

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

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

Submission No:23

Received 26 September 2003

Ms Anne Gallagher

**Former Adviser on Trafficking to the
United Nations High Commissioner for
Human Rights**

 66 2 636 0531 Or 0534 

E-mail: annegallagher@arcppt.org

**SUBMISSION
TO THE PARLIAMENTARY JOINT COMMITTEE
ON THE AUSTRALIAN CRIME COMMISSION**

TRAFFICKING IN WOMEN FOR SEXUAL SERVITUDE

**Submission by:
Anne Gallagher, BA, LLB, M.Int.L**

**SUBMISSION TO THE PARLIAMENTARY JOINT COMMITTEE ON THE
AUSTRALIAN CRIME COMMISSION
TRAFFICKING IN WOMEN FOR SEXUAL SERVITUDE**

**Submission by:
Anne Gallagher, BA, LLB, M.Int.L**

Anne Gallagher is an international lawyer educated and trained in Australia. She was recruited to the United Nations in 1992 and served for over 10 years with the Organisation, most recently as Adviser on Trafficking to the UN High Commissioner for Human Rights, Mary Robinson (1998-2002). In that role, Ms Gallagher was responsible for establishing and coordinating UN policy on trafficking as well as working with national governments in Europe, Asia, Africa and the Americas in develop anti-trafficking laws and policies. She also led a UN Team in the negotiations for the Palermo Trafficking Protocol during the period 2000-2001; investigated allegations of trafficking by peacekeepers in Bosnia; and provided advice and guidance on legal and policy development to international and regional organisations including Interpol, the Council of Europe and the South Asian Association for Regional Cooperation.

Ms Gallagher is currently Team Leader of the AusAID initiated and funded: “Asia Regional Cooperation to Prevent People Trafficking” Project. The Project is working with authorities in Thailand, Cambodia, Lao PDR and Burma to strengthen the criminal justice response to trafficking – particularly through improvements to law enforcement as well as legislative reform.

Ms Gallagher has published widely on the issue of trafficking in international journals including Human Rights Quarterly (November, 2001), Aviation Security (November, 2001) and Forced Migration Review (January, 2002). Her global study on international legal aspects of trafficking will be published in 2004 along with another book which provides a comparative analysis of national legal and criminal justice responses to trafficking.

Summary:

The substance of this submission relates to two key aspects of the Committee’s terms of reference: (i) the issue of establishing the extent of people trafficking in Australia for the purposes of sexual servitude; and (ii) the adequacy of the current legislative framework.

The Submission is divided into three Parts and includes one annex:

Part One: What do we know about trafficking?

Part Two: What are other countries doing about trafficking and what are the obstacles they are encountering?

Part Three: Human Rights, International Obligations and the Criminal Justice Response to Trafficking

Annex: Checklist of Basic Principles for Australia’s response to trafficking

The submission seeks to provide the Committee with an insight into the phenomenon of trafficking from a global perspective as well as an overview of trends in responding to this crime. The submission emphasises, in particular, the following lessons which have been learned elsewhere but which have a particular relevance to the current situation in Australia:

1. The crime of cross-border trafficking continues to be confused with people smuggling and the larger issue of illegal or irregular migrants. Legislative and other reform efforts should seek to raise awareness of the distinction and its operational implications.
2. Lack of understanding as to what constitutes trafficking and the absence of high level political commitment to dealing with this crime results in a failure to identify trafficked persons as such. Failures in identification inevitably compromise effective responses.
3. Lack of understanding as to what constitutes trafficking further complicates the already difficult task of ascertain its nature and extent.
4. The problem of impunity for traffickers and their accomplices in countries of destination such as Australia must be addressed if prevention activities in countries of origin are to have any lasting effect.
5. The provision of information to vulnerable groups about the risks of trafficking is not sufficient to stem the supply of victims.
6. Victim-led investigations of trafficking will continue to be the norm in Australia as in every other country. Victim cooperation is therefore essential to securing prosecutions. The securing of such cooperation requires measures which develop trust between the law enforcement agency and the victim as well as assistance and support to ensure her/his safety and wellbeing.
7. The creation of specialist capacities within law enforcement to investigate and apprehend traffickers is an operational necessity due to the nature and complexity of this crime.
8. Unilateral action by individual countries will not prevent trafficking; the regional problem requires regional solutions along with country-specific solutions.
9. Community and governmental attitudes and prejudices towards women, children, the poor, migrants and sex workers increase their vulnerability to trafficking and influence the nature and quality of the official response to trafficking. Anti-trafficking interventions should directly address these issues.
10. Trafficking responses that do not place the victim at their centre are likely to contribute to further violations of victim's rights and to re-trafficking: consequences which will also have a negative impact on the investigation, apprehension, and prosecution of traffickers.

