Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Human trafficking and a human rights response

Assessing recent legislative amendments

July 2012

Suite 5, Level 7, 189 Kent Street, Sydney NSW 2000 GPO Box 7052 Sydney NSW 2001
DX 10126 Sydney Stock Exchange ABN 96 086 880 499

T + 61 2 9258 7700 **F** + 61 2 9258 7777 **E** enquiries@lawyersalliance.com.au **www.lawyersalliance.com.au**

OVERVIEW

The Australian Lawyers Alliance welcomes the opportunity to provide our Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012.*

The Australian Lawyers Alliance ("the ALA") is a national association of lawyers and other professionals dedicated to the protection and promotion of justice, freedom and the rights of the individual. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. We oppose oppression and discrimination and support democratic systems of government and an independent judiciary. We value immensely the right of the individual to personal autonomy in their lives.

The Australian Lawyers Alliance ("ALA") has considered the *Crimes Amendment (Slavery, Slave-like Conditions and People Trafficking) Bill 2012,* presently before the House of Representatives.

The purpose of this brief submission is to express the ALA's general support for the proposed amendments to the *Criminal Code Act 1995* (Criminal Code), the Crimes Act 1914, the *Migration Act 1958*, the *Proceeds of Crime Act 2002* and the *Telecommunications (Interception and Access) Act 1979* and to offer some brief recommendations in relation to the governments response to slavery, slavery-like offences and people trafficking.

1. INTRODUCTION

The ALA notes that 2007 marked the bicentenary of the abolition of the transatlantic slave trade throughout the then British empire, and 2008 marked the 60th anniversary of the recognition of the fundamental human right to freedom from

slavery and servitude.[1] Despite the abolition of legalised slavery more than 200 years ago[2], the reality is that modern day trade in human lives continues to thrive in the form of trafficking people for forced labour and sexual slavery. The ALA supports all efforts made by the Australian Government to deter and punish those involved in this heinous abuse of human rights and to ensure compliance with our international obligations.

Australia is a state party to the *United Nations Convention Against Transnational Organised Crime* (2000) and its *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (*Trafficking Protocol*) (2003). The *Trafficking Protocol* sets out the obligations of states to combat trafficking in persons and to support and protect victims. It is complemented by the *Recommended Principles and Guidelines* (*Guidelines*)[3] developed by the United Nations Office of the High Commissioner for Human Rights. The ALA believes that Australia's legal and policy framework should be consistent with Australia's obligations under the *Trafficking Protocol* and all other international human rights instruments to which Australia is a state party.[4]

---

[1] *Universal Declaration of Human Rights,* G.A Res. 217 (III), UN GAOR, 3d Sess., Supp. No.13, UN Doc. A/810 (1948)71 (*UDHR)*. Art. 4 holds that "(n)oone shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms'.

[2] *An Act for the Abolition of the Slave Trade* (UK), 47 Geo III Sess. 1 c. 36**,** 25th March 1807 (*Slave Trade Act)*. This Act abolished the practice of slavery and the trafficking of human slaves throughout the then British Colonies. In 1865, the United States f America formally abolished slavery through the introduction of the *13th Amendment* to the *Constitution of the United States of America*.

[3] Office of the United Nations High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking, Addendum to the Report of the United Nations High Commissioner for Human Rights*, UN ESCOR, Substantive Session 2002, UN Doc. E/2002/68/Add.1 (2002) (the *Guidelines*).

[4] Australia has also ratified other conventions that prohibit different forms of exploitation that may occur in a trafficking situation including slavery, debt bondage, forced labour, child labour and forced marriage. These include the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention on the Rights of Elimination of All forms of Discrimination Against Women* (CEDAW).

It is noted that the purpose of the Bill is to ensure the broadest range of exploitative behaviour is captured and criminalised, by introducing new offences of forced labour, forced marriage, and harbouring a victim, and by clarifying existing offences and their definitions to enhance operational effectiveness.[5] The ALA acknowledges that the proposed Bill marks the culmination of an extensive public consultation process.[6] Whilst the ALA has not directly taken part in this consultation process, we have taken a keen interest in this important issue. Moreover, many of our members have offered their support to those organisations who have taken a more active role in this consultation process.

