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Ms Judi Maddigan MP, Chair
Drugs and Crime Prevention Committee
Parliament of Victoria
35 Spring St
East Melbourne Vic 3002

Thursday, October 22, 2009

Inquiry into Trafficking for Sex Work

Dear Ms Maddigan
Dear Committee Members

Thank you for your letter dated September 9, 2009 and the invitation to make a submission to the current *Inquiry into Trafficking for Sex Work* by your Committee.

Please find enclosed our complete submission in which we address the following terms of reference:

- (a) The extent and nature of trafficking people for the purposes of sex work into Victoria from overseas;
- (b) The inter-relationship (if any) between the unlicensed and licensed prostitution sectors in Victoria, and trafficking for the purposes of sex work; and
- (c) The current and proposed intergovernmental and international strategies and initiatives in relation to dealing with trafficking for the purposes of sex work.

Please do not hesitate to contact me to discuss this submission or any other aspect of your inquiry further.

Yours sincerely,

ANDREAS SCHLOENHARDT PhD (Law)

SUBMISSION TO THE INQUIRY INTO TRAFFICKING FOR SEX WORK

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with

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A Extent and nature of trafficking people for the purposes of sex work into Victoria from overseas

A considerable number of persons trafficked into Australia for the purposes of sex work have been detected in Victoria. Further, a large proportion of the Australian investigations into trafficking in persons and related offences (such as sexual servitude and debt bondage) have occurred in Victoria,¹ including the nation's first conviction for slavery.²

The following sections provide an overview of the extent and nature of trafficking in persons in Victoria. While state-specific data on the characteristics of this activity is limited, several conclusions and evidence of some broad trends will be drawn from analysing the relevant case law and reporting.

A.1 Official Estimates

Official reporting of trafficking in persons in Australia provides only general nation-wide estimates, with no break-down or analysis specific to the numbers of trafficked persons in Victoria.

At the national level, in 2007, the Office of the Commonwealth Attorney-General's Department drew on information from the Australian Crime Commission (ACC) and other law enforcement bodies to suggest that around 100 instances of trafficking have occurred nationally in the previous five years.³ A recent review of the Federal Government's response to human trafficking also noted that between January 2004 and April 2009, 34 persons were charged with human trafficking and seven of these individuals were convicted.⁴ This report also revealed that by April 2009, of the 119 suspected victims of trafficking who had received an Australian visa as a part of the trafficking victims' support scheme, 31 of these persons were located in Victoria (compared to 79 visa recipients from New South Wales).⁵ Additionally, since 2004, 131 victims of trafficking have been assisted by the Commonwealth's Support for Victims of People Trafficking Program,⁶ with 41 of these clients located in Victoria (compared to 83 in New South Wales).⁷

All prosecutions of sexual servitude and trafficking in persons in Australia detected thus far occurred in Sydney and Melbourne, in addition to two recent cases in Queensland. The available data and other information suggest that the level of trafficking (in absolute figures) is lower in Victoria than in New South Wales. While this may be reflective of the population concentration in Australia's main urban centres along the east coast — and the size of their local sex industries — it is possible that trafficking in persons also occurs in other parts of Australia, albeit on a smaller scale which, in turn, makes it more difficult to detect.⁸

¹ See for example: *R v Tang* (2008) 238 CLR 1, *R v DS* (2005) 191 FLR 337, *DPP v Kam Tin Ho, Ho Kam Ho, Chee Fui Hoo & Slamet Edy Rahardjo* [pending], *DPP v Glazner* [2001] VSCA 204, *R v Nguyen and Tran* [1998] 4 VR 394. See also, immigration matters relevant to people trafficking in Victoria for the purpose of sex work: *VXAJ v MIMIA* [2006] FMCA 234 and *Yap v MIMA* [2006] AATA 510.

² *R v Tang* (2008) 238 CLR 1.

³ Australia, Attorney-General's Department, *Australia's Strategy to Combat People Trafficking* (March 2007) 3 (copy held with author).

⁴ Australia, Anti-People Trafficking Inter-Departmental Committee, *Trafficking in Persons: The Australian Government Response January 2004-April 2009* (2009) 22, available at [www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(084A3429FD57AC0744737F8EA134BACB\)-IDC+Annual+Report_WEB.pdf/\\$file/IDC+Annual+Report_WEB.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)-IDC+Annual+Report_WEB.pdf/$file/IDC+Annual+Report_WEB.pdf) (accessed 15 Oct 2009).

⁵ *Ibid*, at 28.

⁶ *Ibid*, at 1.

⁷ *Ibid*, at 30.

⁸ Cf Andreas Schloenhardt et al, 'Trafficking in Persons in Australia: Myths and Realities' (2009) 10(3) *Global Crime* 224 at 245.

A.2 Source Countries of Trafficked Persons

In determining the link between trafficking into Victoria and sending countries, official Australian reports on trafficking indicate that the majority of trafficked persons and perpetrators of this crime have travelled to Australia from Asia.⁹ Thailand and the Republic of Korea (South Korea, ROK) have proven to be the most common source countries for trafficked persons entering Australia. For example, the Department of Immigration and Citizenship (DIAC, formerly the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA)) released figures which showed that of the 257 non-citizen workers who were detected in the Australian sex industry during the 2002-03 financial year, 100 of these persons were women from Thailand and 49 were women from Malaysia, along with an additional 42 persons from China and 39 from South Korea.¹⁰ This reporting does, however, not relate specifically to trafficked persons, but only serves to demonstrate the links between illegal sex workers in Australia and South East Asia.

Thai and South Korean nationals also feature most prominently among those 287 potential victims of trafficking who were detected in Australia by the Australian Federal Police (AFP) as part of investigations between July 2004 and April 2009.¹¹ Moreover, the majority of persons who have received assistance from the Support for Victims of People Trafficking Program were Thai nationals (73 of the 131 participants in the program to date).¹² South Korean nationals constitute the second largest group, with 23 Koreans taking part in the program.¹³

A.3 Case Law

To date, there have only been two prosecutions under Australia's trafficking offences,¹⁴ neither of which have occurred in Victoria. This very small number is due in part to the fact that the relevant offences were only introduced into the federal *Criminal Code* in 2005. A number of trafficking and trafficking-related cases in Victoria have been prosecuted under sexual slavery and servitude offences that came into operation in 1999,¹⁵ as well as under other more general criminal offences. In addition, a number of immigration matters have come to the attention of tribunals and courts in Victoria which give further insight into the nature and level of trafficking in persons in the state.

The following Section outlines and examines Victorian cases of trafficking in persons for the purposes of sex work.¹⁶ The cases include both criminal and immigration matters. Based on this information, a number of general observations are drawn about the extent and nature of the phenomenon in Victoria.

⁹ Australian National Audit Office, *Management of the Australian Government's Action Plan to Eradicate Trafficking in Persons*, Audit Report No 30 2008-09 (2009) 11 at 30.

¹⁰ Australia, Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the trafficking of women for sexual servitude* (June 2004) para 2.8 (citing a DIMIA submission to the Inquiry).

¹¹ Australia, Anti-People Trafficking Inter-Departmental Committee, *Trafficking in Persons: The Australian Government Response January 2004- April 2009* (2009) 19.

¹² *Ibid*, at 30.

¹³ *Ibid*, at 30.

¹⁴ Division 271 *Criminal Code* (Cth).

¹⁵ Division 270 *Criminal Code* (Cth).

¹⁶ For a complete inventory of cases see The University of Queensland, Human Trafficking Working Group, *Case reports*, at www.law.uq.edu.au/human-trafficking-case-reports (accessed 21 Oct 2009).

A.3.1 Criminal cases

Nguyen and Tran

The case of *R v Nguyen and Tran* involves two Thai women who were brought into Australia to work in an illegal prostitution racket run by Mr Le Van Chau (who was not an accused in this case). Mr Van Nam Nguyen and Mr Huy Quoc Tran worked for Mr Chau after they arrived in Australia from Thailand, on tourist visas, in 1995.

Mr Chau employed illegal sex workers in his private home and in a number of brothels in Melbourne in the mid 1990s. Mr Chau was involved in organising their journey to Australia and was responsible for their accommodation and prostitution. The Thai women working for Mr Chau gave substantial parts of their earnings to him and feared violence as a result of the threats he made to them.¹⁷

The two Thai victims were kidnapped by Mr Nguyen and Mr Tran, in cooperation with a further two accused, one of whom was acquitted, whilst the other, Mr Sung Ly, was tried separately. Mr Tran and Mr Ly entered the premises of Mr Chau with weapons in the early morning of May 29, 1995. The two then forcibly bound and took the women to Nguyen, who was waiting outside with the car. Tran and Sung Ly also proceeded to remove certain property belonging to Mr Chau. The two victims were then taken by the three men to two separate premises.

It appears that the victims, Ms Toi, 34, and Ms Luai, 31, had come to Australia to work as sex workers at the direction of Chau. They were expected to pay off a debt of AUD 30,000 to Mr Chau,¹⁸ and also to contribute AUD 80.00 each per week to the rent on Mr Chau's home where they stayed, as well as paying for Chau's phone bill, a proportion of the household expenses and for his trips to Thailand. Contrary to earlier promises, Mr Chau failed to send money to Thailand on behalf of the victims in return for their work.¹⁹ The women were also afraid of Chau because they feared he may harm their families in Thailand.²⁰ There was evidence that additional women were being accommodated at Mr Chau's premises, and that they were being made available to illegal brothels in the local area.

At trial, Mr Nguyen and Mr Tran were each found guilty of aggravated burglary,²¹ kidnapping and one count of false imprisonment (they were acquitted of false imprisonment in relation to the second location). Mr Tran was also convicted of a single count of theft,²² whilst Mr Nguyen was acquitted of the theft charges.²³ In sentencing the judge noted that each of the accused had an extensive criminal history. Mr Nguyen, the main orchestrator, was sentenced to six years imprisonment with a non-parole period of five years, while Tran received a sentence of 4.5 years imprisonment with a non parole period of three years.²⁴

The two accused appealed against both conviction and sentence. They contended that the extent of Mr Chau's criminality had not been properly disclosed at trial, rendering the evidence given by Mr Chau, and the two women, who were purportedly under his control, unreliable. However, the appeal was dismissed as the concerns raised were not sufficient to render the verdict unsafe or unsatisfactory.²⁵ Moreover, the Court of Appeal dismissed

¹⁷ *R v Nguyen and Tran* [1998] 4 VR 394 at 395–398.

¹⁸ *Ibid*, at 400.

¹⁹ *Ibid*, at 402.

²⁰ *Ibid*, at 402.

²¹ Section 77(1) *Crimes Act 1958* (Vic).

²² Section 74 *Crimes Act 1958* (Vic).

²³ *R v Nguyen and Tran* [1998] 4 VR 394 at 396.

²⁴ *Ibid*, at 396.

²⁵ *Ibid*, at 403.

arguments raised by the defence that the common law offence of kidnapping was abolished by s 63A of the *Crimes Act 1958* (Vic).²⁶

Mr Chau was charged with prostitution related offences in 1996, according to an affidavit from the Australian Federal Police made available at the appeal of Nguyen and Tran.²⁷ Sexual servitude, slavery and trafficking in persons offences did not exist at that time.

Glazner

Among the most high-profile cases relating to human trafficking in Australia was the prosecution of Mr Gary Glazner in Melbourne. The case was initially brought to the attention of the authorities by an informant in 1997 resulting in the arrest of Mr Glazner 14 months later, in 1999.

The investigations revealed that Mr Glazner had brought several Thai women to Australia after buying them for about AUD 18,000-20,000 each from an agent in Thailand.²⁸ They were aware that they would be working in the sex industry, but were kept in slavery-like conditions once they arrived in Melbourne. The women initially entered Australia on tourist visas and at that time, were accompanied by a Thai 'minder' who escorted them and carried their passports. Some of these documents were forged while others were legal. Mr Glazner then took away the women's passports and was able to obtain work rights for them by lodging forged refugee protection visa applications on their behalf. He accommodated the women in small hotel rooms in Kew, Melbourne where he sealed the windows and installed iron gates and bars to restrict their movement. Mr Glazner verbally abused the women and kept a firearm in clear view of them; there was, however, no evidence of any physical abuse of the women by Mr Glazner. They were forced to work 12 hours a day, seven days a week in an unlicensed brothel in South Melbourne, and were told that they would not receive any payment for their first 500 jobs. Some of the women were also moved to premises in Sydney. It has been estimated that Mr Glazner made at least AUD 1.2 million from these women, though it was suspected that he was associated with at least 40 other 'contract girls'. However, these persons were unwilling to testify against him.²⁹

While these facts fit many of the characteristics of trafficking in persons, at the time the Glazner case came to light, Australia did not have any criminal offences relating to trafficking or sexual servitude. Accordingly, Mr Glazner was only charged and convicted for offences under the *Prostitution Control Act 1994* (Victoria), including being an unlicensed prostitution provider (s 22) and living off the earnings of prostitution (s 10). He received a suspended 30-month sentence and an AUD 30,000 fine: *DPP v Glazner* [2001] VSCA 204.³⁰ Charges of false imprisonment were unsuccessful as there was insufficient evidence of violence or immediate threats of violence to the women.³¹

²⁶ Ibid, at 406.

²⁷ Ibid, at 399.

²⁸ *DPP v Glazner* [2001] VSCA 204 [6].

²⁹ Lara Fergus, *Trafficking in women for sexual exploitation*, Australian Centre for the Study of Sexual Assault Briefing No 5, (June 2005) 18-19, available at www.aifs.gov.au/acssa/pubs/briefing/b5.html (accessed 20 Oct 2009), with reference to the unpublished court reports; Marnie Ford, *Sex Slaves and Legal Loopholes: Exploring the Legal Framework and Federal Responses to the Trafficking of Thai 'Contract Girls' for Sexual Exploitation to Melbourne, Australia* (2001) 17-26, available at <http://projectrespect.org.au/files/sexslaves.pdf> (accessed 21 Oct 2009)

³⁰ Lara Fergus, *Trafficking in women for sexual exploitation*, Australian Centre for the Study of Sexual Assault Briefing No 5, (June 2005) 18-19.