The checklist of basic principles included as an Annex to this submission is drawn from the *International Principles and Guidelines on Human Rights and Human Trafficking* which were developed by the United Nations in 2002. These Principles and Guidelines are being used by countries in all regions of the world as well as by intergovernmental agencies involved in shaping laws and policies to counter this crime.

**SUBMISSION TO THE PARLIAMENTARY JOINT COMMITTEE ON THE
AUSTRALIAN CRIME COMMISSION
TRAFFICKING IN WOMEN FOR SEXUAL SERVITUDE**

**Submission by:
Anne Gallagher, BA, LLB, M.Int.L**

PART ONE: WHAT DO WE KNOW ABOUT TRAFFICKING?

1.1. A note on the limitations of current understandings

Trafficking is a covert activity and, as such, does not easily lend itself to standard methods of analysis and measurement. Over the past two decades interest in trafficking as a social and criminal phenomenon has risen sharply and there has been a corresponding growth in related research and analysis. Generally, however, this quantitative change has not resulted in a greatly improved understanding of the nature, scope and causes of trafficking. Much of the current information on trafficking is still anecdotal. It is typically presented in the form of non-statistical data and indirect indicators derived from small-scale surveys and single examples presented as case studies. There is very little quality trend evidence available and almost no cross-referencing or external verification of data. Where statistics on trafficking cases do exist, their value has been seriously undermined by the lack of a consistent definition of trafficking and the absence of uniform collection procedures. Rather than acknowledging or confronting these inadequacies, much contemporary trafficking research unquestioningly accepts and promulgates unverified data. While there is some noticeable improvement in the quality of the most recently available material, research standards in this area generally remain poor.

1.2. What is trafficking?

Until very recently, there was no agreement on what constituted trafficking. In 2000, Governments including Australia concluded an international treaty on trafficking (The Palermo Protocol) which contained the first-ever definition of this phenomenon.

The Protocol definition is quite complicated. However, it can be broken down into three key elements as follows:

1. Movement (across or within borders)
Through
2. Coercive, deceptive means
For the purpose of
3. Exploitation.

In the case of trafficking in children, element 2 is unnecessary. In other words, the movement of children for purposes of exploitation is considered trafficking, irrespective of whether or not the child was coerced, deceived or otherwise lured into the situation.

1.3. General characteristics of trafficking

The inherent problems involved in capturing and reproducing accurate information on trafficking mean that it is presently impossible to paint an accurate and verifiable picture of the current situation. A more realistic goal is to draw on “best available data” in order to identify broad patterns and trends as well as to highlight gaps in understanding and knowledge. That exercise is attempted below.

Practitioners, policy makers and activists agree that trafficking fact patterns (i.e.: *what* happens, *how* and *to whom*) vary significantly from place to place and even from time to time. As trafficking has moved from the margins to the mainstream of international and domestic political concern, the need for a common understanding as to its typical elements has become more pressing. The most widely accepted recent articulation of that “understanding”, is the Palermo Protocol definition set out above. Using this definition as a reference point and drawing on a range of primary sources, it is now possible to identify the major characteristics of current trafficking patterns. The key points can be summarized as follows:

- Trafficking takes place for a variety of end purposes including domestic service, forced marriage and sweatshop labour. Forced sex work is the most visible end-result of trafficking especially in developed countries such as Australia but there is no hard evidence available that it is the most common.
- Trafficking occurs *within* as well as *between* countries.
- Traffickers use a variety of recruitment methods. Outright abduction is only very occasionally reported and often difficult to objectively verify. Child trafficking generally involves payment to a parent or guardian in order to achieve cooperation and this is often accompanied by a measure of deception regarding the nature of the child’s future employment or position.
- The stereotype of the “coerced innocent” is too simplistic to reflect the reality of the majority of known trafficking situations. Most traffickers use varying levels of fraud or deception, rather than outright force, to secure the initial cooperation of the trafficked person. A commonly reported situation involves a girl or young woman being deceived about the cost (and repayment conditions) of the migration services being offered her, the kind of work she will be doing abroad and/or the conditions under which she is expected to work.
- By definition, a trafficked person ends up in a situation from which she or he cannot escape. Traffickers and their accomplices use a variety of methods to prevent escape including threats and use of force, intimidation, detention and withholding of personal documents.

