

12 April 2011

Standing Committee on Justice and Community Safety

Dear Committee,

1. I would like to make a submission to your inquiry into the operation of the *Prostitution Act 1992 (ACT)*. I sincerely apologize for the fact that I am seeking to make this submission so long after your closing date. However, I was not aware until very recently that your Inquiry would raise so many questions about trafficking in persons.
2. I am not an expert in the legal regulation of the sex industry. I am, however, an expert on trafficking in persons. I notice that a number of submissions to the Committee have drawn a direct connection between the legal regulation of the sex industry and trafficking in persons. Accordingly, I would like to make some observations on this issue, based on my expertise about trafficking in persons.
3. I make this submission in my capacity as a Visiting Fellow at the Centre for International and Public Law at the Australian National University. The views expressed in this submission are my own and should not be taken to represent the views of any organisation with which I am or have been affiliated.
4. In terms of my expertise, my first professional engagement with trafficking in persons issues was in 1999 when I was seconded from the Australian Institute of Criminology (AIC) to work as a researcher on a United Nations trafficking project in the Philippines. Since that time, I have been engaged to undertake research on trafficking and related issues by a range of international and national organisations including the International Organization for Migration, the Association of South East Asian Nations, the Asia Regional Trafficking in Persons Project, the Australian Institute of Criminology and the United Nations Office of Drugs and Crime.

***The importance of ensuring clarity around the meaning of trafficking in persons***

5. In any discussion about trafficking in persons, it is vital to ensure conceptual clarity. In my submission, I will refer to the internationally accepted definition of 'trafficking in persons' found in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (the 'UN Trafficking Protocol').<sup>1</sup> In Article 3(a) of the Protocol, 'trafficking in persons' is defined to mean:

---

<sup>1</sup> Opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003).

... the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

6. For ease of use, the definition is commonly broken up into three key constituent elements:
  - The *action* element ('...the recruitment, transportation, transfer, harbouring or receipt of persons...')
  - The *means* element ('...by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person...')
  - The *purpose* element ('...for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.')
7. For a crime to fall within this definition, it must have each of the *action*, *means* and *purpose* elements. The exception is where children are involved (that is, persons under the age of 18). In this instance, only the *action* and *purpose* element are required.<sup>2</sup>
8. As a States Party to the UN Trafficking Protocol, Australia is obliged in international law to 'adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally'.<sup>3</sup>
9. Australia has enacted laws to criminalize trafficking in persons. While, in my view, there are some gaps in the laws,<sup>4</sup> broadly speaking they seek to reflect the requirements of the UN Trafficking Protocol. These laws are found primarily in Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth).
10. I note that in a number of submissions to your Inquiry, there appears to be a conflation of 'prostitution' and 'trafficking in persons'. This approach

---

<sup>2</sup> Ibid, art 3(c).

<sup>3</sup> Ibid, art 5(1).

<sup>4</sup> See David and Gallagher, (2011) Submission in response to the Attorney-General's Department Discussion Paper, 'The Criminal Justice Response to Slavery and People Trafficking, Reparation, and Vulnerable Witness Protections', <<http://law.anu.edu.au/scripts/StaffDetails.asp?StaffID=637>> .

reflects a misreading of the definition of trafficking in persons in the UN Trafficking Protocol. As noted in the Interpretative Notes to the UN Trafficking Protocol:

The protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms "exploitation of the prostitution of others" or "other forms of sexual exploitation" are not defined in the protocol, which is therefore without prejudice to how States parties address prostitution in their respective domestic laws.<sup>5</sup>

11. As further explained in the UNODC Legislative Guide to the UN Trafficking Protocol:

Dealing with prostitution and related matters outside of the scope of trafficking in persons is specifically reserved for the laws and policies of individual States parties (see the interpretative notes (A/55/383/Add.1, para.64)).<sup>6</sup>

12. In her recent book on the international law of trafficking in persons, Dr Anne Gallagher has noted that:

There was clear consensus within the drafting group that the Trafficking Protocol definition was not to extend to prostitution or pornography *per se*. Since the Protocol was concluded, several different definitions of "sexual exploitation" have emerged, confirming that many of the earlier controversies documented above are alive and well.<sup>7</sup>

13. To avoid confusion, I would suggest that it is important in the Committee's deliberations to ensure that any reference to 'trafficking in persons' is in fact a reference to that term, either as defined in the UN Trafficking Protocol or in Australian law.

