

HUMAN TRAFFICKING AND SEXUAL SERVITUDE IN AUSTRALIA

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I INTRODUCTION

Trafficking in persons in Australia remains a phenomenon which is not well understood and poorly researched. Despite greater public awareness and acknowledgement of the issue by government agencies, the level and patterns of this problem are not fully known, largely due to its clandestine nature. Reports about the number of trafficked persons in Australia also vary greatly depending on the source of information: government sources suggest that one or two hundred persons have been trafficked to Australia in recent years, while advocacy groups argue that this trade involves several thousand people. 'The picture of trafficking remains very unclear with competing claims about the extent and nature of trafficking to Australia', notes Judy Putt, Director of Research at the Australian Institute of Criminology.¹

The lack of any reliable data or comprehensive accounts of the true extent and nature of this illicit business is also the major obstacle to policy making and law reform. Anecdotal evidence, media reports, and statistical estimates without proper evidentiary bases constitute the main sources of information currently available about human trafficking and sexual servitude in Australia. The reported case law is still very limited, largely because criminal offences relating to sexual servitude and slavery were only introduced in 1999 with the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) followed by the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth).

This article reviews the scale of human trafficking in the light of the available, open-source information. It examines the levels and patterns of this

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1 Judy Putt, 'Human Trafficking to Australia: A Research Challenge' (2007) 228 *Trends and Issues in Crime and Criminal Justice* 5.

phenomenon on the basis of official reports, reported cases, academic literature, and media reports. The purpose of this article is to inform the debate about human trafficking and sexual servitude in Australia and to assist policy and law makers in shaping fair, appropriate, and effective responses.

II DEFINITION

The most authoritative definition of trafficking in persons is located in the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* ('*Trafficking Protocol*').² The *Protocol* entered into force on 31 May 2004, as one of the three supplementary instruments to the *Convention against Transnational Organized Crime* ('*Organised Crime Convention*').³

The definition of 'trafficking in persons' is set out in article 3 of the *Trafficking Protocol*. It requires that three elements be fulfilled, which can be broadly classified as the acts involved, the means used, and the purpose of the actor.

Figure 1 Definition of 'trafficking in persons', article 3, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*.

1. Act	Recruitment, transportation, transfer, harbouring or receipt of persons.
2. Means	Threat or use of: <ul style="list-style-type: none"> • force or other forms of coercion; • abduction; • fraud or deception; • the abuse of a position of vulnerability; or • the giving or receiving of payments / benefits to achieve the consent of a person having control over another person.
3. Purpose	Exploitation This includes at a minimum: <ul style="list-style-type: none"> • 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 • the removal of organs.

According to article 3, trafficking in persons involves

[t]he 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

² *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, opened for signature 15 December 2000, 2237 UNTS 319, Annex II (entered into force 31 May 2004).

³ *Convention against Transnational Organized Crime*, opened for signature 15 December 2000, 2225 UNTS 209 (entered into force 29 September 2003).

fraud, of deception, of the abuse of power or 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, for the purpose of exploitation.

‘Exploitation’ is given a partial definition in article 3(a) and other purposes which are not listed may constitute exploitation in satisfaction of the definition of ‘trafficking in persons’.⁴

Exploitation shall include, at a minimum, 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 the removal of organs.

Article 3(b) further prevents any consent to exploitation by a victim of trafficking from having a practical effect as a defence. This subsection holds that the use of any exploitative measures in the commission of the offence of trafficking precludes consideration of a victim’s consent. As exploitation is one of the required elements of the trafficking offence, the exploration of consent thus becomes an irrelevant consideration.⁵ This is a vital component of the definition, as it clarifies the boundaries between trafficking in persons and other transnational crimes such as migrant smuggling, where consent may be relevant. It is also a powerful policy statement about the type of exploitation used in trafficking, which may induce consent through fraud or manipulation.

The status of child victims of trafficking is addressed in article 3(c). It provides that, in respect of child victims, who are defined as persons under the age of 18,⁶ the use of a means of trafficking (that is, threats, coercion, etc) is not required to substantiate an offence. As long as an act included in the article 3(a) definition has taken place, such as recruiting, transporting, harbouring or receiving, for the purpose of exploitation, the child involved will have been trafficked according to the *Trafficking Protocol*. As with adult victims, the child’s consent to the trafficking is irrelevant.⁷

III LEVELS AND PATTERNS OF HUMAN TRAFFICKING AND SEXUAL SERVITUDE

A Statistics on Trafficking in Persons in Australia

In the absence of complete and accurate statistics, it is difficult to gauge the true extent of human trafficking in Australia. In short, the number of persons that have been trafficked to Australia is not known. There are no complete statistics about cases reported to police, about the number of trafficking and trafficking-related investigations, prosecutions of traffickers, and apprehensions of victims of trafficking. The available case law on human trafficking and sexual servitude

4 David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (2007) 326–7.

5 This interpretation is acknowledged in United Nations Office on Drugs and Crime (UNODC), *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol Thereto* (2004) 270 [37].

6 *Trafficking Protocol* art 3(d).

7 McClean, above n 4, 329.

is also very limited, and this may be reflective of the low levels of trafficking into Australia. On the other hand, it is likely that many cases, especially the very sophisticated and clandestine ones, remain undetected. In some instances there may be insufficient evidence to launch further investigations and prosecutions.

Consequently, any published figures on the level of trafficking in persons in Australia are, at best, estimates, and are usually based on guesswork rather than the result of systematic data collection or comprehensive quantitative research. Nevertheless, there is a considerable body of literature that speculates about the number of trafficking victims and the scale of the 'trafficking problem' in Australia. Among these sources there is, however, no consensus about the extent of the problem.

The most complete data on trafficking in persons in Australia to date can be found in the Annual Report of the Australian Federal Police ('AFP') which features a yearly 'performance' update on human trafficking related cases. The reporting on this issue commenced in the 2002–03 financial year and these figures are not always reported consistently. Between 2002–03 and 2007–08 the AFP's Transnational Sexual Exploitation and Trafficking Teams ('TSETT') became aware of between 15 and 29 new cases annually; approximately 250 cases have been investigated since 1999 (when sexual slavery laws were first introduced). It is not possible to identify any trends about the levels of trafficking activity from this limited data.

Other Australian Government sources suggest that 'there is no evidence of any large scale [trafficking] problem in Australia'.⁸ Government agencies seem to be aware of about 100–200 cases of trafficking in recent years. A parliamentary inquiry conducted in 2004 found that while 'approximately 300 women are trafficked into the country each year for sex work, the number of those who can be considered to be in servitude is likely to be relatively small'.⁹ In 2007, the Attorney-General's Department, relying on information from the Australian Crime Commission ('ACC') and other law enforcement agencies, suggested that less than 100 victims of trafficking were found in Australia since mid-2004.¹⁰ Australia's comparatively remote location, the lack of any land borders, and its stringent visa requirements and immigration controls are generally seen as the main reasons for the low levels of trafficking into the country.¹¹ These official statistics are in contrast to some non-government organisations which suggest that approximately 1000 trafficked women are in Australia at any one time.¹²

8 Chris Ellison, then Minister for Justice and Customs, as referenced in Kerry Carrington and Jane Hearn, *Trafficking and the Sex Industry: From Impunity to Protection*, Current Issues Brief No 28 2002–03, Parliament of Australia (2003) 5.

9 Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the Trafficking of Women for Sexual Servitude* (2004) [2.70].

10 Commonwealth Attorney-General's Department, *Australia's Strategy to Combat People Trafficking* (2007) 3 (copy on file with authors).

