

# *Trafficking in Persons: A Critical Analysis of the New Criminal Code Offences*

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## **Introduction**

Trafficking in persons for the purpose of sexual and other forms of exploitation is not new, but attempts to address this problem comprehensively on an international, regional and national basis are relatively recent. Responses have generally focused on the investigation and prosecution of trafficking offences (Mameli 2002; Obakata, 2005), although there is now a growing emphasis being placed on the human rights dimensions of trafficking (Maltzahn 2001; Carrington & Hearn 2003; Costello 2002; Moyle 2002; Carrington 2004; Todres 2006) as well as forced labour and migration approaches to the problem (Grewcock 2003; Macklin 2003; Gallagher 2004; Haynes 2004; Lee 2005).

Mike Grewcock (2003) and Marie Segrave (2004) have highlighted the problems associated with focusing on law enforcement endeavours to combat trafficking in persons rather than on human rights issues or the social dynamics of migration. While this article is predominantly concerned with the Australian Government's criminal justice response to trafficking, it is important to emphasise that combating trafficking in persons must not be viewed as a matter for a criminal justice approach alone. As Segrave (2004:90) has pointed out, the prosecution of traffickers provides a short term approach to addressing the issue and will ultimately fail unless the conditions that lead to the commission of trafficking offences are addressed.

It is difficult to pinpoint the number of people trafficked into Australia each year, with varying estimates in relation to trafficked women ranging from a handful to over a thousand (Parliamentary Joint Committee of the Australian Crime Commission 2004:vii and 20–21), but Andreas Schloenhardt (2001:347) suggests that Australia is among the major destination countries for trafficking of persons in the Asia-Pacific region because of its wealth, stable economy and geographical proximity. A United Nations Office on Drugs and

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Crime Report (2006:20) rates Australia's incidence of reported trafficking (in the context of being a destination country) as 'high'.

The death of Puangthong Simaplee in the Villawood Detention Centre on 26 September 2001 highlighted the lack of a coordinated response in relation to the trafficking of women into Australia for sexual purposes (Carrington & Hearn 2003:13). Puangthong Simaplee was found by immigration officers during a raid on a brothel. She reportedly told officials that she had been sold by her parents at the age of 12 to traffickers in her home village in Thailand and trafficked to Australia as a prostitute two years later (Devine 2003). She was 27 and weighed only 31 kilograms when she was taken to the Villawood Detention Centre. She died three days later. An autopsy indicated that she had died from the 'consequences of heroin withdrawal', exacerbated by malnutrition and pneumonia (Devine 2003). At a subsequent coronial inquest, the Deputy Coroner for New South Wales urged law enforcement authorities to address the trafficking of women into sexual services with 'vigour and appropriate resources' (Deputy State Coroner 2003:2).

Since then, a number of governmental agencies have been given the responsibility of combating the trafficking of women in Australia, with the primary focus being on law enforcement solutions (Australian Government 2004). The agencies include the Australian Crime Commission, the Australian Federal Police's Transnational Sexual Exploitation and Trafficking Team, the Commonwealth Department of Immigration, Multicultural and Indigenous Affairs, the Commonwealth Attorney-General's Department, the Office of the Status of Women, and AusAID, as well as state, territorial and local governments.

The most recent international initiative for the eradication of trafficking is the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (the UN Protocol), which supplements the *Convention against Transnational Organised Crime*. The UN Protocol sets out a definition of 'trafficking in persons'. Moreover, it strengthens avenues for border control and responses by the judiciary and establishes prevention policies. Australia signed the UN Protocol on 11 December 2002, and subsequently passed amendments to the *Criminal Code* (Cth) in order to ratify it. The latter was done on 14 September 2005.

The Australian government has also been involved in the 'Bali Process' — a program of practical cooperation with co-host Indonesia and 40 other Asian and Pacific countries resulting from the Regional Ministerial Conferences on People Smuggling, Trafficking in Persons and Related Transnational Crime held in Bali in February 2002 and again in April 2003. The Conferences provided added impetus for the enactment of national legislation to criminalise people smuggling and trafficking in persons.

