

**Parliamentary Joint Committee on the
Australian Crime Commission**

**Inquiry into trafficking in women for
sexual servitude**

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Human trafficking is first and foremost a violent crime against the person, and as such a severe human rights violation. It is not principally an illegal migration matter, the migration being an incidental if necessary element of an activity that is only about exploitation.

The effective prosecution of traffickers is something that eludes Australia. Indeed, the successful mounting of a quality investigation into traffickers to present for prosecution also eludes Australia. There are many reasons for this, some institutional, some national, some personal.

On the institutional level, there does not exist a body with the mandate to investigate trafficking. Those agencies with some interest in the matter, including the Department of Immigration, Federal and State police services, have neither a professional interest nor any particular skill to work in this field. Additionally those same agencies lack the directive to work on trafficking and do not adequately have the tools (legislative or operational) to work on trafficking.

Australia is not at all alone in this situation. In most western States, responses to trafficking find themselves relegated to the field of social development and welfare, often in the non-government sector. This social development sector response to trafficking often precedes State-based responses by many years. It is only with a certain raising of public awareness of the enormity of trafficking, and knowing this happens with impunity in their midst, that State-based responses are forthcoming.

To some extent, this slowness of State-based responses in Australia is understandable, at least from a utilitarian government perspective which suggests that the matter of trafficking is largely one of the offence against the State that is illegal migration. The fact of trafficking actually being a crime against the person first, and only incidentally a crime against the State, comes with institutional maturity and reflection of the sort not yet witnessed in Australia.

The place to start is analysis of Australia's responses to trafficking and available tools. For this purpose, creating a starting point to raise awareness of each State's lack of preparedness to deal with trafficking, the UN Office of Drugs and Crime provides States with the tools with which to measure concordance with the relevant international law provisions on trafficking¹. Australia, a late signatory of the Optional Protocol on Trafficking in Persons to the UN Convention on Transnational Organised Crime (hereafter the Trafficking Protocol) is not in a position to ratify the protocol. Even Australia's unwarranted reservation to the signing demonstrates a lack of understanding of the most fundamental differences between trafficking and smuggling (the latter of course being a crime against the State and absolutely different qualitatively from trafficking²). Most measures required by this protocol are not in place in Australia and would take some time to prepare. Development in Australia in readiness for ratification lags well behind all neighbouring States normally criticised

¹ "Trafficking Protocol Checklist", Iselin, B. UN Office on Drugs and Crime, Bangkok, February 2003.

² For detailed description of the differences between trafficking and smuggling from a law enforcement perspective, see: "Distinguishing between Human Trafficking and People Smuggling" Iselin, B. and Adams, M., UN Office on Drugs and Crime, Bangkok, April 2003.

for a lack of action on trafficking, including Thailand, Cambodia, Burma, the Philippines and Indonesia.

While Australia is not the best performer against trafficking, it is certainly not the worst. The anti-trafficking progress of countries including Albania, Central Asian Republics such as Uzbekistan, several Baltic States including Lithuania and Latvia, are certainly in similar state as Australia. However Australia is, of the world's leading middle powers, the worst performer and last to recognise the nature and extent of trafficking.

We should aspire to improve, and aspire to be the best. As a country that respects freedom, and the independence of the individual, as well as possessing a long tradition of helping the underprivileged and being supportive of the underdog, Australia should be among the world's best at dealing with trafficking. It is largely our inability (unwillingness?) to try to understand what trafficking is that has stopped Australia responding effectively. But this has been overcome in many countries including the United States, Canada, Denmark, the United Kingdom and Belgium. There is no reason Australia cannot aspire to be better even than Sweden, at present perhaps one of the most advanced in terms of institutional responses to trafficking.

Australia's response must start with a detailed situation analysis, determining through rigorous testing the true nature and likely extent of the phenomena. From this the Trafficking Protocol sets out some reasonable national measures to be put in place including the establishment of a national committee to address the issue that involves all relevant stakeholders from all interested sectors. Legislative change is also essential as part of the raft of changes that must be made institutionally in Australia. Operationally there must also be some mandate for a body to deal with trafficking, emphasising multi-sector responses akin to rape crisis responses and child abuse cases.