11 Ibid; cf Elaine Pearson, 'Australia' in Global Alliance Against Trafficking in Women, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World* (2007) 28, 29.

12 Project Respect, *How are Women Trafficked?*

<http://projectrespect.org.au/our_work/trafficking/why_trafficking> at 07 May 2009.

B Characteristics of Trafficking in Persons

Some common features of the nature and patterns of trafficking in persons in Australia and of the experiences of trafficking victims emerge from the existing case law and other documentation. However, an analysis of the available information also reveals that the literature has often made generalisations about trafficking that are based on isolated, anecdotal reports and are not representative of the wider problem. Each case that has been prosecuted in Australia thus far is unique and does not fit into general stereotypes about trafficking, traffickers, and victims of trafficking.¹³

Human trafficking in Australia is done almost exclusively for sexual purposes involving legal and illegal brothels equally.¹⁴ Instances of trafficking for the purpose of sexual exploitation in domestic settings are very isolated. Trafficking for purposes relating to labour exploitation appears to be even more limited.¹⁵

All cases of sexual servitude and human trafficking detected thus far occurred in Sydney and Melbourne in addition to two recent prosecutions in Queensland. While this may be reflective of the population concentration in Australia's main urban centres – and the size of their local sex industry – it is possible that trafficking in persons also occurs in other parts of Australia, albeit on a smaller scale.

Police investigations further reveal that trafficking in persons to Australia is carried out by small but highly sophisticated organised crime networks that frequently involve family and business connections between Australians and overseas contacts.¹⁶ However, there is no proven link between trafficking in persons and other forms of organised crime.¹⁷

C Profile of Victims

It is noteworthy that all official reports of trafficking for the purpose of sexual exploitation in Australia relate exclusively to women. The very limited available evidence relating to male victims in Australia only refers to instances of labour exploitation.¹⁸ While there are significant reports and publications focusing on the issue of child prostitution in Australia and child trafficking within Asia to satisfy the child sex industry, there is only limited anecdotal evidence of trafficking of children in Australia.

The majority of victims of human trafficking are from Southeast Asian nations and also from South Korea. Thailand is consistently identified as the

13 See Part VI below.

14 Queensland Crime and Misconduct Commission, *Regulating Prostitution: An Evaluation of the Prostitution Act 1999 (Qld)* (2004) 26.

15 See Part VI below.

16 Australian Federal Police, *Annual Report 2006–07* (2007) 25; Australian Federal Police, *Annual Report 2005–06* (2006) 35–6; *Annual Report 2003–04* (2004) 37.

17 Cf Putt, above n 1, 2.

18 United States Department of State, *Trafficking in Persons Report* (2008) 61; see Part IV below.

principal source country of trafficked women.¹⁹ The women often come from rural parts of northern Thailand, though many have previously worked in the sex industry in Bangkok, Macau, Japan, or Singapore.²⁰ Indonesia and Malaysia appear to be the second and third main countries of origin. Smaller numbers have also arrived from mainland China, Hong Kong, and the Philippines.²¹ This seems to confirm a general trend which reflects the development of an Asian sex industry in Australia since the 1980s.²² There have been only isolated cases of victims trafficked from non-Asian countries, including the Czech Republic, the former Soviet Union, and Ghana.²³

From the limited information available, it appears that women are often targeted by recruiters, so-called ‘spotters’, or are contacted by friends or relatives who are paid by the spotters. The victims are promised employment in Australia and frequently surrender their passports to the trafficker when the first contact is made and then wait, sometimes for months, until they leave for Australia.²⁴

The picture that emerges from law enforcement reports, case law, and other official documents is that most victims of human trafficking are or ‘might be’ aware of the nature of work they would be performing in Australia, including the fact that they would be employed in the sex industry.²⁵ Reports that portray Asian women as ‘victims of a ruthless slave market’ have largely been dismissed as ‘too simplistic and ignoring the rational choices women have made’.²⁶

D Entry into Australia

There appear to be two main avenues by which trafficked persons initially enter Australia. Many persons who are later found to be victims of human trafficking have valid travel documents. A 2004 inquiry found that ‘the most common basis for entry is either a student or tourist visa’.²⁷ This has also been confirmed by an analysis of trafficking in Filipina women into Australia,²⁸ and by reports from non-government organisations.²⁹

19 Unites States Department of State, above n 18, 61.

20 Linda Brockett and Alison Murray, ‘Thai Sex Workers in Sydney’ in Roberta Perkins et al (eds), *Sex Work and Sex Workers in Australia* (1st ed, 1994) 191, 193–4, 196.

21 Commonwealth Attorney-General’s Department, *Australia’s Strategy to Combat People Trafficking*, above n 12; Australian Federal Police, *Annual Report 2006–07* (2007) 25; Australian Federal Police, *Annual Report 2004–05* (2005) 32; Australian Federal Police, *Annual Report 2003–04* (2004) 37.

22 Brockett and Murray, above n 20, 191.

23 Australian Federal Police, *Annual Report 2005–06* (2006) 3; cf Mark Phillips, ‘Sex Slave Shame Unveiled’, *The Mercury* (Hobart), 24 March 2004.

24 Parliamentary Joint Committee on the Australian Crime Commission, above n 9, [2.15].

25 Australian Federal Police, *Annual Report 2006–07*, above n 21, 25; Australian Federal Police, *Annual Report 2005–06*, above n 23, 35–6; Australian Federal Police, *Annual Report 2003–04*, above n 21, 37; Rebecca Tailby, *Organised Crime and People Smuggling/Trafficking to Australia*, Trends and Issues in Crime and Criminal Justice No 208, Australian Institute of Criminology (2001) 208; Parliamentary Joint Committee on the Australian Crime Commission, above n 9, [2.18]; Rebecca Tailby, *A Cross-Analysis Report into Smuggling and Trafficking Between the Philippines and Australia*, Australian Institute of Criminology (2003) 6.

26 Brockett and Murray, above n 20, 195.

27 Parliamentary Joint Committee on the Australian Crime Commission, above n 9, [2.22].

28 Tailby, ‘A Cross-Analysis Report into Smuggling and Trafficking’, above n 25, 3.

29 Pearson, above n 11, 28.

There are also reports about the use of fraudulent documents or, in some cases, arranged marriages. Some visas held by trafficked persons were granted on the basis of false documents provided by the traffickers and their aides. Many cases involve the use of 'agents' in Thailand who are involved in the recruitment of women and who organise their travel to Australia. In some instances, the victims are escorted by another person during their travel who may pose as the victims' partner or parent to ensure that the victim does not abscond, and to deceive immigration officials.³⁰ Some victims are equipped with airline tickets and cash to make them appear as though they are tourists. Those funds and tickets, together with their passports, are usually confiscated by the traffickers after arrival in Australia. Reports about corruption of immigration officers at embarkation and disembarkation points are very isolated.³¹

E Conditions in Australia

A considerable number of victims arrive in Australia with the knowledge that they will be working in the sex industry. Although some women claim they were brought to Australia thinking that they would be working in the hospitality or retail industries, cases in which women were tricked or otherwise deceived about the nature of their prospective work are infrequent. A large number of women stated that they thought they would be working legally in Australia when in fact they had no work rights. There are, to date, no reports of women that have been kidnapped and brought forcibly to Australia.

