

Introduction

1. This is a submission made in response to "The Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protections" (the AGD discussion paper) by Fiona David and Dr Anne Gallagher.
2. The author's would like to thank the Attorney-General's Department for their work in preparing the Discussion Paper and for providing a timely opportunity to comment on Australia's legal framework regarding trafficking in persons.
3. Ms David makes this submission in her capacity as a Visiting Fellow at the Centre for International and Public Law at the Australian National University College of Law. Dr Gallagher makes this submission in her capacity as an independent legal adviser. The views expressed in this paper are their own and should not be taken to reflect, in whole or in part, the views of any organisation with which they are or have been affiliated.

Summary of submission

4. The authors submit that there are gaps in Australian criminal law when compared to the requirements of both the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* ("UN Trafficking Protocol"), supplementing the *United Nations Convention against Transnational Organized Crime*, and the *Convention Concerning Forced and Compulsory Labour* (ILO Convention No.29) ("Convention on Forced Labour"). For example, full compliance with these instruments would appear to require Australia to:
 - 4.1. Criminalize the act of *maintaining* a person in a situation of forced labour or servitude, even where there is no preceding process or cross-border movement.
 - 4.2. Amend laws to recognize a broader range of prohibited means, including *abuse of vulnerability or power, making of payments*, and potentially also *coercion* (if not already covered by the meaning of *force* under existing provisions).
 - 4.3. Amend laws to recognize a broader range of prohibited exploitative purposes, namely *servitude, serfdom* and *servile marriage*.
 - 4.4. Review the definition of forced labour in the Criminal Code, to ensure that it is not unnecessarily narrow.
5. In addition to Australia's international legal obligations, operational experience suggests that some aspects of Australia's anti-trafficking laws are not capable of responding to the *modus operandi* of offenders. Key issues include the following:

- 5.1. Instances of labour-related coercion, abuse and harm vary widely in nature and severity. Australian criminal law currently targets the most extreme instances of slavery and trafficking in persons. This leaves little room for the police (as distinct from labour regulators) to respond to cases that appear to be highly abusive and coercive, but do not quite meet the elements of proof required for a prosecution under "forced labour", "slavery" and "sexual servitude" under Australian criminal law. The remedies and penalties that are available under existing migration and labour laws do not reflect the seriousness of these cases.
 - 5.2. Offenders use a *modus operandi* that avoids clear "use of force or threats", and ensures that victims retain some (albeit very limited) personal autonomy such that it is then very difficult to prove that the victim was "not free". It is currently very difficult to target this conduct under Australia's existing laws, except where the crime is extreme enough to be characterised as "slavery".
 - 5.3. There are a range of practices implicated in trafficking and related crimes, such as withholding of passports, deceptive recruitment outside of the sex industry, lodging false asylum (and other visa) applications for another person, using imbalances of power to extract unpaid or very poorly paid labour, and charging of excessive fees and bonds for job placement and other migration or employment services. Many of these practices either do not attract, or attract only very light penalties under existing laws.
6. In view of the points noted above, this submission recommends the following:

Recommendation 1:

A comprehensive review of Australia's legal framework regulating trafficking in persons and forced labour be undertaken, with a view to identifying gaps and inconsistencies when compared to the requirements of the UN Trafficking Protocol and the Convention on Forced Labour.

Recommendation 2:

The Criminal Code be amended to include stand-alone offences of both "forced labour" and "servitude", in accordance with Australia's obligations under the UN Trafficking Protocol and the Convention on Forced Labour.

Recommendation 3:

The concepts of "forced labour" and "servitude" be defined in terms that allow consideration of not only "force" and "threat", but also *deception*. Recent operational experience confirms that deception is part of the

modus operandi of people who seek to extract unpaid labour, basically without the consent of the person providing that labour.

Recommendation 4:

The concepts of "forced labour" and "servitude" be defined in terms that allow judicial consideration of not only single events such as the "use of force" or the "use of a threat", but a combination of circumstances, the practical result of which is to "effectively restrain" or "effectively detain" the person providing labour or services.

