against Transnational Organised Crime*, but the European document also specifies four aggravating circumstances to be taken into account in sentencing.<sup>177</sup>

The absence of further guidance on sanctions in international law may be justified by the importance that States attach to sovereign control over the content of their domestic criminal law and the practical problems for cooperation and agreement that would arise if overly detailed requirements on criminal sanctions were to be included in such instruments. However, the existence of more detailed

<sup>169</sup> E Bruch, ‘Models Wanted: The Search for an Effective Response to Human Trafficking’ (2004) 40 *Stanford Journal of International Law* 1, 20.

<sup>170</sup> *Legislative Guides*, 270; R Piotrowicz, ‘The UNHCR’s Guidelines on Human Trafficking’ (2008) 20 *International Journal of Refugee Law* 242, 247.

<sup>171</sup> *Convention against Transnational Organised Crime*, art 10(4).

<sup>172</sup> *Convention against Transnational Organised Crime*, art 11(1).

<sup>173</sup> *Convention against Transnational Organised Crime*, art 11(4).

<sup>174</sup> Kalen Fredette, ‘Revisiting the UN Protocol on Human Trafficking: Striking Balances for More Effective Legislation’ (2009) 17(1) *Cardozo Journal of International & Comparative Law* 101, 121. See also, Matthew Cameron, *Punishing Trafficking in Persons: International Standards and Australian Experiences*, Research Paper, The University of Queensland Human Trafficking Working Group (October 2011) <<http://www.law.uq.edu.au/ht-legislation>>. Cf. Mohamed Y Mattar, ‘Incorporating the Five Basic Elements of A Model Anti-trafficking in Persons Legislation into Domestic Laws: From the United Nations Protocol to the European Convention’ (2006) 14(2) *Tulane Journal of International and Comparative Law* 357, 378-379.

<sup>175</sup> Kalen Fredette, ‘Revisiting the UN Protocol on Human Trafficking: Striking Balances for More Effective Legislation’ (2009) 17(1) *Cardozo Journal of International & Comparative Law* 101, 121, citing Council of Europe, *Council Framework Decision of 19 July 2002 on combating trafficking in human beings* (2002/629/JHA).

<sup>176</sup> *Council of Europe Convention on Action against Trafficking in Human Beings*, opened for signature 16 May 2005, CETS No. 197 (entered into force 1 February 2008) art 23(1).

<sup>177</sup> *Council of Europe Convention on Action against Trafficking in Human Beings*, opened for signature 16 May 2005, CETS No. 197 (entered into force 1 February 2008) art 23(1), 24. These aggravating factors are that the ‘offence deliberately or by gross negligence endangered the life of the victim’, or was committed ‘against a child’, ‘by a public official in the performance of her/his duties’, or ‘within the framework of a criminal organisation’.



requirements in regional agreements does indicate that the inclusion of such requirements should be the subject of attention in any further developments of international law on slavery and trafficking in persons.

Non-binding guidelines and ‘toolkits’ designed to assist with the implementation of the *Trafficking in Persons Protocol* provide more detailed guidance on sanctions. UNODC’s *Framework for Action to Implement the Trafficking in Persons Protocol* specifies a minimum standard, in accordance with Article 11(1) of the *Convention against Transnational Organised Crime*, that ‘penalties and sanctions are appropriate and proportionate to the gravity of the crime’.<sup>178</sup> Suggested implementation measures relevantly include that, in line with the requirements of the *Convention against Transnational Organised Crime*,<sup>179</sup> legislation provides for ‘serious crimes’ to be punishable by a maximum penalty of at least four years imprisonment, and that the penalty for crimes committed against ‘vulnerable persons [...] must be increased appropriately and proportionately’.<sup>180</sup> The framework specifies five ‘operational indicators’ of the implementation of the sanctioning aspect of the *Trafficking in Persons Protocol* as the:

- 1) severity of sanctions imposed for trafficking in persons;
- 2) number of sanctions reflecting aggravating circumstances;
- 3) number of additional administrative and/or other non-criminal sanctions used;
- 4) number of penal sanctions applied; and,
- 5) number of recidivist/repeat offenders.<sup>181</sup>

UNODC’s *Model Law Against Trafficking in Persons* similarly recommends offences be subject to a penalty of at least four years imprisonment, in order for those offences to qualify as ‘serious crimes’ for the purpose of the *Convention against Transnational Organised Crime* and to bring into play its provisions on extradition and judicial cooperation.<sup>182</sup> The *Model Law* also lists thirteen aggravating factors that would tend to increase the seriousness of an offence, which include:

- a. the offence involves serious injury or death of the victim or another person, including death as a result of suicide;
- b. the offence involves a victim who is particularly vulnerable, including a pregnant woman;
- c. the offence exposed the victim to a life-threatening illness, including HIV/AIDS;
- d. the victim is physically or mentally handicapped;
- e. the victim is a child;
- f. the offence involves more than one victim;
- g. the crime was committed as part of the activity of an organised criminal group;
- h. drugs, medications or weapons were used in the commission of the crime;
- i. a child has been adopted for the purpose of trafficking;
- j. the offender has been previously convicted for the same or similar offences;
- k. the offender is a [public official] [civil servant];
- l. the offender is a spouse or the conjugal partner of the victim;
- m. the offender is in a position of responsibility or trust in relation to the victim; and,
- n. the offender is in a position of authority concerning the child victim.<sup>183</sup>

<sup>178</sup> UNODC, *International Framework for Action to Implement the Trafficking in Persons Protocol* (United Nations, 2009) 24.

<sup>179</sup> *Convention against Transnational Organised Crime*, art 2(b).

<sup>180</sup> UNODC, *International Framework for Action to Implement the Trafficking in Persons Protocol* (United Nations, 2009) 24.

<sup>181</sup> *Ibid.*

<sup>182</sup> UNODC, *Model Law Against Trafficking in Persons* (UNODC, 2009) 34; *Convention against Transnational Organised Crime*, art 2(b). See also, Inter-Parliamentary Union and UNODC, *Combating Trafficking in Persons: A Handbook for Parliamentarians* (United Nations, 2009) 28.