The ALA notes that earlier this year the Government released the "Exposure draft - legislative amendments to Australia's people trafficking and slavery offences' and invited public comment on proposed amendments to the legislative framework criminalising people trafficking, slavery, slavery-like practices, and forced marriage. While the ALA did not make submissions to the Government at this time, the ALA has reviewed a number of the submissions made by other organisations at this time. The ALA takes this opportunity to commend the Government for the fact it has clearly taken on board many of the recommendations made during this process in drafting the proposed *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012.*

In relation to the proposed Bill, the ALA commends the Government on the following:

---

[5] Explanatory Memorandum, circulated by Authority Of The Attorney-General, The Hon Nicola Roxon MP) accessed on the Parliament of Australia Website, at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4840_ems_e18ea7e8-91f4-4c8d-958c-bddb635b505a%22;rec=0

[6] Including the development of the Australian Government's Plan to Eradicate Trafficking in Persons in 2003 (changed to the Anti-People Trafficking Startegy in 2009), the call for submissions to the Senate Legal and Constitutional Committee on the Criminal Code Amendment (Trafficking in Persons) Bill 2004, the establishment of the Australian Government's National Roundtable on People Trafficking in 2008, and the release of the *Criminal Justice Response to Slavery and People Trafficking; Reparation and Vulnerable Witness Protections* Discussion Paper in 2011.

a) Expansion of the existing 'servitude' offences (proposed section 270.5) to cover all forms of servitude regardless of whether they are sexual in nature and to include an offence of 'causing a person to enter or remain in servitude' (proposed section 270.5(1)) and 'conducting a business involving servitude' (proposed section 270.5(2)) and allowing an alternative verdict of 'forced labour';
b) New forced marriage offences (proposed section 270.7B);
c) A broad definition of 'marriage' or marriage-like relationship for the purposes of the new proposed provisions regarding forced marriage;
d) New 'forced labour' and 'deceptive recruiting for labour or services' offences (proposed section 270.6A and 270.7 respectively);
e) Introduction of new Organ trafficking offences (proposed Subdivision BA – Organ Trafficking, ss 271.7A – 271.7E);
f) A general consent provision which provides that the consent of victim is not relevant where force, coercion or deception have been used;
g) Broadening the circumstances under which a reparation order can be made.

However, the ALA does have some concerns in relation to some of the provisions in the Bill. These concerns are set out in the foregoing submissions. Moreover, the ALA has concerns about a number of matters that have not been addressed by the Government in proposing this Bill, including the need to implement victim support/compensation processes and schemes to compliment the proposed criminal amendments.

The ALA notes that the *Trafficking Protocol*, has two distinct aims. First, it sets out the international legal framework obliging states to comprehensively criminalise trafficking. The ALA believes that the proposed Bill is a significant step forward in Australia's efforts to comply with its international obligations. However, the Protocol also sets out several provisions acknowledging the paramount importance of protecting the human rights of victims of trafficking and providing reparation and compensation to these victims. It is the ALA's view that the human rights elements of the Protocol are equally significant to the criminalisation provisions.

The ALA acknowledges and commends the Government for the way in which it has engaged with civil society on the issue of trafficking and on the implementation of a number of important initiatives aimed at combating trafficking and supporting organisations working with victims. However, the ALA submits that the Government can and should be doing more to ensure adequate protection, support services and legal assistance is provided to victims and to ensuring adequate compensation is available to victims and witnesses. In particular, the ALA notes that there is currently no comprehensive framework for compensating victims of trafficking. Further, the current migration framework pertaining to victims of trafficking essentially provides that regular migration status and the provision of assistance to victims is largely contingent upon their willingness to contribute to criminal justice process. Accordingly, the ALA has included recommendations as to how Australia may adopt a more 'victim-centred' approach, as opposed to the predominant 'law and order' approach.

2. SUBMISSIONS

2.1. Amendments/Expansion Of The Existing Definition Section

The ALA notes that new section 270.1A provides definitions of the terms '*coercion*', '*conducting a business'*, '*deceive*', '*forced labour*', '*forced marriage*', '*servitude*', '*slavery*', '*slavery-like offence*' and '*threat*' for the purposes of Division 270 of the Criminal Code. The ALA welcomes the new definitions and wishes to make comment in relation to a number of them.