When talking about nature and extent, we really are addressing two separate sets of data. Extent, demanding a quantitative assessment, of trafficking is very difficult to assess without dedicated resources. This quantitative exercise requires dedicated criminal intelligence and social welfare intelligence probes, and can be pursued also through the application of sensible and academic sampling using epidemiological techniques useful in other fields such as drug-use surveys. The fact that this has not been done is simply symptomatic of Australia's lack of interest in dealing with the problem and subsequent unwillingness to recognise a problem. It is not unlike child abuse and paedophilia or incest, where members of society with insufficient conscience will often rather close their minds to a subject if it invokes thoughts that would rather not be had, in preference to recognising and then confronting the problem. But confront the problem we must, as it sits at the heart of some of our deepest societal prejudices.

Trafficking victims in Australia will largely be found working in brothels and as escorts. Mostly these businesses are illegal, the operators often being standing criminal identities who are unable to obtain licences to sell sexual abuse in Australian jurisdictions. That is not to say that trafficked victims do not end up in legalised sex service institutions, but that it is simply more likely they will be kept 'underground' owing to the risk they present to trafficker's operation once detected.

In terms of identity, they will largely be ‘imported’ to meet certain demands, often for the type of women who cannot be easily or cheaply bought locally, including South Asians, Central Asians, Former Soviet Union, Asian, and Central and South American. Given Australia’s geographical proximity to Southeast Asia it is natural to assert that the majority of trafficked victims in Australia are Southeast Asian women trafficked for sex in illegal sex services, often demanded most by Southeast Asian men.

It is also quite a simple matter to determine that most such victims are destined for larger population centres where there is a meeting of both demand and population in which to better evade detection. Traffickers actively seek to reduce as far as possible the risk of detection and will keep victims under lock and key, in the middle of large population centres, where there is a large established demand for illegal sexual services, and where that demand meets the nature of the women being sold. So, for example, Sydney and Melbourne are likely to be standouts in all of these ways.

Once we understand more about the nature and extent of the problem, we can then turn to improved, hopefully State-based, responses. The Golden Rules that should apply to Australia’s anti-trafficking responses are as follows:

1) You will know what to do when you look inside the nature of the crime.

Understanding more about the nature of trafficking, knowing what the essence of the crime is, will of itself determine the nature of the responses. For example, an early step in the process is recognising in law and operations that trafficking is a crime against the person, and a seriously violent crime. From this recognition stems the obvious response that the protection of the victim and importantly the victim’s rights are paramount. The re-instatement of a victim’s human rights comes before a State’s own interest in deporting illegal migrants.

In order to be a help to victims rather than be someone who re-victimises, intervention authorities (whoever is so tasked) must subordinate their own needs, and the immediate interests of the State, to the needs of the victim. Failure to do so will long term actually more work against the interests of the State. State’s interests in trafficking are several, but at present there exists a bias favouring the short-term interests that mean upholding the integrity of the border, over the longer-term interest of having a safer and more equitable society. If State’s short-term interests in arresting illegal migrants is not, in trafficking cases, subordinated to the longer term interest of improved potential for prosecution of traffickers then the situation is a lose-lose, whereby the State achieves nothing tangible and the victim is re-victimised and probably re-trafficked.

International experience of institutional responses to trafficking suggest that police are best placed to act as ‘rescuers’ at point of detection. But that police alone cannot continue the work needed to truly help victims out of their situation. Further, experience also shows that those best placed to act in trafficking situations are community police rather than, for example, CID or Federal forces. Much information that leads to identification or trafficked victims emanates from communities. In terms

of collection of information, community police offer the best hope. This experience is very much borne out in the UK, US and Sweden.

The crime is one of violence, and against the person. In the Australian context, the Federal Police are not best placed to deal with this crime type. No Federal enforcement agency has experience in this field sufficient to cater. The information sources likely to reveal or detect trafficking are at the community level, where the AFP does not operate. Responses also call for the types of investigative skills applied in rape and child abuse cases, typically handled by State police services through child abuse units and rape crisis teams. It is important to deal with trafficking correctly, applying the resources best placed to deal with the crime type, with the interests of the victims at heart. This crime type demands community-based responses and is best placed with State police services, and probably aligned with existing rape crisis personnel. Further, the crime type demands a restorative justice posture which the AFP and other Federal agencies are unused to adopting.