<sup>183</sup> UNODC, *Model Law Against Trafficking in Persons* (UNODC, 2009) 39-40. See also Inter-Parliamentary Union and UNODC, *Combating Trafficking in Persons: A Handbook for Parliamentarians* (United Nations, 2009) 28-29.



The UNODC *Anti-human trafficking manual for criminal justice practitioners* adopts a similar approach, as well as providing a basic outline of theories of punishment.<sup>184</sup>

Despite the central importance of punishing trafficking offenders, binding international instruments and non-binding documents produced by UNODC contain little guidance for State Parties involved in the drafting of offences and the implementation of those offences in particular cases. Although it is difficult to assess the validity of criticisms by some scholars that ‘complaints of light sentencing relative to other serious crimes are common’,<sup>185</sup> it is unsurprising that, when faced with novel trafficking offences, legislatures and courts may have difficulty assessing both the seriousness of an offence and the weight to be given to particular circumstances of an offence in determining the punishment to be imposed on a particular offender.

### **B.III Assistance and Protection of Victims**

#### **B.III.1 Accommodation and Material Assistance**

International law outlines the provision of assistance and protection to victims of trafficking in persons in Article 6(3) of the *Trafficking in Persons Protocol*. This requirement only applies to victims who are in the territory of the respective country, i.e. the receiving state until the victim has returned to his or her country of origin (and to the country of origin after their return).<sup>186</sup> Article 6(3) is discretionary, not mandatory,<sup>187</sup> and only binds States Parties

to consider implementing measures to provide for the physical, psychological, and social recovery of victims of trafficking, including, in appropriate cases, in cooperation with NGOs and other relevant agencies and members of civil society.

In particular, these measures should include:

- a) appropriate housing;
- b) counselling and information, in particular as regards to their legal rights, in a language that the victim can understand;
- c) medical, psychological and material assistance; and
- d) employment, educational and training opportunities.<sup>188</sup>

In applying these provisions, States Parties should, where possible, differentiate the available support depending on the special needs of different categories of victims of trafficking in persons. Specifically, they shall take into account ‘the age, gender, and special needs of victims, in particular the special needs of children, including appropriate housing, education, and care.’<sup>189</sup> ‘So far as children are concerned’, notes David McClean, ‘it will usually be desirable to appoint some person to act as guardian of the child, both in terms of its social welfare and also in the context of any legal proceedings that may take place.’<sup>190</sup>

Article 6(5) of the *Trafficking in Persons Protocol* reiterates the points raised in paragraph (3) by calling on States Parties to endeavour to provide for the physical safety of victims of trafficking while they are within its territory.<sup>191</sup> This requirement extends to all victims of trafficking, whether or not they are witnesses in criminal proceedings.

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<sup>184</sup> UNODC, *Anti-Human Trafficking Manual for Criminal Justice Practitioners* (UNODC, 2009) Module 14, Considerations in sentencing in trafficking in persons cases.

<sup>185</sup> Anne Gallagher and Paul Holmes, ‘Developing an Effective Criminal Justice Response to Human Trafficking: Lessons From the Front Line’ (2008) 18(3) *International Criminal Justice Review* 318, 322-323.

<sup>186</sup> *Travaux Préparatoires*, para 71.

<sup>187</sup> See further, David McClean, *Transnational Organized Crime* (Oxford University Press, 2007) 337.

<sup>188</sup> *Trafficking in Persons Protocol*, art 6(3).

<sup>189</sup> *Trafficking in Persons Protocol*, art 6(3).

<sup>190</sup> David McClean, *Transnational Organized Crime* (Oxford University Press, 2007) 340.

<sup>191</sup> See also *Convention against Transnational Organised Crime*, art 25(1).

The supplementary material to the Protocol further elaborates on the assistance provided to victims. The *Model Law against Trafficking in Persons* suggests that the ‘referral to assistance agencies should take place at the earliest moment possible and preferably before the victim makes an official statement.’<sup>192</sup> It also recommends ‘that the police and other bodies involved in the identification process establish procedures for adequate assistance to and referral of victims.’<sup>193</sup> It is further suggested that basic benefits and services should be provided without regard to the ability or willingness of the victim to participate in the investigation or prosecution of his or her alleged trafficker – as mentioned earlier, many victims are unable or unwilling to testify against their traffickers or otherwise participate in proceedings against them.<sup>194</sup>

The *Model Law against Trafficking in Persons* suggests that ‘victim of trafficking’ in persons should include

any natural person who has been subject to trafficking in persons, or whom [the competent authorities, including the designated non-governmental organisations where applicable] reasonably believe is a victim of trafficking in persons, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted.<sup>195</sup>

### B.III.2 Legal Assistance and Access to Courts

As mentioned previously, many victims and witnesses of trafficking in persons are at risk of threats and intimidations by traffickers and their associates, especially if victims testify in criminal proceedings. It is for that reason that many victims refrain from cooperating with authorities and refuse to testify against their traffickers.

In order to encourage and facilitate participation in legal proceedings, Article 6(1) of the *Trafficking in Persons Protocol* obliges States Parties to protect the privacy and identity of victims of trafficking in persons, inter alia, by making legal proceedings relating to such trafficking confidential. There are a variety of ways in which protection of the privacy and identity of victims and witnesses of trafficking in persons during court proceedings may be provided. This may include measures such as conducting court proceedings in camera, away from the presence of media and public, sealing records of the court proceedings, hearing victims and witness testimonies out of the view of the accused (by video link, behind a screen, etc), using pseudonyms for victims and witnesses, restricting questions asked to the victim or witness, et cetera. Where threats against victims and witnesses are particularly imminent, it may also be necessary to take measures to relocate the victim or witness and take additional steps to limit the disclosure of personal information.<sup>196</sup> The acceptability and use of these measures will, however, vary between jurisdictions and some measures may not be permissible in all legal systems. The *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols Thereto* also note that:

Drafters should bear in mind that denying information to the defence must be reconciled with any applicable constitutional or other rights, including the right to confront witnesses or accusers and the right to disclose any information that might be exculpatory or assist the defence. Drafters should also consider that excluding the media or the public from legal proceedings limits the effectiveness of openness and transparency as a safeguard to ensure the propriety of the proceedings and may infringe the rights of the media to free expression.<sup>197</sup>

<sup>192</sup> UNODC & UN.GIFT, *Model Law against Trafficking in Persons* (UNODC, 2009) 56.

