

WITHOUT SEX

Slavery, trafficking in persons and the exploitation of labour in Australia

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In 2005, Yu Tu Chuan, the director of Aprint (Aust) Pty Ltd, travelled to China to recruit printers and met with 'Jack', 'Harry', 'Nick' and 'Frank' who were interested in working for the firm in Australia. The men, none of whom were fluent in English, paid a migration agent in China around \$10 000 to organise their journey. Aprint applied for approval to be a business sponsor under the *Migration Act 1958* (Cth) and the four men were then granted business visas subclass 457 (that is, temporary work permits) sponsored by the company.

In addition to the agent's fees, the men were charged \$10 000 by Yu Tu Chuan to come to Australia, \$5000 allegedly being a bond repayable at the end of their employment. The money owed to Yu Tu Chuan was subtracted from the men's pay at a rate of \$200 per week. The four men were accommodated in a run down, unheated house in Melbourne, 200 metres from the business premises and an amount of \$120 was deducted each week from their pay for accommodation and other utilities expenses. Each man worked an average of 50 hours a week and all were paid well under the minimum rates of pay, with the rate of underpayment totalling \$93 667.

'Jack' claimed that as soon as the \$10 000 was fully deducted from his pay, he was sacked and replaced with another worker from China. Under the rules of the 457 temporary work visa he faced deportation unless he could find another registered sponsor of temporary workers.

A workplace inspector brought an application pursuant to the *Workplace Relations Act 1996* (Cth) for the imposition of penalties for the underpayment of wages, failure to pay overtime and failure to require working hours not in excess of 38 hours per week.¹ Yu Tu Chuan admitted to breaching the Act, but contended that the employees were not any more or less vulnerable merely because they were temporary migrant workers. However, O'Sullivan FM did not accept this contention, and gave particular weight to the 'size of the underpayments, the period over which they occurred and that the payments were made after the intervention of the Workplace Ombudsman'.² Penalties were imposed of \$9 240.³ No criminal charges were laid against Yu Tu Chuan or Aprint.

It is interesting to compare the approach in this case to the response to an international scheme which involved bringing Thai women from Thailand to Australia to work as prostitutes in licensed brothels in Sydney and

Melbourne.⁴ Under this scheme, a number of Thai women were 'escorted' to Australia (usually by an elderly couple so as not to arouse suspicion) to work as prostitutes. Each woman's passport and return air ticket was confiscated until she paid off her 'debt', which was usually in the vicinity of \$40 000 to \$45 000. The usual fee paid by a client was \$110, which was divided between the woman's contract 'owner' and the brothel owner. With each service, \$50 was deducted from the contract debt. The women were required to work from 6pm to 2 am or later, six days a week. If the woman chose to work on the seventh day, she could generally keep the \$50 which would otherwise go to offset her contract debt. The women lived in apartments controlled by their 'owners' and were not permitted to leave without an escort. They were driven to the apartments and brothel each day by escorts.

These circumstances, instead of being viewed as a matter of underpayment of employees as occurred in the Aprint case, gave rise to a number of prosecutions for slavery offences.

In both cases, the employees knew what the work would be, but in both cases there was deception involved as to their working conditions and close supervision of their movements. The comments of the sentencing judge, McInerney J in one of the slavery cases could quite easily be applied to the Aprint circumstances:

One asks the rhetorical question: How could they run away when they had no money, they had no passport or ticket, they entered on an illegally obtained visa, albeit legal on its face, they had limited English language, they had no friends, they were told to avoid immigration, they had come to Australia consensually to earn income and were aware of the need to work particularly hard in order to pay off a debt of approximately \$45,000 before they were able to earn income for themselves?⁵

This article focuses on current laws concerning trafficking, slavery and debt bondage offences and explores some of the reasons why sexual exploitation has been in the forefront of the response to trafficking in humans. It examines the question as to why the criminal law is not traditionally used in relation to labour exploitation and argues that, from a social welfare perspective, there may indeed be a role for broadening perspectives as to what constitutes slavery and trafficking offences.⁶