In relation to the proposed definition of 'coercion', the ALA is assured that it covers both the physical and non-physical means by which offenders obtain a victim's compliance.

Similarly, the ALA believes the proposed definition of 'threat' adequately recognises the fact that the express threat of force, the threat to cause the removal of a person from Australia or the express threat of any other detrimental action is not the only way in which offenders force their victims to comply. Rather, it recognises that threats can be express or implied, conditional or unconditional.

In relation to the term '*forced marriage*', the ALA notes that this term is defined as having the meaning given by new section 270.7A of the Criminal Code. New section 270.7A provides that a marriage is a forced marriage if *'because of the use of coercion, threat or deception, one party to the marriage (the victim) entered into the marriage without freely and fully consenting'.*

2.2 Introduction Of A General Provision In Relation To Consent:

The ALA welcomes the fact the proposed Bill has expressly provided that consent of an adult victim is irrelevant where means including force, threats or coercion have been used. This is in keeping with Article 3(b) of the *Trafficking Protocol.*

2.3 Extension Of The Existing Offenses

The ALA notes that the 2005 amendments to the *Criminal Code* (Cth) comprehensively criminalised trafficking in persons with a specific focus on sexual exploitation.[7] Division 271 sets out eight circumstances or acts which could amount to an offence of trafficking, including the transporting of victims for the purposes of exploitation.[8] Trafficking became a strict liability offence committed where the entry of a person into Australia is secured through use of threats or force or is secured as a result of deception as to the conditions of their stay/work and the fact that it will involve exploitation, debt bondage, provision of sexual services or the confiscation of their travel or identity documents.[9] An aggravated version of the basic trafficking offence occurred where a person has *intended* to subject the victim to exploitation upon arrival in Australia, or where a person subjects the victim to cruel, inhuman or degrading treatment, or where the person recklessly subjects the victim to danger of death or serious harm.[10] A separate aggravated offence also existed where the victim is under the age of 18 years.[11] Similarly, the division also created a basic

[7] These amendments were made in 2005 via the *Criminal Code Amendment (Trafficking in Persons Offences) Act* 2005 (Cth).
[8] see ss 271.2(1)(A)-(C))
[9] s271.2(2)
[10] s271.3 which carries a maximum penalty of 20 years imprisonment for the aggravated offence.
[11] s271.4 creates an offence where the victim is under the age of 18 and the person has facilitated entry into Australia and either intends or is reckless as to the fact the victim will

and an aggravated offence in relation to debt bondage.[12] The above-mentioned offences currently attract penalties ranging from 12 months to 25 years imprisonment.

The expansion of the existing provisions of deceptive recruiting and sexual servitude within the proposed Bill, so that they apply to non-sexual servitude and all forms of deceptive recruiting, is a significant step forward and will go some of the way to ensuring Australia is meeting its obligations under the *Trafficking Protocol.*[13]

The ALA believes that it is crucial that the Government continues its efforts to combat slavery, slave-like practices and trafficking within the sex industry; it is equally as important it directs its attention to other industries in which these types of activities/crimes occur.

Importantly, under the new subsection 270.4(3) it is recognised that a person may be in a condition of servitude whether or not escape from the condition is practically possible for the victim, or whether or not the victim attempted to escape. The ALA sees this as an important step forward in recognising the acute vulnerability of victims in these situations and the psychological restraint that may be exercised over them by their perpetrator.

Further, the ALA is pleased to see the word 'commercial' will be removed from the definition of '*sexual service*' in the Dictionary in the Criminal Code, for the purposes of the extended trafficking offences. The ALA agrees this will ensure that offences relating to exploitation through sexual services are broad enough to capture circumstances where sexual services are not provided for remuneration.

---

required to provide sexual services or will be otherwise exploited. With regard to victims under 18 it is not necessary to show there existed the use of threats or force and the consent of a child is no barrier to prosecution.

[12] The basic offence is set out in s271.8 and is accompanied by a maximum penalty of 12 months imprisonments. The aggravated offence is contained in s271.9 and applies where the victim is under the age of 18 and carries a subsequent penalty of two years imprisonment.