- Trafficking is sustained and strengthened through public sector corruption, particularly of police and immigration officials who, in some countries, play a key role in facilitating illegal entry and providing protection to trafficking operations.
- Most though not all trafficked persons enter and/or remain in the destination country illegally. Illegal entry increases a trafficked person's reliance on traffickers and serves as an effective deterrent to seeking outside help.
- Unlike drug trafficking or human smuggling, revenues from trafficking are ongoing and potentially long-term, as the benefits of another person's 'labour' can be appropriated indefinitely.
- The trafficking situation is generally limited in time. The nature of trafficking end-purposes and the dynamic of the activity mean that a trafficked person, if she/he can escape death or serious injury, will, over time, find her/himself in a less exploitative situation from which she/he will at some point be technically free to leave.

It is essential to acknowledge that many trafficked persons, men as well as women, begin their journey as smuggled migrants – having contracted an individual or group to assist their illegal movement in return for financial benefit. In a classic migrant smuggling situation, the relationship between migrant and smuggler is a voluntary, short-term one – coming to an end upon the migrant's arrival in the destination country. However, some smuggled migrants, including (as noted by the AFP), some smuggled to Australia, are compelled to continue this relationship in order to pay off vast transport debts. It is usually at this late stage that the end-purposes of trafficking (debt bondage, extortion, use of force, forced labour, forced criminality, forced prostitution) will become apparent. The link between trafficking and migrant smuggling highlights one of the main obstacles to identification of trafficked persons. As explained above, trafficking involves intention to exploit. Such intent will often not manifest itself until after the "movement" phase is over. It may therefore be impossible to identify a trafficked person as such until the initial movement is completed and they are trapped in the highly exploitative situation which 'proves' the trafficked person is something other than a smuggled migrant.

Current, primary-source information seems to confirm that trafficking affects all regions and most countries of the world one way or another. It is therefore not surprising that complex networks of flows have developed between countries and between continents. While favoured routes are constantly changing (in response to shifts in supply and demand as well as law enforcement pressures), one constant factor is the social and economic distinction between countries and regions of origin and countries and regions of destination. Trafficking, like all other forms of irregular and/or exploitative migration, generally involves movement from poorer countries to relatively wealthier ones. Whilst other forms of migration tend not to be unidirectional, in the case of trafficking, there are few identified exceptions to this trend.

PART TWO: WHAT ARE COUNTRIES DOING ABOUT TRAFFICKING AND WHAT ARE THE OBSTACLES THEY ARE ENCOUNTERING?

2.1. Different responses depending on the nature of the problem

As noted above, most countries in most regions of the world are affected by trafficking one way or another. Some, such as Burma and Romania, are countries of origin. Others, such as Australia and the United States are primarily countries of destination. Certain countries, of which Thailand is a good example, are simultaneously points of origin, transit and destination for trafficked persons.

The particular nature of a country's individual situation will affect the kind of response it could or should adopt. Countries of origin usually focus on preventing trafficking in the first place through raising awareness about the dangers of certain migration practices and, in some cases, giving potential migrants the skills and resources which will allow them to protect themselves. Countries of origin are usually also involved in working to reintegrate returned trafficked persons.

For countries of destination such as Australia, the challenges are quite different. It is in these countries that the *exploitation* which is the real hallmark of trafficking takes place. It is therefore in these countries that the criminal justice process will have a major role to play in directing the overall response. To put it simply, the real traffickers (as opposed to the small-time criminals much further down the chain) will almost inevitably have to be apprehended and prosecuted in the country of destination. This is where the exploitation has taken place; this is where the evidence must be found.

2.2. Political and Institutional Constraints to Effective National Responses

Most governments have individually and collectively expressed their commitment to address the issue of human trafficking. At the present time, however, there are several significant institutional and political constraints to the realisation of this commitment. These include weaknesses in the applicable legal frameworks; lack of capacity within national criminal justice systems; and weak information flows within and between countries. Lack of a common understanding about trafficking has also obstructed the development and implementation of effective responses. Finally, the location of the trafficking phenomenon squarely within sensitive highly politicised areas of migration, public order, human rights and transnational organised crime has impacted significantly on the capacity and willingness of governments to respond effectively. The legal/criminal justice constraints are examined further below.

2.2.1. The Legal framework

An adequate legal framework is the foundation of an effective criminal justice response to trafficking. In most cases, such a framework will best be created through the development of specialised legislation which addresses the trafficking phenomenon directly. The absence of such legislation is not, however, an excuse for law enforcement inaction. The crime of trafficking implicates a wide range of offences including but not limited to murder, assault, sexual assault, kidnapping, extortion, unlawful detention, slavery including sexual slavery, debt bondage and conspiracy to commit these acts.