<sup>193</sup> Ibid 56.

<sup>194</sup> Ibid 57.

<sup>195</sup> Ibid 22.

<sup>196</sup> See further, UNODC & UN.GIFT, *Model Law against Trafficking in Persons* (UNODC, 2009) 62–63, 64–66; *Legislative Guides*, 283.

<sup>197</sup> *Legislative Guides*, 284.

If victims of trafficking in persons are involved in legal proceedings of any kind, including proceedings that may be directed against their trafficker or, occasionally, against the victims themselves (due to their legal status and, perhaps, illegal activities in the host country), it is important that they have access to legal assistance in order to understand relevant proceedings, participate in them effectively, and to facilitate the expression of their views and concerns. Accordingly, the *Trafficking in Persons Protocol* requires States Parties to provide victims of trafficking with information on relevant court and administrative proceedings and with counselling and information, in particular about their legal rights, in a language they can understand.<sup>198</sup>

The provision of legal assistance to victims of trafficking in persons is specifically recognised in Article 6(2) of the *Trafficking in Persons Protocol* which states that

State Parties shall ensure that its domestic legal or administrative system contains measures that provide victims of trafficking, 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.

The same principle is also expressed in Article 25(3) of the *Convention against Transnational Organised Crime*.

Legal advice should be made available as part of the integrated support offered by the victim assistance program and the professional legal counsels should be familiar with the needs and situations of victims of trafficking in persons and should have acquired the necessary expertise to represent them effectively during the various legal proceedings.<sup>199</sup> Because many victims are fearful of governments and bureaucratic authorities, the provision of legal assistance and representation is especially important. The task of legal counsels is to inform victims about their role and rights in criminal proceedings and to accompany them throughout the process. They assist victims in expressing their views and enforcing their procedural rights. Legal counselling also prepares victims for the criminal proceedings and can reduce the risk of imposing further trauma on the victims. Moreover, it increases the chance of sound and coherent witness statements and contributes to the successful prosecution of the traffickers. There is, indeed, a clear relationship between victims' access to legal representation and successful prosecution outcomes.<sup>200</sup>

### **B.III.3 Victim Compensation**

Article 6(6) of the *Trafficking in Persons Protocol* obliges States Parties to ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.<sup>201</sup> The Protocol further requires States to provide trafficked persons with 'information on relevant court and administrative proceedings'. This provision may be interpreted to include information and assistance with respect to obtaining compensation through criminal or civil proceedings.<sup>202</sup>

The *Toolkit to Combat Trafficking in Persons* also notes that receiving compensation is important for victims of trafficking not only because of the financial component but also because it has a symbolic meaning:

- At a societal level, awarding compensation acknowledges that trafficking is a crime;

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<sup>198</sup> UNODC, *Toolkit to Combat Trafficking in Persons* (United Nations, 2<sup>nd</sup> ed 2008) 430.

<sup>199</sup> Ibid 434.

<sup>200</sup> Ibid 433.

<sup>201</sup> See also *Convention against Transnational Organised Crime*, art 25(2).

<sup>202</sup> UNICEF et al, *Assessment of the Legal System in Vietnam in Comparison with the United Nations Protocols on Trafficking in Persons and Smuggling of Migrants, supplementing the United Nations Convention against Transnational Organised Crime* (Women's Publishing House, 2004) 40.

- At an individual level, the victim's pain and suffering are acknowledged and compensation can constitute a first step towards overcoming trauma inflicted and abuses suffered;
- At a practical level, compensation can assist victims in rebuilding their lives;
- At a retributive level, compensation paid by traffickers can constitute a form of punishment and deter other traffickers.<sup>203</sup>

The *Trafficking in Persons Protocol* does not specify the source from which victims may obtain compensation. It has been noted that this source could be the traffickers themselves, either as a result of compensation orders made in criminal proceedings, or some national compensation scheme funded from the public revenue.<sup>204</sup> To that end, the *Model Law against Trafficking in Persons* also recommends the establishment of a victim fund to which victims can apply for compensation for the damages suffered by them. It may, however, be preferable to maintain a single fund for all victims of serious crime rather than establishing different funds for different types of crime.<sup>205</sup>

#### B.III.4 Immigration Status of Victims of Trafficking in Persons

Article 7(1) of the *Trafficking in Persons Protocol* calls on States Parties to consider adopting legislative or other appropriate measures that permit foreign trafficked persons to remain in the territory of the host country, temporarily or permanently, in appropriate cases. In implementing such measures, Article 7(2) calls on States Parties to give appropriate consideration to humanitarian and compassionate factors. It is understood that 'humanitarian factors' refer to rights that are established in international human rights instruments, such as the *International Covenant for Civil and Political Rights (ICCPR)* and the *Convention relating to the Status of Refugees*. 'Compassionate factors' is meant to refer to personal circumstances such as family situation, age, gender, de-facto relationships, and other factors that should be considered on an individual and case-by-case basis.<sup>206</sup>

#### B.III.5 Return and Repatriation

Article 8 of the *Trafficking in Persons Protocol* creates several obligations for countries seeking to repatriate victims of trafficking in persons to their home country. Article 8(2) requires that the State Party returning the victim must have due regard for the safety of the victim and for the status of any legal proceedings relating to the trafficking. This provision relates to the timing of any return of the victim. It recognises that decisions to return a victim of trafficking in persons require consideration of two factors. First, paramount in the decision to repatriate must be the safety of the victim. Accordingly, 'it may well be best for the return of the victim to his or her home State to be delayed in order to allow at least some aspects of [the physical, psychological, and social] recovery process to have been completed.'<sup>207</sup> Second, victims of trafficking in persons may be needed in criminal proceedings in the receiving State before they are returned to their home country. In the case of child victims of trafficking in persons, countries should also consider not repatriating child victims to their home country unless doing so is in their best interest and, prior to their return, a suitable relative or guardian has agreed and is able to take responsibility and offer care and protection for the child.<sup>208</sup>

Article 8(2) further mandates that the repatriation of the victim 'shall preferably be voluntary'. While the Protocol does not prohibit compulsory repatriation against the known wishes of the victim, it calls on Signatories not to use force in order to compel victims to return to their home country. 'There is something offensive in the notion that a victim, compelled by illicit force to move another State,

<sup>203</sup> UNODC, *Toolkit to Combat Trafficking in Persons* (United Nations, 2<sup>nd</sup> ed 2008) 435.