[13] See also United Nations Office on Drugs and Crime, *International Framework for Action to Implement the Trafficking in Persons Protocol* (2009), at 18.

In relation to the proposed aggravated offences (proposed section 270.8), the ALA welcomes the introduction of recklessness as the requisite intention, believing it is in line with international best practice and Australia's international obligations.

2.4 Extension Of Penalties Applicable To Debt Bondage Offences

The ALA supports the proposed increase of the penalty for the offence of debt bondage offence from 2 to 7 years and agrees that this increase reflects the serious nature of this offence.

2.5 The New Offences

2.5.1 Forced Labour

The ALA notes there has been a growing concern in relation to trafficking for the purposes of labour exploitation within Australia, particularly in the agriculture, construction, hospitality, manufacturing and domestic service industries.[14] In her report of 18 May 2012, the UN Special Rapporteur on Trafficking in Persons, Especially Women and Children, Ms Joy Ngozi, reported that in 2011, approximately 30 per cent of the 45 investigations carried out by the AFP related to trafficking for labour exploitation.

Under the International Labour Organisation Convention on Forced or Compulsory Labour (the ILO Convention), Australia has an obligation to 'suppress' forced labour. The ALA notes that under the Bill it will be an offence to cause a person to enter into or remain in forced labour (proposed subsection 270.6A (1)), to conduct a business involving forced labour (Proposed subsection 270.6A (2) and to engage in deceptive recruiting for labour or services (proposed section 270.7).

The ALA is of the view the introduction of the forced labour offences is a positive step forward in ensuring Australia is complying with its international obligations. The

[14] *United Nations General Assembly, Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Addendum. Mission to Australia, dated 18 May 2012, accessed at: www.ohchr.org/Documents/.../A.HRC.20.18.Add.1_En.PDF*

ALA notes that the Criminal Code already contains an offence with regard to deceptive recruiting for sexual services and welcomes the introduction of the new forced labour and deceptive recruiting offences as a means of ensuring those who are being exploited in other industries are afforded some protection. Importantly, the introduction of offences specific to forced labour means that authorities will no longer have to rely on the inadequate existing offences of slavery and debt bondage in their attempts to secure prosecutions of people engaging in practices of forced labour and will hopefully result in many more investigations and prosecutions.

The ALA submits that the introduction of these new criminal provisions need to be complimented by the introduction of services aimed at identifying and educating those migrant workers most at risk of exploitation, particularly those on subclass 457 Visa's. This will go some way towards ensuring a higher level of reporting of these types of criminal practices. The ALA submits that one of the ways the Government can adhere to its international obligation to stem forced labour is to ensure that community legal groups and legal aid services are adequately resourced to inform migrant workers of their rights. This will ensure these encourage these vulnerable people to speak out against the people who have taken advantage of them.[15]

The ALA notes that the Bill proposes to include an objective test in the definition of forced labour so that a person will be considered a victim of forced labour if, because of coercion, threat or deception, a *reasonable person* in the position of the victim would not consider themselves to be able to stop providing their labour or leave the place where they are working.[16] It is noted that proposed section 270.10 provides a list of matters a trier of fact may have regard to in determining whether the alleged victim of an offence against Division 270 has been coerced, threatened or deceived, including:

[15]See also submissions made by the Law Council of Australia in response to the Attorney General's Department, Crimes Legislation Amendment (Slavery, Slave-Like Conditions and People Trafficking) Bill 2012 - Exposure Draft.
[16] Above at n1.

1) The economic relationship between the alleged victim and alleged offender,
2) The terms of any contract or agreement between the alleged victim and the alleged offender, and
3) The personal circumstances of the alleged victim including their lawful presence in Australia, their understanding of English and the extent of their social and physical dependence on the alleged offender.

The ALA strongly urges the government to maintain a watching brief on any prosecutions that are brought pursuant to the new forced labour provisions, with a view to assessing whether the proposed 'reasonable person' test does in fact provide sufficient clarity as to the elements to be proved.

The ALA acknowledges it is critical that section 15.2 of the Criminal Code (extended geographical jurisdiction – category B) applies to the new forced labour offences as this will ensure the conduct of Australian citizens, residents or corporations overseas is also captured by the proposed provisions and acknowledges this has been included in the proposed Bill.