³¹ Marnie Ford, *Sex slaves and legal loopholes* (2001) 17.

Wei Tang

The case against Melbourne brothel owner Ms Wei Tang was the first jury conviction under Australia's *Criminal Code* (Cth) slavery offences. Ms Tang was accused of having purchased five women from Thailand to work in debt-bondage conditions in a legal brothel called 'Club 417' in Fitzroy.³² The women had previously worked in the sex industry in Thailand and were aware that they would be working in brothels in Australia. They arrived in Australia separately between August 2002 and May 2003 on fraudulently obtained tourist visas. After their arrival, applications for protection visas were made on their behalf, thus enabling the women to work legally. It is unclear how much of this process was understood by the victims.

When they testified against the defendant, the women explained that they had voluntarily entered into agreements with a broker in Thailand, and owed between AUD 40,000 and 45,000 to the owner of these 'contracts'. Wei Tang had purchased these contracts from the Thai recruiter for AUD 20,000. Repayments of this AUD 20,000 formed the basis for the charges of slavery that were brought against Wei Tang and her employee, Ms DS. DS is identified by her initials due to a suppression order being placed on her name after she gave evidence against Ms Wei Tang.

The debt owed to Wei Tang had to be repaid by the victims by working in a brothel six days a week, over a period of seven to eight months. Of the AUD 110 earned by the victims per client, AUD 50 was used to pay back the debt owed to Wei Tang while the remaining AUD 60 went to the brothel. The victims were offered the opportunity to work on their free day and keep the AUD 50 otherwise used to pay the debt.³³ Ms Wei Tang also withheld the women's passports and their return airplane tickets which had been used to gain entry to Australia. There was no other evidence of physical maltreatment by the accused.³⁴ It was conceded that two of the five women had indeed repaid their debts and had voluntarily stayed on to work as prostitutes.³⁵

The trial of Wei Tang and her co-accused Mr Paul Pick began in April 2005. The jury was unable to reach a verdict and she was retried (without Mr Pick) in April 2006. At the end of her second trial, Ms Wei Tang was convicted to ten years imprisonment on five counts of possessing a slave and five counts of exercising control over a slave contrary to s 270.3(1)(a) *Criminal Code* (Cth).³⁶ She successfully appealed against the conviction arguing that the judge misdirected the jury on the meaning of the term 'slavery'. Specifically, she argued that it had to be established that she had acted with intent in dealing with the victims as though they were her property.³⁷ Her conviction was overturned in June 2007 and the Victorian Court of Appeal ordered a retrial. In August 2008, the prosecution successfully appealed against that decision and Wei Tang's initial conviction was upheld by the High Court.³⁸

Ms Donoporn Srimonthon, Wei Tang's employee, pleaded guilty to two counts of slave trading and three counts of possessing a slave.³⁹ The details of the case against Ms Srimonthon are discussed below.

³² *R v Wei Tang* (2007) 16 VR 454 at 457.

³³ Australia, Anti-People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government's Response January 2004–April 2009* (2009) 670.

³⁴ Elaine Pearson, 'Australia' in, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007) 36, available at www.gaatw.net/index.php?option=com_content&task=blogcategory&id=0&Itemid=179 (accessed 21 July 2008).

³⁵ *R v Wei Tang* (2007) 16 VR 454 at 457.

³⁶ *R v Wei Tang* [2006] VCC 637.

³⁷ *R v Wei Tang* (2007) 16 VR 454 at 471 at 487.

³⁸ *R v Wei Tang* (2008) 238 CLR 1.

³⁹ *R v DS* (2005) 191 FLR 337.

The brothel manager and driver of the victims, Mr Paul Pick, was originally tried with Wei Tang, but was acquitted on eight charges, while the jury could not decide on a further two. The prosecution successfully applied for a nolle prosequi (notice of discontinuation).⁴⁰

The case of *VXAJ v MIMIA*, a victim of Ms Wei Tang, is discussed further below.

Donoporn Srimonthon (DS)

Ms Donoporn Srimonthon was an employee of brothel owner Ms Wei Tang who has been convicted for offences relating to sexual slavery.⁴¹ The initials DS are used to identify the accused due to a suppression order placed on her name, after she gave evidence against her employer. She was herself a previous victim of Ms Tang and had chosen to stay with her trafficker after she had repaid her contract debt. She had previously worked under similar circumstances in the sex industry in Hong Kong. Ms Srimonthon, a Thai national, was responsible for supervision of the contract workers at 'Club 417', the brothel owned by Ms Tang. She also moved money between Ms Tang and an organiser in Sydney, known as Sam.⁴²

Ms Srimonthon pleaded guilty to two counts of slave trading (s 270.3(1)(b) *Criminal Code* (Cth)) and three counts of possessing a slave (s 270.3(1)(a)). The conviction for possession of a slave was in respect of Ms Srimonthon's work in escorting and supervising three contract workers, whereas the conviction for slave trading was based on her taking possession of the women once they arrived in Australia.⁴³

Ms Srimonthon appealed her sentence in January 2005. In respect of the five counts above, she was originally sentenced to between five and seven years imprisonment. However, each sentence was made cumulative upon the first by six months, resulting in an effective sentence of nine years, with a non-parole period of three years. It was noted that Ms Srimonthon was the first person to be sentenced under the slavery provisions introduced with the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth).

The Victorian Supreme Court of Appeal found that there had been a number of errors in sentencing,⁴⁴ and re-sentenced the appellant to six years imprisonment, with a non-parole period of two and a half years,⁴⁵ on the grounds that although she was an important contributor to the criminal conduct, she had been of great assistance to the police in investigating and prosecuting human trafficking.

Ho et al

This case involves four men from Melbourne including Kam Tin Ho, Ho Kam Ho, Chee Fui Hoo, and Slamet Edy Rahardjo. The men were convicted in 2009 in relation to the trafficking in women from Thailand to Australia.

The scheme involved five Thai women who were forced to perform between 650 and 750 sex acts under debt-bondage conditions. At a rate of AUD 50 per act this represents a debt of between AUD 32,500 and 37,500. Of the AUD 125 charged to clients for the acts, the women only received AUD 5, except for Sundays when the women were able to keep the AUD 50 themselves; a system similar to that used in the case of *Wei Tang* and her co-

⁴⁰ *R v Wei Tang* (2007) 16 VR 454, 458. A nolle prosequi is an entry made on the record, by which the prosecution declares that it will not proceed against the defendant. Cf. Natasha Robinson, 'Second sex slave jury fails to deliver verdict', *The Australian* (Sydney), 28 May 2005, 8.

⁴¹ *R v Wei Tang* (2008) 238 CLR 1.

⁴² *R v DS* (2005) 191 FLR 337 at 341.

⁴³ *Ibid*, at 341.

⁴⁴ *Ibid*, at 342–343.

⁴⁵ *Ibid*, at 346.

accused.⁴⁶ Additional reports have emerged from the trial placing the debt at AUD 80,000–90,000, although it is not explained how this figure is commensurable with the additional other information.⁴⁷

From the available information it appears that the victims knew they were to be working in the sex industry in Australia⁴⁸ but were forced to perform unsafe sex acts.⁴⁹ At least one woman was able to transfer some money to Thailand while she was under debt-bondage conditions.⁵⁰

The trial of the four defendants was originally due to commence on March 12, 2009. However, due to the adverse publicity generated by an article appearing in the Melbourne newspaper, *The Age*,⁵¹ the trial was delayed to April 21, 2009.

The Supreme Court of Victoria delivered a verdict in July 2009. Mr Che Fui Hoo was acquitted of a single count of exercising a right of ownership over a slave,⁵² while verdicts were not delivered on a further two counts of intentionally possessing a slave.⁵³ Mr Rhardjo was acquitted of a single count of entering a commercial transaction involving a slave.⁵⁴

The leader of the trafficking ring has been found guilty of five out of the fourteen counts of intentionally possessing a slave with which he was charged in addition to four counts of conducting transactions so as to avoid financial reporting requirements.⁵⁵ The fourth man was found guilty of four of the eleven counts of intentionally possessing a slave with which he was charged, and also a single count of conducting transactions to avoid financial reporting requirements. Mr Kam Tin Ho and Mr Ho Kam Ho will be sentenced at a later date.

A.3.2 Immigration cases

VXAJ

The woman referred to as VXAJ was a 33 year old Thai female seeking a protection visa after being found working slavery-like conditions in Australia. VXAJ was one of the sex workers in the *Wei Tang* case. VXAJ arrived in Australia on May 15, 2003. On May 30, 2003 the brothel in which she worked was raided by officials from the Immigration Department and the Australian Federal Police.⁵⁶

VXAJ claimed that she had been brought to Australia by an international trafficking ring to work in the sex industry. She was aware of the sexual nature of her employment but was led to believe that she would be working legally. Additionally, she was unaware of the strict working conditions of her employment, such as a complete restriction on movement, which was later been held to be tantamount to slavery. During the course of her employment VXAJ

⁴⁶ See, for example, *R v Wei Tang* (2008) 237 CLR 1.

⁴⁷ Melissa Iaria, 'Thai Sex Workers Were Slaves: Court', (22 Apr 2009) *Australian Associated Press*.

⁴⁸ Ibid.

⁴⁹ 'Sex Worker Was Told to Have Unprotected Sex: Court' (27 Apr 2009) *Australian Associated Press*.

⁵⁰ "'Sex Slave' Sent Home \$32,000' (25 Apr 2009) *Herald Sun* (Melbourne), 12.

⁵¹ Maris Beck, 'Bought & Sold' (12 Mar 2009) *The Age* (Melbourne), 19.

⁵² Section 270.3(1)(a) 1st alt *Criminal Code* (Cth).

⁵³ Section 270.3(1)(a) 2nd alt *Criminal Code* (Cth).

⁵⁴ Section 270.3(1)(c) *Criminal Code* (Cth).

⁵⁵ Section 31 *Financial Transaction Reports Act 1988* (Cth).

⁵⁶ *VXAJ v MIMIA* [2006] FMCA 234 states that the brothel where VXAJ was found was raided on May 31, 2003, while *R v Wei Tang* (2007) 16 VR 454 states at 458 that the brothel was raided on May 30, 2003. From the closeness of these dates and the lack of other incidents at the time, it can be assumed that VXAJ was one of the 'contract girls' uncovered in the raid on Wei Tang's brothel 'Club 417', and that there is an error in one of the reports.

was locked in an apartment with a number of other young women — presumably also sex workers — and controlled as to her hours of work.

After her brothel was searched, she was taken to an immigration detention centre. On June 6, 2003 VXAJ was transferred to police custody and was granted a Criminal Justice Stay Visa to assist in the prosecution of Ms Wei Tang and her accomplices.

VXAJ applied for a protection visa on August 25, 2003. She feared returning to Thailand on a number of grounds, which go some way toward showing the capabilities of the criminal organisation with which she was involved. For example, she believed that police in Thailand would be unwilling or unable to prevent harm against her family or herself in retaliation for her assisting Australian authorities in the prosecution of Wei Tang.

Her application for a protection visa was refused on May 13, 2004 and this decision was upheld by the Refugee Review Tribunal (RRT) on March 21, 2005. On May 13, 2005, VXAJ applied for the judicial review of the RRT's decision to the Federal Court. In his decision, Chief Federal Magistrate Pascoe found that the RRT failed to correctly apply the relevant principles in *Applicant S v MIMA*⁵⁷ and thus fell into jurisdictional error. Magistrate Pascoe further found that Thai 'sex workers' were a social group to which Australia may owe protection obligations under Art 1A(2) of the *Convention Relating to the Status of Refugees*.⁵⁸ The issue was remitted to the Refugee Review Tribunal for further consideration.

Yap and Chai-inpan

The case of Yap is an immigration matter involving the fiancée of Mr Hardy Yap, Thai national Ms Rattanaphon Chai-inpan, who applied for a spousal visa, but whose application was rejected on character grounds.⁵⁹ Mr Yap met Ms Chai-inpan in 2002 while she was working in a massage parlour in Fitzroy, Melbourne. They continued their relationship and became engaged after Ms Chai-inpan returned to Thailand in November 2003.

The appeal against the primary decision to refuse Ms Chai-inpan a visa contains a detailed account of the circumstances in which she entered, lived and worked in Australia's sex industry. Ms Chai-inpan claims to have come to Australia to earn money to help support her sick grandmother, in Chiang Rai province, who raised her after her parents separated. She noted that a man known as Mr Tik and his girlfriend Ms Aa worked as 'travel agents' in Thailand and arranged for a sham Singaporean boyfriend to support Ms Chai-inpan's initial application for a visa to enter Australia. She was accompanied to Sydney by another woman and a male minder. While Ms Chai-inpan knew that she would be working in the sex industry, she did not anticipate the harsh conditions of her employment. She was aware that money would be garnished from her wages to pay for her travel expenses, but did not know of the extent of either her debt to her employers or the garnishing.

When Ms Chai-inpan arrived in Australia, she was picked up from a Sydney hotel by a man known as Mr Ah Van and his wife Je Je (Lili), the owners of a Sydney massage parlour. She then lived in a house with ten people, including six other sex workers. Ms Chai-inpan was not allowed to leave the house unsupervised and she was informed by her employers that she now had a debt to pay off. Her passport was also taken from her, allegedly to process her visa, and she was later informed she would have to make another payment for her passport to be returned. It is also apparent that Ms Chai-inpan's passport was used to lodge a fraudulent protection visa without her knowledge. As seen in other cases, an appeal was made to the Refugee Review Tribunal (RRT) after this application was denied, but the appeal was subsequently withdrawn.

⁵⁷ *Applicant S v MIMA* (2004) 217 CLR 387.

⁵⁸ *VXAJ v MIMIA* [2006] FMCA 234 at para [26].

⁵⁹ *Yap and MIMA* [2006] AATA 510 at para [38]. Her situation was misconstrued by the Immigration Department as being that of 'people smuggling' rather than 'people trafficking'.

Ms Chai-inpan managed to pay off her debt in 6–7 months, seeing 10 clients a day and earning around AUD 50 per client per half hour. In August 2002, Ms Chai-inpan was moved to a Fitzroy brothel also run by Ah Van and Je Je. It was around this time that she met Mr Yap and commenced a relationship with him.