Division 271 of the *Criminal Code* now contains new trafficking and 'debt bondage' offences. This article analyses the main trafficking offences and argues that, while they are certainly a step in the right direction, there are certain anomalies in the provisions which raise the question as to whether they comply with the UN Protocol. The drafting of the offences is also problematic when seen in the context of the *Criminal Code* as a whole.

## The Legislative History

In 1990, the Australian Law Reform Commission recommended that four nineteenth century Imperial Acts dealing with slavery be replaced by legislative provisions. The Commonwealth Government introduced the Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1998 on the basis of a Discussion Paper on the topic by the Model

Criminal Code Officers Committee. That Bill lapsed when a General Election was called (Norberry & Guest 1999:5).

In November 1998, the Model Criminal Code Officers Committee delivered its report on *Offences Against Humanity: Slavery* and recommended that a new Division be inserted into the *Criminal Code* (Cth) criminalising slavery and sexual servitude. A further Bill was introduced in 1999 based on the Final Report. This Bill increased the suggested penalties, amended the definitions of slavery offences and sexual servitude offences and added recklessness as a fault element to the sexual servitude offences (Norberry & Guest 1999:6).

As a consequence, the *Criminal Code Amendment (Slavery and Sexual Servitude) Act* 1999 added Division 270 to the *Criminal Code* which set out offences of deceptive recruitment into sexual services (s270.7), causing another person to enter into or remain in sexual servitude (s270.6) and slavery (s270.3).

While these provisions touched on aspects of trafficking in persons, the sexual servitude offences focused on deceiving individuals in relation to the fact that they would be providing sexual services. The sexual servitude provisions have been criticised as being of limited scope (Carrington & Hearn 2003:9). This is because it appears that the majority of trafficked sex workers into Australia in fact know that they will be providing sexual services, but are deceived as to the nature of the debt owed, the numbers of clients they must see and/or the range of services they must perform (Parliamentary Joint Committee of the Australian Crime Commission 2004:52). On the other hand, there have been two successful prosecutions for slavery offences in Australia against two women who were party to an international scheme which involved bringing Thai women from Thailand to Australia to work as prostitutes in licensed brothels in Sydney and Melbourne (*R v DS; R v Wei Tang*).

The *Criminal Code* also contains the offences of people smuggling (s73.1) and aggravated people smuggling (s73.2). The latter offence encompasses causing the victim of people smuggling to enter into slavery or sexual servitude. These offences were inserted into the *Criminal Code* by the *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act* 2002.

While there may be a link between smuggling and trafficking, they are two distinct offences. In general, smuggling involves delivering persons into the country they wish to enter illegally and then leaving such persons to their own devices (Haynes 2004:232; Fergus 2005:3). Trafficking, in comparison, involves some form of coercion or deception, with persons being moved across borders for the purposes of exploitation. The problems with defining trafficking are explored in the next section.

In June 2004, the Parliamentary Joint Committee of the Australian Crime Commission released the Report of its *Inquiry into the Trafficking of Women for Sexual Servitude*. The Committee found that these existing offences did not 'adequately reflect the realities of the trafficking trade' (2004:52) and recommended that there be a speedy review of the measures needed to ensure the legislation complied with the UN Protocol (2004:54).

The Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 (Cth) was then drafted and referred to the Senate Legal and Constitutional Legislation Committee for an inquiry and report within a month. The Committee received 18 submissions and interviewed 15 members of governmental and non-governmental organisations working in the area. It recommended a number of changes to the Bill as well as suggesting that the Bill be subject to further and wider consultation, including analysis by the Model Criminal Code Officers Committee (2004:vii). The reason why advice from the Model Criminal Code Officers Committee was not sought in the first instance was said to be on the basis that the

Committee's focus is on the development of legislation that is designed to be implemented by the states and territories (Official Committee Hansard 2005:40). This explanation, however, ignores the body of work generated by the Committee in relation to federal offences including its Discussion Paper and Report on offences against humanity including slavery.

A number of amendments were made as a result of the Committee's report and the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* was finally assented to on 6 July 2005. The Act added a new Division 271 dealing with Trafficking and Debt Bondage to the *Criminal Code*, and amended the existing sexual servitude offences to include deception as to the fact that the engagement for sexual services would involve exploitation, debt bondage or the confiscation of the person's travel or identity documents.