### ***Information about trafficking in persons in Australia***

14. In the time available, it is not possible to provide the committee with a comprehensive literature review of all research on trafficking in persons in Australia that may be relevant to the issues before the Committee. I can, however, point the committee to two relevant pieces of work which I have recently completed:

- F David, *Trafficking of Women for Sexual Purposes*, (Research and Public Policy Series 95, Australian Institute of Criminology, 2008) (<http://www.aic.gov.au/publications/current%20series/rpp/81-99/rpp95.aspx>), and

---

<sup>5</sup> A/55/383/Add.1, paras 63-8, cited in United Nations Office of Drugs and Crime, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, (United Nations, New York, 2006), 347.

<sup>6</sup> United Nations Office of Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocol Thereto*, (United Nations, New York, 2004), 268, fn 15.

<sup>7</sup> Anne Gallagher, *The International Law of Human Trafficking*, (Cambridge University Press, 2010), 39.

- F David, *Labour Trafficking*, (Research and Public Policy Series 108, Australian Institute of Criminology, 2010) (<http://www.aic.gov.au/publications/current%20series/rpp/100-120/rpp108.aspx>).

15. The background research for both publications involved a comprehensive review of the existing international and national research-based literature on trafficking in persons and related issues.
16. As noted in these reports, there is no agreement about the likely incidence of this crime in the Australian population. The most reliable (quantitative) indicators of incidence at this time include: numbers of cases detected by non-government and government agencies; numbers of clients on the Australian government's victim support program; and the number of cases investigated and prosecuted. There are reasons to suggest that the numbers of (officially reported) cases understates the size and complexity of Australia's trafficking problem, particularly in contexts outside of the sex industry.
17. Trafficking in persons is a crime that unfortunately has been identified in the Australian community in a range of contexts. While trafficking involving exploitation in the sex industry is without doubt the most well-known and highly publicized form of trafficking, trafficking crimes have occurred in contexts including private homes (through the forced labour, sexual exploitation or enslavement of both 'legal' (visa holder) and irregular (non-visa holder) domestic workers), food preparation (involving chefs/cooks), agriculture, and even small businesses (local takeaway shops, other services).<sup>8</sup>
18. Trafficking crimes are not always perpetrated by organized criminal groups. In the study that I conducted of trafficking of women for sexual purposes in 2008, AFP officers involved in investigating trafficking cases noted that these have not matched stereotypes about 'high-end' organized crime. They drew a distinction between, for example, the level of sophistication in drug trafficking vs the level of organisation and sophistication of those involved in people trafficking crimes.<sup>9</sup> There is considerable discussion in the criminological literature about the value of moving away from fairly simplistic understandings of 'organized crime' (with its connotations of hierarchy, structure, use of violence, and continuity), to a more nuanced consideration that recognises the role of 'mom and pop' offenders, networks and variance in levels of organisation.

---

<sup>8</sup> F David, *Labour Trafficking*, (Research and Public Policy Series 108, Australian Institute of Criminology, 2010) <<http://www.aic.gov.au/publications/current%20series/rpp/100-120/rpp108.aspx>>, 18-35.

<sup>9</sup> F David, *Trafficking of Women for Sexual Purposes*, (Research and Public Policy Series 95, Australian Institute of Criminology, 2008) <<http://www.aic.gov.au/publications/current%20series/rpp/81-99/rpp95.aspx>>, 34.