<sup>204</sup> Ibid 436–437; David McClean, *Transnational Organized Crime* (Oxford University Press, 2007) 341.

<sup>205</sup> UNODC & UN.GIFT, *Model Law against Trafficking in Persons* (UNODC, 2009) 69, 70.

<sup>206</sup> UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, UN Doc A/AC.254/4/Add.3/Rev.6 (4 Apr 2000) footnote 55.

<sup>207</sup> David McClean, *Transnational Organized Crime* (Oxford University Press, 2007) 347.

<sup>208</sup> *Legislative Guides*, 290.

should then be compelled, albeit by legitimate force, to move once again’, notes one commentator.<sup>209</sup> Article 8(2), however, does not place any specific obligation on the State Party returning the victim.<sup>210</sup>

The *Trafficking in Persons Protocol* also obliges States Parties to cooperate in the course of the return procedure. Upon request of the receiving state, states of origin shall verify whether the trafficked person is a national or had the right to permanent residence at the time of entering the receiving state and, if the person has no proper documentation, issue the necessary travel or other documents to enable the person to travel and re-enter its territory: Article 8(3), (4) *Trafficking in Persons Protocol*.

## **B.IV International Cooperation**

Articles 10, 11, 12, and 13 of the *Trafficking in Persons Protocol* promote cooperation between States Parties, inter alia, through the exchange of information, training, mutual control of international borders, and verification of travel documents.

### **B.IV.1 Information Exchange**

Article 10(1) of the *Trafficking in Persons Protocol*, along with Article 26 of the *Convention against Transnational Organised Crime*, states that law enforcement, immigration, and other relevant authorities shall, as appropriate, cooperate with one another by exchanging information about the identification of offenders and victims of trafficking in persons, and the means and methods used by organised criminal groups to traffic human beings, including recruitment, transportation, and routes.

### **B.IV.2 Training**

It is crucial that staff at all levels are adequately trained and skilled to meet the many challenges and hazards associated with combating trafficking in persons. If alleged crimes are investigated by officers insufficiently familiar with the relevant background, techniques, processes, and legal requirements, then it is possible that the integrity of investigations may be compromised, with potential implications for subsequent prosecutions and trials.<sup>211</sup> Relevant authorities and complicit parties often do not perceive trafficking in persons as a criminal activity that poses serious risks to victims of trafficking and to the wider community.

The availability of quality training programs is thus of paramount importance. To that end, Article 10(2) of the *Trafficking in Persons Protocol*, together with Article 29 of the *Convention against Transnational Organised Crime*, calls on States Parties to provide or strengthen training of law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. Both Articles also outline some of the relevant content for training programs.

### **B.IV.3 Border Control Measures**

Article 11(1) of the *Trafficking in Persons Protocol* obliges States Parties to strengthen, to the extent possible and without prejudice to international commitments in relation to free movement of people, border controls and to consider strengthening cooperation among border control agencies by establishing and maintaining direct channels of communication. The qualification ‘to the extent possible’ must be read as referring to the means and resources available to each State Party as well as the practical questions posed by the nature of borders, land or sea, which may make effective border controls very difficult.<sup>212</sup>

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<sup>209</sup> David McClean, *Transnational Organized Crime* (Oxford University Press, 2007) 347–348.

<sup>210</sup> *Travaux Préparatoires*, para 73.

<sup>211</sup> UNODC, *Criminal Justice Assessment Toolkit* (United Nations, 2006) The Integrity and Accountability of Police, 11.

<sup>212</sup> David McClean, *Transnational Organized Crime* (Oxford University Press, 2007) 358.



The practical outcome of the requirement to strengthen basic border controls is to make it more difficult for traffickers to use conventional means of transport and travel routes to enter countries. However, a possible negative side effect of strengthened border controls is the displacement of traffickers' routes as traffickers change their methods.

#### **B.IV.4 Law Enforcement Cooperation**

While the *Trafficking in Persons Protocol* does not directly address the issue of law enforcement cooperation, provisions relating to law enforcement cooperation under the *Convention against Transnational Organised Crime* apply, mutatis mutandis.<sup>213</sup> This includes, inter alia, provisions on international cooperation for purpose of confiscation (Article 13), extradition (Article 16), mutual legal assistance (Article 18), joint investigations (Article 19), and law enforcement cooperation (Articles 26 and 27 of the *Convention against Transnational Organised Crime*).<sup>214</sup>

#### **B.IV.5 Travel and Identity Documents**

Under Article 11(2)–(3) of the *Trafficking in Persons Protocol* States Parties are required to strengthen border controls to detect and prevent trafficking, including imposing requirements on commercial carriers to check whether or not passengers have the necessary passports and visas in their possession,<sup>215</sup> setting standards for the technical quality of passports and other travel documents, and cooperating with other States in establishing the validity of their own documents when used abroad.

Article 12 of the Protocol obliges States Parties to take measures to 'ensure that travel and identity documents are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued' and 'to prevent their unlawful creation, issuance and use'. The *Model Law against Trafficking in Persons* states that 'one way to meet this obligation is to include a provision in [the] criminal law'.<sup>216</sup> In particular it suggests the following provision:

Any person who obtains, procures, destroys, conceals, removes, confiscates, withholds, alters, replicates, possesses or facilitates the fraudulent use of another person's travel or identity document, with the intent to commit or to facilitate the commission of an offence under this Law, shall be guilty of an offence.<sup>217</sup>

Article 13 obliges States Parties to verify within a reasonable time frame the legitimacy and validity of travel and identity documents as requested by other Signatories.