2.5.2 Forced marriage

The ALA commends the Government for heeding the recommendations made by various community groups and in relation to the drafting of the provisions relating to the offence of forced marriage in proposed section 270.5. In particular, the ALA commends the Government for proposing a definition of marriage that is sufficiently broad to capture a variety of relationships including, de facto marriages, marriages recognised by religious custom, marriages recognized under a law of a foreign country, as well as marriages which are void or not recognised for some reason, for example where one party is married to more than one person or where one party has not fully or freely consented (because of age-related capacity etc).

The ALA notes that the new offence applies to circumstances were one party has

not fully and freely consented to a 'marriage', but rather has entered the 'marriage' because of coercion, threat or deception. The ALA welcomes this new offence, and the requisite fault element of recklessness.

The ALA believes the largest potential impediment to enforcing these provisions will be the lack of community awareness and the difficulties law enforcement authorities will face in identifying victims of forced marriages. Research indicates that victims are often trafficked through marriage for the purposes of domestic servitude. The ALA notes that these women are at a heightened risk of sexual abuse, and are often first identified as victims of domestic violence, with welfare officers not always aware that these women are victims of the specific crime of trafficking.[17] The ALA notes that the Australian Institute of Criminology will be conducting research into the issue of forced and servile marriage in Australia in the near future.

The ALA strongly urges the Government to conduct a review of the proposed 'forced marriage' provisions once the AIC have released their findings, in order to ensure the provisions are meeting their objective. Further, the Government should give consideration to other initiatives that can be implemented to ensure at risk women are identified and made aware of their rights, and to ensure law enforcement authorities have a more nuanced understanding of the practice of forced marriage and become more discerning in their investigations.

2.5.3 Organ trafficking

The ALA supports these new provisions and believes this will see Australia meeting its obligations under Article 3 of the Trafficking Protocol.

The ALA believes the proposed penalties are appropriate.

2.5.4 Harbouring a victim

[17] Above at n12.

The ALA notes that proposed section 271.7F will create a new offence of harbouring a victim of trafficking and agrees this will comply with the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, supplementing the United Nations Convention against Transnational Organised Crime (Trafficking Protocol). It is noted that this new offence carries a penalty of 12 years imprisonment.

The ALA supports efforts to criminalise parties who knowingly or recklessly harbour or receive a person who has been 'trafficked'. However, the ALA queries whether the proposed offence has been drafted in terms that will meet this objective. Specifically, the ALA notes that the Government has chosen not to adopt the wording contained in the *Trafficking Protocol* in that the Bill uses the words 'harbouring and concealing of the victim', instead of the 'harbouring and receipt of the victim'. The ALA submits that the wording of this provision needs to be changed so that it is in keeping with Australia's obligations under the *Trafficking Protocol* to criminalise such behavior.[18]

2.6 Reparation to Victims

The ALA notes that Article 6.6 of the Trafficking Protocol obliges each state party to "*ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered".*[19]

The ALA acknowledges that under the current Section 21B of the *Crimes Act 1914*, judicial officers are able to make reparation orders when sentencing those found to have committed a federal offence, and may order the offender to make reparation to their victim by way of money, payment or other means. However, under the current provision a reparation order can only be made in relation to a loss suffered by a person *as a direct result of the offence*.

[18] The Trafficking Protocol "recruitment, transportation, transfer, harbouring or receipt of persons".
[19] Article 6.6 of the *Trafficking Protocol.*

The ALA notes that the proposed Bill seeks to amend Section 21B of the *Crimes Act* and allows for a reparation order to be made "to any person in respect of any loss suffered, or any expense incurred, by the person by reason of the offence". The ALA commends the Government on this proposal and strongly supports this amendment.

However, the ALA is also concerned that the amendment does not go far enough in that it still fails to specify whether "any loss suffered" is intended to include any non-economic loss (i.e. pain and suffering) suffered by a victim by reason of these crimes. The ALA submits that compensation for non-economic loss/pain and suffering is extremely important to people who have been victims of trafficking, as it provides them with some financial support as they embark on the difficult process of rehabilitating themselves and rebuilding their lives.