The next section of this paper deals with some of the problems associated with defining trafficking legislatively in domestic criminal law in general and the *Criminal Code* in particular.

## Problems With Defining Human Trafficking

Defining 'trafficking' has been fraught with difficulties partly because of the continuing debates about whether women trafficked into the sex industry should be seen as victims or independent agents acting in their own interests or some combination of these two approaches (Simm 2004). Article 3(a) of the UN Protocol sets out a definition of 'trafficking in persons' as follows:

'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of 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.

This definition can be broken down into three key elements (Gallagher 2003):

1. conduct associated with moving people (across or within borders);
2. involving coercive or deceptive means;
3. for the purpose of exploitation.

The definition of 'trafficking in persons' in the UN Protocol marked a significant step away from previous definitions that linked trafficking offences solely with the provision of sexual services. For example, the title of the 1949 *Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others* clearly pointed to a relationship between the two. By including the terms 'forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs', the UN Protocol definition emphasises that exploitation may take on a variety of forms other than prostitution. However, the title of the UN Protocol emphasises the trafficking of women and children. It has therefore been criticised as being somewhat ambiguous in its focus (Munro 2005:96).

In order to ratify the UN Protocol, Canada, New Zealand and the United Kingdom as well as Australia have recently introduced domestic offences of trafficking in persons. The Canadian provision does not use exactly the same language as the UN Protocol, but

attempts to capture the three key elements. Section 279.01(1) of the *Criminal Code* (Canada) states that:

Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person (*conduct associated with moving the person*) or exercises control, direction or influence over the movements of a person (*coercion*), for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence (*purpose of exploitation*) [commentary added].

Section 98D(1) of the *Crimes Act* 1961 (NZ), as inserted by the *Crimes Amendment Act* 2002 (NZ), contains the elements of conduct associated with moving the person and coercion or deception, but omits to mention any purpose of exploitation. Section 4 of the *Asylum and Immigration (Treatment of Claimants, Etc) Act* 2004 (UK) sets out three scenarios which contain the elements of conduct associated with moving the person and the purpose of exploitation, but omits any mention of coercion. Sections 57, 58 and 59 of the *Sexual Offences Act* 2003 (UK) contain offences of trafficking for the purpose of sexual exploitation, but these also omit the element of coercion.

The fact that these three countries have taken different approaches to defining the offence of trafficking shows the difficulties with drafting a provision that complies with the UN Protocol. It is arguable that the Canadian approach best attempts to capture the three key elements, although even with this provision, there is no mention of deception and 'control, direction or influence' seems a little weaker than the term 'coercion'. The Canadian provision also uses the word 'or' between the element of conduct associated with moving the person and the element of exercising control, direction or influence which seems to imply that the latter element is not essential for establishing the offence.

The Australian approach to defining trafficking goes far beyond the relatively minimalist approaches set out in Canada, New Zealand and the United Kingdom. Section 271.2 of the *Criminal Code* sets out a complex list of eight different scenarios in relation to international trafficking (s271.5 deals with the offence of domestic trafficking in persons), each of which can amount to an offence of trafficking. The draft s271.2 set out in the original Bill contained just two scenarios. After the Legal and Constitutional Legislation Committee expressed concern that the proposed offences did not meet the requirements of the UN Protocol (2005:9), the Commonwealth Parliamentary Counsel was instructed presumably to add six more scenarios rather than amend the two main offences or simply re-iterate the UN Protocol's definition.

The common element for ss271.2(1), (1B), 272.2(2) and (2B) is that the offender 'organises or facilitates the *entry* or proposed entry, or the receipt, of another person into Australia' (emphasis added) whereas the common element in ss271.2(1A), (1C), 271.2(2A) and (2C) is that the offender 'organises or facilitates the *exit* or proposed exit of another person from Australia' (emphasis added). Each section then contains extra elements that need to be proved. Sections 271.2(1) and (1A) encompass the use of force or threats to gain compliance; ss271.2(1B) and (1C) deal with recklessness as to whether the other person will be exploited; ss271.2(2) and (2A) cover deception as to the provision by the other person of sexual services, or exploitation, or debt bondage or the confiscation of travel or identity documents; and finally, ss271.2(2B) and (2C) encompass the situation of deception relating to the nature and extent of sexual services to be provided or the existence or quantum of debt owed. The penalty for these provisions is imprisonment for 12 years.