In November 2002, after learning that her grandmother's condition had deteriorated, Ms Chai-inpan threatened to kill herself if her employers did not allow her to return to Thailand. They conceded and she left Australia in November 2002, but maintained contact with Mr Yap. Mr Yap subsequently applied for a spousal visa to sponsor her return to Australia. That application was initially refused on character grounds. The Administrative Appeals Tribunal (AAT), however, later found that the applicant should not be refused a visa on the grounds of failing the character test, and the decision was remitted for consideration by the decision maker.⁶⁰

A.3.3 Observations from the Victorian case law

The available case law in Victoria on trafficking in persons for sex work is very limited. This may be reflective, on the one hand, of the low levels of trafficking into Victoria, but on the other hand, there is reason to think that many cases (especially very sophisticated operations) remain undetected. It should be noted that of the seven cases examined, three are a product of investigations into the *Wei Tang* case.⁶¹ Therefore, in Victoria, there are, in total, only five separate instances of trafficking in persons for sex work that have been formally reported by the Victorian Courts.

Despite the small number of reported Victorian cases, it is possible to identify some common features and make some general observations about the patterns of trafficking in persons in Victoria, as well as about the experiences of trafficking victims.

The cases of *Wei Tang*, *Nguyen and Tran*, and *Glazner* illustrate how both (valid) tourist visas and false documents, provided by the traffickers and their aides, have been used to traffic women into Victoria. Additionally, in *Yap*, a sham was used to facilitate the initial application of a trafficked woman for a visa to enter Australia. In three of the cases, a fraudulent protection visa was lodged on behalf of the women so they could work legally, and in these cases there was also evidence the women had their passports confiscated so as to prevent them leaving Australia. Similar patterns can be observed in cases investigated in New South Wales.

Some of the cases involved the use of 'agents' or 'brokers' in Thailand who are concerned with the recruitment of women and who organised their travel to Australia. In *Glazner* and *Yap* there was evidence that another person escorted the victims during their travel (sometimes referred to as a 'minder'). This information suggests that some operations are quite complex, involving numerous people including the manager or owner of the brothel, the residence minder, and sometimes receptionists and drivers. The case of *Nguyen and Tran*, however, demonstrates that sole operators are also involved in the trafficking of persons for the purpose of sex work.

The fact that all of the trafficking victims in the Victoria cases were from Thailand confirms official statistics that Thailand is a major source of trafficked women. In all but one of the cases there was evidence that the women knew they were to work in the sex industry⁶² and

⁶⁰ *Yap and MIMA* [2006] AATA 510.

⁶¹ See *R v Tang* (2008) 238 CLR 1; *R v DS* (2005) 191 FLR 337; and *VXAJ v MIMIA* [2006] FMCA 234.

⁶² See, *R v Tang* (2008) 238 CLR 1; *R v DS* (2005) 191 FLR 337; *VXAJ v MIMIA* [2006] FMCA 234; *DPP v Glazner* [2001] VSCA 204; *Yap v MIMA* [2006] AATA 510; *DPP v Kam Tin Ho, Ho Kam Ho, Chee Fui Hoo & Slamet Edy Rahardjo* [pending].

in *R v Tang* (and associated cases) there were indications that some of the women involved had previously worked in the sex industry.⁶³ However, in most instances these women were tricked or otherwise deceived about the nature of their prospective work.

If the reported case law is indeed reflective of the general patterns of trafficking in persons for sex work in Victoria, the victimisation of trafficked women seems to relate specifically to their working conditions and accommodation. There are ample reports about the hard and unsafe working conditions for trafficked women, the risk of infection with sexually transmitted diseases, poor and unsanitary accommodation, instances of imprisonment, physical and sexual violence, and forced drug use. All the victims from Victoria who have testified appear to have complained about the inflated debt created by their journey, long working hours, threats of violence and deportation, the lack of adequate (or any) payment, poor accommodation, and the health risks associated with their work. Many of these situations are, objectively, nothing short of slavery.

The case law also confirms that trafficking in persons in Victoria alone is a very lucrative industry. It has been estimated from the above cases that some traffickers earned more than one million dollars from this business, as was the case in *Glazner*.

Trafficked women are usually bound to the traffickers by a verbal agreement frequently referred to as 'debt bondage'. This 'contract' obliges women to work for the brothel-owner until the debt for the journey to Australia and their accommodation has been paid off. The so-called 'contract girls' usually enter into the agreement with the traffickers prior to their arrival in Australia, though the contract and the associated debt are sometimes transferred between different traffickers.⁶⁴ The cases suggest that these debts ranged from between AUD 20,000 and AUD 40,000.

It is surprising then to learn that in some cases, certain women deliberately stayed with their traffickers even after their debts had been discharged⁶⁵ — a phenomenon also observed in other Western countries. In the absence of personal interviews with the victims it is not possible to speculate about their motivations. It is noteworthy, however, that many victims were initially drawn into the Australian sex industry (legal and illegal) by the hope that they would earn enough money to support their families abroad.⁶⁶ Some victims were in fact able to transfer some of their income to Thailand, and — given the lack of other employment opportunities in Australia — this fact may have contributed to their decision to remain with the brothel owners that exploited them.

A final point is that trafficking in persons for sexual purposes in Victoria involves both legal and illegal brothels. Despite the clandestine nature of this crime, trafficking in persons is not entirely 'underground'. The inter-relationship (if any) between the unlicensed and licensed prostitution sectors in Victoria, and trafficking for the purposes of sex work is further explored in Part B of this submission.

A.4 NGO assessments

Assessments of trafficking in Victoria and elsewhere in Australia by non-government organisations (NGOs) vary widely. Again, no specific data on the scale of the problem in Victoria is available. The sex worker support organisation, Scarlet Alliance, has claimed that around 400 sex workers enter Australia each year, but denies that these individuals are all trafficked.⁶⁷

⁶³ See, *R v Tang* (2008) 238 CLR 1; and *R v DS* (2005) 191 FLR 337.

⁶⁴ Marnie Ford, *Sex Slaves and Legal Loopholes* (2001) 15.

⁶⁵ See *R v Tang* (2008) 238 CLR 1; and *R v DS* (2005) 191 FLR 337.

⁶⁶ See *R v Nguyen and Tran* [1998] 4 VR 394; *Yap v MIMA* [2006] AATA 510; and *DPP v Kam Tin Ho, Ho Kam Ho, Chee Fui Hoo & Slamet Edy Rahardjo* [pending].

⁶⁷ Cited in Australia, Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry*

In contrast, Project Respect, a Melbourne-based human trafficking advocacy group, has for several years suggested that about 1000 trafficked women reside in Australia at any one time:

Project Respect estimates that there are typically up to 1,000 women in Australia under contract at any one time. This refers to women still paying off a 'debt' and does not include women who have finished their 'debt' but remain in Australia. [...] Project Respect has made estimates based on a range of other information, including statistics from the Refugee Review Tribunal, Department of Immigration removal statistics, sex industry estimates, observations in brothels etc.⁶⁸

Project Respect's figure of 1000 women trafficked into Australia has been cited in several media reports⁶⁹ and the organisation has made multiple presentations and submissions to government agencies in which it repeats this figure. It is not possible to establish the accuracy of these estimates.

These high estimates were rejected by the previous federal Government as exaggerated and unreliable. On April 1, 2003, the then Minister for Immigration and Multicultural and Indigenous Affairs, Mr Philip Ruddock, issued a media release stating that since July 2002 only four women had made complaints of trafficking. Thus, he remarked:

It is not a credible suggestion that hundreds or thousands of people are being trafficked unwillingly into the industry and have escaped detection over many years ... While I do not diminish the concerns on trafficking, the actual complaints from individuals do not match the level of claims being made ... the claims being made about the wide extent of trafficking cannot be substantiated.⁷⁰

A parliamentary briefing paper has also been critical about the methods used by advocacy groups and NGOs to estimate the number of persons trafficked to Australia, suggesting that '[s]ome of these methods may inflate the extent of the problem'.⁷¹ But the same paper also notes that 'it is probable that the Government's reliance on the actual number of complaints significantly understates the problem'.⁷² Another newspaper article remarked: 'Whether there are 500 or 1500 sex slaves (as some zealots claim) is impossible to guess and the task is made more difficult by activists with other agendas'.⁷³

B The inter-relationship (if any) between the unlicensed and licensed prostitution sectors in Victoria, and trafficking for the purposes of sex work

In order to explore and assess the inter-relationship between unlicensed and licensed prostitution in Victoria, and trafficking for the purposes of sex work, the following Sections briefly examine Victoria's prostitution regulation framework. This is followed by an analysis

into the trafficking of women for sexual servitude (June 2004) para 2.65. See also Nicola Piper, 'A Problem by a Different Name? A Review of Research on Trafficking in South-East Asia and Oceania' in Frank Laczko & Elzbieta Godziak (eds), *Data and Research on Human Trafficking: A Global Survey* (2003) 203 at 219.

⁶⁸ Project Respect, *About Trafficking*, available at www.projectrespect.org.au (accessed July 4, 2008).

⁶⁹ See, for example, Cath McAloon, 'Vic: At least 1000 illegally trafficked prostitute in Australia' (23 Oct 2003) *Australian Associated Press National News Wire*; 'Illegal Prostitution Rife' (24 Oct 2003) *Herald Sun* (Melbourne); Mark Phillips, 'Sex slave shame unveiled' (24 Mar 2004) *The Mercury* (Hobart).

⁷⁰ As cited in Kerry Carrington & Jane Hearn, *Trafficking and the Sex Industry: from Impunity to Protection*, Current Issues Brief No 28, 2002-03 (2003), 5.

⁷¹ *Ibid*, at 6.

⁷² *Ibid*, at 6.

⁷³ Piers Akerman, 'When the truth spoils a good slavery story' (3 June 2003) *The Daily Telegraph* (Sydney) 16.

of the case law, revealing the differences (if any) between the existence of trafficking in persons within and outside Victoria's licensed prostitution sector.

B.1 The Prostitution Control Act 1994 (Vic)

Decriminalisation of prostitution occurred in Victoria in 1984 through the *Planning (Brothels) Act 1984* (Vic) which permitted the provisions of sexual services within brothels holding valid town planning permits issued by a local government. Brothels not holding such permits, as well as street prostitution, were heavily penalised.

The system established by the *Planning (Brothels) Act 1984* (Vic) was significantly altered by the *Prostitution Control Act 1994* (Vic), which regulates the provision of sexual services in brothels and escort agencies. The regime is primarily overseen by the Business Licensing Authority⁷⁴ (BLA), a role previously performed by the now defunct Prostitution Control Board.⁷⁵ In addition to meeting local planning requirements, most sexual service providers must also meet numerous requirements under the licensing and authorisation regime, whether as operators or managers. Additionally, sexual service providers exempt from licensing requirements must, nevertheless, register with the BLA.

The primary purpose of the Act, as its name suggests, is to 'seek to control prostitution in Victoria'. Under this wider aim, the Act's objects are:

- (a) to seek to protect children from sexual exploitation and coercion;
- (b) to lessen the impact on the community and community amenities of the carrying on of prostitution-related activities;
- (c) to seek to ensure that criminals are not involved in the prostitution industry;
- (d) to seek to ensure that brothels are not located in residential areas or in areas frequented by children;
- (da) to seek to ensure that no one person has at any one time an interest in more than one brothel licence or permit;
- (e) to maximise the protection of prostitutes and their clients from health risks;
- (f) to maximise the protection of prostitutes from violence and exploitation;
- (g) to ensure that brothels are accessible to inspectors, law enforcement officers, health workers and other social service providers;
- (h) to promote the welfare and occupational health and safety of prostitutes.⁷⁶

The prevention and suppression of trafficking in persons for the purposes of sex work is not a stated purpose of the regulative regime. Nevertheless, the prevention of trafficking in persons might be seen as at least partially subsumed within several of the stated objectives.

Trafficking in persons, by definition, involves some form of coercion or exploitation. Accordingly, subs 4(a), in seeking to protect children from sexual exploitation and coercion, indirectly targets the trafficking of children for the purposes of sex work. Subsection 4(f), in seeking to protect sex workers from violence and exploitation, and subs (g), in seeking to subject brothels to various forms of monitoring by Victorian authorities and other interested organisations, perform similar indirect preventative roles in relation to sexual trafficking. Additionally, the aim of decriminalising the culture of prostitution provision, articulated in s 4(c), indirectly addresses trafficking, given that trafficking in persons it is a serious transnational crime.

⁷⁴ Sections 25, 3 *Prostitution Control Act 1994* (Vic).

⁷⁵ Section 194 (b), (c) *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998* (Vic).

⁷⁶ Section 4 *Prostitution Control Act 1994* (Vic).

B.1.1 Protecting children from sexual exploitation, s 4(a) *Prostitution Control Act 1994 (Vic)*

The Act prohibits causing or inducing a child to take part in prostitution⁷⁷ as well as obtaining payment for sexual services provided by a child.⁷⁸ While not explicitly addressing the issue of human trafficking, these provisions can be seen as indirectly attempting to deter sexual service operators from employing or using trafficked children in the Victorian sex industry.

The Act also prohibits entering into or offering to enter into an agreement under which a child is to provide sexual services,⁷⁹ which has a similar deterrent effect and which would apply not only to sexual services provided within Victoria but also those provided as part of overseas sex tours.⁸⁰

B.1.2 Maximising the protection of sex workers from violence and exploitation, s 4(f) *Prostitution Control Act 1994 (Vic)*

Prostitution in non-residential areas

The enhancement of the physical safety of sex workers in Victoria is another stated goal of the *Prostitution Control Act 1994 (Vic)*. The legislature recognises that sex workers are especially vulnerable to sexual assault and physical violence. For this reason, the regulatory framework seeks to enhance the physical safety of sex workers by discouraging street prostitution, through the creation of offences for both the clients and sex workers involved,⁸¹ as well as by removing brothels (and their clients) from suburban areas,⁸² even small owner-operated brothels of one or two persons.⁸³

The location in which sex work may legally be carried out was a matter of significant debate during the passage of the legislation. One government member suggested that: 'The majority of people do not want to have brothels set up in their streets or nearby. The bill prevents that from occurring. It is a general feeling in the community.'⁸⁴ The Opposition, however, argued that:

Prostitutes will still work out of their homes, as they always have. If they do not they will be confined to the existing legal brothels, which eliminates further competition, which is apparently a lot of what this bill is about. [...]. The bill ignores the right of women who work in this industry to be protected.⁸⁵

The debate as to whether the legalisation of street prostitution would enhance, or detract from, the protection of sex workers in Victoria is ongoing.