Recommendation 5:

Consideration be given to the introduction of a broader range or hierarchy of offences that both reflect the *modus operandi* of trafficking, and also the practices that support this *modus operandi*, such as:

- "abuse of the migration process for financial or material gain"; or
- "abuse of a situation of vulnerability or dependency for financial or material gain"; and
- other practices such as: withholding of passports, deceptive recruitment outside of the sex industry, and charging of disproportionately large fees and bonds for job placement and other labour / migration-related services.

Recommendation 6:

The existing legal framework be reviewed to ensure that the *privacy*, *safety* and *dignity* of all witnesses in prosecutions under Divisions 270 and 271 of the Criminal Code is assured. This review should take into account the likelihood that witnesses may also be involved in related civil proceedings.

Detailed consideration of issues raised in the AGD Discussion Paper

7. The AGD Discussion Paper raises a large number of important and complex issues. For reasons of time, we have not sought to address every issue raised in the AGD Discussion Paper.
8. Bearing in mind the various questions raised in the AGD Discussion Paper, the authors submit that it is relevant to consider the existing Australian legal framework from two perspectives:
 - What are the gaps in the Australian legal framework, when compared with Australia's legal obligations under the UN Trafficking in Persons Protocol and the Convention on Forced Labour?
 - Bearing in mind recent operational experience, are Australia's laws appropriate and sufficiently adapted to the reality of the *modus operandi* of offenders?

What are some of the gaps in Australian criminal law, when compared to the requirements of the UN Trafficking in Persons Protocol?

9. In this submission, the authors do not attempt to comprehensively review every aspect of Australia's legal framework against the requirements of the UN Trafficking Protocol. Rather, they have sought to highlight selected gaps in the Australian legal framework, as part of an argument in favour of a comprehensive review of Australia's laws on this issue.
10. The following marked-up definition of trafficking in persons, taken from Article 3(a) of the UN Trafficking Protocol, illustrates the issues that, in our view, are currently either not covered at all, or are insufficiently covered by Australian criminal laws.

"... 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."

11. As a State Party to the UN Trafficking Protocol, Australia is under an international legal obligation 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".¹ The definition of "trafficking in persons" is provided in Article 3. For ease of

¹ UN Trafficking Protocol, Article 5(1).

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.").

12. For a situation to be considered "trafficking in persons", it must involve each of these three elements (the action, means and purpose). The only exception relates to trafficking involving persons under eighteen years of age. Article 3(c) of the Protocol provides that where a child is the subject of trafficking, the "means" element is not required.

13. Australia's anti-trafficking laws do not closely follow the framework of "action", "means" and "purpose" described in the UN Trafficking Protocol. This is not necessarily a problem in itself, provided that all of the elements are, in fact, covered by the legislation. However, as the analysis below confirms, there are gaps in coverage of the three elements.

Gaps in coverage of certain specified "acts" (harboring, recruiting)

14. Australia's criminal laws prohibiting "trafficking in persons" (and the associated conduct of "slavery" and "sexual servitude") are contained in Divisions 270 and 271 of the Criminal Code (Cth). The "trafficking in persons" crimes are contained in Division 271. Each of these requires proof of some form of *physical movement or transfer*. For example:

- The offence of "trafficking in persons" requires proof either of organizing or facilitating "the entry or proposed entry, or the receipt, of another person *into Australia*", or the "exit or proposed exit of another person *from Australia*".
- The offence of "domestic trafficking in persons" requires proof of organizing or facilitating the "*transportation or proposed transportation of another person from one place in Australia to another place in Australia*".

15. Broadly speaking, the focus on movement in the offences in Division 271 correlates to the requirement in Article 3(a) of the UN Trafficking Protocol to ensure coverage of the acts of *transportation, transfer and receipt of persons*. However, the offences in Division 271 do not cover situations where a person has "harbored" or "recruited" another person, through

prohibited means, for an exploitative purpose. This means that at present, under Division 271, it is only the *process* of trafficking that is criminalized (that is, some form of movement through prohibited means for a prohibited purpose). Situations where a person is simply *recruited* or *maintained* in a situation of exploitation, through prohibited means, are not captured by Division 271.