This is not to say that the problem is not one of sophisticated organised crime, for certainly it is. In this way, relationships with Federal agencies and, for example, the use of the international liaison officers of the AFP essential to transnational organised crime investigations, are critical. Immigration authorities also must be involved in responses, tasked with providing some certainty for victims of what will happen to them on the resolution of the case. But paramount is the protection of the victim and placing them in a safe situation, removing them as far as possible from the threat posed by the traffickers and giving them time to come to terms with their circumstances.

2) Victim protection ≠ protection of human rights.

We must not confuse victim protection with the protection of human rights. The two are not the same and the former can often continue to deny the victim their human rights. Protection of the victim should be seen to include protection from threats, intimidation, physical harm, and importantly retaliation against family.

It should be noted that rescuing a victim alone is not protection enough. Often threats and intimidation are realised after victim's release from State custody, or in fact are levied against family and friends elsewhere. Victim protection that adopts a witness protection approach is likely to only validate thoughts in the victim's mind that they are in fact under arrest or somehow in detention. This will turn the victim against cooperation. Protection of human rights of a victim should be seen to include restoring the right to recovery, right to be free from reprisals, the right to legal redress, and access to justice. Protecting a victim is partly about witness protection but is also much more.

It is often heard in criticism of police agencies and criminal justice systems more generally that when dealing with trafficking they only seek criminal justice outcomes. Sad but true it is often witnessed that if there is no likely prosecution, then there is no case, and police will see no reason to help. Since when has policing been about prosecutions only, and not about helping victims of crime first? But prosecutions and helping victims do not have to be mutually exclusive.

3) Restorative justice first. Punitive justice second.

There is no reason that justice outcomes cannot be found in all trafficking cases. Admittedly this will not always translate into criminal justice outcomes, but at least justice can be served by simply adopting a different approach. Human rights approaches to trafficking cases are about restorative justice, not criminal justice first and foremost. In trafficking, adopting a restorative justice approach is what occurs often now in rape and child abuse responses where the emphasis is on helping the victim first. If a criminal prosecution can be launched then that is all the better but it is secondary to helping the victim. This is the essence of restorative justice, and it must be applied to help reinstate the human rights of a victim.

Human rights approaches to trafficking, and criminal justice approaches, do not have to be at odds with each other. We first, from the point of detection onwards, allow the human rights of the victim to take precedence which includes not incarcerating or arresting on suspicion of illegal migrant status, but on presuming trafficked status in certain situations where trafficking victims are likely to be. Hence, for example, when relevant agencies stage raids on an illegal brothel in inner-city Sydney it is very likely that there will be trafficked women there. The presumption at this point should not be that they are prohibited non-citizens but that they are trafficked victims and need to be helped, not arrested. Custody is indeed necessary but this must be protective not punitive.

Changing this presumption is quite a simple task on the surface but perhaps more problematic at the staffing level. Like it or not, as a generalisation Australians largely attach a stigma to the act of prostitution, Australian men also are innately sexist, and Australians are in many ways xenophobic especially when talking about those who defeat migration laws and find a way 'in' to Australia. For a male policeman finding a woman in illegal prostitution, who is also a foreign national, we are confronting innate prejudices on three counts. Considerable effort must be taken to ensure that those officers likely to be involved at point of detection are as far as possible not imbued with strong feelings of sexism, xenophobia and prejudice against women in prostitution. We must be at pains to make this the case, for the point of detection is a critical time in a trafficking case.

4) Expect hostility.

We should, at point of detection, expect hostility. Trafficked victims have been abused, duped, often raped, perhaps drug-ravaged, almost always assaulted in various ways, mostly by men. It is hardly surprising to find that when women are 'rescued', the reaction to police is not what the police might have expected. There will be little reward of the kind envisaged by rescuing officers, and this must be understood as completely natural in this context. The women are abused. They have suffered at the hands of brutal men, often for a very long time, in degrading circumstances, and forced to sexually service perhaps dozens of men a day. But they have also lived and learned to evade detection, and come to identify often with the criminal milieu into which they have been forced.

There is also a very complicated relationship always between traffickers and their victims. It is a residue of the reason for the victim being trafficked in the first place.