The *Prostitution Control Act 1994 (Vic)* also permits the operation of escort agencies, subject to the same licensing requirements as brothels, following the recognition by the legislature that the majority of sex work in Victoria is provided through such agencies. In an attempt to compensate for the more dangerous nature of escort work, the legislation imposes additional requirements on escort agency operators to better ensure the safety of their workers.⁸⁶

⁷⁷ Section 5 *Prostitution Control Act 1994 (Vic)*.

⁷⁸ Section 6 *Prostitution Control Act 1994 (Vic)*.

⁷⁹ Section 7 *Prostitution Control Act 1994 (Vic)*.

⁸⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 21 Oct 1994, 1454 (Jan Wade, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Council, 29 Nov 1994, 963 (Haddon Storey, Minister for Tertiary Education and Training).

⁸¹ Sections 12, 13 *Prostitution Control Act 1994 (Vic)*.

⁸² Section 73, 74 *Prostitution Control Act 1994 (Vic)*.

⁸³ Sections 23(1)(a)(i), 74 *Prostitution Control Act 1994 (Vic)*.

⁸⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 16 Nov 1994, 1865 (E R Smith).

⁸⁵ Victoria, *Parliamentary Debates*, Legislative Council, 7 Dec 1994, 1265 (Jean McLean).

⁸⁶ Regulation 7(6)–(7) *Prostitution Control Regulations 2006 (Vic)*.

Forced prostitution

The *Prostitution Control Act 1994* (Vic) contains several provisions relating to forced prostitution. It is an offence to force a person to engage, or continue to engage, in prostitution by way of assault, threat of assault, intimidation, offer of supply of certain drugs, false representation or other fraudulent means.⁸⁷ Further, it is an offence to use similar methods to force a sex worker to provide or continue to provide financial support derived directly or indirectly from their provision of prostitution.⁸⁸ For a person holding a relevant position in the prostitution service providing the business or exercising a significant influence over or with respect to the management or operation of that business, it is an offence to knowingly live on, or derive material benefit from, the earnings of a prostitute.⁸⁹

These provisions, while applicable to prostitution generally, are particularly relevant to the participation of trafficked persons in the Victorian sex industry. By criminalising forced prostitution and forced sharing of funds obtained from sex work, the Victorian legislation seeks to ensure that any person engaging in prostitution is doing so of their own free will and not as the result of some form of coercion, as is the case in instances of human trafficking.

B.1.3. Ensuring criminals are not involved in the prostitution industry, s 4(c) *Prostitution Control Act 1994* (Vic)

Key reasons behind prostitution reform are the realisation that brothels exist in any society, regardless of their legal status, and the recognition that an illicit sex industry is more likely to be controlled by organised crime, and more prone to corruption and bribery. When the *Prostitution Control Bill 1994* (Vic) was debated in the Parliament of Victoria, prostitution was at various times recognised as being ‘virtually impossible to stamp out’,⁹⁰ ‘obviously impossible to wipe out’,⁹¹ and ‘inevitably [...] a fact of life in our community’.⁹² The Victorian Government of the time stated that in introducing the legislation, it was ‘neither making an impossible attempt to suppress prostitution, nor leaving prostitution to spread uncontrolled through the state’.⁹³

The introduction of the *Prostitution Control Act 1994* (Vic) ‘centres on a concern about the criminal element – namely organised crime’.⁹⁴ To limit the influence of criminal organisations over brothels and reduce the likelihood of corruption, the *Prostitution Control Act 1994* (Vic) established the Prostitution Control Board as a central agency to oversee stringent licensing application, approval, and administration processes.⁹⁵ Its functions have since been subsumed within the BLA.

Licensing system

The central element of the *Prostitution Control Act 1994* (Vic) is the creation of a licensing system for brothels. Under this regime, a prostitution service provider must hold a licence,⁹⁶ unless he or she works alone or with no more than one other sex worker,⁹⁷ in which case he or she must still register as a sexual service provider relying on the licensing exemption.⁹⁸

⁸⁷ Section 8 *Prostitution Control Act 1994* (Vic).

⁸⁸ Section 9 *Prostitution Control Act 1994* (Vic).

⁸⁹ Section 10 *Prostitution Control Act 1994* (Vic).

⁹⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 16 Nov 1994, 1868 (E R Smith).

⁹¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 21 Oct 1994, 1880 (Inga Peulich).

⁹² Victoria, *Parliamentary Debates*, Legislative Assembly, 16 Nov 1994, 1881 (Bob Sercombe).

⁹³ Victoria, *Parliamentary Debates*, Legislative Assembly, 21 Oct 1994, 1458 (Jan Wade, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Council, 29 Nov 1994, 966 (Haddon Storey, Minister for Tertiary Education and Training).

⁹⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 16 Nov 1994, 1860 (Michael Cole).

⁹⁵ Part 3 *Prostitution Control Act 1994* (Vic).

⁹⁶ Section 22 *Prostitution Control Act 1994* (Vic).

⁹⁷ Section 23(1) *Prostitution Control Act 1994* (Vic).

⁹⁸ Section 24(1) *Prostitution Control Act 1994* (Vic).

Managers must also seek approval before overseeing the operations of an approved prostitution operation.⁹⁹ There are currently 96 licensed brothels in operation in Victoria and 2402 persons notified as exempt from holding a licence for the provision of prostitution, all but two of whom are engaged in escort work.

Essentially, the legislation prohibits the granting of brothel licences to persons convicted of specific offences, especially for offences frequently associated with organised crime and corruption.¹⁰⁰ Licences are refused to any person deemed unsuitable to carry on business as a prostitution service provider.¹⁰¹ The determination of suitability requires reference to various factors including the repute of the applicant and his or her associates (established by reference to character, honesty and integrity), and whether the applicant will have sufficient arrangements to ensure the safety of employed sex workers.¹⁰² Other reasons for refusal to license include that the applicant has been convicted of a serious criminal offence or had a licence cancelled within the preceding five years.¹⁰³

Through this process, it appears that persons (actually or potentially) engaged in human trafficking are less likely to be able to obtain a license to operate a regulated brothel if they have a significant criminal history, trafficking-related or otherwise. It is, however, doubtful that this requirement has any deterrent effect on trafficking in persons. The case law examined earlier has shown that several license holders in Victoria were involved in trafficking in persons and similar offences.

Fees

The *Prostitution Control Act 1994* (Vic), along with the *Prostitution Control (Fees) Regulations 2004* (Vic), establish the fees payable upon applications for and renewal of prostitution service provider licences, and for approval of managers.¹⁰⁴ Escort agencies have to pay an application fee of currently AUD 1,999.80, while brothels and brothel-escort agencies pay AUD 3,999.50.¹⁰⁵ Prostitution service providers are also liable for an annual licence fee of AUD 2,285.40, in addition to AUD 428.60 for the second and any other rooms used for prostitution, AUD 428.60 for the second and any other business names used for prostitution, and the same amount for the second and any other telephone numbers used for prostitution.¹⁰⁶ Managers must pay an application fee of AUD 297.20 and an annual fee of the same amount.¹⁰⁷

This means that an escort agency-brothel operating with the maximum six rooms would be required to pay AUD 8,856.50 to set up operations, and a further AUD 6,571.10 each following year. Compared, for example, to the Queensland regulatory system, which requires a five-room brothel (the largest allowable under that State's legislation) to pay AUD 27,000 to establish and a further AUD 21,500 each following year, the Victorian system provides far less disincentive for entry into the legal, regulated sex industry.

⁹⁹ See ss 49–52 *Prostitution Control Act 1994* (Vic).

¹⁰⁰ Sections 37(1), 51(1), 3 *Prostitution Control Act 1994* (Vic).

¹⁰¹ Section 37(1)(a) *Prostitution Control Act 1994* (Vic).

¹⁰² Section 38 *Prostitution Control Act 1994* (Vic).

¹⁰³ Section 37(1) *Prostitution Control Act 1994* (Vic).

¹⁰⁴ Sections 33(2)(d), 50(2) *Prostitution Control Act 1994* (Vic); ss 5–6, 8 *Prostitution Control (Fees) Regulations 2004* (Vic).

¹⁰⁵ Section 33(2)(d) *Prostitution Control Act 1994* (Vic); s 5 *Prostitution Control (Fees) Regulations 2004* (Vic).

¹⁰⁶ Section 33(2)(d) *Prostitution Control Act 1994* (Vic); s 6 *Prostitution Control (Fees) Regulations 2004* (Vic).

¹⁰⁷ Section 50(2) *Prostitution Control Act 1994* (Vic); s 8 *Prostitution Control (Fees) Regulations 2004* (Vic).

Outcall prostitution/escort services and trafficking

Outcall prostitution (often referred to as escort services) — arguably the most popular form of prostitution among clients and sex workers — is permitted in Victoria. During the passage of the Act through the Parliament of Victoria, it was noted that '[e]scort agency work is inherently dangerous',¹⁰⁸ but the legislature recognised the high demand for such work and sought to strike an appropriate balance between protecting the safety of sex workers and promoting the legal, regulated industry.

The nexus between outcall prostitution and trafficking in persons is not very well explored and it remains debatable whether and how escort agencies may be vulnerable to human trafficking. There is, to date, no evidence that trafficked persons have been involved in the provision of sexual services through escort agencies in Victoria. All relevant reported cases involved either legal or illegal brothels. The Crime and Misconduct Commission (CMC) in Queensland, however, expressed the view that the legalisation of outcall prostitution services could ultimately lead to an increased demand in the provision of illegal services, and may add to the number of trafficked and underage workers in the illegal industry.¹⁰⁹

B.1.4 Enforcement and compliance: s 4(g) *Prostitution Control Act 1994* (Vic)

The *Prostitution Control Act 1994* (Vic) provides various compliance and enforcement measures for ensuring that licensed sexual service providers (as well as sexual service providers exempt from licensing requirements under s 23) comply with the legislative requirements.

Inspectors appointed under the *Fair Trading Act 1999* (Vic) have the power to require the production of documents for inspection and the answering of questions, relating to licensed premises.¹¹⁰ Inspectors also have powers to enter premises, both with and without the consent of the occupier of premises, for the purpose of inspection and seizing documents in order to monitor compliance with the Act or relevant Regulations.¹¹¹ Similar powers exist for Victoria Police in respect of licensed sexual service providers, in addition to police powers of entry of unlicensed premises suspected of use for the purposes of sex work.¹¹²

These powers of enforcement and compliance place sexual service providers under considerable scrutiny, though such scrutiny is considerably heightened within the regulated sector, given the powers of inspectors to enter premises without consent or warrant. Through this, the likelihood of detecting instances of trafficking may be increased. Nevertheless, this is an indirect effect of prostitution licensing and the reported cases provide no evidence that instances of trafficking have been detected as a result of the powers afforded under these provisions.

B.2 Case law

Further analysis of the detected human trafficking cases in Victoria suggests that despite the potential impact of Victoria's prostitution regulatory regime on trafficking in persons (directly and indirectly), the phenomenon is not confined to illegally run brothels or clandestine prostitution rings. Of the reported cases from Victoria, two involved illegal brothels,¹¹³ four

¹⁰⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 16 Nov 1994, 1873 (McGill).

¹⁰⁹ Queensland, CMC, *Regulating Outcall Prostitution* (2006) 17.

¹¹⁰ Sections 61B-61I *Prostitution Control Act 1994* (Vic).

¹¹¹ Sections 61J-61W *Prostitution Control Act 1994* (Vic).

¹¹² Division 9 *Prostitution Control Act 1994* (Vic).

¹¹³ See, *R v Nguyen and Tran* [1998] 4 VR 394; and *DPP v Glazner* [2001] VSCA 204.

(three of which related to the *Wei Tang* case¹¹⁴) involved legal brothels, and one involved a brothel of unknown status.¹¹⁵

The case of *Wei Tang* demonstrates that the current licensing regime may not sufficiently address the trafficking of persons for the purposes of sex work. The five Thai women Ms Tang held under debt-bondage conditions worked in a legal brothel called Club 417 in Fitzroy, Melbourne (Vic). An employee of Ms Tang, Ms Donoporn Srimonthon, was also convicted for offences relating to sexual slavery, whilst women under her control were working at the same licensed brothel.¹¹⁶ The debt-bondage method used by Ms Tang appears to have been the same as that used in another operation, that of *Ho et al.*

It may come as a surprise that such operations were able to be run from a legal brothel, subject to strict licensing requirements and powers of inspection and enforcement by various government authorities. Moreover, the *Wei Tang* case illustrates that — despite some potential indirect benefits — the Victorian *Prostitution Control Act 1994* (Vic) and the associated regulatory, administrative, and enforcement systems do not adequately prevent and suppress trafficking in persons in Victorian brothels and that legislative amendment may be needed.

The High Court, in *R v Tang*, also noted:

Attempts to use “slavery offences” to suppress commercial sex work, based upon individual repugnance towards adult sexual behaviour, potentially contradict the law enacted by the Victorian Parliament. The simple fact is that some commercial sex workers have no desire to exit the industry [...]. In Victoria, so long as the sex worker is a consenting adult with no relevant disability, that is a choice open to her or him. The contrary approach risks returning elements of the sex industry to operate, as was previously the case, covertly, corruptly and underground. This would undermine the fundamental objectives of the recent Australian legislation in this area, such as that of Victoria under which the brothel where the complainants worked was licensed.¹¹⁷

The case of *Glazner*, outlined earlier, is an example of women being trafficked into an illegal brothel for the purpose of sex work in an illegal brothel.¹¹⁸ It was noted by the Court, however, that Mr Glazner, as well as providing the services of prostitutes at unlicensed premises did ‘carry on a business at premises in Tope Street, South Melbourne, behind the façade of a person licensed under the Act.’¹¹⁹ Further, Mr Glazner took over the business of another licensed prostitution service provider in City Road, South Melbourne.¹²⁰ This case demonstrates that whilst the regulatory requirements promulgated by the *Prostitution Control Act 1994* (Vic) may have been effective in some areas, licensing has not eliminated trafficking for the purposes of sex work, or the fluidity with which women working in licensed premises can overlap with unlicensed ones.