16. It is relevant to consider the operation of the offences in Division 271 alongside those in Division 270 of the Criminal Code. The offence provisions in Division 270 (which focus on "slavery" and "sexual servitude") do not require proof of any form of movement. However, as is discussed further below, these two concepts do not completely cover the field of all forms of "exploitation". The offences in Division 270 do not, for example, cover practices such as forced labour or (non-sexual) servitude.
17. The failure to cover harbouring and recruiting (except in relation to slavery and sexual servitude, under Division 270) is at odds with the requirements of the UN Trafficking Protocol. As noted by Dr Anne Gallagher in her recent study of the international law of human trafficking:

"... the references to harbouring and receipt operate to bring not just the process (recruitment, transportation, transfer) but also the end situation of trafficking within the definition. In other words, whereas buying or otherwise taking possession of an individual through any of the stipulated means for purposes of exploiting would fall within the definition of trafficking, *maintaining an individual in a situation of exploitation through any of the stipulated means would, according to the plain meaning of the text, also amount to trafficking*. The breadth of the action element has the effect of bringing, within potential reach of the definition, not just recruiters, brokers, and transporters but also owners and managers, supervisors, and controllers of any place of exploitation such as a brothel, farm, boat, factory, medical facility, or household".² (emphasis added)

Gaps in coverage of the prohibited means (coercion, abuse of power/vulnerability, payments)

18. The UN Trafficking Protocol requires criminalization of the specified actions done, through certain specified means, for the purpose of exploitation. With regard to the "means" requirement, Article 3(a) specifically refers to a range of means, including:

"...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..."

² A. Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, 2010, p.28.

19. The existing Australian offences related to trafficking in persons refer to only some of these elements. The slavery offences in Division 270 do not require proof of means, but instead require proof of the exercise of "any or all of the powers attaching to the right of ownership" (consistent with the international legal definition of slavery). The sexual servitude offences in Division 270, and the trafficking offences in Division 271, refer to use of *force*, *threat* and *deception*.

20. The offence of "sexual servitude" requires proof that: a person is, "because of the use of forced or threats", "not free" to cease providing sexual services, or "not free" to leave a place or area (s.270.6 read with s270.4); or that a person has been subjected to "deception" with regard to the provision of sexual services (s.270.7).

21. The "trafficking in persons" offences in Division 271 use similar language, requiring proof of:

- use of *force* or *threats* (in relation to entry or proposed entry, receipt or exit or proposed exit)³;
- *deception* (of a person about the fact that their entry or proposed entry, or receipt, or any arrangements for their stay in Australia, will involve the provision by that person of sexual services or will involve the other person's exploitation, debt bondage or the confiscation of the other person's travel or identity documents);⁴ or
- (where there is an arrangement for a person to provide sexual services in Australia), *deception* about certain specified facts (the nature of the sexual services to be provided; the extent to which the person will be free to leave the place where they are to provide sexual services, or free to cease providing sexual services, or free to leave their place of residence; or the quantum, existence of any debt owed).⁵

22. It is unclear whether the concept of "use of force" in Australian law would cover the concept of "coercion" noted in the UN Trafficking Protocol. The term "force" is not defined in the Criminal Code. Definitions of "force" in the Australian Pocket Oxford Dictionary (6th Edition) include:

Noun: (1) Power; strength; impetus; intense effort. (2). Coercion, compulsion.

Verb: (1) Compel or coerce (a person) by force.

At present, there is no Australian case law on the meaning of "force" or "threat" in the specific context of the laws on trafficking in persons. The UN Trafficking Protocol does not define "force" or "coercion".

³ Subparas.271.2(1) and (2) Criminal Code.

⁴ Subparas.271.2(2) and (2A) Criminal Code.

⁵ Subparas.271.2(2B) and (2C) Criminal Code.

23. While it is possible that coercive means *might* be covered by the reference to "use of force" in the Australian laws, it is very unlikely that the existing Australian offences could be used to prosecute suspects in situations where exploitation was achieved through means such as "abuse of power", "abuse of a position of vulnerability" or "the giving or receiving of payments or benefits to achieve the consent of a person having control over another person", as required by the UN Trafficking Protocol. This is a serious concern as recent cases in Australia have highlighted the relevance of significant power disparities that result, for example, from the Indian caste system, family expectations and knowledge that the exploiter has links to dangerous criminal organisations.
24. There are various examples available that could be drawn upon as models for the development of Australian laws on this issue. These include the UNODC Model Law on Trafficking in Persons, which recommends the following options for defining "abuse of a position of vulnerability" in national legislation:

"Abuse of a position of vulnerability" shall mean taking advantage of the vulnerable position a person is placed in as a result of [provide a relevant list]:

[(i) Having entered the country illegally or without proper documentation;] or

[(ii) Pregnancy or any physical or mental disease or disability of the person, including addiction to the use of any substance;] or

[(iii) Reduced capacity to form judgements by virtue of being a child, illness, infirmity or a physical or mental disability;] or

[(iv) Promises or giving sums of money or other advantages to those having authority over a person;] or

[(v) Being in a precarious situation from the standpoint of social survival;] or

[(vi) Other relevant factors.]

25. The concept of abuse of vulnerability, where this is linked to obtaining financial or material benefit, also arises in the context of migrant smuggling. The *UNODC Model Law against the Smuggling of Migrants* suggests the following provision to address abuse of vulnerability of smuggled migrants, where this is linked to profit:

*A person who intentionally [takes advantage of] [abuses] the obvious [apparent] or known vulnerability or dependency of a smuggled migrant, including vulnerability or dependency that arises from having entered or being in the State illegally or without proper documentation, pregnancy, physical or mental disease, disability or reduced capacity to form judgements by virtue of being a child, **for profit or other material benefit**, commits an offence punishable by [insert penalty]. (UNODC Model Law on SOM, p 52, emphasis added)*

26. This drafting example, albeit from the smuggling context, draws the link between "abuse of vulnerability" and "profit", which is characteristic of the *modus operandi* surrounding trafficking and related crime types. The UNODC Model Law on Smuggling also includes a number of relevant examples of national laws from other countries (see pp.52-54 of the Model Law on the Smuggling of Migrants).
27. Critically, the existing Australian offences could *not* be used to prosecute a person who, through deception, force, threat, or any other coercive means *recruited* or *maintained* another person in a situation of forced labour or (non-sexual) servitude, if the first person was not involved in any aspect of the movement of the other person either into or out of Australia, or within Australian territory.

Gaps in coverage of certain forms of exploitation (forced labour, forced or servile marriage, serfdom, servitude)

28. The UN Trafficking Protocol requires criminalization of the specified actions done, through certain specified means, for the purpose of exploitation, which includes: "... *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." Australian laws refer to "slavery", "forced labour", "sexual servitude" and removal of organs. They do not presently cover the concepts of "servitude", "serfdom" or "servile marriage".
29. Australian law has essentially reproduced the international legal definition of "slavery". It is important to recognize that the concept of "slavery" under international law is narrower than and thereby distinct from "slavery-like practices", such as servitude, serfdom and servile marriage. With regard to the distinction between "slavery" and "servitude", Gallagher notes that:

"While the relationship between the two concepts is not fully settled, most agree that the distinction between slavery and servitude is both distinct and qualitative: "[s]ervitude should be understood as human exploitation falling short of slavery".⁶

30. It is also important to recognize that "forced labour" will not necessarily fall within the technical legal definition of "slavery". As noted by Gallagher:

"A situation of trafficking, debt bondage, bonded labour or forced labour will be identifiable as slavery only if it has involved, as required by the 1926 Convention, "the exercise of any or all of the powers attached to the right of ownership."⁷

31. If this interpretation is accepted and applied to the existing Australian legal framework, one practical result is that the offences in Division 270 (which

⁶ Gallagher 2010, 182.

⁷ Gallagher 2010, 190.

refer to "slavery" and "sexual servitude") are not sufficient to cover other practices such as (non-sexual) "servitude" or "forced labour". The introduction of specific provisions on servitude and forced labour in Division 270, alongside "slavery" and "sexual servitude", would potentially provide useful alternatives in situations where the conduct is very serious but either not sufficiently extreme to fall within the parameters of slavery, or is not sexual in nature.

32. Australia's laws do already refer to "forced labour" as one element of some of the trafficking offences, under s.271. In Australian law, "forced labour" is defined as:

.. the condition of a person who provides labour or services (other than sexual services) and who, *because of the use of force or threats*:

- (a) *is not free* to cease providing labour or services; or
- (b) *is not free* to leave the place or area where the person provides labour or services.⁸

33. The Australian definition of forced labour is different to, and arguably narrower than the definition found in the Convention on Forced Labour. Article 2(1) of that Convention provides that:

"For the purposes of this Convention the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."