### **B.V Prevention, Education, Awareness**

#### **B.V.1 Awareness Raising and Education**

Article 9 of the *Trafficking in Persons Protocol* seeks to guide Signatories' efforts to prevent trafficking in persons. Article 9(1) broadly requires States Parties to establish comprehensive policies, programmes, and other measures to prevent and combat trafficking in persons as well as protect victims of trafficking. Article 9(2) specifically refers to States Parties endeavouring to undertake research, information and mass media campaigns to prevent and combat trafficking in persons.<sup>218</sup> Article 9(3) and (5) then give some further direction to the content and organisation of awareness-raising campaigns.

<sup>213</sup> *Trafficking in Persons Protocol*, art 1(2), (3).

<sup>214</sup> *Legislative Guides*, 254.

<sup>215</sup> See further, *Travaux Préparatoires*, para 80.

<sup>216</sup> UNODC & UN.GIFT, *Model Law against Trafficking in Persons* (United Nations, 2009) 48.

<sup>217</sup> UNODC & UN.GIFT, *Model Law against Trafficking in Persons* (United Nations, 2009) 48.

<sup>218</sup> See also *Convention against Transnational Organised Crime*, art 31(5).



The *Toolkit to Combat Trafficking in Persons* further notes that anti-trafficking campaigns should focus on educating people about the true nature of the crime and its consequences. Accordingly, it is important that awareness campaigns are supported by solid research and by verifiable sources. The *Toolkit* further remarks that the purpose of raising public awareness is to mobilize popular concern about the risk of falling prey to these criminals and about the social and human costs of trafficking in persons.<sup>219</sup> The *Toolkit* places particular emphasis on creating campaigns that assist victims to identify that they have been victimised, that trafficking is a crime and they can seek protection of the law.<sup>220</sup>

In addition to these victim-oriented approaches, the *Toolkit* and the *Model Law against Trafficking in Persons* highlight some of the other possible messages that an awareness campaign may wish to convey to its target audience:

Some other messages to be conveyed include vigilance and public accountability (taking action when trafficking is detected), information about anti-trafficking programs, highlighting criminal penalties for trafficking, discouraging the demand for exploitation and increasing transparency of enterprises' supply chains.<sup>221</sup>

The *Model Law against Trafficking in Persons* further suggests the implementation of a national anti-trafficking coordinating body or inter-agency anti-trafficking task force to, among other things, carry out information and awareness-raising campaigns, in cooperation with the media, NGO's and other relevant actors.<sup>222</sup> This suggestion builds upon Article 9(3) of the *Trafficking in Persons Protocol* in terms of fostering cooperation between government and non-government organisations and other elements of civil society.

## B.V.2 Research & Analysis

Article 9(4) of the *Trafficking in Persons Protocol* calls on States Parties to cooperate in addressing the root causes of trafficking in persons, including poverty, underdevelopment, and lack of opportunity. Article 9 also encourages to instigate research and collaborate broadly with non-governmental organisations and other elements of civil society.<sup>223</sup> The *Model Law against Trafficking in Persons* further recommends that countries

[e]stablish procedures to collect data and to promote research on the scale and nature of both domestic and transnational trafficking in persons and its forced labour and slavery-like outcomes, the factors that further and maintain trafficking in persons and best practices for the prevention of trafficking, for assistance to and protection of victims and the prosecution of traffickers.<sup>224</sup>

While there is little controversy about and no objection to the prevention measures advocated by the Protocol, some criticism has been levelled at these Articles, arguing that the victim-focussed prevention articles carry diminished, soft obligations in contrast to the mandatory obligations relating to criminalisation.<sup>225</sup> The practical consequence of the non-mandatory language is that most countries do not, or not adequately undertake efforts to prevent trafficking in persons, raise awareness about the causes and consequences, and fail to engage in or contribute to analytical research about the levels and patterns of this phenomenon. Some countries are also hostile to in-depth research that may be critical of government policy and legislation. Where prevention programs are instituted, they generally only take the form of mass media awareness programs. In the absence of other prevention measures, these programs are, however, unlikely to result in systemic change to the magnitude or nature of trafficking

<sup>219</sup> UNODC, *Toolkit to Combat Trafficking in Persons* (United Nations, 2<sup>nd</sup> ed 2008) 439.

<sup>220</sup> Ibid 437-438.

<sup>221</sup> Ibid 439; UNODC & UN.GIFT, *Model Law against Trafficking in Persons* (UNODC, 2009) 83.

<sup>222</sup> UNODC & UN.GIFT, *Model Law against Trafficking in Persons* (UNODC, 2009) 84.

<sup>223</sup> *Trafficking in Persons Protocol*, art 9(2), (3).

<sup>224</sup> UNODC & UN.GIFT, *Model Law against Trafficking in Persons* (UNODC, 2009) 86.

<sup>225</sup> Kalen Fredette, 'Revisiting the UN Protocol on human trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101, 128.

in persons. Instead other measures aimed at counteracting the root causes of trafficking need to be implemented, but these are not sufficiently supported by mandatory Protocol requirements.<sup>226</sup>

## B.VI Observations and Concerns

Twelve years since its inception, there have been many doubts about how well adapted the *Trafficking in Persons Protocol* is towards achieving its lofty ambitions.<sup>227</sup>

### B.VI.1 The Blurry Line Between Trafficking in Persons and Smuggling of Migrants

Although the *Trafficking in Persons Protocol* provides a straightforward and universally accepted definition, confusion between trafficking in persons with the issue of smuggling of migrants (and other forms of irregular migration) persists. The conceptual distinction between ‘smuggling of migrants’ and ‘trafficking in persons’ is subtle, and sometimes blurry,<sup>228</sup> but is imperative, as both phenomena are addressed by separate international legal instruments with widely different requirements and consequences. According to Article 3 of the *Protocol against the Smuggling of Migrants by Land, Sea and Air*<sup>229</sup> the smuggling of migrants involves ‘the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a country of which the person is not a national or a permanent residence.’