The existing case law suggests that the victimisation of trafficked women seems to relate specifically to their working conditions and accommodation. Victims of human trafficking generally do not know details about the reality they will face after arriving in Australia:

What they do not know, however, is that they might be held in captivity, be subject to physical and sexual violence and intimidation, be forced to engage in unsafe sexual practices, be unable to refuse clients or certain services, and be obliged to pay off huge debts to their traffickers. These women are victims of trafficking, even if they consented to work in the sex industry.³²

There are ample reports about the hard and unsafe working conditions for trafficked women, the risk of infection with sexually transmitted diseases, poor and unsanitary accommodation, instances of imprisonment, physical and sexual violence, and forced drug use.³³ All victims that have testified in trafficking proceedings also complained about the inflated debt created by their journey, long working hours, threats of violence and deportation, the lack of adequate (or any) payment, poor accommodation, and the health risks associated with their work. Many situations are nothing short of slavery.

30 Parliamentary Joint Committee on the Australian Crime Commission, above n 9, [2.22]–[2.24].

31 Ibid [2.25].

32 Commonwealth Attorney-General's Department, *Australian Government's Action Plan to Eradicate Trafficking in Persons* (2004) 7.

33 Parliamentary Joint Committee on the Australian Crime Commission, above n 9, [2.40]–[2.46]; Brockett and Murray, above n 20, 197.

It is surprising then to learn of those cases in which women deliberately stay with their traffickers even after their debts had been discharged. There are also more than isolated reports of victims of trafficking who later become traffickers. In the absence of personal interviews with the victims it is not possible to speculate about their motivations. It is noteworthy, however, that many victims were initially drawn into the Australian sex industry (legal and illegal) by the hope that they will earn enough money to support their families abroad. Some victims were in fact able to transfer some of their income to Thailand, and – given the lack of other employment opportunities in Australia – this fact may have contributed to their decision to remain with the brothel owners that exploited them, or to become involved in the trafficking ring. In addition, there are several other factors which may contribute to a trafficked person's decision to remain in an exploitative labour situation. These factors may include pressure from the person's employer, the victim's lack of support systems, and English-language skills, or their fear of capture by authorities, which would be a common concern given the irregular migration status of many of these individuals.

Trafficked women are usually bound to the traffickers by a verbal agreement frequently referred to as 'debt bondage'. This 'contract' obliges women to work for the brothel-owner until the debt for the journey to Australia and their accommodation have been paid off. The so-called 'contract girls' usually enter into the agreement with the traffickers prior to their arrival in Australia, though the contract and the associated debt are sometimes transferred between different traffickers.³⁴ Research conducted in 1993 in Sydney suggested that over 90 percent of Thai women in Sydney's sex industry initially arrived under these conditions.³⁵

There is to date no reliable information about the debts incurred by women who have been trafficked to Australia. Given the experience in other jurisdictions, it is likely that traffickers demand several thousand dollars from their victims and that this 'fee' is generally higher than originally advertised to the victims. From the available information, the fees charged by traffickers range between A\$12 000³⁶ and A\$50 000.³⁷ Several reports confirm that women are required to pay off their debt by working a set number of jobs (up to 500–800). On average it takes the women between six and 18 months to pay off that debt, usually by working six or seven days a week and more than ten hours per day.³⁸ This lends support to the observation that there is often a rapid 'turnover' of women.³⁹

34 Marnie Ford, *Sex Slaves and Legal Loopholes: Exploring the Legal Framework and Federal Responses to the Trafficking of Thai 'Contract Girls' for Sexual Exploitation to Melbourne, Australia*, Project Respect (2001) 15.

35 Brockett and Murray, above n 20, 191.

36 Ibid 192.

37 Parliamentary Joint Committee on the Australian Crime Commission, above n 9, [2.17]; cf Project Respect, above n 12.

38 Ford, above n 34, 15.

39 Brockett and Murray, above n 20, 192.

IV LABOUR TRAFFICKING

The available evidence relating to labour trafficking in Australia is extremely limited and largely anecdotal. To date, there have been no convictions for labour trafficking under the trafficking in persons offences in Division 271 of the *Criminal Code* (Cth) ('*Criminal Code*'). There is also very limited literature available which explores labour trafficking in Australia, and there are no estimates of the level of labour trafficking in this country.⁴⁰

A Foreign Workers in Australia

There is little doubt that foreign workers are in a vulnerable position and there are incidents of labour exploitation reported in the media.⁴¹ There have also been reported cases of debt bondage, where the workers involved are dependent on the support of their employer-sponsors.⁴² None of these instances, however, have resulted in trafficking charges. This may be due to a number of reasons, including lack of evidence, failure to report cases to the Australian Federal Police and other law enforcement agencies, and also the fact that many situations of labour exploitation do not contain all the elements of the offence of trafficking in persons. Specifically, employers who underpay their non-citizen employees or who fail to comply with industry standards for their workers generally do not meet the criteria for liability under Division 271 offences.⁴³

The possibility of labour trafficking occurring in Australia was raised in a 2004 report published by the Department of Immigration and Multicultural and Indigenous Affairs ('DIMIA', now Department of Immigration and Citizenship, 'DIAC'), which stated that 'people trafficking can occur in any industry' and is not limited to the sex industry.⁴⁴ The same report, however, also noted that 'the existence of people working illegally does not mean that they have been trafficked. Similarly, individuals who find that their working conditions are different from those which they anticipated are not necessarily trafficked.'⁴⁵

B Subclass 457 Visas

The Skilled – Regional Sponsored (Provisional) Visa, subclass 457, allows skilled foreign workers to enter Australia and work in a specified area for up to

40 Cf Miriam Cullen and Bernadette McSherry, 'Without Sex: Slavery, Trafficking in Persons and the Exploitation of Labour in Australia' (2009) 34 *Alternative Law Journal* 4 ff.

41 See, eg, Matthew Moore and Malcolm Knox, 'Dead Men Working', *The Sydney Morning Herald* (Sydney), 28 August 2007; Ben Doherty, 'Schemes to Import Seasonal Workers Labour Under a History of Exploitation', *The Age* (Melbourne), 18 August 2008; Yuko Narushima, 'Moves to Overhaul Temp Visa Scheme', *The Sydney Morning Herald* (Sydney), 14 November 2008.

42 See, eg, *Inspector Hortle v Aprint (Aust) Pty Ltd* [2007] FMCA 1547 (Unreported, O'Sullivan FM, 10 September 2007). Cf Pearson, above n 11, 45; Craig Skehan and Anne Davies, 'Foreign Workers Scheme is Slavery, Says US', *The Sydney Morning Herald* (Sydney), 14 June 2007.

43 Cullen and McSherry, above n 40, 5 argue that if inadequacy of payment is combined with restrictions of movement, this can fall within the scope of s 271.2 of the *Criminal Code*.

44 Department of Immigration and Multicultural and Indigenous Affairs, *Managing the Border: Immigration Compliance – 2004–05* (2005) 96.

45 *Ibid.*

three years. It is designed especially for persons who have qualifications which allow them to perform work currently sought after by the Australian labour market. Introduced by the Government in 1997, it has been popular with companies seeking foreign agricultural and horticultural workers, many of whom arrive from the Pacific Islands or Southeast Asia. The visa allows the workers to enter Australia and work for up to three years, with the possibility of applying for permanent residency after two years.