In summary, the limited case law suggests that Victoria’s prostitution regulation regime has not had a significant impact, if any, on the prevention and suppression of trafficking in persons for the purposes of sex work.

¹¹⁴ See, *R v Tang* (2008) 238 CLR 1; *R v DS* (2005) 191 FLR 337; and *VXAJ v MIMIA* [2006] FMCA 234.

¹¹⁵ See, *DPP v Kam Tin Ho, Ho Kam Ho, Chee Fui Hoo & Slamet Edy Rahardjo* [pending].

¹¹⁶ *R v DS* (2005) 191 FLR 337.

¹¹⁷ *R v Tang* (2008) 238 CLR 1 at para [121].

¹¹⁸ See also *R v Nguyen and Tran* [1998] 4 VR 394 for another case example where women were brought into Australia to work in an illegal prostitution racket.

¹¹⁹ *DPP v Glazner* [2001] VSCA 204, at para [7].

¹²⁰ *Ibid*, at para [7].

B.3 Summary

The analysis of Victoria's prostitution legislation and reported cases of trafficking in persons reveals that there is little discernable difference in the relationship between trafficking and licensed, as opposed to unlicensed prostitution providers.

There is no specific mention anywhere in the legislative material of the link between the sex industry and trafficking in persons, and the role and status of foreign sex workers in Victoria's brothels. It appears that links between legal and illegal prostitution and trafficking in persons were not widely or properly appreciated at the time the *Prostitution Control Act 1994* (Vic) was developed.

Foreigners are particularly vulnerable to sexual exploitation within legal and illegal brothels around Australia. On the surface, it appears that foreign sex workers benefit equally from those measures introduced to enhance the physical safety and health of sex workers. But there are no specific clauses relating to persons that may have been brought into the country illegally, that are psychologically or economically exploited in the sex industry, or that are threatened with deportation.

General questions remain as to whether the regulation of brothels assists in making human trafficking unnecessary or whether it contributes to an influx of foreign sex workers and their exploitation in Victoria's legal and illegal brothels.

Some NGOs try to link the issue of trafficking with the legalisation of brothels in Victoria which started in 1986.¹²¹ For example, Kathleen Maltzahn, the director of Project Respect, argues that the presence of trafficked women in Victoria, including in legal brothels, demonstrates that the Victorian Government's current brothel registration arrangements are not working,¹²² and that legalisation actually encourages trafficking by legitimising prostitution.¹²³ This link between legal brothels and trafficking in persons is also seen in the recent media speculation that 'sex traffickers are using Melbourne's legal brothels as a front for their trade' with the Australian Federal Police agent Ms Jennifer Cullen claiming that Melbourne was a "major destination" for sex trafficking and most trafficked women were found in legal brothels'.¹²⁴ There is, however, no evidence to support these statements.

C Current and proposed intergovernmental and international strategies and initiatives in relation to dealing with trafficking for the purposes of sex work

C.1 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

The United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*¹²⁵ (the '*Trafficking in Persons Protocol*'), opened for signature in 2004, marks the international community's most comprehensive effort to deal with human trafficking in its modern form. The *Trafficking in Persons Protocol* is one of three supplementary instruments to the *Convention against Transnational Organised Crime*.¹²⁶

¹²¹ Marnie Ford, *Sex slaves and legal loopholes* (2001) 37.

¹²² Kathleen Maltzahn, 'Time to end a heinous crime' (26 Oct 2003) *The Age* (Melbourne), available at www.theage.com.au/articles/2003/10/25/1066974363820.html?from=storyrhs (accessed 21 Oct 2009). See also Kathleen Maltzahn, 'Beyond sex slavery' (16 June 2004) *The Courier Mail* (Brisbane).

¹²³ Kathleen Maltzahn, 'Beyond sex slavery' (16 June 2004) *The Courier Mail* (Brisbane).

¹²⁴ Kate Lahey & Maris Beck, 'Brothels to spell out illegal slavery' (12 Mar 2009) *The Age* (Melbourne), available at www.theage.com.au/national/brothels-to-spell-out-illegal-slavery-20090311-8vbi.html (accessed 21 Oct 2009).

¹²⁵ Opened for signature 15 Dec 2000, 2237 UNTS 319, Annex II.

¹²⁶ Opened for signature 15 Dec 2000, 2225 UNTS 209, (the '*Convention*').

The Convention entered into force on September 29, 2003. The Protocol entered into force on May 31, 2004.

The express purposes of the Protocol are to prevent and combat trafficking in persons, to protect and assist the victims of that trafficking, and to promote cooperation among state parties in order to achieve these objectives.¹²⁷ To that end, the *Trafficking in Persons Protocol* takes a '3-Ps' approach to combating human trafficking, as its provisions can be broadly characterised as relating to the protection of victims, the prosecution of perpetrators or the prevention of human trafficking;¹²⁸ — Parts I, II and III of the *Trafficking in Persons Protocol* are concerned with prosecution, protection and prevention respectively.

C.1.1 Background

During the early 1990s, the UN General Assembly became increasingly aware of the need for international cooperation to combat the growing threat posed by transnational organised crime. In December 1998, the General Assembly established an Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime (AC.154), which was also charged with the task of elaborating a new treaty dealing with the trafficking of women and children.¹²⁹ The Ad Hoc Committee held eleven meetings in Vienna, Austria between January 1999 and October 2000, culminating in the opening of the Convention and Protocol for signature at the High Level Signing Convention in Palermo, Italy on December 12–15, 2000.¹³⁰

The two major textual influences on the Protocol were draft documents submitted by the governments of the United States and Argentina. The United States proposal did not limit trafficking to women and children, but was narrower in scope than the Argentinean proposal, which also covered pornography, sex tourism, acts in connection with marriages and the extraction of body organs.¹³¹ A preference for the United States proposal became evident at the second meeting of the Ad Hoc Committee and the definition of 'trafficking in persons' adopted in the Protocol bears a strong resemblance to that submitted by the United States.¹³²

Since its inception, there have been doubts about how well adapted the Protocol is towards achieving its lofty ambitions.¹³³ Whilst general criticism has been levelled at the *Trafficking in Persons Protocol*, the vast majority of academic commentary has limited itself to distinct parts or articles of the Trafficking in Persons Protocol.

C.1.2 Part I Trafficking in Persons Protocol (General provisions)

Part I of the *Trafficking in Persons Protocol* contains:

¹²⁷ See Article 2 *Trafficking in Persons Protocol*.

¹²⁸ LeRoy G Potts, 'Global trafficking in human beings: Assessing the success of the United Nations Protocol to prevent trafficking in persons' (2003) 35 *George Washington International Law Review* 227; Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 121.

¹²⁹ UN General Assembly, *Resolution on Transnational Organized Crime*, UN DOC A/RES/53/111 (1998).

¹³⁰ Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (2008) 56.

¹³¹ David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (2007) 323.

¹³² See UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Revised draft Protocol to Prevent, Suppress, and Punish Trafficking in Women and Children, Supplementing the Convention against Transnational Organized Crime, Combined drafts of Argentina and the United States of America*, UN Doc A/AC.254/4Add.3/Rev.1

¹³³ Elizabeth Defeis, 'Protocol to prevent, suppress and punish trafficking in persons — a new approach' (2003–04) 10 *ILSA Journal of International & Comparative Law* 485 at 488.

- definitions and use of terms (Article 3);
- scope of application of the Trafficking in Persons Protocol (Article 4); and
- criminalisation of conduct (Article 5).

A Common Definition

The *Trafficking in Persons Protocol* represents the first international consensus on the definition of trafficking and is an important step towards a concerted global response to this problem.¹³⁴ The definition of ‘trafficking in persons’ is set out in article 3 of the Protocol. It requires that three elements be fulfilled, which can be broadly classified as the acts involved, the means used, and the purpose of the actor.¹³⁵

Article 3, Trafficking in Persons Protocol Definition of ‘trafficking in persons’	
1. Act	<ul style="list-style-type: none"> • ‘[T]he recruitment, transportation, transfer, harbouring or receipt of persons’
2. Means	‘The threat or use of’: <ul style="list-style-type: none"> • force or other forms of coercion; • abduction; • fraud or deception; • the abuse of a position of vulnerability; or • the giving or receiving of payments / benefits to achieve the consent of a person having control over another person.
3. Purpose	Exploitation This includes at a minimum: <ul style="list-style-type: none"> • the exploitation of the prostitution of others or other forms of sexual exploitation; • forced labour or services; • slavery or practices similar to slavery; • servitude; or • the removal of organs.

The term ‘exploitation’ is only given a partial definition in article 3(a) and other purposes which are not listed may constitute exploitation in satisfaction of the definition of ‘trafficking in persons’.¹³⁶ Additionally, article 3(b) provides that the consent of the victim to exploitation is irrelevant where any of the means listed are used. As proof of one of the means is a necessary element for establishing that a person has been trafficked, the practical effect of article 3(b) is that the consent of the victim is wholly irrelevant.¹³⁷

The definition has been adopted by 117 countries¹³⁸ and has been credited with promoting consistency in international anti-trafficking efforts. It has assisted law enforcement agencies in numerous ways. Firstly, it has made trafficking a crime in countries which previously had limited or non-existent offences. Secondly, it simplifies the process of extraditing suspected participants. Generally, extradition between states is dependent on the dual criminality requirement, which requires the offence to exist in both the prosecuting state and the state in which the offence occurred.¹³⁹ A universal legal denominator such as an accepted definition

¹³⁴ Kelly E Hyland, ‘The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children’ (2001) 8(2) *Human Rights Brief* 30 at 31.

¹³⁵ David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (2007) 323.

¹³⁶ *Ibid.*, at 326-327.

¹³⁷ *Ibid.*, at 328. This interpretation is acknowledged in UNODC *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol thereto* (2004) 270 [37].

¹³⁸ United Nations Office on Drugs and Crime (UNODC), *The United Nations Convention against Transnational Organized Crime and its Protocols* (2008), available at www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html (accessed 21 Oct 2009).

¹³⁹ Kalen Fredette, ‘Revisiting the UN Protocol on Human Trafficking: Striking balances for more

facilitates extradition and mutual legal assistance between countries which would otherwise have to undertake time-consuming bilateral negotiations.¹⁴⁰ Thirdly, it is hoped that a common definition will standardise research and allow for better comparisons of data on trafficking.

The actual content of the definition has received mixed reviews. Positive points include its consideration of more subtle forms of coercion as a means of facilitating trafficking. For example, the phrase 'abuse of a position of vulnerability' takes into account the fact that trafficking does not always occur by force, but often involves close family members pressuring or convincing the victim to partake in the activity.¹⁴¹ However, the definition has also been criticised on a practical level as unwieldy and ill-suited for use in domestic criminal codes.¹⁴² A major criticism is that it contains too many elements, which complicates prosecution efforts. Furthermore, ambiguity in some of the language could lead to legal challenges by defendants in appellate courts.¹⁴³ Various modifications have been suggested. Of particular note is the proposal to eliminate the requirement to prove a means of trafficking, such as threats, force and coercion and to limit the 'purpose' element to internationally recognised crimes such as forced labour, slavery and servitude.¹⁴⁴ The rationale is that the 'means' utilised to traffic an individual are not significant, but the process of transporting people in order to hold them in forced labour or slavery is essential. However, the words 'force, threats and coercion' were expressly included in the definition to distinguish trafficking from smuggling. It is arguable that the removal of these means might further blur the distinction between the two offences.

Exploitation and Consent

A particularly controversial topic during the negotiations for the *Trafficking in Persons Protocol* related to the definition of 'exploitation'. During the meetings of the Ad Hoc Committee in Vienna, a group of NGOs led by the Coalition Against Trafficking in Women and Equality, proposed that the definition in the *Trafficking in Persons Protocol* encompassed all forms of prostitution. Their belief was that the distinction between forced and free prostitution was meaningless as prostitution was by its very nature exploitative.¹⁴⁵ This position is underpinned by the conviction that a woman's consent to undertake sex work is meaningless¹⁴⁶ and as such, sex work satisfies the exploitation element for the purpose of trafficking.¹⁴⁷ These NGOs were supported by nations such as Argentina and the Philippines. On the other side of the debate were NGOs such as the Human Rights Caucus, and countries including the United States. They argued that the *Trafficking in Persons Protocol* should only include prostitution which was conducted under force or deception. In other words, voluntary adult sex work did not constitute exploitation for the purpose of trafficking.

The delegates compromised by leaving the term 'sexual exploitation' and 'exploitation for the prostitution of others' undefined. The Travaux Préparatoires explicitly state that these terms

effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 113.

¹⁴⁰ Anthony Destefano, *The War on Human Trafficking: US Policy Assessed* (2007), xx.

¹⁴¹ Ann D Jordan, *Annotated Guide to the complete UN Trafficking Protocol* (2002) 4, available at [www.globalrights.org/site/DocServer/Annotated_Protocol.pdf?docID=2723#search=""Annotated%20Guide%20to%20the%20Complete%20UN%20Trafficking%20Protocol""](http://www.globalrights.org/site/DocServer/Annotated_Protocol.pdf?docID=2723#search=) (accessed 21 Oct 2009).

¹⁴² *Ibid*, at 3.

¹⁴³ *Ibid*, at 3.

¹⁴⁴ *Ibid* at, 3.

¹⁴⁵ Elizabeth Defeis, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons – A New Approach' (2004) 10 *ILSA Journal of International and Comparative Law* 485 at 488.

¹⁴⁶ J Doezeema, 'Who gets to choose? Coercion, consent, and the UN Trafficking Protocol' (2002) 10(1) *Gender & Development* 20 at 21.

