



# Transnational Crime Brief

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## Labour trafficking: key concepts and issues

At the international level, there is no single, clear definition of 'labour trafficking'. Arguably, the expression can be used to describe those forms of *trafficking in persons* of which the *exploitative purpose* relates to a person's *labour*. There are, however, debates over the scope and meaning of these terms. This brief provides an introduction to key terms and notes some of the issues that remain less settled.

### What is trafficking in persons?

Many countries, including Australia, have ratified the UN Trafficking Protocol (UN 2000). As defined in the Protocol, 'trafficking in persons' is a process entailing three elements:

- an *action* by the trafficker, in the form of recruitment, transportation, transfer, harbouring or receipt of persons
- undertaken by one of the following *means*: force or threat of force, other forms of coercion, abduction, fraud, deception, abuse of power, abuse of a position of vulnerability, giving or receiving payments to achieve the consent of a person having control over another person
- for the *purpose of exploitation*, such as 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 removal of organs (Art. 3).

Trafficking involving children (under 18) requires only two elements: the *action*, and the *purpose* of exploitation.

### What is labour trafficking?

While there is no formal definition of labour trafficking, terminology such as 'trafficking for the purposes of labour exploitation' and 'labour trafficking' tend to be used to refer to trafficking the end purpose of which involves forced labour on fishing vessels, the enslavement of migrant domestic workers, bonded labour in agricultural settings, and sweatshop labour (see for example UNODC 2008).

The term 'labour trafficking' also needs to be understood alongside the concept 'trafficking for the purposes of sexual exploitation'. Frequently, the language of 'labour trafficking' is used to signal that the area of focus is exploitation that takes place *somewhere other than in the commercial sex industry*. This reflects the history and drafting of the Protocol, which

is itself the result of various difficult political compromises. In particular, the inclusion of both 'sexual exploitation' and 'forced labour' as examples falling within the Protocol's definition of trafficking suggest that there is (or was intended to be) a distinction between these two concepts. The distinction is not, however, always clear. For example, how should we describe trafficking involving exploitation in the commercial sex industry where this industry is both legal and regulated? How should we differentiate between 'labour trafficking' and trafficking for the purposes of 'sexual exploitation' of a person who has been subjected to multiple forms of abuse (for example, forced domestic labour and sexual abuse by a member of the household)? These issues cannot be resolved by recourse to the UN Trafficking Protocol, the language of which appears deliberately equivocal (see Munro 2005: 96).

### What is 'exploitation'?

Under the UN Trafficking Protocol, *exploitation* is defined to include several overlapping but potentially different kinds of conduct, including *forced labour or services*, *slavery or practices similar to slavery*, and *servitude*. These terms are particularly relevant to the meaning of 'labour trafficking'. Though these terms are not defined in the Protocol, they have been used in other international legal instruments. Accordingly, it is useful to look at how they have been defined elsewhere.

*Forced labour or services* has been defined as the condition in which the work or service is exacted under menace of penalty and it is undertaken involuntarily (Forced Labour Convention [ILO no. 29]: see also European Convention on Human Rights, Article 4). According to the International Labour Organisation (ILO), 'forced labour or services' is not the same as situations merely involving low wages or poor working conditions or lack of choice due to economic necessity. It represents a severe violation of human rights, and restriction of freedom (Report of the Director General 2005: 5).

The term *slavery* has a long legal history. In several treaties, one of the defining features of slavery is the exercise of any or all of the powers attaching to the right of ownership of a person (1929 Slavery Convention, Article 3; Rome Statute of the International Criminal Court, Article 7(2)(c)). The concept of *exercising powers attaching to the right of ownership* can be difficult to apply, given

that in many countries, it is not possible to legally own a person. It is, however, possible to act as if you own a person. Allain draws the analogy that, although it is not possible for drug dealers to lawfully own a shipment of heroin, they are still able to exercise any or all of the powers of ownership attaching to the drugs, such as the capacity to buy, sell, possess and use the drugs (Allain 2007: 13; see also Gallagher 2008).

*Practices similar to slavery* has been defined to include *debt bondage* and *serfdom*, concepts that may be relevant to labour trafficking (*Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956*, Article 1). In the 1956 Convention, these terms are defined as follows:

- *Debt bondage* is a condition that arises when a person pledges his or her personal services (or the services of a person under his control) as security for a debt, in circumstances in which either the value of those services as reasonably assessed is not applied to reducing that debt, or the length and nature of those services are not respectively limited and defined.
- *Serfdom* is the condition of a tenant who is, by law, custom, or other agreement, bound to live and labour on land belonging to another person and to render services to that person, whether for reward or not, in circumstances in which the tenant is not free to change his or her status.

## How is labour trafficking regulated in the Australian context?

Under Commonwealth law, there are various offences that cover situations that fall within the broad descriptors of labour trafficking noted above. These include the offences in Divisions 270 and 271 of the Criminal Code (Cth), including the crimes of 'slavery', 'sexual servitude', 'trafficking in persons', 'trafficking in children', and 'debt bondage'. Also, recent amendments to the *Migration Act 1956* (Cth) made it an offence to employ a non-citizen working in Australia without a visa, or in breach of their visa conditions. This offence attracts a higher penalty if there was exploitation through 'slavery', 'forced labour', or 'sexual servitude' (terms that are defined in the Criminal Code) (see ss. 245AA–AK, *Migration Act 1956*).

These criminal offences exist against a larger backdrop of labour laws. For example, a restaurant owner was recently prosecuted under the Criminal Code for allegedly trafficking a chef for exploitation (forced labour) in his restaurants. The defendant was acquitted on this charge, but convicted on a related charge of influencing a Commonwealth official in forging a signature

on an employment contract provided to immigration officials (*R v Rasalingam*, District Court of NSW, 2 November 2007, unreported). Separate proceedings were also taken against the restaurant owner for breaches of the *Workplace Relations Act* (*Fryer v Yoga Tandoori House* [2008] FMCA 288). The company, Yoga Tandoori, was ordered to pay \$18,200 in penalties.

The High Court has also recently considered the meaning of the term 'slavery' in the Criminal Code. Chief Justice Gleeson noted that central to the identification of 'slavery' was the issue of whether or not the individual was being treated as a commodity, 'as an object of sale and purchase'. His Honour noted that the line between 'slavery' and 'harsh and exploitative conditions of labour' can be difficult to locate, but that powerful indicators of slavery include: a capacity to deal with an individual as a commodity (as an object of sale and purchase); the exercise of powers of control over movement that extend well beyond powers exercised even in the most exploitative employment circumstances; and absence or extreme inadequacy of payment for services (*R v Tang* [2008] HCA 39, paras 44–45).

## Institute research on labour trafficking

The Institute is currently undertaking research on the issue of labour trafficking in the Australian context. This research aims to build a better picture of labour trafficking in the Australian context, including information about known cases, gaps and vulnerabilities in our system, and research priorities. Reports from this research will be published as they become available.

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