Although the visa has been used by growing numbers of skilled foreign workers, it has been recognised that some holders of the 457 visas are particularly vulnerable to exploitation, particularly those seeking permanent residency. This vulnerability stems from migrants' dependence on their sponsor for continued employment, until the two-year work requirement is fulfilled and they can apply for permanent residency. There have been several incidents of worker exploitation reported, mainly concerning failure to pay 457 visa holders the appropriate award and penalty rates.⁴⁶

Reports also revealed unsafe working practices and conditions. In 2007, it was reported that three workers holding 457 visas had been killed in work-related incidents:⁴⁷ a Filipino man who was thrown off the back of a truck and killed on a cattle station in the Gulf of Carpentaria, another worker from the Philippines who was crushed to death by two slabs of granite in a stoneworks north of Perth, and a Chinese logger who was killed by a falling tree in a remote State forest north of Brisbane. It was alleged that these deaths were the result of labour exploitation under the 457 visa scheme, as workers are afraid to speak out against those who sponsored their entry into Australia or complain about their work/workplace.⁴⁸

Although reported incidents of labour exploitation do not usually fulfil the criteria for the offence of trafficking in persons, there have been reported incidents of 'debt bondage' occurring in cases reported to the trade unions. An article by Elaine Pearson outlines a case involving a worker from China, recruited from Shanghai to work in Melbourne, who started work in Australia with an A\$10 000 debt to his employer:

After the employer made deductions for the debt owed, rent, tax and health benefits, JZ only earned A\$280 per week (US\$220), even though he worked 60 hours every week. He lived with other workers in a rundown house owned by the employer. JZ slept on a mattress on the floor of the scantily-furnished house which had no heating. After a year, JZ paid back the A\$10,000 but was told his work was not up to standard and so his contract was terminated and he was going to be deported.⁴⁹

46 See, eg. Australian Government Workplace Ombudsman, 'Probe of Alleged Underpayment of Foreign Worker on the North West Shelf by McDermott Industries (Aus) Pty Ltd' (Press Release, 23 January 2008); ABC Television, 'Guest Worker Re-paid Lost Wages', *The World Today*, 20 February 2008; Australian Government Workplace Ombudsman, 'Just \$9650 for 18 months restaurant work, so the boss faces court' (Press Release, 13 October 2008); Sarah Smiles, 'Equal Pay for Migrant Workers Gains Backing', *The Age* (Melbourne), 14 November 2008; 'A Visa for Exploitation', *The Sydney Morning Herald* (Sydney), 30 August 2007.

47 Moore and Knox, above n 41.

48 Ibid.

49 Pearson, above n 11, 45.

V HUMAN TRAFFICKING IN THE MEDIA

News media publications in Australia have reported extensively on the topic of human trafficking in recent years. An investigation of media coverage of the issue in Australia uncovers reporting of trafficking and the stories of trafficking victims in a variety of publications, both tabloid and broadsheet, and in a small number of transcripts from radio programs. While it is difficult to generalise the content of the large number of articles considered, some trends become evident in examining these reports. The media items display a general transition from often sensationalist and simplistic reports in the early years of the media coverage, to a more detailed discussion of the issue, with reference made to legal considerations and contextual details, rather than mere stereotypes. This is arguably a reflection of the increased level of governmental reporting on, and public discussion of, the issue, which has rendered trafficking in persons somewhat less confronting for an Australian audience than when first revealed in 1998 and 1999.

The use of the term ‘sex slaves’ in headlines to describe victims of trafficking is particularly notable and is arguably an inappropriate use of the phrase as it fails to reflect the complexity of the employment, debt bondage, and consent issues involved in trafficking.⁵⁰ This is symptomatic of the general trend to stereotype trafficked women as naïve victims tricked into working in the sex industry – a portrayal which conflicts with the accounts of those women who actively pursue a career in this field in Australia, but are exploited by their employers. Earlier articles also feature a lack of distinction between smuggling and trafficking,⁵¹ a trend which was altered as more cases were reported.

A External Considerations

Several major triggers for newspaper reports and opinion pieces are evident. The frequency of articles published increases in number around the time of major arrests, government reports or other newsworthy events involving victims of trafficking, such as the death of a Thai trafficking victim in detention in 2001 and the subsequent New South Wales coronial inquest.⁵²

In terms of content, the majority of reports merely restate information provided by police or released in court and do not enter into aspects of

50 See, eg, Charles Miranda, ‘\$1m Trade in Sex Slaves – Girls as Young as 13 Smuggled in’, *The Daily Telegraph* (Sydney), 23 February 1998, 9; ‘Thais Pledge to Stop Sex Slavery’, *The Courier Mail* (Brisbane), 14 June 1999; Debra Way, ‘Fed: Numbers of Sex Slaves in Australia Quadruples’, *Australian Associated Press* (Sydney), 9 December 1999; ‘Sex Slaves Auctioned in Australia’, *The Mercury* (Hobart), 27 December 1999, 4.

51 Miranda, above n 50; Peter Clack, ‘Smugglers “Being Paid With Australian Benefits”’, *The Canberra Times* (Canberra), 9 September 2001, 12; ‘Human Trafficking – Thailand a Transit Point for Smugglers’, *Bangkok Post* (Bangkok), 20 November 2001.

52 See, eg, Leonie Lamont, ‘Sold at 12: Nightmare Ends in Death’, *Sydney Morning Herald* (Sydney), 13 March 2003, 7; Elisabeth Wynhausen and Natalie O’Brien, ‘Death Exposes Agony of Sex Slaves’, *The Australian* (Sydney), 15 March 2003; Elisabeth Wynhausen, ‘Coroner in Call for Action on Sex Slaves’, *The Australian* (Sydney), 25 April 2003, 5; ‘Villawood Death Highlights People Smuggling Perils: Commissioner’, *ABC News Online* (Sydney), 25 April 2003. See Part VI.B below.

investigative journalism with respect to trafficking in persons.⁵³ In addition, many feature articles provide only surface-level condemnation of trafficking, without any analysis or specific evidence of numbers or trends. This lack of clarity is somewhat understandable given the covert nature of trafficking and the lack of detailed government reporting on the issue. The death of Ms Puongthong Simaplee in the Villawood detention centre has been the most commonly discussed victim, and the source of the largest amount of investigative reporting. Some reports also dealt with criticism of Australia's limited action on human trafficking by non-governmental organisations ('NGOs') and the US Government, as well as reporting on general information on the issue published by NGOs, the United Nations, and Australian sex industry groups such as Scarlet Alliance.⁵⁴

Many articles also tie the issue of trafficking to the release of films or broadcast of documentaries without providing any specific facts about trafficking, or merely repeating generalised details disseminated by NGOs. In particular, the release and subsequent critical acclaim for the Australian movie 'The Jammed' in 2007, which was based on the accounts of victims of trafficking, was the source of a number of news articles discussing this issue in general terms.⁵⁵ In 2008 and early 2009, news reports reflected a growing awareness of the legal significance of the issue of trafficking in persons, with many articles considering the impact of the landmark High Court case of *R v Tang*⁵⁶ and its distinction between sexual servitude and slavery.⁵⁷

B Limitations

In examining these news reports, a lack of information in relation to several matters can be noted. For example, there is a distinct absence of reporting on trafficking in persons for purposes other than prostitution.⁵⁸ In terms of the

53 With the exception of the majority of articles by Elisabeth Wynhausen and Natalie O'Brien, which included a greater incidence of investigation and reporting of primary sources such as interviews with victims than was otherwise evident in the articles.

54 See, eg, the reports detailing criticism by the US of Australia's response to trafficking in persons: 'NSW: Australia Named in Sex Slave Report', *Australian Associated Press* (Sydney), 16 April 2004; ABC Radio, 'Australia "Doing the Minimum" on Sex Slavery: US', *PM*, 16 June 2004; 'Sex Slave Tag Hits Australia', *The Daily Telegraph* (Sydney), 16 June 2004, 28; Natalie O'Brien, 'Sex Slave Fight Rests With New Laws to Stop Trafficking', *The West Australian* (Perth), 9 March 2005, 9; Jamie Walker, 'Minister Raps US Over Visa Criticism', *The Australian* (Sydney), 14 June 2007, 4.