19. The fact situations involved in actual trafficking in persons crimes may bear little resemblance to popular stereotypes about this crime type. As noted in the 2008 report:

Few of the cases discovered in Australia fit the traditional stereotype of 'slavery'. For example, the suspected victims of trafficking who have come to the attention of the AFP have not been kidnapped from their home villages, held at gunpoint or chained to beds. The fact situations that have arisen over the past four or so years are far more complex than this. In many cases, the suspected victims of trafficking have known they are coming to Australia to work in the sex industry; many have had access to mobile telephones while here in Australia; and only some have been physically restrained, through detention in brothels and safe houses. However, in all cases, coercion and control has involved a range of subtle methods such as threats of violence, obligations to repay debt, isolation, manipulation of tenuous or illegal migration situations and a general sense of obligation.<sup>10</sup>

20. As suggested by the above quote, the risk of victimisation (or vulnerability to exploitation) tends to result not from any single factor but more typically from multiple individual characteristics, situations, and relationships. In some instances, relevant factors may include the legal context surrounding the workplace but there are many other factors that may be relevant, such as migration status and capacity to access different visa categories, physical and linguistic isolation, contractual obligations including debt in the home country, financial pressures and cultural and family obligations.<sup>11</sup> It is the very factors that make people vulnerable to exploitation that can also make them unable or unwilling to report their experiences.

21. In the study I conducted in 2008, there was no consensus or clear view about the importance or relevance of the regulatory framework surrounding the sex industry for detecting or investigating trafficking in persons. For example:

AFP investigators noted that cases have been detected in both legal and illegal brothels. Several AFP investigators considered that this distinction had little relevance from the perspective of investigating trafficking.<sup>12</sup>

In this same study, it was also noted that clients of sex workers have been a source of information about trafficking crimes in the Australian context, and they have also acted as witnesses in prosecutions.<sup>13</sup>

22. In the 2008 study, I recommended working more closely and directly with culturally appropriate services already working in the sex industry, as part of efforts to detect and respond to trafficking in persons. As noted in this report:

The experience of the past four years confirms that some victims of trafficking will actively seek help. Accordingly, it is important that women have as many opportunities as possible to access information about

---

<sup>10</sup> Ibid, 39.

<sup>11</sup> Above n 8, 46; see also above n 9, x.

<sup>12</sup> Above n 9, 34.

<sup>13</sup> See *ibid*, pp xiii, 25, 35, 45.

support and services. Such information needs to be available in relevant languages, and presented in a way that takes account of cultural considerations. To date, most information has been provided in written form. While this is one strategy, consideration could be given to funding outreach services provided by workers with relevant language skills and cultural competence. There are already several outreach services for the sex industry operating around Australia. However, few have sufficient resources to engage workers to focus specifically on culturally and linguistically diverse groups. As many participants noted, without language and cultural competence, it is difficult to build trust and rapport.<sup>14</sup>

I further noted the importance of ensuring that outreach and support services reflect the experience and needs of the likely client group:

Victims of trafficking have, to date, been drawn from some of the more marginal groups in society, including illegal workers, female migrants and sex workers. It is not realistic to expect that this client group will always receive appropriate, sensitive and high-quality care from just any service provider. Stigmatisation, stereotyping and lack of information have an impact on the quality and appropriateness of service delivery. This suggests that services should, where possible, be drawn from existing services that have a depth of relevant specialisation and expertise. In this context, this might include services that have experience working with sex workers, clients from particular cultural and linguistic groups, victims of sexual assault, and migrants with complex legal needs. It is likely that increased engagement with existing service providers would effectively extend the services that can be offered under the program while ensuring services are appropriate to clients' needs.<sup>15</sup>

23. I also recommended monitoring *impact* of interventions, considering the full spectrum of 'harm' that can result from interventions, not just simple increases or decreases in 'incidence of trafficking' (a notoriously unreliable indicator of change). As noted in my 2008 report:

The government's response to trafficking does not operate in isolation. For example, law reform and law enforcement activities can have an impact that goes well beyond individual victims and offenders. Some of these impacts were raised in this research process, including the potential for law enforcement or compliance activities to affect a wider group of women, beyond those who are victims of trafficking. In line with modern approaches to measuring progress, it is suggested that consideration should be given to monitoring not only the indicators noted above, but also the broader social impact of the government's response to trafficking. Any response to crime can have unintended consequences, including impacts well beyond the intended target audience. It is important that these broader impacts are identified and understood, so unintended consequences can be addressed.<sup>16</sup>

24. I consider these observations are relevant to the Committee's deliberations. There are likely to be a range of consequences associated with (for example) criminalization of the sex industry, and an effect on incidence of trafficking in persons is just one of these. It is equally important to be aware that simplistic measures such as 'increase or

---

<sup>14</sup> Above n 9, 65.