¹⁴⁷ Ann D Jordan, *Annotated Guide to the complete UN Trafficking Protocol* (2002) 4.

are 'without prejudice' as to how nations approach prostitution in their particular domestic laws.¹⁴⁸ In other words, the *Trafficking in Persons Protocol* defers to the discretion of individual nations, allowing each government to make a judgment on the legal treatment of voluntary sex work. This accommodates the seemingly irreconcilable views of countries with different regulatory schemes for prostitution. Those with liberal regimes, such as the Netherlands, are able to exclude voluntary prostitution from their national trafficking framework while countries with stricter prostitution laws are able to expand the scope of their offences.¹⁴⁹ While this compromise resolved a major stumbling block in negotiations, it has been seen by some commentators as having repressive consequences, particularly for migrant sex workers.¹⁵⁰

A secondary issue concerns the extent to which consent is offered and in particular, whether a person who consents to illegally enter a country and work also consents to working in conditions of forced labour. The weight of academic opinion suggests that consent must be continuous.¹⁵¹ A victim may consent to migrating, but that consent is non-existent or defective if exploitation occurs.¹⁵²

Scope of Application

Article 4 provides for the Protocol to apply to the prevention, investigation, and prosecution of the offences established under article 5, where those offences are transnational in nature and involve an organised criminal group.¹⁵³ However, the *Legislative Guide* explains that 'the Protocol offences of trafficking in persons [...] must apply equally regardless of whether the case involves transnational elements or is purely domestic.'¹⁵⁴ Thus, the Protocol does not require State Parties to include a transnational component or the involvement of an organised criminal group as essential elements of any offences criminalising trafficking in persons. In the context of trafficking in persons this is quite important, as it ensures that persons trafficked internally within a country or without the involvement of an organised criminal group are entitled to protection under the Protocol, and their traffickers remain criminally liable.¹⁵⁵ Article 4 of the *Trafficking in Persons Protocol* has attracted much criticism for limiting the definition of trafficking to offences that are transnational in nature and involve an organised criminal group. These terms are to be read in conjunction with the Convention which defines an 'organised criminal group' as a 'structured group of three or more persons', and a transnational offence as one 'committed in more than one State.'¹⁵⁶ The reference to an organised criminal group was seen as overlooking the widespread

¹⁴⁸ Robyn Emerton, 'Translating International and Regional Trafficking Norms into Domestic Reality: a Hong Kong Case Study' (2004) 10 *Buffalo Human Rights Law Review* 215 at 226.

¹⁴⁹ Interpretive Note 13 of the Protocol explains that the *Trafficking in Persons Protocol* takes no position on the treatment of non-coerced adult sex work and explicitly leaves its legal treatment to the discretion of individual governments.

¹⁵⁰ J Doezema, 'Who gets to choose? Coercion, consent, and the UN Trafficking Protocol' (2002) 10(1) *Gender & Development* 20 at 25.

¹⁵¹ See for example, Natalia Ollus, *The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children: A Tool for Criminal Justice Personnel*, Resource Material Series No 62 (2008), available at www.ungift.org/docs/ungift/pdf/knowledge/unafei_analysis.pdf (accessed 21 Oct 2009); Mohamed Y Mattar, 'Incorporating the Five Basic Elements of Model Anti-trafficking In Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention' (2006) 14 *Tulane Journal of International & Comparative Law* 357 at 371.

¹⁵² Mohamed Y Mattar, 'Incorporating the Five Basic Elements of Model Anti-trafficking In Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention' (2006) 14 *Tulane Journal of International & Comparative Law* 357 at 371.

¹⁵³ As defined in Article 2(a) of the Convention.

¹⁵⁴ UNODC *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocol thereto* (2004) 10-11 [18].

¹⁵⁵ See Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (2008) 62.

¹⁵⁶ Articles 2, 3 *Trafficking in Persons Protocol*.

practice of two person (usually husband and wife) trafficking operations.¹⁵⁷ Likewise, restricting the operation of the Protocol to transnational crime was condemned for ignoring the wider phenomena of internal trafficking.¹⁵⁸ However, the publication of the Legislative Guide to the Protocol in 2004 provided some clarification. It stated that domestic offences should apply even where the crime was not transnational and the involvement of organised criminal groups does not exist.¹⁵⁹ More specifically, it affirmed that transnationality and organised crime must not be required to be proved in a domestic prosecution.¹⁶⁰ This hopefully increases the scope of the offence, and affords greater protection to victims that are trafficked within their own country.

Child Trafficking

During the negotiations for the *Trafficking in Persons Protocol*, a group of UN agencies¹⁶¹ made a joint submission regarding the issue of child trafficking. They called for an explicit acknowledgment that children had special rights under international law and a focus on the special needs of child victims of trafficking, including rights to physical and psychological recovery and social integration and the provision of non-discretionary assistance and protection.¹⁶² The drafters of the *Trafficking in Persons Protocol* responded with subsection (c) of Article 3 which reduces the standard formulation of a trafficking offence from the three elements of act, means and purpose, to a two pronged approach involving only act and purpose. That is, where a child has been recruited, transported, transferred, harboured or received for the purpose of exploitation, he or she will have been trafficked. The consent of a child to exploitation is irrelevant.¹⁶³ Further, to ensure consistency and uniformity among State Parties, article 3(d) of the Protocol defines a child as any person less than eighteen years of age.

The section has been both criticised as falling far short of the standard expected by UN agencies¹⁶⁴, and praised as a major step forward in the battle against child trafficking.¹⁶⁵ Commentators have noted approvingly that the removal of 'means' takes into account the special vulnerability of children, especially in situations where they are obeying orders from parents or important figures in their community.¹⁶⁶ This approach is based on the accepted assumption that children do not sufficiently understand their likely fate in order to give informed consent. Nonetheless, some commentators have noted that a plan to increase the scope of the offence was rejected.¹⁶⁷ It was proposed that the second element of child trafficking – purpose – be expanded to include the contents of the International Labour

¹⁵⁷ Ann D Jordan, *Annotated Guide to the complete UN Trafficking Protocol* (2002) 9.

¹⁵⁸ N Ray, 'Looking at Trafficking through a New Lens' (2006) 12 *Cardozo Journal of Law & Gender* 909 at 916.

¹⁵⁹ United Nations, *Legislative guide for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2004) 259 para 25.

¹⁶⁰ United Nations, *Legislative guide for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2004) 275 para 45: 'The offences established in accordance with the protocol should apply equally, regardless of whether they were committed by individuals or by individuals associated with an organised criminal group'.

¹⁶¹ Office of the High Commissioner for Human Rights (OHCHR), the International Organisation for Migration (IOM), the United Nations Children's Fund (UNICEF), and the United Nations High Commissioner for Refugees (UNHCR).

¹⁶² Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975 at 989.

¹⁶³ David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (2007) 329.

¹⁶⁴ Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975 at 989.

¹⁶⁵ L Kurbiel, 'Implementing the UN Trafficking Protocol to Protect Children: Promising Examples from East Asia' (2004) 24 *Children's Legal Rights Journal* 73 at 80.

¹⁶⁶ *Ibid*, at 75.

¹⁶⁷ Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975 at 989.

Organisation's *Worst Forms of Child Labour Convention* (1999).¹⁶⁸ However, in the final version of the *Trafficking in Persons Protocol*, the definition of exploitation remains consistent throughout. A stand-alone instrument to specifically address the global issue of child-trafficking has been suggested.¹⁶⁹

Trafficking in persons offences

Article 5 of the Protocol requires State Parties to adopt legislative or other measures which establish that trafficking in persons (as defined in article 3) amounts to a criminal offence.

The language used is mandatory and imposes an obligation to prosecute trafficking offences.¹⁷⁰ However, the *Trafficking in Persons Protocol* does not address the issue of criminal sanctions, which is left at the discretion of individual nations. It has been suggested that the inclusion of minimum sanctions in the *Trafficking in Persons Protocol* would have rebutted the view that States are less interested in fighting human trafficking than other offences.¹⁷¹ Compared to other forms of organised crime, human trafficking has historically had the lowest rates of detection, prosecution and penalties.¹⁷² The *European Council Framework Convention of 2002* has been cited as a better model, authorising sentences of eight years imprisonment with an accompanying schedule for aggravating factors.¹⁷³ However, it is arguable that achieving consensus on criminal sanctions among European countries with similar political and judicial models is less demanding than a global agreement consisting of countries with vastly differing criminal justice systems.

In addition, State Parties are required to establish the following inchoate offences:

- Subject to the basic concepts of their legal system, attempting to commit an offence involving trafficking in persons;
- Participating as an accomplice in an offence involving trafficking in persons; and
- Organising or directing other persons to commit an offence involving trafficking in persons.

Whilst the *Trafficking in Persons Protocol* requires signatories to criminalise the offence of 'trafficking in persons' it does not impose any obligations with respect to related conduct.¹⁷⁴ Focusing on the act of trafficking and targeting individual offenders is seen as unnecessarily limiting the Protocol and ignoring the critical role of public officials in facilitating and tolerating the crime.¹⁷⁵ The issue of corruption is significant as many trafficking networks are

¹⁶⁸ Ibid, at 989.

¹⁶⁹ Natalia Ollus, *The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children: A Tool for Criminal Justice Personnel*, Resource Material Series No 62 (2008) 23 (noting the International Human Rights Network's joint NGO submission to the Ad-Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime).

¹⁷⁰ This is in contrast to Articles 6-13, the protection, prevention and cooperation measures, which employ permissive language.

¹⁷¹ Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 121.

¹⁷² Ibid, at 121.

¹⁷³ Ibid, at 121.

¹⁷⁴ This is in contrast to the other two supplementary Protocols to the Convention. The *Migrant Smuggling Protocol* requires the criminalization of enabling illegal residence and certain conduct in relation to travel or identity documents; and the *Firearms Protocol* requires the criminalisation of multiple offences in relation to illicit manufacturing and trafficking, as well as a further offence of tampering with serial numbers or other markings of firearms.

¹⁷⁵ E Bruch, 'Models Wanted: The Search for an Effective Response to Human Trafficking' (2004) 40 *Stanford Journal of International Law* 1 at 20.

dependent on official collusion.¹⁷⁶ It has been reported that a number of officials routinely accept bribes to ignore illicit activities and tip-off networks before police raids.¹⁷⁷ Individual states have explicitly addressed the problem on their own accord. An Indonesian draft law proposes the punishment of any state administrator who abuses his/her power resulting in the commission of trafficking in persons.¹⁷⁸ Others have listed public corruption as an aggravating factor in trafficking offences.¹⁷⁹ Furthermore, the Convention contains articles specifically criminalising corruption. However, the Legislative Notes state that in defining and criminalising trafficking, signatories are not bound by other international legal instruments. It is clear that many countries have exercised this option. Some commentators have gone further and called for sanctions against states whose officials assist trafficking.¹⁸⁰ The rationale is that official corruption is often tolerated by states, which benefit from lucrative industries that rely on the trafficking trade. However, such an approach is unlikely to succeed as States would not be signatories to an agreement that would result in their punishment. Indeed in its present incarnation, the *Trafficking in Persons Protocol* has not been signed by many states in regions heavily affected by trafficking.¹⁸¹

C.1.3 Part II *Trafficking in Persons Protocol* (Victim Protection)

Part II, articles 6 to 8 of the Protocol mandates the adoption of measures and procedures for the protection of victims of trafficking in persons, though in rather vague terms which do not place strong obligations on State Parties.¹⁸² These include:

- protecting the identity and safety (both physical and psychological) of victims;
- providing general welfare and support;
- ensuring access to compensation for damage suffered¹⁸³; and
- facilitating the residence of victims in the receiving country or safe return to their country of origin, at the victim's election.¹⁸⁴

A major criticism of the *Trafficking in Persons Protocol* has been the emphasis it places on law enforcement (or prosecution) in lieu of prevention and protection. In particular, the protection and prevention obligations have been criticised for being too vague, and appropriate remedies too few.¹⁸⁵ Clauses in Part II frequently begin with or contain permissive language, such as 'shall endeavour to',¹⁸⁶ 'shall consider',¹⁸⁷ 'shall give appropriate consideration',¹⁸⁸ and '[i]n appropriate cases and to the extent possible under domestic law'.¹⁸⁹ This drafting approach obviously grants State Parties considerable

¹⁷⁶ Ibid, at 21.

¹⁷⁷ Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 121.

¹⁷⁸ Indonesian Combat Against the Crime of Trafficking in Persons Draft Law (Article 12): punishing "any state administrator who abuses his/her powers to force a person to commit, not commit, or allow something that results in the crime of trafficking persons".

¹⁷⁹ See for example, art 380 *Penal Code* (Burundi).

¹⁸⁰ United Nations, *Legislative guide for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2004) 270, para 39; R Piotrowicz, 'The UNHCR's Guidelines on Human Trafficking' (2008) 20 *International Journal of Refugee Law* 242 at 247.

¹⁸¹ Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 122.

¹⁸² Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (2008) 64.

¹⁸³ Article 6 *Trafficking in Persons Protocol*.

¹⁸⁴ Article 8 *Trafficking in Persons Protocol*.

¹⁸⁵ Kathryn Nelson, "Sex trafficking and forced prostitution: Comprehensive new legal approaches" (2001-02) 24 *Houston Journal of International Law* 551 at 578.

¹⁸⁶ Article 6(5), *Trafficking in Persons Protocol*.

¹⁸⁷ Articles 6(3), 7(1), *Trafficking in Persons Protocol*.

¹⁸⁸ Article 7(2), *Trafficking in Persons Protocol*.