REFERENCES

1. *Inspector Robert John Hortle v Aprint (Aust) Pty Ltd & Anor* [2007] FMCA 1547 (Unreported, 10 September 2007, O'Sullivan FM).
2. *Ibid* [33] – [34].
3. *Ibid* [7].
4. *R v DS* (2005) 191 FLR 337; *R v Wei Tang* [2006] VCC 637 (Unreported, 9 June 2006, McInerney J).
5. *R v Wei Tang* [2006] VCC 637 (Unreported, 9 June 2006, McInerney J) [6]–[7].
6. On 24 September 2008, the Migration Legislation Amendment (Worker Protection) Bill 2008 (Cth) was introduced to the Senate. This proposes the creation of Inspectors under the Migration Act with powers to monitor compliance with legislative requirements in relation to non-citizens sponsored for temporary visas with work rights. Inspectors will have powers broadly analogous to those of Workplace Inspectors of the Workplace Ombudsman under the *Workplace Relations Act 1996*, including powers to enter premises without force, inspect, interview and require production of documents. In the longer term, the scheme may be extended to cover all visas: Commonwealth, *Parliamentary Debates*, Senate, 24 September 2008, 2 – 4 (Senator Ludwig, Second Reading). The introduction of the Bill suggests an increasing focus on the problem of labour exploitation, although the Bill proposes civil penalties, rather than a criminal law framework in relation to non-compliance.

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Criminalisation of slavery and trafficking in humans

In recent years trafficking in persons in Australia has received heightened attention from the government, non-governmental organisations and the public. In 2001, the death of a victim of trafficking, Puangthong Simaplee, in the Villawood detention centre highlighted the lack of a coordinated response to the problem.⁷ Puangthong's death marked the beginning of a concerted campaign for increased awareness of the issue and greater protection of victims of trafficking in Australian law and policy. As a result, in 2003 the Australian Government committed \$20 million towards 'fighting trafficking in persons'.⁸ In May 2007, a further \$26.3 million was allocated to eradicating the problem.⁹

In 2005 the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth) came into force. It inserts a new Division 271 into the *Criminal Code* (Cth) dealing with Trafficking and Debt Bondage in accordance with the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*¹⁰ (the Protocol). Section 271.2 sets out eight different scenarios that may amount to international trafficking.¹¹ Trafficking includes 'organising or facilitating the entry or proposed entry, or receipt, of another person into Australia' while using force or threats or the use of deception about certain matters (including the nature of the work or amount of the debt or confiscation of travel or identity documents) for the purposes of 'exploitation'. The latter term is defined as occurring where 'the exploiter's conduct causes the victim to enter into slavery, forced labour or sexual servitude'.¹²

Section 271.8 sets out the offence of debt bondage which is defined in the Dictionary to the *Criminal Code* (Cth) as a pledge for services where the debt owed is 'manifestly excessive' or the services are 'not applied to the liquidation of the debt' or 'the length and nature of [the] services are not ... limited and defined'.

While there is considerable overlap between the offences of slavery (explored below), trafficking, smuggling and debt bondage, the scope of section 271.2 suggests that the case of Yu Tu Chuan and Aprint would fall squarely within such an offence, if restrictions on movement and inadequacy of payment of services were seen to amount to slavery. To date the Australian debate has focused on trafficking in persons for sexual exploitation and there has been less scrutiny of trafficking for the exploitation of labour. It is not

immediately clear why this has occurred, particularly in the context of frequent allegations of labour exploitation from trade unions and other institutions.¹³ This point is taken up later in this article when exploring theories concerning the purpose of criminalisation.

There have, however, been successful prosecutions brought under related slavery provisions which were inserted into the *Criminal Code* (Cth) by the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth).¹⁴ The decision of the High Court in *R v Tang* [2008] HCA 39 (29 August 2008) to dismiss an appeal by a brothel owner against ten convictions for slavery related offences has potential ramifications for labour exploitation cases. This is explored in the next section.

The Wei Tang Decision

The introduction to this article referred to an international scheme which brought a number of women to Australia to work as prostitutes. Some of the women worked in Club 417, a legal Melbourne brothel where they worked to pay off their 'debts' to their contract owner and brothel owner.

Section 270.1 of the *Criminal Code* (Cth)¹⁵ 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.

Section 270.3(1)(a) states that the offence of slavery occurs when a person intentionally 'possesses a slave or exercises any of the other powers attaching to the right of ownership' over another person'.¹⁶ The offence may also be made out when a person intentionally engages in slave trading; enters into a commercial transaction involving a slave; or controls or finances slave trading or commercial transactions involving a slave.¹⁷ Section 270.3(3) defines 'slave trading' as including 'the capture, transport or disposal of a person with the intention of reducing the person to slavery' or 'the purchase or sale of a slave'.

Two women were successfully prosecuted for slavery related offences in relation to the Club 417 scheme. 'DS' pleaded guilty to three counts of possessing a slave and two counts of engaging in slave trading. She was sentenced to nine years' imprisonment, with a non-parole period of three years. On appeal, this sentence was reduced to six years with a non-parole period of two and a half years.¹⁸ DS had herself been brought to Australia by a Thai organiser to work as a 'contracted'

7. Kerry Carrington and Jane Hearn, 'Trafficking and the Sex Industry: From Impunity to Protection' (2003) *Current Issues Brief*, No 28, Department of Parliamentary Library, 1–24.