Section 271.3(1) delineates an aggravated offence of trafficking. This will be established if one of the eight scenarios is proven plus circumstances exist where the offender intends that the victim will be exploited or the victim is subjected to cruel, inhuman or degrading

treatment or the accused engages in conduct that gives rise to a danger of death or serious harm to the victim and is reckless to that danger. The penalty is imprisonment for up to 20 years.

A major difference between these offences and the UN Protocol is that the three key elements listed above are not found in every offence. For example, ss271.2(1) and (1A) criminalise conduct associated with moving persons with the use of force or threats, but without including the third element of the purpose being for exploitation. Similarly, ss271.2(1B) and (1C) criminalise conduct associated with moving persons together with recklessness as to exploitation, but without the element of coercion or deceptive means.

In their submissions to the Legal and Constitutional Legislation Committee, both the Human Rights and Equal Opportunity Commission and World Vision pointed out that these offences blur the difference between trafficking and smuggling (Legal and Constitutional Legislation Committee 2005:8). As a consequence, these offences extend to circumstances beyond the UN Protocol's definition of trafficking.

The Attorney-General's Department's response to this criticism was that all the trafficking offences 'require the use of force or threats, or the use of deception about certain matters, including that the victim will be exploited' (Legal and Constitutional Legislation Committee 2005:8). However, this is certainly not clear from the wording of the sections. The Committee recommended that the offences be amended to require that the conduct to be proscribed be undertaken for the purpose of exploitation (2005:9). This recommendation was not followed.

Sections 271.2(1B) and (1C) which omit the element of coercion were not in the Bill considered by the Committee and therefore were not subject to scrutiny. These offences certainly overlap with the offence of smuggling, adding fuel to the argument that it remains doubtful whether the offences as drafted meet the requirements of the UN Protocol.

Section 271.2(1), as originally drafted in the Bill, required that the use of force or threats resulted in obtaining the victim's consent. This was inconsistent with Article 3(b) of the UN Protocol which states that the consent of a victim to the intended exploitation is irrelevant where any of the means set out in the definition have been used. The Committee recommended that any reference to the consent of victims be removed (2005:7).

Sections 271.2(1) and (1A) now refer to the use of force or threats resulting in the victim's 'compliance' in respect of the entry or exit offered. This means that the focus in a trial can still shift to the victim and what constitutes his or her 'compliance' rather than simply criminalising the accused's actions. 'Compliance' is left undefined, but as one of the synonyms for compliance in *Roget's International Thesaurus* is consent (Kipfer 2001:338), the underlying problem of these sections' incompatibility with the UN Protocol remains.

Sections 271.2(1B) and (1C) of the *Criminal Code* refer to the accused being 'reckless as to whether the other person will be exploited, either by the accused or another'. The Dictionary in the *Criminal Code* then includes a definition of exploitation as occurring where:

- (a) the exploiter's conduct causes the victim to enter into slavery, forced labour or sexual servitude; or
- (b) the exploiter's conduct causes an organ of the victim to be removed and:
  - (i) the removal is contrary to the law of the State or Territory where it is carried out; or

- (ii) neither the victim nor the victim's legal guardian consented to the removal and it does not meet a medical or therapeutic need of the victim.

This definition echoes that of the UN Protocol while going into somewhat more detail concerning organ removal.

'Forced labour' is defined in s73.2 to mean:

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

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

Most of the other offences, however, focus on exploitation in relation to the provision of sexual services. Section 270.7(1) sets out an offence of deceptive recruiting for sexual services while ss271.2 (2), (2A), (2B) and (2C) all relate to deception in relation to the provision of sexual services. In practice, this may mean that the Australian Federal Police will concentrate their prosecutions on trafficking in relation to the recruitment and provision of sexual services, rather than casting the net more widely.

## Problems with Drafting and the Criminal Code Framework

In recent years, the *Criminal Code* (Cth) has expanded markedly with the addition of a range of different offences. For example, in 2002, the Australian Government inserted approximately 100 new offences into the *Code* under the headings of terrorism, genocide, crimes against humanity and war crimes. These crimes attempted to encapsulate customary international law doctrines which rest on different principles to that of domestic criminal laws and sometimes the drafting led to anomalies when viewed in the context of the sections setting out the General Principles in Chapter 2 of the *Code* (McSherry 2004).