The ALA notes that there is currently no comprehensive national framework for victim compensation in Australia, much less one for victims of trafficking, slavery or slave-like practices. The ALA acknowledges that victims of crimes may be able to access compensation under the state and territory victim's compensation schemes, however remedies vary from state to state, with different eligibility requirements, different time frames, different caps on the maximum compensation and different access to compensation for pain and suffering.[20] The ALA submits that it is unjust that victims of the same crime may receive different outcomes by reason of the differences between the state compensation schemes.

Moreover, the ALA notes that in some jurisdictions, for example NSW, in order to be entitled to compensation a physical act of violence needs to have been perpetrated against the victim. In the case of a victim of slavery, slave-like practices or trafficking, there may have been no physical violence or abuse, but rather the

[20] Above at n12.

exertion of psychological and emotional abuse and exploitation. The ALA submits such abuse is no less worthy of recognition and restitution.

The ALA submits that a federal compensation scheme is required, particularly in respect of victims of the crimes the subject of this proposed Bill. The introduction of such a scheme would see Australia complying more fully with its international obligations.

Should the Government not be willing to establish such a scheme, the ALA submits it is critical that the state and territory compensation schemes are urgently and carefully reviewed. The state and territory schemes should be reviewed with the objective of ensuring they operate consistently and more expansively (i.e. incorporate awards for pain and suffering) in relation to victims of federal criminal offences.

2.7 The Migration Framework:

It is the ALA's position that to date, the Australian legal response to the *Trafficking Protocol* has focused primarily on combating trafficking through a law enforcement framework and has dealt with victims only through a limited migration framework. The ALA is concerned that the government has not considered making long overdue amendments to the migration framework to ensure it is in keeping with Australia's international obligations.

The ALA acknowledges that in 2004 and again in 2009, a new 'Trafficking' visa framework was introduced into the *Migration Act*. This new framework offers some protection and support to victims of trafficking who are 'persons of interest' to the Australian Federal Police and are willing to assist in investigations and prosecutions. Wherever there is a possibility a person has been trafficked into Australia, Department of Immigration and Citizenship officials are now under an obligation to refer the case to the Transnational Sexual Exploitation Trafficking Team (TSETT).[21] The TSETT determines whether a person is a trafficking victim

[21] Under the *People Trafficking Referral Protocol* Immigration (DIAC) officers are required to refer to the AFP all suspected victims of trafficking: Office for Women (OfW), *Fact sheet:*

and whether they may be eligible to access the visa system. The ALA notes that trafficked persons may not apply for protection visas of their own accord, however they may do so if they can assist TSETT in relation to trafficking, sexual slavery or deceptive recruitment offences.

Under the current framework, persons of interest are first granted a 45 day Bridging F Visa ('BVF')[22] while the veracity of their claims is verified and the women consider whether they wish to assist the police.[23] The Minister, under the guidance of the AFP, retains the discretion to cut short the bridging visa period at anytime.[24] Persons of interest may subsequently be eligible for a Criminal Justice Stay Visa ('CJSV'),[25] which is valid for the duration of the prosecution. Once the case is finalised, the person may be eligible for a Temporary Witness Protection (Trafficking) Visa ('TWPTV')[26] enabling them to remain in Australia temporarily. The grant of this visa is entirely at the discretion of the Minister, and will only be granted where the Attorney General has certified the person has cooperated with law enforcement efforts and the Minister is satisfied an applicant would be in danger if returned home.[27] Those who hold the Temporary Visa for more than two years and

---

support for victims of people trafficking, (2008)Department of Families, Housing, Community Services and Indigenous Affairs <http://ofw.facsia.gov.au/international/combating_people_trafficking-fs.htm>

[22] *Migration Regulations 1994* (Cth) Sch 2 subclass 060 (Bridging F).
[23] Fergus, *Trafficking in Women:* 26.

[24] Should a person cease to be of assistance to the AFP and this is articulated to DIAC in writing, the 'BVF' may be terminated by the Minister and the woman will subsequently be notified her Visa is no longer effective.

