

**SUBMISSION TO THE FEDERAL ATTORNEY-GENERAL'S DISCUSSION
PAPER:**

**THE CRIMINAL JUSTICE RESPONSE TO SLAVERY AND PEOPLE
TRAFFICKING, REPARATION, AND VULNERABLE WITNESS PROTECTIONS**

Submission on behalf of Project Respect and Fitzroy Legal Service

Written by: Belinda Lo, Fitzroy Legal Service

Email: blo@fitzroy-legal.org.au

Web: www.fitzroy-legal.org.au

Web: www.projectrespect.org.au



Project Respect and Fitzroy Legal Service welcome the opportunity to comment on the Discussion Paper released by the Criminal Division of the Attorney General on the Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protections.

About the contributors:

Project Respect is a non profit, community based organisation established in 1998 to work with, empower and support women in the sex industry. Project Respect is committed to addressing violence against women in the sex industry, and working to prevent exploitation and enslavement of women by the industry - including those who are trafficked for prostitution.

Project Respect led the 2003 national campaign on trafficking for prostitution that resulted in the Federal Government's \$20 million package on trafficking. The organisation is widely recognised as a leading support agency for women trafficked into the sex industry in Australia as it continues to lobby, advocate and advise on issues related to trafficking, as informed by direct, individual work with women who have been trafficked. Project Respect also established and continues to run the first shelter for women who have been trafficked into the sex industry in Australia.

In addition to anti-trafficking work, Project Respect does direct work with women in the sex industry, including outreach to brothels, information provision, individual counselling, support and referrals, and training for women in the sex industry.

Project Respect conducts and publishes research on the sex industry and trafficking of women into the sex industry, undertakes community education, advocacy and policy development. More information about Project Respect can be found at <www.projectrespect.org.au>.

Fitzroy Legal Service is one of the oldest community legal centres in Australia. Located in the inner Melbourne suburb of Fitzroy, our doors first opened in 1972 to provide casework to clients who live, study or work in a catchment area consisting of Fitzroy, Collingwood, Abbotsford, Brunswick, Richmond, Carlton, East Melbourne and Clifton Hill.

Our service operates both day and night services to best meet the needs of clients and to take full advantage of the many highly experienced lawyers and willing legal students who provide their valuable skills on a pro bono basis.

The service also plays a significant role in the areas of law reform and community legal education, which is closely bound up with the practice of preventative law, demystification of the law, self-help and empowerment. Fitzroy Legal Service also has a long history of running public interest cases.

Our experiences in the casework practice serve to inform our law reform and community legal education activities, and we therefore hope that our submission will be given careful consideration during the review of these laws.

Introduction

Project Respect and Fitzroy Legal Service commend the Federal Government for its ongoing commitment to counter-trafficking measures and support for victims of trafficking. Project Respect and Fitzroy Legal Service have worked together on a range of cases involving victims who have been trafficked to Australia and forced into prostitution.

Given that our expertise and experience has been in regards to trafficking of persons for the purpose of sexual servitude, our submission relates primarily to trafficking and slavery in these particular situations, and not other forms of forced labour. We therefore have only have addressed the questions raised in the discussion paper that are relevant to, and in the context of our clients' experiences of being trafficked into sexual servitude.

The views of both organisations are represented in this submission except where expressly stated.

4.3 DEFINITIONAL DIFFERENCES WITH RESPECT TO FORCED LABOUR

Should the offence of debt bondage be made an indictable offence?

Debt bondage is an extortionate, illegal debt and common feature of trafficking operations. It is inextricably linked to coercion, threat of force and deceptive recruitment, which are the salient elements of trafficking and slavery offences. From our experience working with women who have been victims of trafficking, the concept of debt bondage commands a very real and very strong sense of control and ownership of the trafficker or 'owner' over the victim. Any resistance from the woman to adhere to demands of the trafficker/s often results in 'fines' and increases to the debt.

One woman supported by Project Respect said that by coming to Australia with a man who turned out to be a trafficker, she had actually put her family in danger when she had been trying to help them by earning money to send home. She said that she felt so guilty about this that she did not care what happened to her, as long as her family were safe, and so acquiesced to the trafficker's demands.

In light of the above, it is our view that the offence of debt bondage should be made an indictable offence to reflect the seriousness of the offence.

4.4 HARBOURING OR RECEIVING VICTIMS OF PEOPLE TRAFFICKING

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

The current trafficking in persons offences, as defined by s271.2 specifically relate to the offender's conduct at the point of entry or exit from Australia. Where subsection (1) and similar subsections use the term 'receipt', it is used in the narrow sense of a person being received into Australia.