The drafting of the trafficking offences also raises concerns about the 'fit' between them and the sections dealing with physical and fault elements, absolute liability, inchoate offences and jurisdiction. These will be dealt with in turn.

### *Physical and Fault Elements*

The traditional view of the elements of serious offences is that they consist of two elements: a physical (or external) element — the 'actus reus' — and a subjective fault element — the 'mens rea'. This principle was set out by the High Court in *He Kaw Teh v The Queen* and it finds its way into the *Criminal Code* by way of s3.1(1) in Chapter 2, which states that 'an offence consists of physical and fault elements'. Section 3.2 then requires proof of a fault element 'in respect of each such physical element'.

The trafficking offences in s271.2 do not use the customary words denoting fault elements such as 'intention' or 'recklessness' in relation to organising or facilitating the movement of people into or out of Australia or the use of force, threats or deception. Recklessness is mentioned only in relation to whether the victim will be exploited.

Without a fault element attached to organising and facilitating the movement of people and the use of force, threats or deception, the offences do not comply with the general principle that the prosecution must prove both a subjective fault element and physical element for serious offences.

However, s5.6 of the *Criminal Code* imports a subjective fault element in the absence of an offence creating one. That section states that '[i]f the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element'. It could be argued that 'organising or facilitating' the movement of others is conduct which will have the subjective fault element of intention attached to it pursuant to s5.6.

All this seems rather convoluted. Ian Leader-Elliott (2002:93) has pointed out that '[t]he legislature would be expected to displace most of the applications of s 5.6 by specific provisions dealing with fault'. Why a fault element was not specified in relation to the physical acts in the offences of trafficking is unclear.

The other anomaly is that s271.2(3) states that 'absolute liability applies to paragraphs (1)(c) and (1A)(c) which relate to the use of force or threats to obtain the victim's compliance. This requirement seems inordinately strange to domestic criminal lawyers. Having a strict liability paragraph within an offence is disconcerting for criminal lawyers because the term 'strict liability' has traditionally applied to legislative offences as a whole, rather than to paragraphs within them. For example, JC Smith (2002:115) writes that '[c]rimes which do not require intention, recklessness or even negligence ... are known as offences of strict liability ...' (emphasis added). There is no reference to strict liability paragraphs. This is reflected in s6.2(1) of the *Criminal Code* (Cth) which refers to offences of absolute liability.

It could be argued that s6.1(2) of the *Criminal Code* opens the way for this unusual treatment of strict liability by stating that:

If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:

- (a) there are no fault elements for that physical element; and
- (b) the defence of mistake of fact under s 9.2 is available in relation to that physical element.

However, absolute liability makes no sense in relation to proof of causation which is what s271.2(3) requires. A fault element is irrelevant to whether or not a person's consent *resulted* from the use of force or threats; nor is there any defence of mistake of fact. Section 5.6 presumably still requires that the use of force or threats is made intentionally and this is borne out by the Attorney-General Department's submission that 'absolute liability is applied only in a limited way to particular elements in two offences where the offender has *intentionally* used force or threats' (Legal and Constitutional Legislation Committee 2005:27). The Attorney-General's Department has indicated that s271.2(3) means that the prosecution does not have to prove that the accused was aware that the force or threats would result in obtaining the victim's compliance (Legal Constitutional Legislation Committee 2005:27). Section 5.3 of the *Criminal Code* states that the fault element of 'knowledge' applies where a person is aware that a result exists or will exist in the ordinary course of events. However, since knowledge has not been specified in the trafficking offences, it seems nonsensical to have a separate section excluding awareness. The drafting of the fault elements of these provisions therefore leaves a lot to be desired.

### ***The Overlap with Inchoate Offences***

In its *Offences Against Humanity, Slavery* Report, the Model Criminal Code Officers Committee pointed out that there was an overlap between their proposed sexual servitude offences and inchoate offences (attempts, incitement and conspiracy) (1998:18ff). The

Committee recommended the use of the word 'recruit' because it implies that the consequence or result actually intended must have happened.