Many trafficked victims on ‘rescue’ do not actually want to be rescued as they still believe their trafficker will get them the promised job in the promised land, whether it be in sexual servitude, fishing, sweatshops, or mining. Agents operating at point of detection must expect hostility. Over time this may be calmed, but it must be dealt with sensitively at the beginning.³ While not going so far as to assert this is akin to Stockholm Syndrome, there certainly are many elements of it present in trafficking cases, especially those cases of sexual servitude. We need to understand the relationship between trafficker and victim is not a purely linear one, where linear responses such as rescue will achieve any tangible outcome. The relationship is a system, requiring systems responses that take into account far more variables than simply drawing the victim out from the immediate captivity of the trafficker.

In this way it is important that officers at point of detection and shortly thereafter behave with utmost patience and are as far as possible seen to be completely fair-handed with the victim. Officers must engage the women with the knowledge that they have no relationship of trust by virtue of being a rescuer but, to the contrary, are seen as perhaps a captor or someone who seeks simply to deport the victim and someone therefore not to be trusted. Further there will be residual threats from traffickers that act on the minds of victims, contact with police often being a trigger for extremely serious consequences for victims and families. The situation is stressful for victims and the best way forward for investigating staff of to ensure the victim feels comfortable and steps are taken to establishing quickly rapport and trust.

5) Improved care of victims = improved criminal justice outcomes.

Given a choice at point of detection, trafficking victims will invariably opt to be returned to their situation. Anyone subject to the violence and abuse of the type levelled at trafficked victims would do the same, especially when provided this choice by someone who has arrested them as an illegal migrant. The choice made at this time, or shortly thereafter, to rather be deported is made in a highly constrained and stressful environment. This is not the exercise of free choice and should not necessarily be considered valid.

Victims must be offered a reflection delay, where they are cared for and not under arrest. In this time they are being offered their human right to recovery and, given this reflection may in fact come to better terms with their previous situation and confinement to the point where they may be willing to testify against their trafficker. International experience of this reflection delay proves the point that given time to recover from their ordeal in a supportive environment, criminal justice outcomes become more likely.

The question arises as to where women will undergo such recovery, and with what support. In many cases around the world, the State does not fulfil its obligations in this regard, the task falling to women’s shelters and NGOs without the wherewithal to cope adequately with the number of women we may be talking about. The State should not abandon its responsibility to these crime victims who need recovery time in a safe (and probably covert) location. Safe houses, operated by the State with

³ I would refer you to the forthcoming World Health Organisation’s “Ethical Guidelines on Interviewing Trafficked Women”, developed by the London School of Hygiene and Tropical Medicine under the auspices of European Commission’s Daphne Programme project reference 2000/265/WC.

support and counselling staff, is demanded by this situation. NGOs and women's shelters can take on the role, especially given their expertise working with traumatised women, but they must be provided financial support to do so.

Improved care for victims must not relate only to recovery. In circumstances where a victim agrees to testify against their trafficker, possibilities to reduce the re-traumatisation of the victim must be sought. This should include determining procedures for the giving of evidence and undergoing cross-examination that are more victim-friendly. It is true that in our adversarial common law system of criminal prosecutions procedures are not friendly or empathetic to the victim in such violence cases. We should be seeking to adopt such measures, in law if necessary, to protect the victim from further victimisation during trial. Measures may include for example video testimony and *in camera* proceedings. In this way we are also doing our utmost to ensure that criminal justice outcomes are more likely.

6) Deportation = Re-trafficking

It is certain that given a reflection delay, victims will be in better and less constrained position to make decisions regarding their future. Deportation remains an option for a State in protecting its borders, and can be considered an option for the victim but only after they have been offered sufficient time to think the possibilities over. The victim knows, as do many law enforcement officers working on trafficking that deportation means re-trafficking. Sending the victim women back to their country of origin places them in a position of extreme vulnerability and at great risk of being re-trafficked. Often they will simply be recaptured by their original trafficker and trafficked to another destination. We must understand that a woman is trafficked in the first instance owing to a range of factors that make her vulnerable to being trafficked. Sending a trafficked victim back to the same milieu does nothing to address those vulnerability factors, indeed sending someone back who has lived underground in Australia for three years actually sends them into a more vulnerable situation as they have little or no understanding of what they will go back to, no support network they can rely on and usually no prospects of income safe from trafficking. It is criminally irresponsible in itself to deport someone in such circumstances knowing that the act makes them still more vulnerable to trafficking.