UNODC has identified three principal points of difference between smuggling of migrants and trafficking in persons:

The first point relates to the purpose of the criminal enterprise. ‘[T]he primary source of profit and thus also the primary purpose of trafficking in persons is exploitation,’ notes UNODC.<sup>230</sup> In the case of migrant smuggling, however, there is typically ‘no intention to exploit the smuggled migrant after having enabled him or her to irregularly enter or stay in a country.’<sup>231</sup> Rather, migrant smugglers seek payment in advance or upon arrival from the smuggled migrant. In many cases this distinction is not an easy one to draw. For example, a person may agree to be smuggled unaware that on arrival he/she will be forced to work in poor or restrictive conditions for the smuggler in order to pay off a ‘debt’ for the service. This situation would be considered an instance of trafficking because there has been exploitation of the smuggled person.

Secondly, the two concepts have differing requirements relating transnationality and the legality/illegality of the trafficked/smuggled person’s entry into another State. For the smuggling of migrants, there must be ‘illegal entry of a person into a State Party of which the person is not a national or a permanent resident.’<sup>232</sup> There is thus both a cross-border element as well as a requirement of illegal entry. Trafficking in persons, in contrast, may involve illegal or legal entry into a country. Furthermore, there is no requirement that trafficking in persons can only occur transnationally; trafficking can occur completely within one country.

<sup>226</sup> Kalen Fredette, ‘Revisiting the UN Protocol on human trafficking: Striking balances for more effective legislation’ (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101, 128.

<sup>227</sup> Elizabeth Defeis, ‘Protocol to prevent, suppress and punish trafficking in persons – a new approach’ (2003-04) 10 *ILSA Journal of International & Comparative Law* 485, 488.

<sup>228</sup> See generally, UNODC, *Smuggling of Migrants: A Global Review and Annotated Bibliography of Recent Publications* (UNODC< 2010) 8.

<sup>229</sup> Opened for signature 15 Dec 2000, 2241 UNTS 507 [hereinafter *Smuggling of Migrants Protocol*].

<sup>230</sup> UNODC, *A short introduction to smuggling of migrants*, Issue Paper (UNODC, 2010) 10.

<sup>231</sup> *Ibid* 10.

<sup>232</sup> *Smuggling of Migrants Protocol*, art 3(a).

The final and critical difference between the two concepts is the issue of consent, which is considered to be irrelevant by the *Trafficking in Persons*.<sup>233</sup> The Protocol is based on the understanding that

[v]ictims of trafficking have either never consented — for instance if they have been abducted or sold — or, if they have given an initial consent, their initial consent has become through the means the traffickers have used to gain control over the victim, such as deception or violence.<sup>234</sup>

Smuggling of migrants, in contrast, involves an agreement whereby a person may pay or give some other benefit to a smuggler in order to facilitate that person's illegal migration. It has been recognised that smuggled migrants might retract their initial consent during a smuggling operation but be forced to continue on the journey.<sup>235</sup> Retracting consent, however, does not automatically denote an instance of trafficking. Other elements of the trafficking definition, such as the purpose of exploitation, would still need to be satisfied.

### B.VI.2 Prosecution vs Protection

The impetus which precipitated the drafting and adoption of the *Convention against Transnational Organised Crime* and the *Trafficking in Persons Protocol* was the perceived threat of criminal organisations to nation-state sovereignty and border security. Hastening the adoption of the *Trafficking in Persons Protocol* was an increased political consciousness of the susceptibility of national borders to the clandestine movement of people.<sup>236</sup> A major criticism of the *Trafficking in Persons Protocol* has been the emphasis it places on law enforcement and prosecution in lieu of prevention and protection. In particular, the protection and prevention obligations have been criticised for being too vague, and appropriate remedies too few.<sup>237</sup>

Clauses in Part II of the Protocol frequently begin with or contain permissive language, such as 'shall endeavour to',<sup>238</sup> 'shall consider',<sup>239</sup> 'shall give appropriate consideration',<sup>240</sup> and '[i]n appropriate cases and to the extent possible under domestic law'.<sup>241</sup> This drafting approach obviously grants States Parties considerable flexibility to determine how and to what extent victim protection measures are established within that state, but also permits States Parties to take no action in this respect. During negotiations for the *Trafficking in Persons Protocol*, there were discussions about creating mandatory protection and assistance provisions. This was decided against as a result of concern over the cost that would be imposed by mandatory requirements, particularly on developing countries.<sup>242</sup> Instead, it has been suggested that on a reasonable interpretation of the language of Article 6, an onus

<sup>233</sup> *Trafficking in Persons Protocol*, art 3(b).

<sup>234</sup> UNODC, *A short introduction to smuggling of migrants*, Issue Paper (UNODC, 2010) 10.

<sup>235</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols Thereto* (United Nations, 2004) [hereinafter *Legislative Guides*] 340–341; UNODC, *A short introduction to smuggling of migrants*, Issue Paper (UNODC, 2010) 10.

<sup>236</sup> J Chuang, 'The United States as global sheriff: Using unilateral sanctions to combat trafficking in persons', (2006) 27 *Michigan Journal of International Law* 437.

<sup>237</sup> Kathryn Nelson, 'Sex trafficking and forced prostitution: Comprehensive new legal approaches' (2001–02) 24 *Houston Journal of International Law* 551, 578.

<sup>238</sup> *Trafficking in Persons Protocol*, art 6(5).

<sup>239</sup> *Trafficking in Persons Protocol*, arts 6(3), 7(1).

<sup>240</sup> *Trafficking in Persons Protocol*, art 7(2).

<sup>241</sup> *Trafficking in Persons Protocol*, art 6(1).