Traffickers can be pursued, apprehended, prosecuted and punished under existing laws in Australia as in most other countries. In general however, it appears that understanding, capacity and willingness to act are higher in countries which have enacted specific legislation setting out precisely the nature of the offence and detailing the law enforcement and judicial responses to it. Encouragement of and support to the development of a specialised anti-trafficking law which goes beyond present 'sexual slavery' legislation can therefore be justified.

Even where anti-trafficking legislation does exist, there are still problems. Australia is well placed to learn from the experiences of other countries which have gone through the process of developing their own legislation to combat this crime. A recent comparative legal study of specific anti-trafficking legislation by the UN identified a number of common problems with anti-trafficking legislation. These include:

- lack of legislative clarity on what constitutes trafficking;
- insufficient focus on end-purposes of trafficking other than sexual exploitation;
- lack of any human rights context in anti-trafficking legislation (with the resulting implication that the law is concerned solely with suppression of trafficking and not with protecting and supporting its victims);
- lack of a gender perspective including inadequate recognition of and protection for adult male victims of trafficking; and
- insufficient provision for remedies including access to compensation.

Inadequacies in related laws are also a cause for concern. For example, the widespread lack of social and legal protection for workers in informal unregulated industries such as the entertainment / sex sector impacts directly upon the investigation, apprehension and prosecution of traffickers.

2.2.2. National criminal justice systems

National criminal justice systems in destination countries such as Australia are the cornerstone of any effective counter-trafficking strategy. In general however, the criminal justice response from destination countries has been weak and ineffective. Common problems include the following:

- **The complexity of the phenomenon itself:** in particular the lack of current understanding about trafficking patterns and processes and the legal and technical issues inherent in investigating a crime which can often only be identified as such after the event. One common result of lack of understanding about trafficking is the arrest of trafficking victims as illegal migrants and/or for their involvement in the sex trade.
- **The fragile and often contradictory social environment** within which trafficking generally takes place. Community attitudes towards marginalised groups, in particular migrants, ethnic minorities, women, children and sex workers operate to support and encourage inappropriate or inadequate criminal justice responses.

- The potential (and, in some cases, actual) **involvement of law enforcement officials** in the trafficking crime. Such involvement can be indirect (e.g. through corrupt practices such as overlooking cases in exchange for payment) or direct (e.g. ownership of / involvement in business into which victims are trafficked).
- The **dependence of trafficking prosecutions on the role of victims as witnesses**. Victim led prosecutions will continue to be the case for the foreseeable future while law enforcement agencies in countries such as Australia begin to acquire capacities and resources to undertake proactive, intelligence-led investigations. The relationship between police and victim is often characterised by mutual distrust. Victims in particular may hold genuine fears for their personal safety and that of their families. They may be denied much needed shelter, counselling and other physical and emotional support and thereby not be in a position to assist an investigation.
- The **low priority accorded to trafficking as a crime**. The investigation of trafficking cases is labour intensive work which is not usually rewarded in the same way that investigations into drug trafficking or other high profile crimes may be. The fact that victims of trafficking are often considered to be complicit in their own misfortune further decreases the likelihood that the crime which has been committed against them will be investigated, prosecuted and punished.
- The **failure to recognise trafficking in men** means that the law enforcement response is inevitably incomplete. In addition to the implications of not providing assistance and avenues of redress for trafficked men and, correspondingly not creating disincentives and punishments for traffickers of men, this omission reinforces the stereotype that *'men migrate, but women are trafficked'*. It therefore benefits neither men nor women. While men are not protected under laws and policies designed for trafficked women and children, the perception of trafficked women as weak, ignorant and without agency is also reinforced.

PART THREE: HUMAN RIGHTS, INTERNATIONAL OBLIGATIONS AND THE CRIMINAL JUSTICE RESPONSE TO TRAFFICKING

Trafficking is a violation of the most basic rights to which all persons, irrespective of the ethnicity, sex, language, religion, occupation or any other difference, are entitled. Human rights violations are also implicated in any analysis of the causes of trafficking. Many of the vulnerabilities identified above can be traced back to a failure to uphold and protect certain basic human rights. Of particular relevance to the present submission is the issue of human rights violations in the response to trafficking. As victims of crime, trafficked persons have certain fundamental rights including protection from threats to their personal security, assistance with legal proceedings and access to effective remedies.

3.1. The responsibilities of destination countries such as Australia

While trafficking does not generally directly implicate the State, governments are nevertheless responsible, as a matter of international law, for ensuring that the rights of those within their jurisdiction are respected and protected. In the present context, this

means that States must act with ‘due diligence’ in preventing, prosecuting and punishing the crime of trafficking as well as providing assistance and redress to victims.