55 Kilmeny Adie, 'Fiction From Fact', *Illawarra Mercury* (Wollongong), 18 October 2007, 33; James Joyce, 'Our Seedy Sex Slave Underbelly', *The Newcastle Herald* (Newcastle), 25 October 2007, 26; 'Movie Reveals the Horror of Human Trafficking', *Townsville Bulletin* (Townsville), 21 February 2008, 7.

56 (2008) 249 ALR 200.

57 ABC Radio, 'Slavery in the 21st Century', *The Law Report*, 13 May 2008; 'Calling a Slave a Slave', *Canberra Times* (Canberra), 14 May 2008, 19; Karen Kissane, 'Judge Warns Many Could be Snared by Slavery Laws', *The Age* (Melbourne), 14 May 2008, 5; Victor Violante, 'High Court Reserves Sex Slave Decision', *Canberra Times* (Canberra), 15 May 2008, 3; Anne Gallagher, 'A Question of Bondage', *The Age* (Melbourne), 15 May 2008, 17; Natalie O'Brien and Elisabeth Wyhausen, 'DPP to Test Laws in Sex Slavery Case', *The Australian* (Sydney), 15 May 2008, 4. See Part VI.B below.

58 With the exception of the report: ABC Radio, 'Crime experts warn of untold story of human trafficking', *AM*, 30 April 2004, in which former AFP agent Brian Iselin noted that 'we know that men are trafficked into circumstances of slave-like labour in kitchens and restaurants around Australia'.

general discussion of human trafficking, most articles cite statistics provided by NGOs but fail to engage in any deeper investigation or critique of these figures. In particular, the use of the estimate that '1000 women' have been trafficked into Australia is repeated verbatim in the majority of articles,⁵⁹ with very few reports questioning this figure or providing other statistics on this point.⁶⁰

A general educative function is served by the articles, but the absence of concrete data is troubling. As a means of providing the public with information on this complex issue, Australia's news media often lacks the consideration of detail necessary to present a balanced and factually accurate view of trafficking. In general terms, many articles are highly sensationalist in their discussion of the issue, with an emphasis on the lurid nature of the sex industry, organised crime and slavery, rather than a balanced consideration of factors such as the driving forces behind trafficking in persons. However, this type of news coverage becomes understandable, given the aforementioned lack of reliable published data or detailed government reporting on the issue.

VI LEGISLATION AND CASE LAW

To this date, there has only been one conviction under Australia's trafficking offences.⁶¹ This is due in part to the fact that the relevant offences were only introduced into the federal *Criminal Code* in 2005.⁶² In addition, a number of trafficking and trafficking-related cases have been prosecuted under sexual slavery and servitude offences which came into operation in 1999.⁶³

The 'success' of prosecutions under the sexual slavery and human trafficking offences has, at best, been mixed, as a considerable number of cases have been dismissed due to lack of evidence or have been appealed to higher courts. Between 1999 and 21 April 2009, there have only been four cases of sexual servitude, slavery or trafficking that have resulted in convictions, with another case currently before the courts in Victoria.

59 See, eg, Natalie O'Brien and Elisabeth Wynhausen, 'Sex Slaves May Get Witness Protection', *The Australian* (Sydney), 26 March 2003, 6; Natalie O'Brien and Elisabeth Wynhausen, 'Canberra to Review Sex Slave Policing', *The Australian* (Sydney), 4 April 2003, 6; 'Shame of Sordid Sex Rings – Thousands Duped Into Misery', *The Daily Telegraph* (Sydney), 22 April 2003, 7; Kimina Lyall, 'Police Lay First Sex Traffic Charges', *The Australian* (Sydney), 19 June 2003, 1; Meagan Shaw, 'Police Team to Tackle Sex Slavery', *The Age* (Melbourne), 14 October 2003, 4; 'Sex Slaves Overworked', *The Herald Sun* (Melbourne), 25 June 2004, 11.

60 With the exception of doubts expressed by the then Minister for Immigration Philip Ruddock: 'Mismatches, False Claims Plague Fight on Sex Traffickers', *The Australian* (Sydney), 20 May 2003, 11; see also opinion pieces questioning the veracity of the estimate as a figure disseminated by 'zealots', such as Piers Akerman, 'When the Truth Spoils a Good Slavery Story', *The Daily Telegraph* (Sydney), 3 June 2003, 16.

61 *R v Dobie* (Unreported, Southport District Court, Clare DCJ, 20 October 2008).

62 Div 271 – 'Trafficking in Persons and Debt Bondage', introduced by the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth).

63 Div 270 – 'Slavery, Sexual Servitude and Deceptive Recruiting', introduced by the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth).

From the limited reports available it is not possible to identify a common pattern about the way in which law enforcement or other government agencies become aware of trafficking cases. An analysis published in 2008 suggests that in most instances, the victims themselves initially alerted the authorities by contacting police directly or calling 000, contacting their foreign embassies in Australia, or by seeking assistance from brothel clients. The report only identified two cases in which the victims were detected following police or immigration compliance raids.⁶⁴

A Slavery and Sexual Servitude

1 Legislation

The *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) was the Australian Government's first attempt to legislate against slavery, following a long history of being governed by British Imperial anti-slavery Acts. Section 270.2 notes that slavery remains unlawful despite the repeal of the Imperial Acts relating to slavery in the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth). This new legislation had the additional effect of legislating against human trafficking, and put into effect the reforms suggested by the Australian Law Reform Commission and the Model Criminal Code Officers Committee.⁶⁵

The slavery offences are set out in sections 270.1–270.3 of the *Criminal Code* and offenders are liable for a maximum prison term of 25 years. Division 270.1 defines slavery as 'the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person'. While there are separate offences for sexual servitude, this definition of slavery offers the potential to catch perpetrators of trafficking in persons, as these exploitative situations may also constitute slavery, as in *R v Tang*. The slavery offences would only apply 'if the control of the sex worker is so far-reaching that it effectively amounts to a right of ownership over him or her'.⁶⁶ This result accords with the stated goals of this definition, which included 'ensuring that the traffickers – the financiers, managers, and the organisers of this insidious trade – cannot slip through the net'.⁶⁷

Section 270.3 creates the offences of possessing a slave, exercising a power of ownership over a slave, engaging in slave trading, entering into a commercial transaction involving a slave or an act of slave trading. If the defendant 'means' to engage in that conduct, this will satisfy the test of intention (see also

64 Fiona David, *Trafficking of Women for Sexual Purposes*, Research and Public Policy Series No 95, Australian Institute of Criminology (2008) 24–6 with reference to relevant case law (see Part VI below).

65 Explanatory Memorandum, *Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999* (Cth) 2; Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code – Offences Against Humanity – Slavery: Report* (1998) 31.

66 Commonwealth, *Parliamentary Debates*, Senate, 24 March 1999, 3076 (Ian Macdonald).

67 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 August 1999, 8512 (Teresa Gambaro).

section 5.2 of the *Criminal Code*).⁶⁸ Section 270.3(1)(a) makes it an offence for a person to intentionally possess a slave or exercise over a slave any of the other powers attaching to a right of ownership. The Explanatory Memorandum additionally notes that ‘possession’ has an accepted judicial meaning of control.⁶⁹ Section 270.3(1)(c) criminalises intentional entry into any commercial transaction involving a slave. This replicates the format of section 270.3(2)(a) but with a fault element of intention, rather than recklessness.

There are also a series of offences involving recklessness, which replicate the format of section 270.3(c)–(d) except for the substitution of a fault element of recklessness for intention. Recklessness is assessed in respect of the defendant’s awareness of a substantial risk that the commercial transaction concerned involves a slave or slavery and, having regard to these circumstances, the defendant is not justified in taking this risk.⁷⁰ These offences have a maximum penalty of 17 years imprisonment.