[25] *Migration Act 1958* (Cth) ss147-148. A woman will first be granted a Criminal Justice Stay certificate by the Attorney General, which will then enable the DIAC to grant a CJSV.
[26] *Migration Regulations 1994* (Cth) Schedule 1, item 1224AA (Witness Protection (Trafficking) (Temporary) (Class UM)
[27] See *Migration Regulations 1994* (Cth) reg 2.07AJ(3)(c), (f). A person who has held a 'CJSV' may be offered a 'TWPTV' only in circumstance where:

who continue to fulfill these criteria may qualify for the Witness Protection (Trafficking) Permanent Visa ('PWPTV').[28] The ALA acknowledges and commends the Government for the fact each visa is accompanied by a victim support package, including assistance finding accommodation, rent assistance, access to certain medical benefits, court support and legal assistance, employment and vocational training, and English classes. The ALA also acknowledges the new visa scheme entitles immediate family members both inside and outside Australia to apply for permanent residency.

While the ALA commends the Government for providing essential services to victims of trafficking, the ALA is of the view more can be done to protect and restore the rights of victims of trafficking. The current migration framework exposes those people who cannot or will not assist in prosecutions to subsequent human rights abuses. However, if the Australian authorities extend legal status and support networks to all victims of trafficking, this is likely to produce both a better human rights outcome for victims, and an increased degree of willingness on the part of victims to assist in the law enforcement process.

The ALA notes that the *Trafficking Protocol* provides several guidelines for how Australia can better support victims of trafficking. Article 7 encourages states to consider humanitarian and compassionate factors, and develop legislative or other measures enabling trafficked women to stay in Australia either temporarily or permanently.[29] Article 6(3) obliges states to consider implementing measures to

---

(a) the Attorney-General has certified that the person has *made a significant contribution to and cooperated closely with*, the prosecution or investigation of a person who has trafficked others;

(b) the person is not the subject of any related prosecutions; and

(c) the Minister is satisfied that the person would be in danger were they to return to their home country.

[28] Class DH, subclass 852: *Migration Regulations 1994* (Cth) reg 2.07AK

[29] See generally Art. 7 'Status of victims of trafficking in persons in receiving States'. Art.7(1) states that 'each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.' Article 7(2) states that in implementing the provision

enable the physical and psychological recovery of victims, including the provision of housing, counseling and legal advice, medial assistance, and employment and education opportunities. Principle 8 of the complementary *Guidelines* requires states to provide medical care to victims regardless of whether they can or will assist in prosecutions. Principle 11 requires that legal alternatives to deportation be made available where deportation would threaten the safety of victims or their families.

Trafficked persons need a considerable period of time in which to recover from their trauma and to have the opportunity to be fully informed of their legal rights before they can make informed choices. The ALA submits 45 days is not a sufficient period of time for trafficked persons to process the abuses they have suffered or form relationships of trust with immigration and law enforcement authorities. An extended reflection period, in conjunction with the provision of culturally appropriate information, counseling and legal advice, would enable victims to make more informed and independent choices. Their range of options should include whether to participate in criminal proceedings, whether to seek compensation, and whether they wish to enter a social integration and protection program within Australia or return to their home country.[30] Allowing a sufficient recovery period for victims will also help to ensure that they are not severely re-traumatised should they later decide to participate in the law enforcement process. This approach has been recognised as international best practice and was first implemented by the Netherlands. Under the Netherlands policy the granting of a three-month reflection bridging visa is an automatic right for any presumed trafficking victim.[31]

---

contained in Article 7(1), each State Party shall give appropriate consideration to humanitarian and compassionate factors.

[30] Helga Konrad, 'Trafficking in Human Beings: A Comparative Account of Legal Provisions in Belgium, Italy, the Netherlands, Sweden and the United States' in Van den Anker, C.L. and Doomernik, J. (eds), *Trafficking and Women's Rights* (2006) 118-137: 128 (Konrad, 'A Comparative Account').