The major duties imposed by international law upon States including Australia in relation to trafficking are to:

- Criminalise trafficking;
- Prevent trafficking through all reasonable means;
- Promptly and adequately investigate allegations of trafficking;
- Ensure the law applies to all without discrimination on the basis of sex, race, age, national, ethnic or social origin or other status;
- Take appropriate action against traffickers including prosecution and the imposition of penalties which are commensurate with the seriousness of the offence;
- Identify victims of trafficking and ensure their safety, dignity and personal security;
- Provide access to remedies for victims of trafficking;
- Ensure that victims of trafficking are treated with respect during criminal proceedings and that the proceedings themselves do not further violate their rights or dignity;
- Ensure that the ‘best interests of the child’ is the overriding principle in relation to any and all aspects of the treatment of child victims of trafficking.

While most countries, including Australia, have implicitly accepted these obligations, there is a clear need to support their transition from statements of principle into operational reality. From the criminal justice perspective, special attention must be given to ensuring an understanding of why: victims should not be forced, coerced or pressured into participation in proceedings against their traffickers; the psychological and physical safety of victims of trafficking should be considered of paramount importance and assured during criminal prosecutions of traffickers; positive steps should be taken to ensure that the investigations of trafficking are conducted in a sensitive and respectful manner; and the possibility that other offences have been committed against the victim in addition to trafficking, for example rape, torture or debt bondage, should be explored and all relevant offences prosecuted.

Governments should also ensure that measures to protect vulnerable people from being trafficked do not in themselves limit the rights of those people. For example, as noted above, restrictions on the freedom of movement of adult women are not an appropriate protective response to the risk of trafficking. The prosecution or penalisation (e.g. by any form of detention) of trafficked persons for offences, which directly arise out of their situation, would also be inappropriate. For example, it would not be acceptable to prosecute a trafficked victim for immigration offences when it is clear that such offences were committed in the actual course of the trafficking process. Similarly, the coerced involvement of trafficked victims in unlawful work (e.g. the sex industry) should not give rise to criminal prosecution or any other form of penalty. Any irregular migration status of victims of trafficking should not be used to justify failure to respect the rights owed to

them. Victims of trafficking should not be deported as a matter of course. From a human rights perspective, voluntary repatriation should be the goal and any repatriation should only take place after appropriate steps have been taken to ensure that the victim will be able to return home safely, and without the added risk of the victim being re-trafficked. These considerations are at the heart of an effective, victim-supportive criminal justice response to trafficking.

These obligations have been distilled from major international legal instruments on human rights and on human trafficking to which Australia is either full Party or signatory. They are included in the United Nations Principles and Standards on Human Rights and Human Trafficking (Economic and Social Council, UN DOC, E/2002/G8/Add.1). See further attached Annex

ANNEX: CHECKLIST OF BASIC PRINCIPLES FOR AUSTRALIAS RESPONSE TO TRAFFICKING WITH A PARTICULAR FOCUS ON THE CRIMINAL JUSTICE RESPONSE

Principles on Criminalisation, Punishment and Redress:

- ✓ Adopt appropriate legislative and other measures necessary to establish, as criminal offences, trafficking, its component acts and related conduct.
- ✓ Effectively investigate, prosecute and adjudicate trafficking, including its component acts and related conduct, whether committed by governmental or by non-State actors.
- ✓ Ensure that trafficking, its component acts and related offences constitute extraditable offences under national law and extradition treaties. Cooperate to ensure that the appropriate extradition procedures are followed in accordance with international law.
- ✓ Apply effective and proportionate sanctions to individuals and legal persons found guilty of trafficking or of its component or related offences.
- ✓ In appropriate cases, freeze and confiscate the assets of individuals and legal persons involved in trafficking.

Principles on Protection of Victims:

- ✓ Trafficked persons not detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.
- ✓ Trafficked persons protected from further exploitation and harm and have access to adequate physical and psychological care. Such protection and care not made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings.
- ✓ Legal and other assistance provided to trafficked persons for the duration of any criminal, civil or other actions against suspected traffickers.
- ✓ Protection and temporary residence permits provided to victims and witnesses during legal proceedings.
- ✓ Child victims of trafficking identified as such. Their best interests considered paramount at all times. Child victims of trafficking provided with appropriate assistance and protection. Full account taken of their special vulnerabilities, rights and needs.
- ✓ Safe (and, to the extent possible, voluntary) return guaranteed to trafficked persons by both the Australia and the State of origin. Trafficked persons offered legal alternatives to repatriation in cases where it is reasonable to conclude that such repatriation would pose a serious risk to their safety and/or to the safety of their families.