8. Attorney-General's Department [Australia], *Australian Government's Action Plan to Eradicate Trafficking in Persons* (2004) 8.

9. Attorney-General's Department [Australia], 'More Resources to Combat People Trafficking' (Press Release, 8 May 2007), <ag.gov.au/www/agd/agd.nsf/Page/RWP7561D03F6952FB64CA2572D4000BB873> at 3 September 2008.

10. Opened for signature 15 November 2000, UN Doc A/55/383 (entered into force 25 December 2003), supplementing the *United Nations Convention Against Transnational Organized Crime*, opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003).

11. Bernadette McSherry, 'Trafficking in Persons: A Critical Analysis of the New Criminal Code Offences' (2007) 18(3) *Current Issues in Criminal Justice* 385, 389.

12. Dictionary to the *Criminal Code* (Cth).

13. See, eg. submissions to the Joint Standing Committee on Migration's *Inquiry into Temporary Business Visas* including: submissions 19 (Australian Demographic and Social Research Institute, Australian National University); 20a (Liquor, Hospitality and Miscellaneous Union); 21 (Construction Forestry Mining Energy Union); 34 (Federation of Ethnic Communities Councils of Australia); 39 (Australian Council of Trade Unions); 40 (Australian Manufacturing Workers Union); 51 (John Della Bosca MLC on behalf of the Premier of New South Wales Morris lemma); 63 (Australian Nursing Federation); 72 (Victorian Government); 85 (Dr Selvaraj Velayutham and Dr Amanda Wise, Macquarie University); Parliament of Australia, *Inquiry Into Temporary Business Visas*, <aph.gov.au/house/committee/mig/457visas/subs.htm> at 9 September 2008.

14. *R v DS* (2005) 191 FLR 337; *R v Wei Tang* [2006] VCC 637 (Unreported, 9 June 2006, McInerney J).

15. Inserted by the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth).

prostitute. The 'contract' was that she would service 700 clients in Australia in return for a visa, a return airline ticket and 'a chance to earn money' in Australia. She completed this contract and began to assist her 'owner', a man known as Sam, to negotiate with Thai organisers and to settle other Thai women in brothels in Australia. She also looked after the 'contracted' prostitutes in Club 417.

The other woman prosecuted, Wei Tang, who owned the brothel, pleaded not guilty to five counts of possessing a slave and five counts of exercising a power of ownership over a slave. At her first trial in 2005, the jury was discharged without verdict. On 3 June 2006, she was convicted by a jury of all ten charges. She was sentenced to ten years' imprisonment, with a non-parole period of six years.¹⁹

In delivering his sentence, McInerney J interpreted 'slavery' broadly. He included within the offence the situation where a person may not literally be under a condition of ownership but is *effectively* under such a condition. This broad definition could conceivably carry over to conditions of labour exploitation such as the circumstances of the Aprint case mentioned in the introduction.

On 27 June 2007, the Court of Appeal of Victoria upheld an appeal against conviction on the basis that the trial judge had misdirected the jury as to the elements of the slavery offences²⁰ and, on 29 June 2007, the Court of Appeal ordered a re-trial.²¹

The Court of Appeal's decision focused on the trial judge's direction to the jury in relation to Wei Tang's state of mind in relation to the exercise of power over the women. The slavery provisions require proof that the act of slavery was carried out intentionally, but the scope of the requisite intention is unclear.²² Acting Justice Eames, with whom the other justices agreed, held that the jury should have been directed that the prosecution had to prove that Wei Tang intentionally exercised power over the women knowing that the power that was being exercised was one related to ownership:

[T]he power must have been intentionally exercised as an owner of property would exercise power over that property, acting in the knowledge or belief that the victim could be dealt with as no more than a chattel. It would not suffice for the power to have been exercised by the accused in the belief that she was dealing with the victim as her employee, albeit one in a subservient position and being grossly exploited.²³

Acting Justice Eames pointed out that the slavery offences should be strictly construed²⁴ and had the offence of debt bondage existed at the time of Wei Tang's actions, she may well have been prosecuted under that offence.²⁵ The Court of Appeal ordered a re-trial of Wei Tang, rather than directing an acquittal.²⁶ The Court found that 'it was open to a reasonable jury to have convicted the appellant on the counts of the presentment'²⁷ and that it was 'not unjust' to order a re-trial.²⁸

The prosecution appealed to the High Court against the decision of the Court of Appeal. The defence also instituted a cross-appeal against the order for a new trial.