The new trafficking offences use the words 'organises or facilitates'. It is unclear how these offences tie in with ss11.2(1) and 11.2(1) of the *Criminal Code* which deal with inchoate offences.

The three main inchoate offences are treated as substantive crimes in themselves, separate from the completed offences at which they are aimed. In general, the common thread among these crimes is that there can be a conviction even though the substantive offence that was intended is not completed and no apparent harm is caused. The doctrine of attempts is designed to punish those who intend to commit a crime and who perform acts that are more than merely preparatory to the crime. The offence of attempting to commit a crime is set out in s11.1 of the *Criminal Code*. Section 11.1(2) requires that for the accused to be found guilty, 'the person's conduct must be *more than merely preparatory* to the commission of the offence' (emphasis added).

Peter Glazebrook (1969) has criticised the doctrine of attempts as broadening the scope of criminal responsibility too far because it has a vague physical element incapable of definition. He argues that there is in fact no need for a generalised offence of attempt. The words 'organise' and 'facilitate' in the new trafficking offences are also vague in relation to the physical element. 'Organise' seems to indicate some form of conduct beyond the merely preparatory such as arranging for transport or communicating in some way with others who can supply transport. It may be that it is possible to come up with a notion of conspiring, inciting or attempting to organise trafficking, although the concept of double inchoate crimes is certainly open to criticism (Robbins 1989). 'Facilitate', however, could mean anything and it is difficult to imagine what would be encompassed by *attempting* to facilitate trafficking. It is also unclear what aiding, abetting, counselling or procuring the facilitating of trafficking would include. Perhaps the use of the word 'facilitate' should be seen in the context of the current trend amongst developed nations to broaden the scope of the criminal law to include offences of planning and preparation, particularly in relation to terrorism offences (McSherry 2004). A body of jurisprudence has yet to develop as to the precise scope of such offences.

The Attorney-General has confirmed that inchoate offences still apply to trafficking offences (Legal and Constitutional Legislation Committee 2005:24), but the way in which the proposed offences are worded may cast the net too far and encroach upon the pre-existing inchoate offences. It would perhaps have been preferable to follow the UN Protocol in using such words as recruitment, transportation, transfer, harbouring or receipt rather than relying on the vague terms 'organise' and 'facilitate'.

### ***Jurisdiction***

In domestic criminal law, the traditional 'territorial' approach has been that all crime is local and a state should only exercise its powers to prosecute offenders where the offence was committed within its geographical boundaries. However, ss15.2 to 15.4 of the *Criminal Code* (Cth), which were inserted by s12 of the *Criminal Code (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth) dramatically broaden the scope of criminal jurisdiction.

Jurisdiction is now classed into Categories A to D. Category A covers Australian citizens anywhere in the world, subject to a foreign law defence (that is, it is a defence if there is no crime in the foreign jurisdiction which corresponds to the Commonwealth offence); Category B covers Australian citizens or Australian residents anywhere in the world, subject to a foreign law defence; Category C covers anyone anywhere regardless of

citizenship or residence, subject to a foreign law defence; and Category D covers anyone anywhere regardless of citizenship or residence.

Category D jurisdiction appears to reflect the international law concept of 'universal jurisdiction', the scope of which has been the subject of much academic debate. Whether or not extended geographical jurisdiction is absolute or conditional on the apprehension of the accused within the country concerned is unclear (Cassese 2003:284ff). However, it certainly has the broadest sweep of the categories subject to the limitation contained in s16.1 of the *Criminal Code* (Cth) that if the conduct constituting the offence occurs wholly in a foreign country, the Attorney-General must give written consent before the prosecution can take place.

Section 271.10 refers to Category B jurisdiction for the eight international trafficking scenarios. This means that prosecutions for trafficking will be confined to Australian citizens and residents. Section 254A of the *Migration Act* 1958 (Cth) states that a resident of Australia has the same meaning as in the *Shipping Registration Act* 1981 (Cth). Section 3(3)(a) of the latter Act defines an Australian resident as a person whose *permanent* place of abode is in Australia. Thus, Category B jurisdiction appears to exclude the prosecution of a foreign national whose permanent place of abode is not in Australia.