Policies that bring about early deportation of trafficking victims are a failure. Such policies fail to adequately protect those who are in most need of protection. These same policies fail to help bring traffickers to account for their actions. And such policies also fail to break the chain of trafficking, whereby the early deportee is at greatest risk of re-trafficking, feeding the trafficking network with another displaced, marginalised, and vulnerable woman.

Once we adopt the appropriate posture on trafficking, that is a victim-friendly restorative justice approach that aims to maximise criminal justice outcomes by providing for the recovery of the victim, then we can adopt the relevant legislation. Even without good law, we can go a long way towards improving the situation but in terms of ushering in requisite changes of values and policies, the law is the best place to start our anti-trafficking regime.

Australia is, like many other examples, a place where extant law can address many aspects of the trafficking chain of events. None, however sufficiently capture the essence of the crime, and fail to reflect the seriousness of the crimes perpetrated. We would not be content catching a murderer for a traffic infringement, and in the same way we should not be content to charge a trafficker with migration or prostitution offences. We need dedicated trafficking laws on the books, laws that adequately reflect the violence and serious issues of deprivation of liberty that take place in most trafficking chains.

7) Trafficking laws alone ≠ successful prosecutions.

But laws alone do not equal successful prosecutions, or an end to trafficking. Even in countries with trafficking laws on the books, prosecutions do not occur as a natural consequence. For many reasons, including lack of viable witnesses, corruption, lack of interest in trafficking, laws that are too unclear or not provable, or traffickers being caught for other and often lesser offences, prosecutions for trafficking do not naturally follow from having good trafficking laws.

Laws must be backed up by investigations worthy of the serious and complicated nature of the crime. Trafficking is a very hard nut to crack in terms of criminal investigations. In terms of complexity and sophistication it is as technically challenging as murder. But it is hardly considered so by seasoned investigators. There should be effort made within policing organisations to elevate the profile of trafficking, holding it out as at the acme of investigative skill. In this way there will be a professionalisation of those capable and interested in dealing with the crime.

In the same way as rape and child abuse interventions are now signalled by often multi-disciplinary teams, not by police alone in many cases, this should also extend to investigating trafficking. Police alone are not equipped, try as they might, to deal with all the complexity that comes with a trafficking case. Psycho-social workers and medical workers are often required, counselling being a key method of aiding recovery of victims. The development internationally of teams especially built of specialist workers from several fields to deal with serious sexual violence cases is something to be mirrored in trafficking responses.

The seriousness of trafficking is akin to rape and murder, and constructed in an organised crime context. It is complex criminality that demands resources and tools. Trafficking is serious enough to be an offence scheduled to allow the most invasive of investigative tools, including listening devices and telephone intercepts as well as proceeds of crime action.

8) Act to cut demand for sexual services or fail to stop trafficking.

Trafficking for sexual servitude is very much about demand. While legalised prostitution on the one hand acts as an outlet for demand, it also creates demand by legitimising in the minds of 'clients' that sex can be bought. And what can be bought can be sold. The very mentality that exists behind the selling of sex, the lack of respect for women and their right to their bodies, is at the heart of trafficking for sexual servitude. While men see a legitimised sex 'industry', this legitimises their perception that sex can be bought. This in turn creates a demand for sexual services

that legitimised sex-workers cannot meet. The void is filled by trafficking and by illegal brothels and sexual services. Australia does nothing to address demand and can do nothing solid to defeat trafficking without simultaneously addressing demand. We must take steps to reduce the perception that sex can be a legitimate commodity, freely bought and sold like a packet of cigarettes.

This includes overturning the increasingly held 'morality' that suggests men have some right to buy sex. Phrases such as 'the oldest profession in the world' do nothing to reduce demand for sex, rather they serve to legitimise the act of buying sex. The very act of legalising, taxing and regulating prostitution normalises the demand for paid sex. Demand-reduction measures must include, taking examples from countries such as Sweden, Finland and Norway, legislation to criminalise the act of buying sex. Clients are the problem in terms of creating the demand which creates trafficking. Legislate against that. Further demand reduction measures should be introduced into school and university curricula that encourage mature conceptions of masculinity and sexuality, overturn images of it being a legitimate act to purchase sex, and ensure adequate attention is paid to elevating sexual violence to where it belongs which is at the height of criminal deviance.