The majority of the High Court, with Justice Kirby dissenting, upheld the prosecution's appeal. Chief Justice Gleeson pointed out that Eames JA's added requirement of a certain state of knowledge or belief as to the source of the powers being exercised was likely to have arisen from a desire to 'distinguish between slavery, on the one hand, and harsh and exploitative conditions on the other'.²⁹ The majority of the High Court rejected the notion that the prosecution had to prove this extra requirement. Chief Justice Gleeson went on to point out that distinguishing between slavery and exploitative labour conditions was possible without placing an extra requirement on the prosecution. Distinguishing between slavery and exploitative conditions:

may be found in the nature and extent of the powers exercised over a complainant. In particular, a capacity to deal with a complainant as a commodity, an object of sale and purchase, may be a powerful indication that a case falls on one side of the line. So also may the exercise of *powers of control over movement* which extend well beyond powers exercised even in the most exploitative of employment circumstances, *and absence or extreme inadequacy of payment for services* [emphasis added].³⁰

Justice Hayne, while agreeing with Gleeson CJ's conclusion, also looked at United States' cases dealing with slavery and stated that:

[a]sking what freedom a person had may shed light on whether that person was a slave. In particular, to ask whether a complainant was deprived of choice may assist in revealing whether what the accused did was exercise over that person a power attaching to the right of ownership.³¹

In applying this approach to the facts, he concentrated on the women's incurring of a debt, their living and working conditions and the

practical impediments and economic consequences for each woman, if she refused to complete her performance of the arrangement, were such ... that, if there were choices to be made about those matters, they were to be made by others.³²

This broad understanding of slavery would seem to open the door for prosecutions in labour exploitation cases. What needs to be proved is the intentional possession and use of workers as slaves. While it may be difficult at times to draw the line between slavery and exploitative conditions, there is also a need to examine why it is that exploitative conditions are seen as the subject for workplace laws rather than criminal laws. The next section outlines the extent of labour exploitation in Australia, while the ensuing section examines whether criminal law theories concerning the purpose of the criminal law can be used to bolster the use of the criminal law in workplace matters.

Perception, existence and extent of labour-trafficking and slavery in Australia

Because labour-trafficking and exploitation is predominantly hidden, its true nature and extent is difficult to determine and widely disputed. Publicity fostered by non-governmental organisations and the media has been a crucial component in bringing the general issue of exploitative labour conditions to

16. The offence will also occur when a person intentionally engages in slave trading; enters into a commercial transaction involving a slave; or controls or finances slave trading or commercial transactions involving a slave: *Criminal Code* (Cth) 270.3(1)(b)–(d).

17. *Criminal Code* (Cth) ss 270.3(1)(b)–(d).

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

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

20. *R v Wei Tang* (2007) 16 VR 454.

21. *R v Wei Tang* [2007] VSCA 144 (Unreported, 29 June 2007, Maxwell P, Buchanan and Eames JJA).

22. *Criminal Code* (Cth) s 270.3(1).

23. *R v Wei Tang* (2007) 16 VR 454, 482.

24. *Ibid* 473.

25. *Ibid*.

26. *R v Wei Tang* [2007] VSCA 144 (Unreported, 29 June 2007, Maxwell P, Buchanan and Eames JJA).

27. *Ibid* [8].

28. *Ibid* [13].

29. *R v Tang* [2008] HCA 39 (Unreported, 29 August 2008, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ) [44] (Gleeson CJ).

30. *Ibid*.

31. *Ibid* [156] (Hayne J).

32. *Ibid* [166] (Hayne J).

The broad scope of the definition of slavery in Wei Tang means that the sphere of analysis can now be broadened so that labour-trafficking and slavery can be perceived as equally serious offences and thus warrant further investigation and inquiry.

the fore. Most recently, a Workplace Ombudsman's investigation of a union complaint found that workers laying a gas pipeline off the West Australian coastline were being paid as little as \$4.20 an hour and were working 12 hour shifts on a 60 days on/30 days off roster.³³ However, the Ombudsman concluded that this was not unlawful because the workers held 456 Australian short-stay visas 'which do not attract a minimum wage'.³⁴ The Immigration Minister has since promised to act to protect such workers.³⁵

Such selective attention to labour exploitation can paradoxically reinforce a perception of slavery and trafficking in persons as mostly, if not exclusively, involving sexual exploitation and/or violence. These perceptions of what slavery and trafficking involve are not inaccurate, nor necessarily uncommon, but they are extreme, and fail to take account of other sometimes less severe and more nuanced forms of slavery and trafficking in persons.