Category B jurisdiction seems unduly restrictive given that other recent offences such as terrorist offences, war crimes and crimes against humanity are able to operate extraterritorially under Category D jurisdiction (McSherry 2004:367–368; Bronitt & McSherry 2005:857ff). It means that prosecutions cannot be brought against foreign nationals trafficking persons into Australia which seems to go against the purpose of the UN Protocol.

When this criticism was brought to the attention of the Legal and Constitutional Legislation Committee, the Attorney-General's response was that 'Category D offences are generally restricted to the most serious international offences ... for which specific resources are available for investigations and prosecutions' and that 'there are very many serious crimes under Commonwealth law to which Category D jurisdiction has not been applied' (Legal and Constitutional Committee 2005:25).

Unfortunately this seems to imply that trafficking in humans is not viewed by the government as one of the most serious international offences. This goes against the view that trafficking is a crime against humanity (Obokata 2005). For example, in the case of *Prosecutor v Kunarac* the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia held that enslavement is a crime against humanity and that it includes the trafficking of humans. Article 7(2)(c) of the Rome Statute of the International Criminal Court also defines enslavement as 'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power *in the course of trafficking* in persons, in particular women and children' (emphasis added). The Attorney-General's response thus contradicts the government's efforts to address the problem. It also ignores the existence of the Australian Federal Police's Transnational Sexual Exploitation and Trafficking Team which demonstrates that specific resources have been made available to combat trafficking.

This restriction on jurisdiction means that the focus of prosecutions will be on Australian citizens and permanent residents working within Australia rather than on Australian citizens and foreign nationals working abroad to traffick people into Australia. An opportunity has been missed to place trafficking humans on the same jurisdictional level as terrorist offences and other serious international crimes.

## Conclusion

The new *Criminal Code* offences are obviously a step in the right direction towards combating trafficking in persons. Having such legislative provisions in place may go some way toward preventing a repeat of the appalling circumstances surrounding the death of Puangthong Simaplee. The broad definition of exploitation to include forced labour is also welcome as it provides an opportunity for the gathering of information in relation to the trafficking of persons 'to work in a wide range of industries, including agriculture and construction' as well as for sexual services (Burn et al 2005:543).

However, the way in which the current trafficking provisions are drafted leaves a lot to be desired in the context of the *Criminal Code* as a whole and may mean that prosecutors will find it difficult to bring successful charges against those trafficking persons into Australia. Although investigations may be extra-territorial, the jurisdictional limit will undoubtedly mean those resident in Australia will be the focus of prosecutions. The complexity of the provisions also raises doubts as to whether they actually comply with the UN Protocol.

In a broader context, trafficking in persons should be viewed not only as a criminal justice issue, but also as a subset of 'forced' (illegal and involuntary) migration that characterises recent international migration patterns (Grewcock 2003). It should also be viewed as a human rights issue because such conduct poses a serious threat to the promotion and protection of human rights. The benefit of a human rights approach is that it treats those trafficked as victims rather than as criminals who violate national immigration laws and it provides a framework for exploring the conditions that may give rise to trafficking such as poverty (Obokata 2003:411; Fergus 2005:8), unemployment, discrimination and persecution.

If too much emphasis is placed on trafficking in persons as a criminal justice problem, there is a danger that the victim will be seen purely as a witness for the prosecution (Segrave 2004). Many victims are afraid to cooperate with the police due to a fear of reprisals by traffickers (Somerset 2001:8). It is important that measures exist to ensure that victims can remain in the country at the very least while investigations or proceedings are taking place and that they be offered access to interpreters, legal advice and medical assistance. The new visa regime that was introduced in January 2004 which includes bridging visas of 30 days and witness protection visas provide some support for victims (Australian Government 2004:12), but it remains the case that 'access to victim support services is contingent on whether or not a trafficked person is deemed to be a good witness, not on the person's status as a victim' (Burn et al 2005:550). Witness protection visas may also be of limited value where there is no guaranteed migration outcome for assisting prosecutors (Carrington 2004:63).

The framework for prosecutions for trafficking in persons is now in place in Australia, but the criminal justice response must be supplemented by human rights and migration perspectives for a more complete understanding of why trafficking in persons occurs in order to work towards its prevention.

## Cases

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