These provisions cover only very limited conduct relating to a discrete set of circumstances, and cannot adequately deal with the complex nature of trafficking operations. Trafficked women are often the subject of many transactions, involving many people, after their arrival in the destination country.

In the cases of several women that our organisations have worked with, they have indicated that they were transported from place to place and under the control of several different people before being used and possessed by their ultimate 'owner'. The third parties who facilitate the transportation and exchange of trafficked women, after arrival into Australia may or may not have had an active role in the facilitation or organisation of that person entering the country. The current offences under the Code do not adequately capture the conduct of these third parties.

Whilst both organisations agree on the complexities in these circumstances, we have different views on the categorisation of the offence of 'harbour or receive' in this context:

- Project Respect considers that any offence of harbour or receive, after the person has been brought into the country, is as much an offence as any other part of trafficking.
- Fitzroy Legal Service believes that the offence of harbour and receive is somewhat akin to the State offence of 'aid and abet' and as such, should be considered a lesser offence in the sense that it is secondary to the trafficking or slavery offences.

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

One of the main difficulties that have been encountered by the prosecution in relation to s270.3(1) is the issue regarding the accused's intention to cause someone to be in a position of enslavement, namely whether the accused intended to enslave the person, or whether the accused received the person in a slave-like condition and thereafter, possessed or used the person.

It is our submission that in reality, the differences between these two categories is artificial. We submit that if it can be established that a person possesses or uses someone as a slave, then the intention to enslave that person is unnecessary to prove.

The contemporary experience of slavery is very different to the traditional image of government sanctioned trade in human beings for forced labour-atrocities that that caused the framing of the international conventions after the Second World War.

In modern times, the traditional image of slavery no longer applies. Rather, as demonstrated by *R v Tang*¹, slavery now takes place in the private domain where women find themselves forced into prostitution to pay off a debt that they did not originally agree to owe (or agreed to owe under the understanding that they would be employed in a form of employment not including prostitution). Threats to harm (including threats to harm family members in origin countries), sexual/physical/psychological violence, forced detention/restricted freedom of movement and the withholding of identity documents are used as very effective means to control and force someone to perform acts against their will.

We submit that the definitions and understanding of slavery should be modernised to take into account that ‘the shackles of slavery can be fabricated out of lies, deception, false contracts and a cunning manipulation of human desire to change the cards that life has been dealt.’² In light of the insidious nature of modern slavery, the differences between causing someone to be enslaved and using a person who is enslaved are subtle and often intersect. It is the experience of our clients that being enslaved is not caused by one particular event or person. Rather, it is a series of behaviours and conduct of a range of people who use controlling and intimidating measures by which to exploit our clients for their own personal gain.

It is our submission therefore, that if the accused is found to be profiting from someone who is enslaved (pursuant to modernised definitions of slavery), then this has contributed to that person being enslaved and should be dealt with accordingly.

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

The offences outlined in s270.2 clearly distinguish the different types of conduct constituting trafficking under that section. Section 270.3 essentially provides for situations where s270.2 conduct is committed with aggravating features. We believe that amending section s270.3(1)(a) to insert sub-paragraphs relating to distinct type of s270.2 conduct would clarify the specific type of offence that is alleged against the accused. This would appropriately assist the accused in defending his or her case, and would not detrimentally affect the prosecution, as it does not alter the substance of that section.

¹ R v Tang [2008] HCA 39

² Dr. Anne Gallagher, ‘a question of bondage’ *The Age* 15 May 2008

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

The current provisions capture the elements of coercion and exploitation through the concepts of threats and deception. Whilst ‘threat’ and ‘deception’ are both defined broadly by the legislation, it does not necessarily capture the complex relationships, especially power relations, that are formed between victims and their traffickers, ‘owners’ and ‘minders’.

The UN Trafficking Protocol’s definitions of exploitation and coercion are more broadly defined, and include abuse of power, and abuse of the vulnerability of another person. In our view, the Protocol’s definition more adequately reflects the complex nature of coercion, power and control, in the context of trafficking for the purpose of sexual servitude and should be adopted by the Australian Government.

6. REPARATION FOR VICTIMS OF PEOPLE TRAFFICKING

Does section 21B of the Crimes Act 1914 (Cth) adequately provide for reparation orders to be made for victims of people trafficking? If no, what measures could be introduced to permit greater access to reparation orders by victims of people trafficking

The physical, psychological and social impacts of being trafficked can be immense and span over a number of years. We refer to the recent Victorian Parliamentary Inquiry Drugs and Crime Prevention Committee “Inquiry Into People Trafficking for Sex Work” report³ which details the impacts and effects of sex trafficking on women. This includes living in fear, detrimental impacts on a trafficked person’s health and well-being, Post Traumatic Stress, occupational hazards, stigmatization, isolation, social exclusion, marginalisation and legal insecurity.