In a recent report, the Australian Institute of Criminology (AIC) concluded that 'human trafficking to Australia is predominantly women for the purpose of sexual exploitation, with 17 of the 23 sources of information referring to this type of activity'.³⁶ There is a danger in presuming that because this study has focused on sex-trafficking that sex-trafficking is therefore the predominant form of trafficking into Australia. As it stands, there is no agreed data on the extent of trafficking in persons into Australia. Some estimates run to the hundreds, but as pointed out in the AIC report '[t]he problem with estimates is that they are often without cited sources ... [and] ... these vaguely defined numbers are repeated, thereby reinforcing themselves'.³⁷

The omission of labour-trafficking from political consideration in Australia was illustrated by the process of inquiry undertaken by the Senate Legal and Constitutional Affairs Committee on the Criminal Code Amendment (Trafficking in Persons Offences) Bill 2005. There was a severe imbalance in the discussion, with almost exclusive focus on sex-trafficking despite the fact that labour-trafficking was also to be criminalised by the Act. In the entire consultation process undertaken by the Senate Committee, trade unions and other groups alleging instances of labour-trafficking were completely absent. Trade unions have used other forums to highlight alleged instances of labour trafficking but their absence from the very policy process initiated to create trafficking offences is noteworthy because it highlights the imbalance in the policy focus.

The minds of parliamentarians and participants were focused on sex-trafficking and debt bondage. For example, when asked by Senator Mason 'how much trafficking is there for the purposes of sexual services and other labour?',³⁸ an Australian Federal Police (AFP) representative proffered only sex-trafficking statistics without mentioning any of the alleged instances of labour exploitation.³⁹ When this information was not forthcoming nor its absence explained, the Senator moved on without further comment or inquiry.

There has been a distinct lack of inquiry into alleged instances of trafficking in persons into non-sex industries (notwithstanding the efforts of unions) and thus it is not surprising that little is known about the extent of labour-trafficking in Australia. When asked 'how much we know about forced labour that isn't sex' a leading researcher of trafficking in persons into Australia answered:

All we have is [sic] anecdotal reports. ... some of those have been reported in the press, but there's almost nothing. There's no research in that area at all. ... We suspect that there's an increase in areas such as construction and hospitality, and there's been some reporting of those areas in the media. But I don't think that the police are focused in looking at non-sex trafficking and slavery yet. There seems to be a divide between work visas and policing of those through immigration, and criminal offences which is something that the AFP looks at.⁴⁰

The AFP currently operates under the 'Case Categorisation and Prioritisation Model', which provides a guide for the determination of which matters to give investigative priority. They contend that a prioritisation model is necessary because 'the number of such [Commonwealth] offences identified or reported far exceeds its investigational capacity'.⁴¹ Factors considered in prioritisation include incident type, the impact of the matter on Australian society, the importance of the matter to the AFP in terms of Government and Ministerial direction and the resources required to undertake the matter.⁴² While these are all, of course, legitimate considerations in determining which matters to pursue, they do not justify a blanket policy (whether formal or informal) not to investigate certain types of crimes.

Although there has been limited attention given to trafficking in persons for labour exploitation in Australia, there is evidence which provides some indicia of its existence.⁴³ In its investigation into the effectiveness, fairness and integrity of the temporary work visa program, the Joint Standing Committee

33. Australian Government Workplace Ombudsman, 'McDermott Inquiries Complete' (Press Release, 4 September 2008) <wogov.au/asp/index.asp/sid=7407&page=mediacentre-current-view&cid=5390&id=1139> at 8 September 2008.

34. *Ibid.*

35. Alexandra Kirk, 'Government Promises to Protect Overseas Workers', *AM Program*, ABC Radio, 5 September 2008 <abc.net.au/am/content/2008/s2356076.htm> at 8 September 2008.

36. Judy Putt, 'Human Trafficking to Australia: A Research Challenge' (2007) 338 *Trends and Issues in Crime and Criminal Justice* 1, 5.

37. *Ibid.* 3.

38. Commonwealth, *Parliamentary Debates*, Senate Legal and Constitutional Affairs Committee, 23 February 2005, 52 (Senator Mason) [emphasis added].

39. Commonwealth, *Parliamentary Debates*, Senate Legal and Constitutional Affairs Committee, 23 February 2005, 52 (Evidence of Grant Edwards, Federal Agent).

40. Jennifer Burn, Director of the Anti-Slavery Project at the University of Technology Sydney, interviewed by Richard Aedy, ABC Radio, 10 March 2008.

41. Australian Federal Police, *Case Categorisation and Prioritisation Model 1* <afp.gov.au/___data/assets/pdf_file/25044/CCPM_October_2006.pdf> at 6 April 2008.

42. *Ibid.*

43. This has been recognised internationally. See: United States Department of State, *Trafficking in Persons Report: June 2008* (2008) 61.

on Migration (the Committee) received a number of submissions alleging breaches of conditions of 457 visas, some of which could amount to trafficking in persons under Australian criminal law.