<sup>15</sup> Ibid, 67.

<sup>16</sup> Ibid, 71.

decrease in incidence of trafficking' are notoriously unreliable, highly problematic and broadly rejected as a useful measure of change in the anti-trafficking sector. This is not a field where we know the incidence of the crime to start with, so measurements of change in incidence are speculative at best and misleading at worst. With this in mind, I would suggest it is much more constructive to avoid these simplistic indicators, and consider the likely implications that a change in regulatory framework would have on the full spectrum of 'harm' indicators (eg, incidence and severity of violence, incidence and severity of time and wage issues, willingness to report crime to the police, occasions of outreach or service to relevant populations, etc).

### ***The impact of politics on research on trafficking in persons***

25. In reviewing any research or writing on trafficking in persons, it is important to be mindful of the very real impact that the polarising political debate about prostitution (as a form of violence) vs sex work (as a form of work) has, both on the conduct of research and the tenor of commentary on this issue. This is an area of work where there is a great variation in the quality of the research undertaken. Some 'research' is better described as political commentary, some of which relies on fallacious arguments (eg, demonstrating a conclusion by relying on premises that assume the conclusion; or drawing conclusions while ignoring contrary evidence).

26. In 2008, I made the following observation, which I consider is still relevant to the Committee's deliberations:

The area of middle ground on the issue of trafficking for the purposes of sexual exploitation has grown considerably in recent years. This has been greatly assisted by the adoption of a shared definition of trafficking, through the United Nations Trafficking Protocol. However, several significant points of tension remain. For example, one person's 'rescue from exploitation' is another person's interrupted contract of employment, with ramifications for capacity to repay debt and support a family. Points of disagreement and debate are an important part of a free and open society. Meaningful debate can only be fostered by information sharing and making space for all voices to be heard.<sup>17</sup>

27. With this in mind, I would like to point the Committee to what I consider to be some additional, useful summaries and discussions of the debates on the likely intersection of sex work and trafficking in persons, and trafficking in persons generally. In order to extend the Committee's consideration of this issue, I have sought to identify references that are not already mentioned in other submissions. They are:

- Janie A Chuang, 'Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy', 158 University of Pennsylvania Law Review, 165 (May 2010).
- The deliberations of the Ontario Superior Court of Justice, in *Bedford v*

---

<sup>17</sup> Ibid, 3.

*Canada* (ONSC-4264, 28 September 2010). In this case, the court considered 25,000 pages of evidence, from both 'sides' of the debate around the regulation of prostitution, and provides summaries of the evidence received.

- Drugs and Crime Prevention Committee, Parliament of Victoria, *Inquiry into People Trafficking for Sex Work* (Final Report, June 2010), especially pages 159-62 on the various evidence received on the Swedish Model.
- The chapter on Australia by Elaine Pearson in Global Alliance against Trafficking in Women, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World*, 2007 (available for download at: [http://www.gaatw.org/Collateral%20Damage\\_Final/CollateralDamage\\_AUSTRALIAfinal.pdf](http://www.gaatw.org/Collateral%20Damage_Final/CollateralDamage_AUSTRALIAfinal.pdf)).

28. For the leading commentary on the international law of trafficking in persons, I would recommend Anne Gallagher, *The International Law of Human Trafficking*, (Cambridge University Press, 2010).

29. I wish you the very best with your deliberations.

Fiona David

Visiting Fellow  
Centre for International and Public Law  
Australian National University