¹⁸⁹ Article 6(1), *Trafficking in Persons Protocol*.

flexibility to determine how and to what extent victim protection measures are established within that state, but also permits State parties to take no action in this respect. During negotiations for the *Trafficking in Persons Protocol*, there were discussions about creating mandatory protection and assistance provisions. This was decided against as a result of concern over the cost that would be imposed by mandatory requirements, particularly on developing countries.¹⁹⁰ Instead, it has been suggested that on a reasonable interpretation of the language of Article 6, an onus is placed on developed nations to provide assistance while developing nations must provide assistance to the best of their ability, having regard to the limited resources at their disposal.¹⁹¹

Concerns were also raised about the relationship between victim assistance programs and the legal status of victims. Developed countries to which persons are often trafficked argued against trafficked persons having a legal right to remain since this would provide an incentive both for trafficking and illegal migration. Understandably, countries whose citizens were commonly trafficked sought as much protection as possible.¹⁹²

A further issue that follows from the vague approach taken to victim assistance and protection by the *Trafficking in Persons Protocol* is the lack of support measures directed specifically at problems that victims of trafficking suffer from. This has led one commentator to conclude that the '[Trafficking] Protocol is a lost opportunity to protect the rights of victims of trafficking.'¹⁹³ Apart from vagueness in the *Trafficking in Persons Protocol* this shortcoming has also been partially blamed on the treatment of trafficking as a subset of violence against women or other crimes, rather than as its own distinct issue. Trafficked victims have potentially been subjected to both physical and mental abuse, and are often unsure as to their legal status; the *Trafficking in Persons Protocol* arguably overlooks this and other specific needs.¹⁹⁴ For example, the *Trafficking in Persons Protocol* provides no basis for governments to treat trafficked persons differently to other undocumented migrants nor does it guarantee the confidentiality of victims.¹⁹⁵ Notably, neither of these measures would impose a significant financial or administrative burden on State Parties. Through a combination of vague wording and a generic approach to victim support, the *Trafficking in Persons Protocol* does not even imply that State parties should provide support services which are necessary for the unique issues faced by victims of trafficking in persons.

Linked closely with the general concept of victim assistance and protection is the legal status of victims in destination countries. Article 7 of the *Trafficking in Persons Protocol* requests that State Parties 'consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in [their] territory [...] in appropriate cases.' Article 8 covers the alternative situation by requiring cooperation between destination and source countries to ensure the safe repatriation of the trafficking victim at their request. Both these articles have attracted their share of criticism. Delegates were concerned that the Protocol would become an inadvertent means of illegal migration if the legal status of victims in receiving countries was strengthened i.e. through the creation of specific visa categories. As

¹⁹⁰ See Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, Eleventh session (2-27 October 2000), fn 25, A/AC.254/4/Add.3/Rev.7 (2000); see also Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children' (2001) 8(2) *Human Rights Brief* 30 at 37.

¹⁹¹ Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children' (2001) 8(2) *Human Rights Brief* 30 at 37.

¹⁹² Elizabeth Defeis, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons – A New Approach' (2004) 10 *ILSA Journal of International and Comparative Law* 485 at 489.

¹⁹³ *Ibid.*, at 490.

¹⁹⁴ Sarah King, 'Human Trafficking: Addressing the International Criminal Industry in the Backyard' (2007-08) 15 *University of Miami International & Comparative Law Review* 369 at 377.

¹⁹⁵ *Ibid.* at 377.

a result, no strong obligations were placed on receiving countries and the most common approach taken, in the absence of any mandatory Protocol provision, is for temporary visas to be extended to victims of trafficking who agree to testify or provide evidence in the prosecutions of traffickers.¹⁹⁶ It has been suggested that at the very least, the Protocol should require that temporary residency be extended where deportation presents clear hazards to the trafficked person or where the person is a child.¹⁹⁷ This would help allay both protection and migration concerns (by maintaining a degree of state control over whom is granted residency) and also ameliorates the State's desire for reliable witnesses.¹⁹⁸

Some have criticised the protection measures provided by Part II of the Protocol as being overly-oriented toward maximising a victim's utility as a witness. This argument is given credibility by the drafting of the articles which de-emphasise the witness role, such as Article 6(3), which carry markedly diminished State obligations.¹⁹⁹ Arguably by failing to offer suitable incentives for victims to testify (i.e. temporary rather than semi-permanent or permanent residency), States are damaging their prospects of successfully prosecuting traffickers and if Australian prosecutions are any indication, the cooperation of victims at trial is a near-prerequisite for success.²⁰⁰ This is a further example of the Protocol's emphasis on law enforcement at the expense of victim protection which, ironically and somewhat counter-intuitively, reduces the effectiveness of law enforcement measures.

Despite the existence of some academic support for the contrary view,²⁰¹ the weight of opinion suggests that the *Trafficking in Persons Protocol* does entrench the principle of non-criminalisation of trafficking victims.²⁰² This principle guarantees that victims of trafficking will not be criminally liable for their unlawful entry into a State or for any acts that they were forced to commit while under the control of other persons. Whilst the Protocol does not explicitly provide for this, it does present trafficked persons as victims, and the legislative link between the Protocol and the United Nations *Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power* strongly indicates that the non-criminalisation principle applies.²⁰³

The threshold for repatriation of victims of trafficking under the *Trafficking in Persons Protocol* is not particularly high; returns should be made with due regard for the safety of the

¹⁹⁶ Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 129; Mohamed Y Mattar, 'Incorporating the Five Basic Elements of Model Anti-trafficking In Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention' (2006) 14 *Tulane Journal of International & Comparative Law* 357 at 362-363.

¹⁹⁷ Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 132.

¹⁹⁸ *Ibid.*, at 132.

¹⁹⁹ Article 6(3) *Trafficking in Persons Protocol* requires only that State Parties 'consider implementing measures for the physical, psychological and social recovery of victims'.

²⁰⁰ Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 130.

²⁰¹ Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children' (2001) 8(2) *Human Rights Brief* 30 at 37.

²⁰² Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 129.

²⁰³ See *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, GA/Res 55/25, Annex II at 35. UN Doc A/RES/55/25 (Jan 8, 2001); see also Sarah King, "Human Trafficking: Addressing the International Criminal Industry in the Backyard" (2007-08) 15 *University of Miami International & Comparative Law Review* 369; Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 129.

person involved and ‘shall preferably be voluntary.’ In a similar fashion to the general victim support provision,²⁰⁴ Article 8 does not appear to address the particular issues faced by trafficking victims (though Article 9 does broadly address re-victimisation). Victims who are returned to their countries of origin face persecution as a result of the stigma attached to working in prostitution and fear of HIV/AIDS.²⁰⁵ Similarly, beyond having ‘due regard for the safety of that person’ there is nothing to prevent victims from being delivered back into the same conditions, and same pattern of poverty-driven exploitation, from which they were trafficked.²⁰⁶ This is even more likely where the families of victims are complicit in the trafficking activities.²⁰⁷ Despite the genuine risk of re-victimisation, courts and tribunals in Australia have been hesitant to classify victims of trafficking as refugees.²⁰⁸ This creates an even greater need for a settled legal status to be granted to trafficked victims, which the Protocol at present fails to provide. Instead, the Protocol’s principal concerns in relation to repatriation are that States respond sensitively to prosecutorial proceedings, and that repatriation efforts are both timely and documented.²⁰⁹

C.1.4 Part III *Trafficking in Persons Protocol* (Prevention, Cooperation and other Measures)

Part III contains articles aimed at preventing trafficking and promoting cooperation between parties to the *Trafficking in Persons Protocol*. Article 9 requires State Parties to establish comprehensive policies, programmes and other measures to prevent trafficking and protect victims. Articles 10, 11 and 13 promote cooperation between State Parties through the exchange of information, mutual control of State borders and verification of travel documents respectively. Finally, Article 12 calls for States to take measures to ensure the integrity and security of travel documents, and to ensure that these documents cannot be easily replicated. It was agreed by delegates that any prevention and cooperation measures should be included in the final Protocol only insofar as they go beyond those measures contained in the Convention;²¹⁰ this explains why this part of the Protocol is not more comprehensive in this respect.

There has been a positive reaction to a number of the measures introduced in Part III of the *Trafficking in Persons Protocol*. Support has been found for the victim-focussed approach to prevention detailed in Article 9 which is directed at constricting the supply side of ‘an illicit market stoked by chronic poverty.’²¹¹ Specifically, the ‘revolving door’ problem — where rescued victims who return home to vulnerable situations are cycled back into trafficking — is addressed by Article 9(1)(a), which will hopefully motivate source countries to develop effective programs for the reintegration of victims. Similarly, Article 9 recommends that the implementation of social and economic initiatives to prevent trafficking in persons and alleviate the factors that make persons vulnerable, such as underdevelopment and lack of

²⁰⁴ See Article 6 *Trafficking in Persons Protocol*.

²⁰⁵ Elizabeth Defeis, ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons – A New Approach’ (2004) 10 *ILSA Journal of International and Comparative Law* 485 at 491.

²⁰⁶ Kelly E Hyland, ‘The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children’ (2001) 8(2) *Human Rights Brief* 30 at 38.

²⁰⁷ Kalen Fredette, ‘Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation’ (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 133.

²⁰⁸ See, for example, *VXAJ v MIMIA* [2006] FMCA 234.

²⁰⁹ Kalen Fredette, ‘Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation’ (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 133.

²¹⁰ UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, UN Doc A/AC.254/4/Add.3/Rev.2 (1999).

²¹¹ Kalen Fredette, ‘Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation’ (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 127-128.

opportunity.²¹² Example initiatives include microcredit lending, social advancement of women, job training, or tax incentives to start small businesses.²¹³

Article 10 of the Protocol specifies that governments and NGOs should cooperate using social methods for research and prevention of the situations that encourage trafficking. This suggests that the international community is open to examining the issues behind trafficking rather than simply obvious (surface) effects of the problem.²¹⁴

Part III of the *Trafficking in Persons Protocol* has been subject to much the same criticism as has been levelled at Part II, namely that these victim-focussed prevention articles carry diminished, soft obligations in contrast to the mandatory obligations expressed in Part I.²¹⁵ The practical effect of this approach to drafting the prevention articles is that most victim-based programs have been shelved. Where programs are instituted, they are almost uniformly in the form of mass media education programs. Ultimately, these programs are unlikely to result in systemic change to the volume or nature of trafficking in persons. Instead other measures aimed at counteracting the root causes of trafficking must be implemented.²¹⁶ A final issue noted in relation to the cooperation articles is that while States that have ratified the *Trafficking in Persons Protocol* have a duty to cooperate with each other, cooperation between other non-party States is simply encouraged.²¹⁷ Whilst this is understandable, this will probably diminish the utility of the cooperation articles.

C.1.5 Addressing the Protocol's flaws

The *Trafficking in Persons Protocol* contains significant flaws which have been exposed by numerous of academic commentators. In relation to Part I, the benefits of having a settled definition of trafficking in persons outweigh any inadequacies and ambiguities identified. Similarly, the issue of consent inherent within the definition of trafficking in persons was arguably dealt with intelligently and discreetly; it would have been disappointing if religious and political opinions had derailed attempts to define what all present states fundamentally consider to be a social issue of great concern. The scope of application clause (Article 4) is drafted in a somewhat confusing manner but the Legislative Guide produced at the same time as the Protocol entered into force explains its intended operation sufficiently. The inclusion of specific offences to criminalise the involvement of public officials in trafficking in persons is readily justifiable and should be considered by signatories to the *Trafficking in Persons Protocol* when enacting domestic legislation. However, delegates understandably had more obvious general concerns when negotiating and drafting the Protocol.

A number of the problems with the protection provisions in Part II of the Protocol could be quite easily remedied through the introduction of mandatory language. However, fears that this would increase the financial burden on developing nations are arguably well-founded and unless an assistance program is developed to alleviate some of the burden, it is unlikely that any victim support programs will become mandatory. Also, given the complaints that have been made about Part II's treatment of the specific needs of trafficking victims, it is perhaps fortunate that ill-directed mandatory requirements for victim protection were not introduced. Similar comments can be made in relation to Part III and its general clauses

²¹² See Article 9(2), (4) *Trafficking in Persons Protocol*.

²¹³ Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children' (2001) 8(2) *Human Rights Brief* 30 at 37.

²¹⁴ Sarah King, 'Human Trafficking: Addressing the International Criminal Industry in the Backyard' (2007-08) 15 *University of Miami International & Comparative Law Review* 369 at 379.

²¹⁵ Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking balances for more effective legislation' (2009) 17 *Cardozo Journal of International & Comparative Law Journal* 101 at 128.

²¹⁶ *Ibid*, at 128.

²¹⁷ Sarah King, 'Human Trafficking: Addressing the International Criminal Industry in the Backyard' (2007-08) 15 *University of Miami International & Comparative Law Review* 369 at 379.

aimed at the prevention of trafficking in persons. For the time being, it is important that State parties recognise that the focus of the *Trafficking in Persons Protocol* is on law enforcement rather than victim support.²¹⁸ As a result, the Protocol should at best be viewed as establishing minimum standards for victim support and protection that State parties are free to supplement and augment through their own domestic law and policy.²¹⁹

C.2` United Nations Office on Drugs and Crime (UNODC)

The United Nations Office on Drugs and Crime (UNODC) is a United Nations (UN) agency that was established to assist Member States in their responses against illicit drugs, crime and terrorism, including the prevention of human trafficking. It is the guardian of the UN *Convention against Transnational Organised Crime* and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*. Although many UN entities have some form of involvement in the area of human trafficking,²²⁰ UNODC is the only UN entity that focuses on trafficking in persons and related issues from a criminal justice perspective.²²¹

UNODC's anti-human trafficking initiatives primarily consist of promoting awareness, developing and setting up anti-human trafficking strategies in state parties, and the continued development of best practice strategies.

General initiatives include:

- United Nations Global Initiative to Fight Human Trafficking (UN.GIFT; see below);
- The Blue Heart Campaign, which was launched on March 8, 2009. The campaign promotes awareness by encouraging members of the public to spread the Blue Heart logo through social networking forums,²²²
- Hosting regular meetings and conferences that offer guidance or to develop methods to combat human trafficking for member states and non-government organisations.²²³
- The organisation of community-led activities that promote detection and victims' support. Such activities have been undertaken in India, Nepal, Bosnia, Croatia, and Herzegovina,²²⁴
- Creating reports, training manuals, and toolkits that give assessments on human trafficking on specific member states, global human trafficking, and best practice strategies for combating human trafficking;²²⁵ and
- Creating technical reports on human trafficking, which are published under UN.GIFT.²²⁶

²¹⁸ Suzanne Egan, 'Protecting the victims of trafficking: problems and prospects' (2008) 1 *European Human Rights Law Review* 106 at 109-110.