9) Must be able to answer the question – what happens after trial?

Paramount in a victim's mind is not what will happen to the trafficker, but what will happen to them. All effort put into a case that deals with trafficked victims will result in nought if the investigating staff cannot help to answer this obvious question of the victim. If there is doubt in the mind of the victim that they will be safe and secure after trial and in a better position than before, we will absolutely not achieve viable criminal justice outcomes. The more effort we put into being able to answer this question, with clarity and definitively, the more likely we will achieve criminal justice outcomes.

The US model for anti-trafficking laws has proved itself to be a good starting point with the offering of certain new visa types providing right of abode for trafficking victims whether they testify in criminal cases or not. It is important that the right of abode not be tied concretely to issuance of such residency. In the first instance, temporary right of abode should be granted to allow for the reflection delay. This right of abode should give time, and this will vary considerably from case to case, for the victim to reach a point of mature reflection on their experience and, relatively free of constraints and stressors, decide whether to assist with inquiries.

Right of abode should not solely be on the basis of assistance to police investigations. As we have said, the relationship between trafficker and victim is complex, and the situation of the trafficked victim similarly complicated. It is not necessarily the case that victims will refuse to testify to protect only themselves, there are often other factors such as vulnerable family and friends that militate against unconstrained decision-making. Right of abode should also be determined on the basis of the apprehended insecurities of the victim, on the likelihood of being re-trafficked etc. The latter can be determined by examination of the situation into which the victim would be returned, in much the same way as an asylum-seekers claim of probable persecution are assessed. It is an abrogation of civil responsibility, and not in line with international humanitarian principles, to refuse someone right of abode on the

basis that they have not assisted police, when in fact they are likely to be re-trafficked if, for example, they have no trade or income on which to rely in their place of origin.

Further there is good reason not, in our common law system with adversarial criminal justice processes, to link residency with testimony. There is a very obvious point to be scored for defence lawyers if in fact residency is granted conditional to testifying, for the intent behind the testimony comes into question and is easily turned to discredit the victim. It is in this regard also important not to link the two.

It is important to take the lessons that may be learnt from abroad, many places including Belgium, Italy, the US, the UK, Norway, and Sweden are far more advanced than Australia on the subject. Further the experience and spirit captured in the Trafficking Protocol also must be applied. Beyond legislation and enforcement effort there must be serious institutional attention paid to the subject. This effort should include not only epidemiological research into the extent of trafficking in Australia but also for example the establishment of a national committee structure at which table sit experts and stakeholders from Australia and abroad with experience of trafficking and advice on how to move forward. Such national structure must also be sufficiently positioned and resourced as to be able make policy decisions and demand follow follow-up by relevant agencies both Federal and State.

Australia should aspire to be the best in the world when dealing with trafficking. There is absolutely no valid reason for not being the best, but there are plenty of excuses. We must take seriously the fact that we have not done enough by any means to address this problem, and we must take decisive steps to better understand the issue, and to rectify our obvious deficiencies. Australia is a win-win society, where underdogs are supported, underprivileged are assisted and, as a general rule, people do not go out of their way to cause a loss for someone else. In trafficking, we should be about finding that 'win-win' solution, where victim's rights are prioritised in order that the chances of criminal justice outcomes are also maximised. In every aspect of our anti-trafficking work, we can do a lot better

About Iselin Consulting: Brian Iselin is the Managing Director of Iselin Consulting. A former Australian Federal Police officer, Brian Iselin served as the AFP's Senior Liaison Office in the People's Republic of China. During AFP service he also worked extensively with AFP and also with the National Crime Authority (Sydney) on Asian and drug-related organised crime, and functionally in investigations, operations policy, and intelligence. He left the AFP when forced to choose between working against human trafficking and continuing with the AFP. He worked with the UN Office on Drugs and Crime to launch their regional legal and law enforcement responses to trafficking, focusing on the Greater Mekong Sub-region. He is now an independent consultant working, *inter alia*, with the UNODC on anti-trafficking measures and with the EC on programmes addressing violence against women and children.