Instead of focusing on whether or not a person has been subjected to a "menace of penalty" in circumstances where the person has not given their labours "voluntarily", the Australian laws focus on the elements of "force" or "threat" (concepts that are arguably far narrower than "menace of penalty") that render a person "not free" to cease providing work or services, or to leave a particular place or area of work.

34. The following table (Table 1) identifies the elements of each offence, using the terminology of action/omission, circumstance and result. It can be seen that under the international legal definition, the menace of penalty is simply required to happen in the circumstance that the person has not offered themselves voluntarily. In contrast, under Australian law, the use of force or threat has to result in the person being "unfree".

Table 1: Elements of international and Australian definition

Element	ILO Definition	Criminal Code Definition
Circumstance	All work or service	The condition of a person who provides labour or services (other than sexual services)

⁸ Criminal Code (Cth), s73.2(3).

		who
Action or omission by offender	Which is exacted from any person under the menace of any penalty	Because of the use of force or threats
Circumstance	And for which the person has not offered himself voluntarily	
Result		Is not free to: cease providing labour or services; or to leave the place or area where the person provides labour or services.

35. It is very clear that the ILO concept of "voluntariness" allows consideration of whether or not a person has been *deceived* or *coerced*. It is not at all clear that such consideration would fall within the parameters of the Australian definition of forced labour, which requires proof of either "use of force or threat". This is significant as there have been incidents in Australia where people have been tricked into working without payment for years at a time, on the basis of fraudulent promises.

36. The ILO definition, referring as it does to a "menace of penalty" clearly allows consideration of features of the relationship between the victim and offender that are less overt than "use of force or threat", such as loss of rights or privileges⁹ and economic penalties linked to debt¹⁰. It is not clear whether factors such as these would be sufficient to constitute evidence of either "use of force or threat", or that a person was rendered "not free", under Australian law.

37. In this context it is relevant to note that the ILO Committee of Experts has referred to a number of factors that might transform a situation from "employment" to "forced labour". For example, in 1998, the ILO Committee of Experts expressed its views to Saudi Arabia on certain factors that might transform the "employment" of domestic workers into "near slavery".¹¹ The two factors noted by the Committee were:

- Withholding of passports, the result of which is that migrant workers can no longer exercise their freedom of movement and cannot leave the country or change employers freely; and

⁹ International Labour Organization, *Forced Labour and Human Trafficking: Casebook of Court Decisions: A Training Manual for Judges, Prosecutors and Legal Practitioners*, 2009, page 12.

¹⁰ ILO, *The Cost of Coercion*, 2005, p.6.

¹¹ See CEACR: Individual Direct Request Concerning Convention No. 29, Forced Labour, 1930, Saudi Arabia Submitted: 1998: Cited in International Labour Organization, *Forced Labour and Human Trafficking: Casebook of Court Decisions: A Training Manual for Judges, Prosecutors and Legal Practitioners*, 2009, page 35.

- Non-payment of work, the result of which is that workers cannot afford to seek other employment without risking the loss of all of their earnings.¹²

38. More recently, in 2005, the ILO stated that:

“Clearly, "forced labour" encompasses activities which are more serious than the mere failure to respect labour laws and working conditions. For example, the failure to pay a worker the minimum statutory wage does not constitute forced labour. However, action taken to prevent the worker from leaving the workplace will normally come within the ambit of forced labour”.¹³

39. None of these indicators of forced labour noted by the ILO necessarily involve either "use of force or threat"; or necessarily result in a situation where it would be possible to say a person was, literally, "not free" to cease working or leave a situation. This suggests that the Australian laws are unnecessarily narrow by international legal standards.

40. Definitional issues aside, operational experience suggests that the existing laws on forced labour may be too inflexible to respond to the types of cases that are actually coming to official attention. Recent operational experience in Australia suggests that offenders are making use of *modus operandi* that avoids use of clear "force" or "threats", in situations where a person still retains some (albeit very limited) personal autonomy. For example, there might be evidence that a person had been coerced into providing free or very poorly paid labour, in situations where that person: could leave the place of residence or work, but only for specific, limited periods of time with permission; or where they had a mobile phone but this was used primarily to receive calls from the employer who wanted to keep track of them, and that person had no money to buy their own SIM card; or could theoretically have left through unlocked doors but because of fears fostered by the employer, withholding of wages, and social or linguistic isolation, the person has no real prospect of leaving.