²¹⁹ Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children' (2001) 8(2) *Human Rights Brief* 30 at 38

²²⁰ One example is the Office of the United Nations High Commissioner for Refugees (UNHCR), whose interests in human trafficking are focussed on, but not restricted to, protecting refugees from traffickers, and human trafficking as a human rights violation. UNHCR, *Combating Human Trafficking: Overview of UNHCR Anti-Trafficking Activities in Europe* (Dec 2005) 1, Available at www.unhcr.org/refworld/docid/43fd782d4.html (accessed 21 Oct 2009).

²²¹ UNODC, *UNODC on Human Trafficking and Migrant Smuggling* (2009), available at www.unodc.org/unodc/en/human-trafficking/index.html (accessed 27 Feb 2009).

²²² UNODC, *UNODC Launches Blue Heart Campaign Against Human Trafficking* (2009), available at www.unodc.org/unodc/en/frontpage/unodc-launches-blue-heart-campaign-against-human-trafficking.html (accessed 1 Mar 2009).

²²³ UNODC, *News and Events* (2009), available at www.unodc.org/unodc/en/human-trafficking/news-and-events.html (accessed 27 Mar 2009).

²²⁴ UNODC, *Preventing Human Trafficking* (2009), available at www.unodc.org/unodc/en/human-trafficking/prevention.html (accessed 1 Mar 2009).

²²⁵ See UNODC, *Tools and Publications* (2009) available at www.unodc.org/unodc/en/human-trafficking/publications.html#Technical_papers (accessed 1 Mar 2009).

²²⁶ See *ibid.*

In addition, in 2006, UNODC launched the Toolkit to Combat Trafficking in Persons, a document that contains recommended resources and guidance as to best practices for policymakers, law enforcers, judges, prosecutors, victim service providers and members of the community to enable them to tackle human trafficking more effectively.²²⁷ Summaries of UNODC's prevention,²²⁸ protection,²²⁹ and prosecution²³⁰ initiatives and best practices are made available for immediate use and adaptation worldwide through this document, which is currently in its second edition.

C.2.1 Prevention

UNODC helps raise awareness amongst those most vulnerable to human trafficking by broadcasting public service announcements in numerous languages throughout the world. Along with NGOs, UNODC also distributes awareness leaflets, and contact actual and potential victims of trafficking.²³¹

Other prevention initiatives include

- The operation of emergency information campaigns in conflict zones, where displaced persons are more likely to be targeted by traffickers;²³² and
- Collaborative efforts with policy-makers, law enforcement agencies and civil society in research in the area of human trafficking. The research is aimed at gathering reliable global data and enhancing global cooperation in the fight against human trafficking;²³³ An important product of this research has been the Trafficking in Persons: Global Patterns report, which identifies 127 countries of origin, 98 transit countries and 137 destination countries.²³⁴

C.2.2 Protection

UNODC recognises the need for standard police and criminal justice staff working procedures to guarantee the safety of victims. It aims to incorporate these issues into its human trafficking training for police, prosecutors and judges.²³⁵

UNODC's protection initiatives include:

- Helping member states to better identify trafficking victims, as to prevent unjust prosecution;²³⁶
- The development of victim referral mechanisms;²³⁷
- The funding of NGO victim support projects,²³⁸ and
- The development of victim reintegration programs.²³⁹

²²⁷ UNODC, *Toolkit to Combat Trafficking in Persons* (1st ed, 2006).

²²⁸ UNODC, *Toolkit to Combat Trafficking in Persons* (2nd ed, 2008), ch. 9.

²²⁹ UNODC, *Toolkit to Combat Trafficking in Persons* (2nd ed, 2008), ch. 6.

²³⁰ UNODC, *Toolkit to Combat Trafficking in Persons* (2nd ed, 2008), ch. 5.

²³¹ UNODC, *Preventing Human Trafficking* (2009).

²³² UNODC, *Preventing Human Trafficking* (2009).

²³³ Human Rights Tribune, *UNODC launches Global Initiative to Fight Human Trafficking* (2007) Human Rights Tribune 1404, available at www.humanrights-geneva.info/UNODC-launches-Global-Initiative (accessed 1 Mar 2009).

²³⁴ UNODC, *Global Report on Trafficking in Persons* (2009)

²³⁵ UNODC, *Protecting Victims of Human Trafficking* (2009).

²³⁶ UNODC, *Protecting Victims of Human Trafficking* (2009).

²³⁷ Ibid.

²³⁸ Academy for Educational Development, *UN Preventing Human Trafficking* (2008) available at www.humantrafficking.org/updates/826 (accessed 3 Mar 2009).

²³⁹ UNODC, *Protecting Victims of Human Trafficking* (2009).

C.2.3 Prosecution

UNODC seeks to better prosecute human traffickers through strengthening national criminal justice systems, with its primary goal being to achieve a greater number of convictions globally. This has been implemented through assisting the development of anti-human trafficking legislation and the training of law enforcement and criminal justice staff. In 2006, legislative drafting assistance was offered to Armenia, Lebanon, and South Africa. To date, law enforcement and criminal justice staff training have been provided to Togo, Afghanistan, Burkina Faso, Finland, Ghana, Laos, Moldova, Nigeria, South Africa, Ukraine, and Vietnam, and as well as to senior NATO officials. Of particular note is Vietnam, which has one of the highest conviction rates for traffickers in the world, thanks in a large part to training by UNODC.²⁴⁰

Other prosecution initiatives include:

- Three computer-based training modules to combat trafficking in persons in Thailand;²⁴¹ and
- The publication of *The Training Manual: Assistance for the Implementation of the ECOWAS Plan of Action against Trafficking in Persons*, containing an action plan for West and Central African countries.²⁴²

C.3 UN.GIFT

In 2007 the UNODC launched an initiative under UN.GIFT (the United Nations Global Initiative to Fight Trafficking). UN.GIFT is a signal that there is increased international will to address human trafficking and recognition that it should be viewed as a problem per se rather than as a part of something larger.²⁴³ The initiative draws on stakeholders from a variety of sectors, including government, business, academia, civil society and the media, and its initiatives are developed in such a way as to encourage multilateral action and extend the collective knowledge base.

The key goals of UN.GIFT are awareness building, data mining and encouraging coordination between both state and non-state actors.²⁴⁴ There are four main initiatives aimed to fulfil these goals.²⁴⁵

Leadership

The Women's Leaders' Council is made up of corporate executives, politicians, first ladies, legal professionals and artists. The Council responds to the specific relevance of sex trafficking to women (both as victims and increasingly, perpetrators) and aims to promote women's leadership, to form inter-professional and international connections and to emphasise the role of women in fighting trafficking.

Legislation

Adequate legislation is crucial to a comprehensive response to human trafficking. Through the Parliamentary initiative and in association with the Inter-Parliamentary Union and

²⁴⁰ Ibid.

²⁴¹ UNODC, *Prosecuting Human Traffickers* (2009) available at www.unodc.org/unodc/en/human-trafficking/prosecution.html (accessed 3 Mar 2009).

²⁴² UNODC, *The Training Manual: Assistance for the Implementation of the ECOWAS Plan of Action against Trafficking in Persons* (2006).

²⁴³ Sarah King, 'Human Trafficking: Addressing the International Criminal Industry in the Back Yard' (2008) 15 *University of Miami International and Comparative Law Review* 369.

²⁴⁴ UN.GIFT, *About UN.GIFT*, available at www.ungift.org/ungift/en/about/index.html (accessed 15 Feb 2009).

²⁴⁵ UN.GIFT, *Initiatives*, available at www.ungift.org/ungift/en/initiatives/index.html (accessed 15 Feb 2009).

UNODC,²⁴⁶ UN.GIFT has produced a handbook sharing experience and knowledge pertaining to anti-trafficking measures. The handbook provides a guide to parliamentarians and addresses legislative definitions, criminalisation of different forms of trafficking and prevention.²⁴⁷ It conforms to international conventions.²⁴⁸

Research

Combating human trafficking for sex work is handicapped by an urgent need for more research. The international community struggles to combat trafficking in persons and to monitor successes due to this lack of knowledge. The research initiative under UN.GIFT seeks to promote data sharing and consolidation.

The information collected by UN.GIFT on behalf of the UNODC is intended to have global application. In February 2009 the Global Report on Trafficking in Persons was released.²⁴⁹ The Report gathered legislative, criminal justice and victim service data from 155 countries.

The Report looked into the patterns of traffickers, finding that women were disproportionately represented among convicted offenders when compared to general criminal offences. Women also made up the majority of trafficked persons.²⁵⁰ Sexual exploitation was the most prevalent form of exploitation involved in human trafficking.²⁵¹ Information on trafficking routes also provided important insights into the patterns of trafficking activities. Among the major findings of the report were that:²⁵²

- intra-regional trafficking appears to be more frequent than inter-regional; domestic trafficking is significant and frequently under-detected;
- victims from East Asia were trafficked to the widest range of destination countries; and
- victims in Western and Central Europe came from the widest range of source countries.

Expert Group Initiatives

UN.GIFT has also developed tools to assist stakeholders in combating trafficking, protecting victims, and executing justice. Manuals currently available from the website include:²⁵³

- Legislative Assessment Tools;
- Training Manual for Law Enforcement, Judges and Prosecutors;
- NGO/Law Enforcement Model Cooperation Agreement;
- Guidance for Health Providers;
- Supply Chain Management; and
- Child Trafficking.

²⁴⁶ The Inter-Parliamentary Union (IPU) was founded in 1889. Its key goals are: to foster contacts and coordination between members of parliament around the world; to emphasise the importance of the defence of human rights through legislation; and to facilitate the sharing of experience and best practice between parliaments and parliamentarians. (Inter-Parliamentary Union, *Overview*, available at www.ipu.org/english/whatipu.htm (accessed 27 Mar 2009).

²⁴⁷ UN.GIFT, UNODC & IPU, *Combating Trafficking in Persons: A Handbook for Parliamentarians* (2009).

²⁴⁸ See, *United Nations Convention against Transnational Organised Crime*, opened for signature 25 December 2000, UN Doc. A/55/383 (Annex I, p. 25); Un ECOSOC, *Economic and Social Council Recommended Principles and Guidelines on Human Rights and Human Trafficking Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council: Addendum*, UN Doc. E/2002/68/Add.1 (2002).

²⁴⁹ UNODC, *Global Report on Trafficking in Persons* (2009).

²⁵⁰ *Ibid*, at 48.

²⁵¹ *Ibid*, at 50.

²⁵² *Ibid*, at 69.

²⁵³ UN.GIFT, *Expert Group Initiatives*, Available at www.ungift.org/ungift/en/initiatives/expert-groups.html (accessed 2 Oct 2009).

Others manuals are due for release throughout 2009.

Coordination

UN.GIFT has also focussed on the importance of forming international and interregional links with a wide range of stakeholders, through the Vienna Forum in 2008, over 1,500 representatives came together to share experiences and best practice policies and to present proposals. Highlights, recommendations and event details are available in the Vienna Forum Report.²⁵⁴

C.4 Model Law against Trafficking in Persons

In 2009, UNODC launched the *Model Law against Trafficking in Persons* in order to promote the implementation of the *Trafficking in Persons Protocol* by Member States.²⁵⁵ Given the connection between trafficking in persons and organised crime, corruption, obstruction of justice and money-laundering, the *Model Law* strongly emphasises the importance of reading and applying the *Trafficking in Persons Protocol* provisions together with the *Convention against Transnational Organised Crime*.²⁵⁶

The *Model Law* sets out to comprehensively outline a legislative framework to support the measures and procedures for creating trafficking offences and victim protection expressed in the *Trafficking in Persons Protocol*.

First, it provides for a system of trafficking offences, categorised into:

- Foundational offences (criminalizes participation in an organized criminal group; laundering of the proceeds of crime; corruption; and obstruction of justice);²⁵⁷
- Specific offences (trafficking in persons; aggravating circumstances; non-liability of victims of trafficking in persons; use of forced labour and services);²⁵⁸
- Ancillary and related offences (accomplice; organising and directing to commit an offence; attempt; unlawful handling of documents; unlawful disclosure of identity of victims/witnesses; duty of commercial carriers);²⁵⁹
- Victim and witness protection, assistance and compensation;²⁶⁰
- Immigration and return of victims;²⁶¹ and
- Prevention, training and cooperation of law enforcement agencies.²⁶²

The *Model Law* is designed to be adaptable to the needs of each State, whatever its legal tradition and social, economic, cultural and geographical conditions. Whenever appropriate or necessary, several options for language are suggested in order to reflect the differences between legal cultures. Alternative wordings of certain provisions and sample legislation from various countries are also provided.²⁶³

Incorporated into the *Model Law* is commentary indicating the source of each provision.²⁶⁴ Although no Australian representatives were expressly consulted in the drafting of the *Model Law*, it is evident from the commentary that the *Criminal Code 1995* (Cth) was used as a

²⁵⁴ UN.GIFT, *The Vienna Forum Report: A way forward to combat human trafficking* (2008).

²⁵⁵ UNODC, *Model Law against Trafficking in Persons* (2009) 1, available at www.unodc.org/documents/human-trafficking/Model_Law_against_TIP.pdf (accessed 10 Oct 2009).

²⁵⁶ *Ibid*, at 2.

²⁵⁷ *Ibid*, at 29.

²⁵⁸ *Ibid*, at 31.

²⁵⁹ *Ibid*, at 45.

²⁶⁰ *Ibid*, at 53.

²⁶¹ *Ibid*, at 73.

²⁶² *Ibid*, at 83.

²⁶³ *Ibid*, at 1.

²⁶⁴ *Ibid*, at 1.

reference point for certain concepts within the Model Law. In particular, the Model Law referred to the Australian legislation in coming to definitions on 'deception',²⁶⁵ 'debt bondage',²⁶⁶ and 'forced labour'.²⁶⁷

C.5 Regional Initiatives

Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime

Not further examined here.

C.6 National Initiatives

The Anti-People Trafficking Interdepartmental Committee

Not further examined here.

²⁶⁵ Ibid, at 13.

²⁶⁶ Ibid, at 14.

²⁶⁷ Ibid, at 17.