Some submissions to the Committee argued that greater monitoring of the temporary migration programme was needed.⁴⁴ The extent of the nexus between breach of 457 visa conditions by employers and possible offences of trafficking in persons warrants further investigation.

Researchers at Macquarie University provided to the Committee examples of several situations where employer obligations under the 457 visa scheme had not been met. In one case, a group of workers had signed what they believed was a reasonable contract of employment before leaving Singapore to work in Australia. However,

[w]hen they arrived in Australia they were presented ... with a new AWA and given 24 hours to sign or face termination. The new AWA required they work 11 to 18 hours per week day (overtime without penalty rates), accept termination without notice, and leave Australia if terminated by the company. On refusing to sign, their passports were confiscated.⁴⁵

The submission did not outline how this situation concluded, but it nevertheless provides a sound example for present purposes. The employer has committed two *prima facie* offences of trafficking in persons. The ultimatum that the employees sign a new contract or face termination, as well as the requirement that each employee leave the country upon the cessation of their employment, each constitute a threat pursuant to the *Criminal Code Act 1995* (Cth). 'Threat' is defined to include a threat to cause a person's removal from Australia or any other detrimental action.⁴⁶

Facilitated entry into Australia and the use of threats arguably amount to offences against the trafficking scenario set out in section 271.2(1). Additionally, the employer deceived the employees as to whether their stay in Australia would involve the confiscation of their travel documents, which also amounts to an offence.⁴⁷

The situation was compounded by the conditions in which the workers lived. Having been promised accommodation upon arrival in Australia,

[o]nce here they found themselves in a small room at the back of the factory, with bunks which housed 5 men, a kitchen and a bathroom. They were each charged \$100 per week for this room, which was deducted from their salary.⁴⁸

Susan Coppedge has suggested that living conditions are among the indicia of trafficking and that ultimately the question to be asked is, in all the circumstances, 'was the employer exploitative?'⁴⁹

Submissions from a number of unions to the Committee alleged that it is common practice for the cost of travel to and from Australia to be paid for by the employer and then recouped through unlawful salary deductions from the employee. Similar unlawful deductions such as for medical or accommodation costs are also alleged to occur.⁵⁰ These practices clearly constitute a breach of the employer obligations under the 457 visa scheme. However, they could also amount

to a crime if the unlawful deductions are found to amount to debt bondage, which, as mentioned above, arises where a person pledges their services to another person in liquidation of a debt and the debt owed is manifestly excessive or is not reduced commensurate with the value of the services provided.⁵¹

The problems highlighted by the unions are well summarised in a statement to the Committee by David Bibo of the Liquor, Hospitality and Miscellaneous Union (LHMU):

The LHMU has become aware of many incidents of employers not complying with their obligations under the 457 visa program. In relation to these incidents, we have identified a virtual vacuum in the monitoring of employers. Further, there has been a concerning absence of penalties for participants [in the 457 visa scheme] exploiting their privilege, and no-one to enforce them. With this in mind it is little wonder that employees are being severely exploited.⁵²

Insight into the nature of trafficking into Australia can also be obtained from examples in neighbouring jurisdictions. In *R v Deny Setiadi*⁵³ Indonesian workers were paid NZ\$8000 for what they thought was legitimate passage and work in New Zealand. Upon arrival in New Zealand they were housed in substandard housing for which they were charged \$60 per week and were also subject to additional charges for transport. The men worked in local orchards for 12 hours per day, seven days a week.⁵⁴ The accused employer pleaded guilty to four counts of smuggling in persons under section 98C of the *Crimes Act 1961* (NZ). However, evidence led by the Prosecution clearly indicated that deception had been used to get the workers to New Zealand and the situation could have been charged under trafficking in persons offences.⁵⁵

These cases raise the question as to why labour exploitation has not traditionally been viewed as giving rise to criminal offences. The next section outlines how certain approaches to the role of the criminal law have had the effect of restricting the scope of the criminal law to slavery and trafficking offences relating to sexual exploitation.

Harms, morals and social welfare

Traditional normative theories concerning the criminal law have generally related to protecting liberal values, such as preventing harm to individuals and limiting the power of the State, or have linked labelling and punishing wrongdoing to the enforcement of morality.⁵⁶ While an argument can be made for the criminalisation of slavery and trafficking in humans on the basis of harm caused to the individuals concerned, it has been a moral focus on sex trafficking that has taken attention away from labour trafficking and slavery issues. This section provides an overview of this moral approach to slavery and trafficking and argues that if the purpose of the criminal law is viewed more broadly than either morals or harm theory allow, then the criminalisation of labour exploitation is justifiable.