[31] See B9 Regulation (2000) (formerly B17 (1988))

The ALA notes that Article 7 of the *Trafficking Protocol* and Principle 8 of the *Guidelines* encourage states to permit victims to remain in their territory regardless of whether they can or will cooperate in criminal prosecutions. The ALA submits that the de-linking of visa status from the criminal justice system is important both as a means of better protecting the human rights of victims, and as a means of promoting an effective criminal justice response to the crime of trafficking. The provision of legal status to victims as soon as they are identified offers recognition that victims of trafficking are rights-bearing individuals who have suffered serious rights violations and crimes.[32] The provision of clear legal status and the prospect of social inclusion will help victims regain control of their life and encourage them to contribute to the law enforcement process. The ALA submits victims may be more likely to trust law enforcement authorities if they feel confident that their residence status is secure. Further, the granting of legal status at the first instance is important to ensure that during the course of a trial a victim's testimony is not discredited by claims they are seeking a grant of residency.[33]

If a person is identified in Australia as a victim of trafficking, they should not be deported immediately if they cannot or will not assist police, but rather should have the option of independently seeking protection via the migration system. A self-petitioning visa application process is superior to the current discretionary process because it recasts trafficking victims as rights-bearers, rather than simply witnesses to a crime. Importantly, experience of the self-petitioning visa process in the United States and Italy has shown that this approach does not 'open the floodgates' to a raft of false claims of trafficking.

The ALA submits that an allied means by which Australia may promote a human rights approach to trafficking, through its migration system, is to establish a visa designed to promote social inclusion and empowerment for victims of trafficking. This has occurred in Italy where support for women is not conditional upon cooperation in criminal proceedings.[34] Under the Italian model, a 'stay permit' may

[32] Above at n30 at 126.
[33] Ibid at 129.
[34] See *Law on Immigration* Article 18 (LD n.286/1998) (Italia).

be issued on the grounds of participation in criminal proceedings or, alternatively, due simply to a woman's status as a victim of trafficking. Applications for either visa class can be made by the women themselves and by police, public and social service agencies, and accredited NGOs.[35] One benefit of the Italian model is the fact that women are able to choose whether they wish to opt for a 'judicial/criminal' or a 'social' stay permit. Although women are required to provide information to law enforcement officers in either case, the 'judicial/criminal' permit is available for women who wish to proceed with charges against their traffickers, while the 'social' permit is available for those who do not. Under both avenues, women are provided with the same support services and are able to remain in Italy on the proviso they undertake a social integration program over six months. During this period women are given access to vocational training programs, education and employment. At the conclusion of the program a 'social' protection permit may then be transferred into a regular working permit which offers longer-term security.

The US *Victims of Trafficking and Violence Protection Act* 2000 (VTVPA) also promotes a human rights approach to trafficking by de-linking the migration system and the criminal justice system, and giving trafficked persons access to a three year protection visa regardless of whether they assist in prosecutions.[36] This temporary visa may be converted to permanent residency in appropriate circumstances. The US approach extends equivalent social benefits to trafficked women as those provided to refugees.[37] Persuaded that the human rights approach is the appropriate way to deal with victims of trafficking, the US government has previously urged Australia to shift its policy focus in this regard and to consider expanding our protection efforts to cover victims who cooperate with police but who are not part of a viable investigation. The ALA submits that this response to

[35] The situation is similar in Belgium where three specialised centres are given the responsibility of assisting trafficked women in making their applications.
[36] See *Victims of Trafficking and Violence Protection Act of 2000* (*VTVPA*) USC 7108 (2000). See also United States Department of Justice, 'Department of Justice Issues T Visa To Protect Women and Children' (media release, 12 January 2002) < http://www.usdoj.gov/opa/pr/2002/January/02_crt_038.htm> (Accessed 2 October 2008).

[37] *VTVPA.*

trafficking would be an important means of acknowledging that at the centre of this global criminal phenomenon are people whose rights have been violated and whose dignity must be restored.

3. Conclusion and Recommendations:

The ALA supports the Government's continued to efforts to combat slavery, slave-like offences and people trafficking. The continued efforts of government and civil society to combat these heinous crimes is crucial to the lives, liberties and futures, not only of victims, but also of those people in our community who are most at risk.

The ALA commends the Government for the proposed Bill and its continued efforts, both domestically and abroad, to ensure these crimes are investigated and prosecuted. However, the ALA also encourages the Government to consider the need to compliment the criminal justice framework with development of a federal compensation scheme for victims, and the inclusion of much fairer provisions under the Migration Act. Indeed, these are only some of the ways in which Australia can do more to protect and restore the rights of those affected by these heinous crimes.