2 Case Law

The first prosecution involving charges under Division 270 of the *Criminal Code* concerned Mr Daniel Sweeseang Kwok. He was charged after three Indonesian women reported to the New South Wales Police and the AFP that they had been deceptively recruited to Australia for work in the public relations or catering industries. The women had learned upon their arrival to Australia that they were to be engaged in prostitution in order to fulfil a ‘contract debt’ of which they had no prior knowledge. This arrangement required them to undertake 800 sexual acts for no payment in order to repay their ‘debt’. The prosecution of Mr Kwok also initially involved three further accused persons, Hosea Prayudi Saputra Yoe, Jenny Lai Chin Ong, and her son Raymond Aik Tong Tan. Ms Ong was also known as ‘Mummy Jenny’ and was herself a former victim of human trafficking. The case against this group was later dismissed due to lack of evidence: *R v Kwok*; *R v Ong*; *R v Tan*; *R v Yoe*.⁷¹

The case of Kwok was followed by another unsuccessful prosecution involving Sydney brothel owners Ms Sally Ciu Mian Xu, Ms Ngoc Lan Tran, and their co-accused, brothel manager Mr Lin Qi. The group was charged with sexual servitude after they allegedly brought out women from Thailand to perform sex work in Australia. The authorities only became aware of the scheme after one of the victims, 22-year old Thai woman Rattavan Kachenchart, called the police. She testified that in 2002 she had been promised waitressing work in Australia but when she arrived in Australia she was forced to work in Ms Xu’s and Ms Tran’s brothels. Ms Kachenchart was then told that she owed a debt of A\$200 000 to the brothel owners, which was to be worked off through the

68 *Criminal Code* s 5.2(1); Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) 24.

69 *Criminal Code* s 5.2(1); Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) 24.

70 *Criminal Code* s 5.4(1), (2); Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) 31 ff.

71 (2005) 64 NSWLR 335.

performance of 20 sex acts a day. While paying off the debt, she was also forbidden from leaving the premises. In April 2005, the District Court of New South Wales found Ms Xu not guilty of trading a sex slave and the jury was not able to reach a verdict on the other two accused.⁷²

Among the very few convictions for sexual servitude offences is the case against Mr Trevor McIver and his wife Kanakporn Tanuchit, who were each convicted in 2007 of five counts of possessing a slave and five counts of using a slave (20 counts in total) following a jury trial in New South Wales. The pair was accused of bringing six women from Thailand to Australia. They were assisted by a third Thai woman who was paid A\$15 000 to arrange the transfer of the victims, using false documents and return airline tickets to secure their entry into Australia. Upon arrival, the victims' documents were taken from them and the women were accommodated in the couple's home or their brothel, where they were forced to work seven days a week to repay a debt of A\$45 000.⁷³

The recent trial of Melbourne brothel owner Ms Wei Tang attracted an extensive degree of attention when it was appealed to the High Court of Australia. This case also represents the first jury conviction under the *Criminal Code* slavery offences.⁷⁴ Ms Wei Tang was convicted of having purchased five Thai women to work under a debt bondage arrangement in her legal brothel, Club 417, in Fitzroy, Melbourne.⁷⁵ The women testified that they had voluntarily entered into an agreement with a broker in Thailand, and owed A\$40 000 – A\$45 000 to the owner of their 'contract'. The contracts had subsequently been purchased for A\$20 000 from the Thai recruiter by Wei Tang. It was conceded that two of the five women had repaid their debts and had voluntarily stayed on to work as sex workers.⁷⁶ Ms Wei Tang was initially convicted to 10 years imprisonment⁷⁷ on five counts of possessing a slave and five counts of utilising a slave.⁷⁸ She appealed against the conviction arguing that there had been a misdirection of the jury on the meaning of the term 'slavery'. She further contended that the prosecution had failed to establish that she had acted with intent in dealing with the victims as though they were her property.⁷⁹ Wei Tang's conviction was overturned in June 2007 and the Victorian Court of Appeal ordered a retrial. In August 2008, the prosecution successfully appealed against that decision and Ms Tang's initial conviction was upheld by the High Court.⁸⁰

72 Natasha Robinson, 'Second Sex Slave Jury Fails to Deliver Verdict', *The Australian* (Sydney), 28 May 2005, 8; *DPP (Cth) v Xu* (2005) 154 A Crim R 173; David, above n 64, 49 (with reference to the unpublished court transcripts); 'Trio on Trial Accused of Keeping Student as Sex Slave', *Sydney Morning Herald* (Sydney), 22 March 2005.

73 Lisa Davies and Kim Arlington, 'Couple Kept Sex Slaves', *The Courier Mail* (Brisbane), 16 November 2007; David, above n 64, 49.

74 See further Andreas Schloenhardt and Genevieve Beirne, 'R v Tang (2008)' (2009) forthcoming *Melbourne University Law Review*; Cullen and McSherry, above n 40, 6–7.

75 *R v Wei Tang* (2007) 16 VR 454, 457.

76 *Ibid.*

77 *R v Wei Tang* [2006] VCC 637 (Unreported, McInerney J, 9 June 2006).

78 *Criminal Code* s 270.3(1)(a).

79 *R v Wei Tang* (2007) 16 VR 454, 471, 487.

80 *R v Tang* (2008) 249 ALR 200.

In a related case, Ms Donoporm Srimonthon pleaded guilty to two counts of slave trading and three counts of possessing a slave.⁸¹ Ms Srimonthon was herself a previous trafficking victim of Wei Tang who had chosen to stay with her in order to gain employment. Furthermore, brothel manager Mr Paul Pick was originally tried with Ms Tang, but was acquitted on eight charges, while the jury could not decide on a further two. He successfully applied for a *nolle prosequi*.⁸²

Another successful trafficking prosecution involved Sydney brothel owners Mr Joseph Sieders and Ms Somsri Yotchomchin. They had purchased women from Ms Montha Phuncharaen, a recruiter in Thailand, who then arranged for the women to enter Australia on fraudulent tourist visas.⁸³ Upon their arrival, the women were then taken to Mr Yotchomchin who obtained fraudulent bridging and protection visas from the corrupt immigration official Mr Moffazzal Haque Kazi.⁸⁴ These visas allowed the women to remain in Sydney and they were subsequently shared between the four brothels operated by Ms Yotchomchin and a brothel operated by Mr Sieders and his wife Ms Arpornrat.⁸⁵ A victim referred to as 'LK' later joined her cousin in sex work to pay off an unrelated family debt to another party, but after four weeks LK contacted immigration authorities with the assistance of a customer. The authorities then attended the premises, which led to the proceedings. At the trial, it was alleged that the women and their families were threatened with violence and deportation by the accused if they did not discharge their debts.⁸⁶ Both convictions were unsuccessfully appealed in *R v Sieders*.⁸⁷

One of the most recent cases in Australia involved a group of 10 South Korean women who were found working in slavery-like conditions in a brothel in Sydney in March 2008.⁸⁸ After further investigations, it was discovered that the women had been deceptively recruited by a South Korean criminal syndicate, which had confiscated their travel documents and forced them to work for up to 20 hours a day in a legal brothel in Surry Hills. On 6 March 2008, the brothel was raided and the authorities charged five people with offences relating to deceptive recruitment for sexual services and debt bondage. The persons charged included the brothel owner and alleged ringleader Ms Kwang Su Ra, her receptionist Mr Ji Woo Lee, Ms Jin Hee Do who had lured the women to Australia, Ms Na Kyung Kim who was involved in moving the proceeds of the group's activity, and another man, Mr Gin Taek Choi. It has been alleged that the syndicate earned more than US\$2.3 million per year from the operation of the

81 *R v DS* (2005) 191 FLR 337.