41. The cases that are coming to operational attention are analogous to a case that was considered by the European Court of Human Rights, *Siliadin v France*.¹⁴ In this case, the applicant had been fifteen years old when she arrived in France in 1994 with a French national of Togolese origin, Mrs D. According to an arrangement made with Ms Siliadin's father, Mrs D was supposed to regularise the applicant's immigration status and arrange for her education, while the applicant did the

¹² See CEACR: Individual Direct Request Concerning Convention No. 29, Forced Labour, 1930, Saudi Arabia Submitted: 1998: Cited in International Labour Organization, *Forced Labour and Human Trafficking: Casebook of Court Decisions: A Training Manual for Judges, Prosecutors and Legal Practitioners*, 2009, page 35.

¹³ ILO, *Human trafficking and forced labour exploitation: Guidance for legislation and law enforcement*, Special Action Programme to Combat Forced Labour, Geneva, 2005, p. 19.

¹⁴ Information about the *Siliadin* case is extracted from David F, *Labour Trafficking*, AIC Research and Public Policy series No. 108, 2010, pp.9-10. See also Gallagher, 2010.

housework for long enough to pay off the cost of the plane ticket. Instead, Mrs D confiscated the applicant's passport and she became an unpaid servant, first in the household of Mrs D and then in the household of Mrs D's friend, Mrs B. At one point, the applicant left the household and went to work in other paid employment. However, on the advice of her uncle, she returned to the household of Mrs B where she continued to provide unpaid domestic labour. This situation continued until the applicant disclosed her situation to a neighbour in 1998, some four years after her arrival in France.

42. The European Court of Human Rights considered that the situation was sufficient to amount to "forced labour" under the ECHR. The Court applied the definition of "forced labour" from the Convention on Forced Labour. The Court noted that although the applicant was not threatened by a "penalty", she was in an equivalent situation as a result of the perceived seriousness of the threat. She was an adolescent girl in a foreign country, unlawfully present, and in fear of arrest. Her employers nurtured this fear, and led her to believe that her status would be regularised. The Court considered that it could not seriously be argued that the applicant performed this work of her own free will; she was not given any choice.
43. The European Court of Human Rights also considered the issue of whether the situation amounted to "slavery" or "servitude". The Court considered that her 'employers' had not exercised a genuine right of ownership over her, thus reducing her to the status of an object. Accordingly, the Court held that while Ms Siliadin had been deprived of her personal autonomy, she had not been held in "slavery". However, the Court did consider that the situation amounted to "servitude". The Court noted that servitude can be regarded as an obligation to provide one's services under coercion, which is linked to but distinct from the concept of slavery.
44. In supporting findings of forced labour and servitude in this case, the Court looked at *the totality of the victim's circumstances*, and the *offender's role in creating and maintaining those circumstances*. This included consideration of the following:
 - The young domestic worker (aged 15 at the time of her arrival in France) worked excessive hours with no leave (she worked approximately 15 hours a day, seven days a week);
 - She had not chosen to work for her employers, Mr and Mrs B. This had been arranged by her family;
 - As a minor, she had no resources and was vulnerable and isolated. She had no means of subsistence other than in the home of Mr and Mrs B;
 - She was entirely at Mr and Mrs B's mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, something that never occurred;

- She was not permitted to leave the house, except with a family member. She had no freedom of movement or spare time. She was also afraid of being arrested if she left the house, a fear that her employers fostered;
- She had not been sent to school, despite this being promised to her father. As a result, she had no hope that her situation would improve or change (for example, when she finished her education);
- While Mr and Mrs B argued that they treated Siliadin like a member of her family, there was evidence that this was not the case. Instead, she was "at the beck and call" of the family.

45. In Australia, there has been *judicial* recognition that a person can be "effectively detained through a set of circumstances" in the limited context of slavery prosecutions in Australia.¹⁵ It is arguable that this approach reflects the complexities of the *modus operandi* of offenders. However, while it is available for prosecutions under slavery laws, it is not clear that a similar approach could be used under the existing laws on trafficking for forced labour. The requirements of proof of "use of force or threats" seem to suggest a focus on specific events and incidences, rather than consideration of a set of complex circumstances.

