



HUMAN TRAFFICKING VICTIMS WHO COMMIT CRIMES - AN EXTRA DEFENCE FOR CLIENTS

Australian law offers no specific legal protections to victims of human trafficking who commit crimes. This means that victims are less likely to report their trafficked status and may be further victimised by the criminal justice system. This perpetuates a disincentive for victims of trafficking to come forward and provide information to authorities that could facilitate investigations and prosecutions of traffickers in persons.

The UK has a statutory defence for victims of human trafficking; Indonesia has laws that provide protection; and the Canadian Criminal Code has a broadly worded Defence of Person provision that could apply to a situation where a human trafficking victim is coerced into committing a crime. Victoria's narrowly drafted defence of duress has never been applied to a case where the accused raises their status as a victim of human trafficking.

Australia has committed to international obligations not to prosecute / not to punish victims who commit crimes including through a national action plan and referral mechanisms but, the Modern Slavery Act 2018 is limited to corporate response. In the absence of a statutory defence, implementation in criminal justice is poor.

1. THE PROBLEM

The number of human trafficking victims in the world is an estimated 21 million.¹ It is not known how many of these operate in transnational organized crime where they are coerced, abused and exploited to commit criminal offences but UNODC estimates that profits from human trafficking alone are in the region of \$32 billion USD.²

2. THE COMMITMENT

The UN Trafficking Protocol, a supplement to the U.N. Convention Against Transnational Organized Crime defines victims as those who have been subject to recruitment, transportation, transfer, harboring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation which includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or removal of organs.

3. NON-PROSECUTION / NON-PUNISHMENT

Article 2 of the UN protocol provides the statement of purpose to:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
- (c) To promote cooperation among States Parties in order to meet those objectives.

In the EU this has been developed in Article 26 of The EU Trafficking Directive which has a non-punishment provision which provides that:

Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.³

This does not *require* non-prosecution or non-punishment but allows for the provision of systems to recognize the possibility of not imposing any penalty where people act under compulsion. UN Trafficking Principles and Guidelines, at Principle 7 states:

Trafficked Persons shall not be detained, charged or prosecuted for their illegal entry into or residence in countries of transit or destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.⁴

¹ International Labour Organization, Profits and Poverty: The economics of forced labour (ILO 2014).

² UN Office on Drugs and Crime, *Human trafficking: organized crime and the multibillion dollar sale of people*, UNODC(2012), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_243391.pdf.

³ European Commission Migration and Home Affairs. 2011.

⁴ UN Office of the High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking. 2002.

In addition there are a series of other communications coming out from the UN as to the importance of non-punishment especially in relation to women and girls. This is reinforced by the International Labour Office (ILO) Protocol of June 2014 (updating the existing ILO Convention 29 on Forced Labour). Article 4(2) of the ILO Protocol requires states to:

... take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour.⁵

4. THE ACTION PLAN

Australia has a current National Action Plan to Combat Human Trafficking and Slavery 2015-19 (*the NAP*).⁶ It provides “the strategic framework for Australia’s whole-of-community response to human trafficking and slavery and sets clear goals and action items which align to Australia’s domestic laws and international obligations and are underpinned by key performance indicators for monitoring purposes”.⁷ A complimentary International Strategy was launched in March 2016.⁸ Together, the intention is that the measures will “address the full cycle of human trafficking and slavery from recruitment to reintegration and give equal weight to the critical areas of prevention, enforcement and victim support”.⁹

5. THE AUS MODERN SLAVERY ACT 2018 – CORPORATE ONLY

The *Hidden in Plain Sight* report found evidence that suggested more could be done to “combat these crimes and to better support victims”¹⁰ as part of the global momentum to combat modern slavery. The Report recommends defences for trafficked victims and an appellate process similar to the UK model was recommended.

⁵ International Labour Organization, P029 - Protocol of 2014 to the Forced Labour Convention, 1930. 2014.

⁶ Commonwealth of Australia, National Action Plan to Combat Trafficking and Slavery, 2015-19 (2014).

⁷ *Id.* at 9.

⁸ Department of Foreign Affairs and Trade, Amplifying our Impact: Australia’s International Strategy to Combat Human Trafficking and Slavery (Australian Government 2015).

⁹ Commonwealth of Australia, 9. 2014.

¹⁰ Joint Standing Committee on Foreign Affairs Defence and Trade, x. 2017.

6. THE APPROACH OF THE COURT OF APPEAL OF ENGLAND AND WALES BEFORE THE MODERN SLAVERY ACT 2015

Convictions effectively as an abuse of process albeit flowing from direct effect of the Directive. Note recent comments in relation to fresh evidence limits scope.

R v LM [2010] EWCA Crim 2327

R v VSJ [2017] All ER (D) 100

7. THE UK APPROACH IN THE UK MODERN SLAVERY ACT 2015

Section 45

- (1) A person is not guilty of an offence if—
- a. the person is aged 18 or over when the person does the act which constitutes the offence,
 - b. the person does that act because the person is compelled to do it,
 - c. the compulsion is attributable to slavery or to relevant exploitation, and
 - d. a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.

- (2) A person may be compelled to do something by another person or by the person's circumstances.

- (3) Compulsion is attributable to slavery or to relevant exploitation only if—
- a. it is, or is part of, conduct which constitutes an offence under section 1 or conduct which constitutes relevant exploitation, or
 - b. it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation.

- (4) A person is not guilty of an offence if—
- a. the person is under the age of 18 when the person does the act which constitutes the offence,
 - b. the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation, and
 - c. a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act.

- (5) For the purposes of this section—

“relevant characteristics” means age, sex and any physical or mental illness or disability;

“relevant exploitation” is exploitation (within the meaning of section 3) that is attributable to the exploited person being, or having been, a victim of human trafficking.

- (6) In this section references to an act include an omission.

8. THE LIMITATIONS OF THE UK MODERN SLAVERY ACT

By section 45(7), subsections (1) and (4) do not apply to a long list of offences listed in Schedule 4.

9. NEW CLIENTS IN AUSTRALIA

- (a) The referral mechanism
- (b) Prosecutorial discretion
- (c) Judicial Powers at trial
- (d) mitigation

10. PREVIOUS CLIENTS – APPEALS?

11. LAW REFORM – THE ICJV PROJECT.

ABOUT FELICITY GERRY QC

Professor Felicity Gerry QC has a long history of dealing with cases involving trafficked victims including assisting lawyers in the Philippines for Mary Jane Veloso who was reprieved from execution in Indonesia whilst her status as a human trafficking victim in the drug trade is investigated. Felicity's role was the subject of ABC Foreign Correspondent's documentary Saving Mary Jane and she received a Charles Darwin University Ryan Family Award for commitment to excellence and outstanding results in research for her research on the matter. She provided training to the Commonwealth Parliamentary Association as part of The Modern Slavery Project which is a two year multilateral project providing practical advice and support to Commonwealth legislatures in the pursuit of combatting modern slavery and she is leading a Project for ICJV on defences for Human Trafficking Victims. She has published numerous articles on the topic of defences for human trafficking victims and is a contributing author to Modern Slavery and Human Trafficking Law and Practice, Bloomsbury (2018) and Human Trafficking: Emerging Legal Issues and Applications, Lawyers & Judges Publishing Company (2017). Her current PhD candidature looks at Using Technology to Combat Human Trafficking.

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