82 *R v Wei Tang* (2007) 16 VR 454, 458. A *nolle prosequi* is an entry made on the record, by which the prosecution declares that it will not proceed against the defendant; cf Robinson, above n 72, 8.

83 *R v Sieders and Yotchomchin* [2006] NSWDC 184, [19].

84 *Ibid* [21].

85 At the time of the trial in Australia, Ms Arpornrat was under arrest in Thailand for seeking to procure Thai nationals to travel to Australia: *R v Sieders and Yotchomchin* [2006] NSWDC 184, [104].

86 *Ibid* [38].

87 [2008] NSWCCA 187 (Unreported, Campbell JA, James and Johnson JJ, 13 August 2008).

88 Simon Kirby, 'NSW: Brothel Madam Lied to Sex Slaves About Debts: Court', *Australian Associated Press* (Sydney), 7 March 2008.

brothel.⁸⁹ However the charges laid against the accused have since been dropped for evidentiary reasons.⁹⁰

There have been isolated cases involving women being brought to regional or rural areas of Australia to perform domestic work or sexual slavery. One recent example occurred in Weipa in Far North Queensland,⁹¹ where a woman from the Philippines was raped and forced to work without pay in the takeaway food store owned by Mr Zoltan Kovacs and his wife Mrs Melita Kovacs. The defendants are currently awaiting a retrial after their initial convictions were successfully appealed.⁹²

In April 2009, a new trial against four men, Kam Tin Ho, Ho Kam Ho, Chee Fui Hoo, and Slamet Edy Rahardjo, began in Melbourne. The accused are being prosecuted for the trafficking in persons and sexual slavery of five female victims from Thailand. The women were allegedly forced to perform between 650 and 750 sex acts under debt bondage conditions. At a rate of A\$50 per act, this represents a debt of between A\$32 500 – A\$37 500. Of the A\$125 charged for each of these acts, women only received A\$5.⁹³ Mr Rahardjo is charged with a single count of entering a commercial transaction involving a slave,⁹⁴ Mr Hoo is charged with two counts of possessing a slave and one count of exercising a right of ownership over a slave,⁹⁵ while the siblings Mr Kam Tin Ho and Mr Ho Kam Ho are charged with four counts each of possessing a slave, exercising a right of ownership over a slave and a single count each of entering into a commercial transaction involving a slave, as well as other financial offences.⁹⁶

B Trafficking Offences

In 2004, as a part of a new Australian Government initiative to combat trafficking in persons, legislation was introduced to comprehensively criminalise trafficking in persons. The reforms also allowed for the delayed ratification of the *Trafficking Protocol*. The *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth) was entered into the *Criminal Code* to form a new Division 271. The existing deceptive recruiting offences in Division 270 were also significantly amended by this Act in order to criminalise deception about the conditions under which sexual services are to be provided.⁹⁷ To date, there have

89 United States Department of State, above n 18, 62; 'Brothel Madam Lied to Sex Slaves: Court', *The West Australian* (Perth), 7 March 2008.

90 Natalie O'Brien, 'Trafficked, Then Waiting by the Roadside', *The Weekend Australian* (Australia), 6 December 2008, 27.

91 *R v Kovacs* [2007] QCA 143.

92 *R v Kovacs* [2008] QCA 417. Mr Kovacs was additionally convicted of two counts of rape and a single count of sexual assault in 1997 after the victim, his wife's niece, was brought to Australia to work as a domestic cleaner for the couple. This was later unsuccessfully appealed in *R v KO* [2006] QCA 34.

93 'Thai Sex Workers Were Slaves: Court', *Nine MSN News*, 22 April 2009.

94 *Criminal Code* s 270.3(1)(c).

95 *Criminal Code* s 270.3(1)(a).

96 Shelley Hadfield, 'Sex Workers Were "\$5 Slaves" Victorian Supreme Court Hears', *Herald Sun* (Victoria), 22 April 2009.

97 Explanatory Memorandum, Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 (Cth) item 7.

only been two prosecutions brought under Division 271; only one of the two cases resulted in a conviction, which has since been appealed.

1 Legislation

Division 271 of the *Criminal Code* divides the offences between those that concern transnational trafficking (section 271.2) and those that concern domestic trafficking (section 271.5). Section 271.2 sets out trafficking in persons on a transnational level and separates criminal activity which occurs upon entry into Australia from that which occurs upon exiting the country. Sections 271.2(1), (1B), 272.2(2) and (2B) cover instances where a person organises or facilitates the entry, proposed entry or receipt of another person into Australia. In contrast, sections 272.2(1A), (1C), 271.2(2A) and (2C) operate where the offender organises or facilitates the proposed exit of a person from Australia. The offence of domestic trafficking in persons is created by section 271.5, and largely mirrors the transnational equivalent.

For constitutional reasons, the domestic trafficking offences under sections 271.5–271.7 are tied to specific heads of Commonwealth power.⁹⁸ Domestic trafficking offences will have occurred if any of the relevant conduct occurs outside Australia, the conduct involves transportation across State borders for reward, the conduct occurs within a territory, is engaged by a constitutional corporation, makes use of a postal, telegraphic or telephonic service, or the victim is a non-citizen.⁹⁹ This section is designed to preserve the operation of other relevant Commonwealth, State and Territory laws, such as sexual servitude laws in these jurisdictions.¹⁰⁰

Sections 271.3 and 271.6 of the *Criminal Code* create aggravated offences of trafficking in persons (on a transnational and domestic level, respectively) if the defendant intended their victim to be exploited, they subjected the victim to cruel, inhuman or degrading treatment, or they engaged in conduct which was reckless as to the danger of the victim dying or being seriously harmed. These offences attract a maximum penalty of 20 years imprisonment.

Offences for trafficking in children (on a transnational and domestic level respectively) are created by sections 271.4 and 271.7. Victims must be under 18 years of age, and the offender must have organised the victim's entry into Australia and intended to, or have been reckless about, the victim's use for sexual services or other forms of exploitation. These offences have a maximum penalty of 25 years imprisonment, with this higher penalty designed to reflect the repugnant nature of trafficking in children.¹⁰¹ Section 271.2 creates an additional offence of domestic trafficking in children and mirrors section 271.4 of the *Criminal Code*.

98 Department of Parliamentary Services, *Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 (Cth)*, Bills Digest No 96 2004–05 (2005) item 7.

99 Ibid 8.

100 Ibid 9.

101 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 2005, 30 (Philip Ruddock, Attorney-General).

Debt bondage is also an offence under section 271.8 *Criminal Code*. It is defined as occurring when a person pledges his or her services or the services of another as security for a debt, if the reasonable value of those services is not applied to repay the debt, or if the length and nature of the services is not defined.¹⁰² Targeting debt bondage assists with the criminalisation of trafficking, as the offences help to:

prevent traffickers from using unfair debt contracts and other similar arrangements to force victims into providing sexual services or other labour to pay off large debts supposedly incurred by the trafficker in transporting the victim.¹⁰³

Debt bondage occurs under section 271.8 if a person intentionally causes another person to enter into debt bondage. Admissible evidence includes the economic relationship between the parties, the terms of any agreement between them, and the personal circumstances of the victim. This offence is considered to be less serious than the offences of human trafficking, sexual servitude and slavery, and accordingly only has a maximum penalty of 12 months imprisonment. Aggravated debt bondage under section 271.9 will have occurred if the defendant commits an offence of debt bondage (under section 271.8) and their victim is under 18 years old. For this offence, the prosecution must prove that the defendant intentionally committed or was reckless about committing the offence against a person under 18 years of age.¹⁰⁴ This offence has a maximum penalty of two years imprisonment.