Glasbleek has argued that:

In making our choice of regulatory mechanism, we reflexively grade the wrongful behaviour. We reserve

44. The Parliament of the Commonwealth of Australia, Joint Standing Committee on Migration, *Temporary Visas... Permanent Benefits: Ensuring the Effectiveness, Fairness and Integrity of the Temporary Visa Business Program* (2007) 112.

45. Selvaraj Velayutham and Amanda Wise, Centre for Research on Social Inclusion, Macquarie University, *Submission to the Joint Standing Committee on Migration's Inquiry into Temporary Business Visas*, Submission 85, 6 <aph.gov.au/house/committee/mig/457visas/subs/sub085.pdf> at 9 September 2008.

46. *Criminal Code* (Cth) s 271.1.

47. *Criminal Code* (Cth) s 271.2(2).

48. Velayutham and Wise, above n 45.

49. Susan Coppedge, *People Trafficking: An International Crisis Fought at a Local Level* (2006) 35 <fulbright.org.nz/voices/axford/docs/axford2006_coppedge.pdf> at 1 April 2008.

50. The Parliament of the Commonwealth of Australia, above n 44, 113.

51. *Criminal Code* (Cth) Dictionary.

52. Commonwealth, *Parliamentary Debates*, Senate Joint Standing Committee on Migration, 16 May 2007, 51 (Evidence of David Bibo, Organiser, Liquor, Hospitality and Miscellaneous Union).

53. *R v Setiadi* [2006] NZHC 619 (Unreported, 1 June 2006, Priestly J).

54. These facts are taken from *ibid*.

55. Bernadette McSherry and Miriam Cullen, 'The Criminal Justice Response to Trafficking in Persons: Practical Problems with Enforcement in the Asia-Pacific Region' (2007) 19(3) *Global Change, Peace and Security* 205, 218.

56. For an overview of such theories see Simon Bronitt and Bernadette McSherry B, *Principles of Criminal Law* (2nd ed, 2005) 51ff.

... in the present context, the criminal law should not be the exclusive bastion of sex-trafficking and slavery with labour-trafficking and slavery perceived as less serious and not warranting any police or governmental inquiry.

the criminal law for circumstances in which our sensitivities have been deeply offended, that is, when, in addition to setting things right, we want to make an issue of condemning the behaviour.⁵⁷

In the slavery and trafficking context the moral wrong by which society is 'deeply offended' has generally related to slavery and trafficking for sexual purposes. During the drafting of the UN Protocol, two movements developed as to the scope of the definition of trafficking; one movement rejected any definition that would aid in regulating or legalising prostitution and the other, which accepted prostitution as sex work, focused on the labour and other rights of sex workers and the need to protect victims of forced labour.⁵⁸ As Jyoti Sanghera has pointed out, the 'sex wars transmute into the anti- trafficking arena'.⁵⁹ The final definition of trafficking in persons represents a compromise of these positions.⁶⁰

In Australia, from all sides of the political spectrum, the justification for the introduction of trafficking offences rested upon outlawing a moral wrong more than any other factor. This is apparent from the political debate itself. In the second reading speech of the Criminal Code Amendment (Trafficking in Persons Offences) Bill 2005, Senator Ellison described trafficking in persons as 'abhorrent',⁶¹ and in the debate that ensued Senator Greig described it as an 'insidious trade in human misery',⁶² with Senator Santoro adding that 'it offends every moral principle'.⁶³ Interestingly, however, Senator Nettle noted the emphasis on sex-trafficking in the debate, and found the Bill to be inadequate. She was one of few to point out that '[p]eople are trafficked to provide labour and there is evidence that this extends to the construction industry, clothing and textiles, [and] domestic work'. Parliamentary debate was emotive and emphasised trafficking in persons as a moral wrong, but in doing so it allowed this factor to dominate the discussion, understating, if not completely ignoring, other fundamental considerations.

It is important to emphasise that the United Nations *Convention against Transnational Organized Crime* and its Protocols as well as the respective trafficking and slavery offences in the *Criminal Code* (Cth) are broadly framed and are not couched in terms of moral wrongs. This is not to dispute that there are moral wrongs inherent in the offences of slavery and trafficking in persons; rather, there is no legislative reason to limit the investigation and prosecution of such offences to sexual slavery and trafficking.