We acknowledge that it can be difficult to prove that the above effects are a direct cause of being trafficked, as these impacts may not be felt for some time after the experience of being trafficked. Also, it is difficult to measure the financial loss incurred from the above effects.

Furthermore, it is our experience that trafficked women are unlikely to seek reparation orders pursuant to section 21B for fear of repercussions (to themselves or their family) from people within the wider human trafficking network.

We have found that trafficked women are more likely to seek assistance via the Victims of Crime Assistance or compensation schemes available at State

³*Inquiry into People Trafficking for Sex Work* Drugs and Crime Prevention Committee (Victoria) June 2010

levels. They are more likely to utilize these schemes as they are then not required to testify against the traffickers, and can remain in a relatively safe physical and emotional position, particularly if they have either fled the circumstance of enslavement, or have paid off their debts.

This can raise difficulties as trafficked often arrive in one state of Australia then are transported to another state where the exploitation actually occurs, or moved between two or more states (such as Sydney and Melbourne) for the purposes of prostitution.

The Victim of Crime schemes vary significantly depending upon each state jurisdiction and we therefore submit that there should be a Government Inquiry into the harmonization of the state Victims of Crime compensation/assistance schemes.

7. PROTECTION FOR VULNERABLE WITNESSES

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

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

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

Providing evidence in the initial stages for trafficked women can be complicated, intimidating and traumatising. Women who have been trafficked are often told that Australian Police are corrupt, they may not be clear on some details of their trafficking including names, dates, locations etc, and their evidence may be further confused by mental health issues or drug dependency issues often brought on during the trafficking experience. We recommend that a review of the initial stages of information gathering/evidence gaining of vulnerable witnesses in people trafficking matters be conducted, with consideration of the above issues and ensure supporting agencies are informed of these processes.

Testifying in court can be a re-traumatising experience for trafficked women particularly in matters involving slavery, servitude or trafficking. We therefore recommend the implementation of measures to improve access to justice of victims of trafficking, specifically protections for witnesses such as those available to complainants in sexual offence cases. There should be automatic name-suppression orders of trafficked persons (as witnesses) as well as the option of testifying via closed circuit television.

Should the Commonwealth enact a provision which defines ‘vulnerable witness’?

We recommend that the Commonwealth enact a broad provision of ‘vulnerable witness’ that takes into account witnesses who are testifying to circumstances where physical, psychological and emotional intimidation tactics have been alleged to be used as forms of control and exploitation.

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

In Victoria, victim impact statements are a useful tool for the judiciary to consider in imposing sentences. We submit that victim impact statements should be provided to the bench, prosecution and the accused in people trafficking matters. Judicial members who are determining matters in crimes against the Commonwealth are also likely to be assisted from understanding the impact of a crime against a trafficked person.

The trafficked women we work with do not speak English as a first language and are also often subject to pejorative racial stereo-typing if they choose to provide evidence. In our view, provision should be made to enable a trafficked person to provide an account of their experience of undergoing the court process in addition to their experience as a victim of trafficking.

We submit that victim impact statements should be voluntary, and a choice not to provide a victim impact statement should not be seen to diminish the seriousness of the offence.

What presentation methods should be available to provide a victim impact statement?

The victim impact statement should be provided in the witness’s first language and translated by an NAATI accredited translator so that the true experience is represented. We submit that the trafficked woman should have the option to elect who reads out her victim impact statement (herself, the interpreter or a support person) and to be provided with at least one day to prepare the statement with the support of court staff, interpreters and relevant support services.

Should victims be able to express a view about sentence?

We submit that it is the role of the judiciary to impose sentences and legislation that governs the judiciary in making these decisions. It is our experience that victims of trafficking often do not want to be involved in court proceedings for fear of harm being caused to their family either in Australia or their country of origin. In the event that they do provide evidence, it is with much fear and trepidation of the legal process. As trafficked women are not familiar with the legal system, we do not believe that it is appropriate for them to express a view about sentence. The victim impact statement is the appropriate manner in which the judiciary or jury will be able to take into account the individual’s experience of being trafficked and the judiciary will then appropriately take this experience into account in sentencing.

What protections need to be in place for offenders?

As with all criminal trials, there must be access to a fair trial. Procedural fairness is important in situations where victim impact statements are tendered, and the accused, or his or her lawyer therefore must have provision to the victim impact statement prior to it being tendered to the Bench.