<sup>242</sup> See UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime*, Eleventh session A/AC.254/4/Add.3/Rev.7 (2000) footnote 25; see also Kelly E Hyland, 'The impact of the protocol to prevent, suppress and punish trafficking in persons, especially women and children' (2001) 8 *Human Rights Brief* 30, 37.

is placed on developed nations to provide assistance while developing nations must provide assistance to the best of their ability, having regard to the limited resources at their disposal.<sup>243</sup>

An issue that follows from the vague approach taken to victim assistance and protection by the *Trafficking in Persons Protocol* is the lack of support measures directed specifically at problems that victims of trafficking suffer from. This has led one commentator to conclude that the ‘Protocol is a lost opportunity to protect the rights of victims of trafficking.’<sup>244</sup> Apart from vagueness in the Protocol, this shortcoming has also been partially blamed on the treatment of trafficking as a subset of violence against women or other crimes, rather than as its own distinct issue. Trafficked victims have potentially been subjected to both physical and mental abuse, and are often unsure as to their legal status; the *Trafficking in Persons Protocol* arguably overlooks this and other specific needs.<sup>245</sup> For example, the Protocol provides no basis for governments to treat trafficked persons differently to other undocumented migrants nor does it guarantee the confidentiality of victims.<sup>246</sup> Notably, neither of these measures would impose a significant financial or administrative burden on States Parties. Through a combination of vague wording and a generic approach to victim support, the *Trafficking in Persons Protocol* does not even imply that States Parties should provide support services which are necessary for the unique issues faced by victims of trafficking in persons.

Some have criticised the protection measures provided in the Protocol as being overly oriented toward maximising a victim’s utility as a witness. This argument is given credibility by the drafting of the articles which de-emphasise the witness role, such as Article 6(3), which carry markedly diminished State obligations.<sup>247</sup> By failing to offer suitable incentives for victims to testify (i.e. temporary rather than semi-permanent or permanent residency), States are damaging their prospects of successfully prosecuting traffickers and if Australian prosecutions are any indication, the cooperation of victims at trial is a near prerequisite for success.<sup>248</sup>

The Protocol’s provisions relating to the stay of victims in the receiving country anytime beyond their apprehension and identification has been another point of controversy since the early days of drafting. Article 7 of the *Trafficking in Persons Protocol* requests that States Parties ‘consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in [their] territory [...] in appropriate cases.’ Article 8 covers the alternative situation by requiring cooperation between destination and source countries to ensure the safe repatriation of the trafficking victim at their request. Both these articles have attracted their share of criticism. Understandably, countries whose citizens were commonly trafficked sought as much protection as possible. Delegates from developed nations were concerned that the Protocol would become an inadvertent means of illegal migration if the legal status of victims in receiving countries was strengthened, for example through the creation of specific visa categories.<sup>249</sup> As a result, no strong obligations were placed on receiving countries and the most common approach taken, in the absence of any mandatory Protocol provision, is for temporary visas to be extended to victims of trafficking who agree to testify or

<sup>243</sup> Kelly E Hyland, ‘The impact of the protocol to prevent, suppress and punish trafficking in persons, especially women and children’ (2001) 8 *Human Rights Brief* 30, 37.

<sup>244</sup> Elizabeth Defeis, ‘Protocol to prevent, suppress and punish trafficking in persons – a new approach’ (2003-04) 10 *ILSA Journal of International & Comparative Law* 485, 490.

<sup>245</sup> Sarah King, ‘Human Trafficking: Addressing the International Criminal Industry in the Backyard’ (2007-08) 15 *University of Miami International & Comparative Law Review* 369, 377.

<sup>246</sup> Ibid.

<sup>247</sup> Article 6(3) of the *Trafficking in Persons Protocol* requires only that States Parties ‘consider implementing measures for the physical, psychological and social recovery of victims’.

<sup>248</sup> Kalen Fredette, ‘Revisiting the UN Protocol on human trafficking: Striking balances for more effective legislation’ (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101, 130.

<sup>249</sup> Elizabeth Defeis, ‘Protocol to prevent, suppress and punish trafficking in persons – a new approach’ (2003-04) 10 *ILSA Journal of International & Comparative Law* 485, 489.

provide evidence in the prosecutions of traffickers.<sup>250</sup> It has been suggested that at the very least, the Protocol should require that temporary residency be extended where deportation presents clear hazards to the trafficked person or where the person is a child. This would help allay both protection and migration concerns (by maintaining a degree of state control over whom is granted residency) and also ameliorates the State's desire for reliable witnesses.<sup>251</sup> On the other hand it appears that the current status envisaged by Article 7 is already seen as too generous as several countries have filed reservations relating to Article 7 of the Protocol and, as discussed further below, this provision may indeed deter some countries from signing the Protocol in the first place.

A further point of criticism relating to the protection provisions under the Protocol concerns the relatively low threshold for repatriation of victims of trafficking: returns should be made with due regard for the safety of the person involved and 'shall preferably be voluntary.'<sup>252</sup> Article 8 does not appear to address the particular issues faced by trafficking victims upon return to their country of origin (though Article 9 does broadly address re-victimisation). Victims who are repatriated may face persecution as a result of the stigma attached to working in prostitution and false fears in some communities that the victims return with HIV/AIDS infections.<sup>253</sup> Beyond a 'due regard for the safety of that person' there is nothing in the Protocol to prevent victims from being returned to the same conditions, and same pattern of exploitation, from which they were trafficked in the first place.<sup>254</sup> This is even more likely where the families of victims are complicit in the trafficking activities. As most courts have been hesitant to classify victims of trafficking as refugees, these factors create an even greater need for a settled legal status to be granted to trafficked victims, which the Protocol at present fails to provide. Instead, the Protocol's principal concerns in relation to repatriation are that States Parties respond sensitively to prosecutorial proceedings, and that repatriation efforts are both timely and documented.<sup>255</sup>

### B.VI.3 The Gendered Approach to Trafficking

Although the *Trafficking in Persons Protocol* definition extends the scope of trafficking by recognising that it may be related to various forms of exploitation and that men, women, and children alike can be trafficked, debates during the drafting of the Protocol remained focused on the issue of prostitution. Indicative of the continued preoccupation of the international community with the traffic of women and children for the purpose of commercial sexual exploitation is the mandate given by the UN General Assembly to the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, which restricted trafficking to the phenomenon affecting only women and children.<sup>256</sup>

The very title of the Protocol evidences this preoccupation insofar as it refers to the special objective of protecting women and children, despite recognition that men, too, are potential victims of

<sup>250</sup> Kalen Fredette, 'Revisiting the UN Protocol on human trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101, 129; Mohamed Y Mattar, 'Incorporating the Five Basic Elements of Model Anti-trafficking In Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention' (2006) 14 *Tulane Journal of International & Comparative Law* 357, 362-363.