The broad scope of the definition of slavery in *Wei Tang* means that the sphere of analysis can now be broadened so that labour-trafficking and slavery can be perceived as equally serious offences and thus warrant further investigation and inquiry. The perception of slavery and trafficking in persons as primarily a moral wrong oversimplifies what is an innately complex issue. This framework contributes to the reinforcement of an oversimplified (if not false) dichotomy of innocent victims and evil others, when the reality of trafficking in persons is far more complex.⁶⁴

An additional purpose of the criminal law other than enforcing morals and the prevention of harm was identified over half a century ago as being that of encouraging social welfare.⁶⁵ Anders Vilhelm Lundstedt has argued that the criminal law has a role in encouraging 'a general sense of security as concerns enterprising activities as well as other modes of action not harmful from a social point of view'.⁶⁶ Such security includes:

the greatest possible freedom of action and movement, therein also including limitation of the amount of work a person may be required to do within a specified period of time.⁶⁷

This social welfare approach to the purpose of the criminal law has found favour with those arguing for the criminalisation of certain corporate activities. For example, Lawrence Friedman has argued that the criminal law establishes the standards by which persons and goods should be properly valued.⁶⁸ Criminal liability thus:

...expresses the community's condemnation of the wrongdoer's conduct by emphasizing the standards for appropriate behaviour – that is, the standards by which persons and goods properly should be valued.⁶⁹

In this sense, Friedman views criminal liability as 'establishing goodness' by reinforcing community values.⁷⁰ Similarly, Nicola Lacey has framed the concept of criminal law as a protector of community values as follows:

The criminal law can be conceived as a set of norms backed up by the threat and imposition of sanctions, the function of which is to protect the autonomy and welfare of individuals and groups in society with respect to a set of basic goods, both individual and collective.⁷¹

In terms of 'welfare' Lacey explains that this refers to 'the fulfilment of certain basic interests such as maintaining one's personal safety, health and capacity to pursue one's chosen life plan [meaning] ...basic goods: health, physical security and so on'.⁷²

57. Harry J Glasbleek, 'Occupational Health and Safety Law: Criminal Law as a Political Tool' (1998) 2 *Australian Journal of Labour Law* 1, 19.

58. Bernadette McSherry and Susan Kneebone, 'Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights' (2008) 12(1) *The International Journal of Human Rights* 67.

59. Jyoti Sanghera, 'Unpacking the Trafficking Discourse', in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds), *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work and Human Rights* (2005) 4.

60. Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975, 986.

61. Commonwealth, *Parliamentary Debates, Senate*, 8 December 2004, 2 (Chris Ellison, Minister for Justice and Customs).

62. Commonwealth, *Parliamentary Debates, Senate*, 20 June 2005, 72 (Brian Greig, Democrats).

63. Commonwealth, *Parliamentary Debates, Senate*, 20 June 2005, 79 (Santo Santoro, Liberal Party).

64. Jo Doezema, 'Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy' in Kamala Kempadoo and Jo Doezema j (eds), *Global Sex Workers: Rights and Resistance* (1998) 43.

65. Anders Vilhelm Lundstedt, *Legal Thinking Revised* (1956).

66. *Ibid* 138.

67. *Ibid* 140.

68. Lawrence Friedman, 'In Defence of Corporate Criminal Liability' (2000) 23 (3) *Harvard Journal of Law and Public Policy* 833, 843.

69. *Ibid*.

70. *ibid*.

71. Nicola Lacey, *State Punishment* (1988) 104–105.

72. *Ibid* 104.



Slavery and trafficking in persons involves the deprivation of basic rights or needs such as food and the right to liberty and security of persons. The relevance of conceptualising slavery and trafficking in persons in this way is that it highlights the protective role of the criminal law and gives added impetus to pursuing criminal law sanctions where basic needs have been deprived. Thus, in the present context, the criminal law should not be the exclusive bastion of sex-trafficking and slavery with labour-trafficking and slavery perceived as less serious and not warranting any police or governmental inquiry.

Conclusion

The differing approaches to the investigation of the cases of *Aprint* and *Wei Tang* set out in the introduction raise concerns that the focus in relation to offences of slavery and trafficking in persons has been too much on sexual exploitation. The UN Protocol and the offences set out in the *Criminal Code* (Cth) encompass forced labour and debt bondage that go beyond sexual servitude.

While Chief Justice Gleeson in *Wei Tang* pointed out that there may be a distinction between slavery and harsh and exploitative conditions, the majority decision opens the way for the prosecution of employers who

control the movement of their workers and provide inadequate payment for their services.

Those who are victims of labour-trafficking and slavery are largely invisible, tend to work in isolation, often have limited proficiency in English and limited interaction with the general populace and are thus usually voiceless and vulnerable. If the purpose of the criminal law is taken to be not only to punish moral wrongs; but also to preserve and encourage social welfare, then forced labour, slavery and debt bondage for both sexual as well as other services should be subject to investigation and prosecution.

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