Are there gaps in Australian law, when compared to the requirements of the ILO Forced Labour Convention of 1930?

46. The AGD Discussion Paper asks whether a stand-alone offence of forced labour is required in Australian law. In the view of the authors, a stand-alone offence *is required* by Australia's international legal obligations. As a State Party to the Convention on Forced Labour, Australia has an obligation to "suppress the use of forced or compulsory labour in all its forms within the shortest possible period" (Article 1(1)). Furthermore, Article 25 provides that:

"The illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced."

47. The Convention makes clear that States Parties are to *criminalize* the exaction of forced labour itself, absent any surrounding movement, process or other features. At present, forced labour is not a separate offence in Australian law but only exists as an element of trafficking crimes. This does not meet the requirements of the Convention. There

¹⁵ See for example, the sentencing remarks of Justice Cullinane in *The Queen v Zoltan John Kovacs and Melita Kovacs*, Townsville, 6 December 2007, pp.3-5; and the comments of Justice McInerney, the original trial judge in *The Queen v Wei Tang [2006] VCC 637*, cited in FDavid (2008), *Trafficking of Women for Sexual Purposes*, Australian Institute of Criminology Research and Public Policy Series No. 95, on p.54.

are relevant provisions in industrial laws but these cannot be considered "penal offences" as required by Article 25 of the Convention.

Are the laws appropriate and adapted to the criminal environment?

48. Recent research, and operational experience confirms that instances of labour-related coercion, abuse and harm vary widely in nature and severity.¹⁶ Australian criminal law currently targets the most extreme instances of slavery and trafficking in persons. This leaves little room for the police (as distinct from labour regulators) to respond to cases that appear to be highly abusive and coercive, but do not quite meet the elements of proof required for a prosecution under "forced labour", "slavery" and "sexual servitude" under Australian criminal law. For example, in discussions at a recent seminar on this issue, investigators noted instances where they could prove *most but not all* of the elements of proof under the existing laws. Given the seriousness of these cases, the options that were available under existing migration and labour laws were not considered to be suitable alternatives, as these did not reflect the severity of the harm involved.
49. Even in the most serious cases (ie: those that are properly described as slavery or trafficking), there will always be instances where it is simply not possible to meet the burden of proof for all elements of either slavery or trafficking crimes. In these instances, it is important that investigators and prosecutors can look to alternative charges that might, for example, require either fewer or different elements of proof. This suggests the need to introduce a broader *range or hierarchy* of offences within Divisions 270 and 271, which include more gradations and variations in the elements of proof. Ideally, this hierarchy would be developed bearing in mind the options that are available under immigration and labour laws, along with State and Territory criminal laws.
50. As noted above in the context of discussion on trafficking for forced labour, recent operational experience in Australia suggests that offenders are making use of *modus operandi* that avoids clear "use of force or threats", in situations where a person still retains some (albeit very limited) personal autonomy (such that it is then very difficult to prove that the victim was "not free"). This *modus operandi* tends to involve *manipulation* of a situation of vulnerability, not through a single decisive act or event, but by a series of small steps and actions, each of which has the result of reducing or restricting a person's ability to exercise meaningful agency in a situation.
51. Also as noted above, there has been judicial recognition, in the specific context of slavery prosecutions in Australia, that a person can be "effectively detained through a set of circumstances". In these instances, the courts have *looked at the totality of the victim's circumstances and at the offender's role in creating and maintaining those circumstances*. This

¹⁶ See further, FDavid (2010) Labour Trafficking, AIC Research and Public Policy series No. 108, pp.15-46, and 49.

kind of approach reflects an understanding of the *modus operandi* of offending. However, it is not at all clear that this approach could be followed by the courts, for example, in a case involving forced labour under the existing Division 271.