<sup>251</sup> Kalen Fredette, 'Revisiting the UN Protocol on human trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101, 132.

<sup>252</sup> See further, Andreas Schloenhardt & Mark Loong, 'Return and Reintegration of Human Trafficking Victims from Australia' (2011) 23(2) *International Journal of Refugee Law* 143-173.

<sup>253</sup> Elizabeth Defeis, 'Protocol to prevent, suppress and punish trafficking in persons – a new approach' (2003-04) 10 *ILSA Journal of International & Comparative Law* 485, 491.

<sup>254</sup> Kelly E Hyland, 'The impact of the protocol to prevent, suppress and punish trafficking in persons, especially women and children' (2001) 8 *Human Rights Brief* 30, 38.

<sup>255</sup> Kalen Fredette, 'Revisiting the UN Protocol on human trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101, 133.

<sup>256</sup> UN General Assembly, *Transnational organised crime*, UN Doc A/RES/53/111 (20 Jan 1999) para 10.



exploitation. The use of such language recognises the gendered reality of the phenomenon. But it also fosters and perpetuates a gendered perception of trafficking in persons, leading to skewed preventative, legislative, policing, and rehabilitative efforts, and the stereotyping of victims and their experiences. Approaching trafficking in persons from a gendered perspective — whether regulationist or abolitionist — retains focus on prostitution and sexual exploitation, rather than on the complex realities of the trafficking process. Such a focus is to the detriment of a more comprehensive analysis of trafficking.

On the other hand, by leaving the ‘exploitation of the prostitution of others’ and ‘other forms of sexual exploitation’ undefined, the drafters of the *Trafficking in Persons Protocol* declined to comment on whether voluntary adult prostitution should be considered trafficking in persons, thus positioning the regulation or prohibition of prostitution as a matter of domestic jurisdiction. This may ‘provide a foundation upon which anti-trafficking discussion, research, and policy development may transcend the general debate about the rights and wrongs of prostitution’,<sup>257</sup> and potentially transcend typical conceptualisations of the victim and purpose of trafficking.

Although the *Trafficking in Persons Protocol* has expanded the concept of trafficking in persons to include child exploitation and labour trafficking, the international community, governments, and academic scholarship remain predominantly focussed on trafficking for the purpose of commercial sexual exploitation and, to a significantly lesser extent, on forced labour. Such a focus has meant other forms of exploitation have not been sufficiently investigated. It is thus necessary to shift the perspective to a position which not only recognises the potentially diverse victim demographic and the various exploitative purposes of trafficking but also allocates sufficient resources to these aspects of trafficking.

#### **B.VI.4 The Infinity of Trafficking in Persons**

The definition in the *Trafficking in Persons Protocol*, which combines various acts, means, and purposes to constitute trafficking, has greatly expanded the concept of trafficking in persons. The reason behind this broad conceptualisation of trafficking in persons in the Protocol are the multiple — and sometimes conflicting — influences that stem from the evolution of the international legal framework relating to trafficking in persons and the perception of the problem in individual countries.

The Protocol attempts to consolidate different and sometimes conflicting approaches into the one concept, governed by a single international instrument. Yet, questions arise whether such a conceptualisation is feasible and functional. It is evident that preventative mechanisms, investigative procedures, prosecutorial systems, and victim rehabilitation must be tailored to specific manifestations of trafficking in persons. The experience of a person trafficked for the purpose of commercial sexual exploitation is fundamentally different from the experience of a person trafficked for the purpose of labour exploitation; and the systems in place to address these different aspects of trafficking must be tailored accordingly.<sup>258</sup> Over-extending the concept of trafficking in persons fails to recognise that the resources and attention of policy makers, legislators, law enforcement agencies, and the public cannot adequately encompass all the different — related and unrelated — facets of trafficking in persons.

The creation of the *Trafficking in Persons Protocol* has made it increasingly difficult to determine what trafficking actually is and, just as importantly, what it is not. If the definition in the *Trafficking in Persons Protocol* and other contemporary conceptualisations of trafficking are taken at face value, trafficking in persons is a potentially indefinite phenomenon, encompassing entirely unrelated

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<sup>257</sup> UNCHR, *Report of the Special Rapporteur on human rights aspects of the victims of trafficking in persons, especially women and children*, UN Doc E/CN.4/2006/62/Add.2 (2006) para 33.

<sup>258</sup> UNCHR, *Report of the Special Rapporteur on violence against women, its causes and consequences on trafficking in women, women's migration and violence against women*, UN Doc E/CH.4/2000/68 (2000) para 2.

instances of exploitation. Yet, narrowly confining the concept of trafficking in persons to the area where the exploitative purposes overlap seems to unjustifiably limit the scope, and critically, is a wilful position of ignorance in relation to the exploitation experienced by countless people globally.

It may be desirable to separate the different aspects of trafficking in persons in order to recognise distinct issues requiring distinct responses. ‘Trafficking in persons is a complex, multi-faceted problem that intertwines issues of law enforcement, border control, gender, crime, security and human rights’.<sup>259</sup> An internationally coordinated response which is tailored to suit the specific dynamics of each aspect is one possible approach to overcoming the complexity and confusion surrounding current conceptualisations of trafficking in persons in international law.

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<sup>259</sup> Alexandra Amiel, ‘Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation’ (2006) 12 *Buffalo Human Rights Law Review* 5, 5.