2 Case Law

The first person to be charged with trafficking offences under Division 271 of the *Criminal Code* was Mr Yogalingham Rasalingam, a restaurant owner in the Blue Mountains near Sydney. He was accused of bringing Mr Anbalagan Rajendran (a man from his home town in southern India) to Australia and then forcing him to work seven days a week, sometimes for more than 15 hours a day.¹⁰⁵ During the trial, the victim testified that upon arrival in Australia, his passport and airline ticket were taken away from him, he was forced to sleep on the floor, and was told by the accused that he would be deported if he complained to the authorities.¹⁰⁶ Mr Rasalingam was charged with trafficking a person under section 271.2(1B) of the *Criminal Code*¹⁰⁷ and with intentionally exercising control over a slave under section 270.3(1)(d). The jury found him not

102 Department of Parliamentary Services, *Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 (Cth)*, Bills Digest No 96 2004–05 (2005) Item 9.

103 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 2005, 31 (Philip Ruddock, Attorney-General).

104 Explanatory Memorandum, *Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 (Cth)* item 9.

105 Kim Arlington, 'Chef Told: Work Like a Machine', *The Daily Telegraph* (Sydney), 11 October 2007, 13.

106 James Madden, 'Chef Was "Forced Labour"', *The Australian* (Sydney), 10 October 2007, 5; David King, 'Cook Made Deal to Work 365 Days a Year', *The Australian* (Sydney), 11 October 2007, 3.

107 See *Criminal Code* s 271.2(1B): facilitating the entry of another person to Australia, being reckless as to the exploitation of that other person.

guilty on both counts.¹⁰⁸ Mr Rajendran was able to gain civil compensation for his experiences under the *Workplace Relations Act 1996* (NSW).¹⁰⁹

The only successful prosecution under the federal trafficking offences thus far involved Mr Keith William Dobie, a hairdresser from Currumbin, on the Gold Coast. Mr Dobie had been left in serious financial difficulties after the destruction of his hair salon by fire and floods impaired his capacity to repay his debts to a number of loan sharks. It was alleged by the prosecution that between 28 November 2005 and 17 April 2006, Dobie was directly involved in the deceptive recruitment of at least two Thai women and had possibly been preparing to bring more women from Thailand to Australia. The Thai women Mr Dobie had brought to Australia were deceived about the conditions of their stay and employment,¹¹⁰ as they were kept locked in hotel rooms in Surfers Paradise and Broadbeach and were forced to work nine hours a day, serving up to eight men per day. Dobie had promised the women that they would be earning up to A\$14 000 over three months, but his victims only ever received a small fraction of that money.¹¹¹ On 20 October 2008,¹¹² he pleaded guilty to charges of trafficking in persons, presenting false information to immigration officials and dealing in the proceeds of crime. Mr Dobie appealed against his conviction in January 2009.

C Other Case Law

In addition to the case law involving criminal charges, there are a small number of reported cases concerning immigration matters relating to trafficked women.¹¹³ These cases largely refer to the legal status of victims of trafficking in Australia.

In 2007, Ms Jetsadophorn ‘Ning’ Chaladone, a former victim of trafficking, successfully brought a claim before the NSW Victims Compensation Tribunal. She was trafficked from Thailand to Australia in 1995, then aged 13. She left Thailand with the consent of her father, on expectations that she would be working as a nanny in Sydney. Instead, Ms Chaladone was put to work as a prostitute in a brothel in Surry Hills, Sydney, and was told that she would be required to complete at least 650 sex acts in order to service the A\$35 000 debt she had incurred by travelling to Australia.¹¹⁴ The brothel in which Ms Chaladone was working was raided by immigration officials ten days after she

108 Mr Rasalingam was, however, convicted of one count of dishonestly influencing a Commonwealth public official contrary to *Criminal Code* s 135.1(7) for photocopying his victim’s signature on an employment contract sent to the Immigration Department. See Arlington, above n 105, 13; cf David, above n 64, 49.

109 *Fryer v Yoga Tandoori House Pty Ltd* [2008] FMCA 288 (Unreported, Cameron FM, 13 March 2008).

110 “‘Deception’ Lured Sex Worker to Australia”, *The Courier Mail* (Brisbane), 9 May 2007, 7.

111 Ibid; “‘I Was Paid \$20 a Day’: Thai Prostitute Tells Court of Work Conditions With Gold Coast Man”, *Gold Coast Bulletin* (Gold Coast), 11 May 2007; ‘Hairdresser Exploited Thai Sex Workers, Say Police’, *Gold Coast Bulletin* (Gold Coast), 2 August 2006.

112 *R v Dobie* (Unreported, Southport District Court, Clare DCJ, 20 October 2008).

113 *Karalis v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] AATA 483 (Unreported, Wright DP, 27 May 2003); *VXAJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 2234 ALR 381.

114 ABC Radio, ‘Tribunal Pays Compensation to Sex Trafficking Victim’, *PM*, 29 May 2007.

had begun work there, by which time she had already had sex with 100 men. During this period she was threatened with physical violence if she did not comply with the brothel operator's requests and was not permitted to leave the 'safe house' where she and the other sex workers slept. Ms Chaladone was expediently detained and deported by the Department of Immigration back to Thailand.

VII CONCLUSION

An analysis of available, open-source reports, statistics, and cases confirms that trafficking in persons to Australia remains a phenomenon that is poorly documented and not well understood. Many myths about human trafficking are not supported by any evidence. The realities of human trafficking and sexual servitude are not well researched and much of the available information is the result of guesswork rather than of thorough analysis. Until this day, many aspects of human trafficking and sexual servitude – especially the more sophisticated trafficking operations – remain hidden from investigations, academic research, and the media spotlight.

The central problems in identifying, exploring, and ultimately solving the problem of trafficking in persons are the illegal and clandestine nature of this activity, the lack of cooperation of victims and witnesses with government authorities, and the shame and stigma attached to prostitution and other aspects of human trafficking.¹¹⁵ It is therefore important that any strategy designed to prevent, disrupt, and suppress trafficking in persons, actively assists victims and witnesses, and removes common stereotypes, preconceptions, and prejudices.

Not only is it difficult to measure the current levels of trafficking in persons to Australia and the number of traffickers and their victims, it is equally difficult to measure the success of any action taken to prevent and suppress this type of crime. Greater numbers of arrests and prosecutions of traffickers alone, for instance, may demonstrate greater law enforcement activity, but they may also be indicative of more trafficking operations.

The Australian Government's introduction of specialised visas for victims of trafficking in 2004 has been subject to significant scrutiny. Many commentators have criticised the scheme for its focus on the capacity of victims of trafficking to provide useful information to law enforcement agencies as the sole criterion for visa eligibility. This emphasis is seen as diminishing the levels of protection available to trafficked persons and contributing to the frequent deportation of persons who may be at risk of violence or further trafficking if they return home.

Thus, many aspects of human trafficking and sexual servitude such as the recruitment and repatriation of victims remain hidden from scrutiny. The immigration status and legal protection available to both lawful and unlawful foreign sex workers also require further examination. More research into this phenomenon is necessary to make better estimates about the 'true' figure of this

¹¹⁵ See further Carrington and Hearn, above n 8, 5.

crime and to document the level and nature of unreported cases more accurately. Such research will better inform public debates and assist policy makers and law enforcement agencies in developing fair and effective prevention and suppression strategies.