52. Operational experience suggests that there is a range of practices implicated in trafficking crimes, some of which attract either very low or even no criminal penalties. Examples of relevant practices include: withholding of passports, deceptive recruitment outside of the sex industry, lodging false asylum applications for another person, sham marriages, using imbalances of power to extract unpaid or very poorly paid labour, and charging of excessive fees and bonds for job placement. Individuals engaged in such activities may not be complicit in any eventual exploitation. Nonetheless, these practices arguably contribute to the vulnerability of the person who is ultimately exploited. Treating these practices as appropriately serious may help to foster an environment that is less tolerant of exploitation.

Witness protections

53. As noted in the AGD discussion paper, the existence of in-court witness protection measures for victims of trafficking is primarily regulated by State and Territory laws. There are significant inconsistencies in these laws. As noted in recent research on the trafficking of women for sexual purposes:

"Because of legislative differences, there is potential for considerable disparity across jurisdictions in the protection available for witnesses. For example, protections that might be available in New South Wales may not be available in Victoria. Also, protections that might be available in one jurisdiction might have to be applied for in another. To add further complication, different courts have different rules and facilities for witnesses."¹⁷

Accordingly, it is the view of the authors that current witness protections are inadequate.

54. Trafficking in persons and slavery offences are Federal crimes, and the Australian Government has obligations under both the *Convention against Transnational Organized Crime* and the *UN Trafficking Protocol*, as well as general human rights law, to ensure the provision of privacy, and in-court protections for victim-witnesses.¹⁸ As set out in the AGD Discussion Paper itself, there are numerous gaps and inconsistencies across the protections that are available. Accordingly, it is our recommendation that the existing legal framework be reviewed to ensure that the *privacy, safety* and *dignity* of all witnesses in prosecutions under Divisions 270 and 271 of the Criminal Code is assured.

¹⁷ FDavid (2008), *Trafficking of Women for Sexual Purposes*, Australian Institute of Criminology Research and Public Policy Series No. 95, on p.53.

¹⁸ Gallagher, 2010, p.319.

55. In considering the issue of protection for vulnerable witnesses, it is important to bear in mind that the same victim may be involved in both criminal and civil proceedings. Accordingly, the protection of witnesses (and their privacy) requires consideration of the law regulating civil matters, at both the Federal and State and Territory levels. In one well-known example, the name of a victim of trafficking was suppressed in the criminal trial but released in the decision of a Federal Magistrate considering an application by the Workplace Ombudsman for breaches of industrial laws. This example suggests that consideration needs to be given to the suppression of names, not only in criminal cases but also in related civil proceedings.

Recommendations

56. In view of the points noted above, this submission recommends the following:

Recommendation 1:

A comprehensive review of Australia's legal framework regulating trafficking in persons and forced labour be undertaken, with a view to identifying gaps and inconsistencies when compared to the requirements of the UN Trafficking Protocol and the Convention on Forced Labour.

Recommendation 2:

The Criminal Code be amended to include stand-alone offences of both "forced labour" and "servitude", in accordance with Australia's obligations under the UN Trafficking Protocol and the Convention on Forced Labour.

Recommendation 3:

The concepts of "forced labour" and "servitude" be defined in terms that allow consideration of not only "force" and "threat", but also *deception*. Recent operational experience confirms that deception is part of the *modus operandi* of people who seek to extract unpaid labour, basically without the consent of the person providing that labour.

Recommendation 4:

The concepts of "forced labour" and "servitude" be defined in terms that allow judicial consideration of not only single events such as the "use of force" or the "use of a threat", but a combination of circumstances, the practical result of which is to "effectively restrain" or "effectively detain" the person providing labour or services.

Recommendation 5:

Consideration be given to the introduction of a broader range or hierarchy of offences that both reflect the *modus operandi* of trafficking, and also the practices that support this *modus operandi*, such as:

- "abuse of the migration process for financial or material gain"; or
- "abuse of a situation of vulnerability or dependency for financial or material gain"; and
- other practices such as: withholding of passports, deceptive recruitment outside of the sex industry, and charging of disproportionately large fees and bonds for job placement.

Recommendation 6:

The existing legal framework be reviewed to ensure that the *privacy*, *safety* and *dignity* of all witnesses in prosecutions under Divisions 270 and 271 of the Criminal Code is assured. This review should take into account the likelihood that witnesses may also be involved in related civil proceedings.

Signed,

Fiona David
Visiting Fellow
Centre for International and Public Law
ANU College of Law

Dr Anne Gallagher
Independent Legal Adviser

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