

HUMAN TRAFFICKING AND NEW ZEALAND

By Justice Susan Glazebrook¹

Introduction

Human trafficking is a modern day form of slavery, involving particularly egregious breaches of fundamental human rights. The criminal activity of trafficking breaches a trafficked person's right to liberty, human dignity, freedom of movement and even the right to life, through the possibility of disease including HIV, and because of the conditions in which a trafficked person may be held. Trafficking is a crime that has been seen to increase global health risks, fuel growing networks of organised crime, sustain levels of poverty and impede development. Furthermore, it is one of the fastest growing criminal activities in the world, a phenomenon that has been said to be driven by the same forces that drive the globalisation of markets.²

The scope of trafficking around the world is immense. Approximately 12.3 million adults and children are in forced labour, bonded labour and commercial sexual servitude at any given time³ and around 80 per cent of transnational victims of human trafficking are women and girls.⁴ The estimated annual profit from trafficking for sexual exploitation alone is US\$27.8 billion worldwide.⁵ The prevalence of trafficking in the Asia-Pacific region has been estimated at the ratio of 3 for every 1,000 inhabitants (with the global ratio being 1.8 for every 1,000 inhabitants).⁶

¹ This was the keynote address given to the AGM of the New Zealand Women Judges Association on 13 August 2010 in Auckland. It is an adaptation of an address to the 2010 International Association of Women Judges (IAWJ) conference in Korea on 14 May 2010. My thanks to Court of Appeal clerk, Natasha Caldwell, and Court of Appeal intern, Ricarda Kessebohm for their assistance in preparing this paper. Any errors remain my own. The paper represents my views and not necessarily those of the New Zealand Court of Appeal.

² Joy Ngozi Ezeilo *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, A/HRC/10/16 (2009) at 5.

³ United States Department of State *Trafficking in Persons Report* (2009) at 8.

⁴ *Report Submitted of the Special Rapporteur* above n 2 at 6.

⁵ Patrick Belser *Forced Labour and Human Trafficking: Estimating the Profits* (2005, ILO Minimum Estimate of Forced Labour in the World Working Paper) at 15, cited in O'Driscoll "AT v Dulghieru: Accounting for the Profits of Sex Trafficking" (2009) 40 VUWLR 695.

⁶ United States Department of State *Trafficking in Persons Report* (2010) at 7.

A core feature of the human trafficking process is a trafficker's abuse of power over his or her vulnerable victim. As the majority of trafficked persons have entered their destination country illegally, many trafficked persons are left vulnerable to the power of their traffickers. Accordingly, traffickers will be able to use a variety of methods such as threats, use of force, intimidation, detention and the withholding of personal documents to prevent the escape of their victim.⁷

For those trafficked internationally, the pattern is usually for victims to be abducted or recruited in the country of origin, transferred through transit regions and then exploited in the destination country.⁸ Trafficking takes place for a variety of end purposes.⁹ However, forced prostitution and forced labour are seen to be the most common forms of trafficking in the 21st century.¹⁰

Trafficking Protocol

Despite the prevalence of human trafficking, international legal consensus on the nature of the human trafficking problem has been relatively recent.¹¹ Indeed, it was not until December 2000 that the term "trafficking" was accorded a precise definition in international law.¹² The definition is found in the primary international instrument which establishes minimum standards that State parties are required to follow with regard to trafficking; the

⁷ Ibid.

⁸ United Nations Office on Drugs and Crime (UNODC) *Trafficking in Persons: Global Patterns* (April 2006) at 17. UNODC was established 1997 through a merger between the United Nations Drug Control Programme and the Centre for International Crime Prevention. As the only UN entity focusing on the criminal justice element of international crimes, the work that UNODC does to combat human trafficking and the smuggling of migrants is underpinned by the United Nations Convention on Transnational Organized Crime and its protocols on trafficking in persons and migrant smuggling. UNODC helps countries to develop effective law enforcement and criminal justice institutions but has no power to enforce the Trafficking Protocol or provisions from the United Nations Convention on Transnational Organized Crime.

⁹ These include domestic service, sexual exploitation, forced marriage and sweatshop labour.

¹⁰ Advisory Council of Jurists *Summary of the Advisory Council of Jurists Background Paper on Trafficking* (2002) at 3.

¹¹ Anne Gallagher and Paul Holmes in "Developing an Effective Criminal Justice Response to Human Trafficking: Lessons From the Front Line" (2008) 18 *International Criminal Justice Review* 318 argue at 319 that this was because for many years the problem of human trafficking was lumped together with other migration processes including migrant smuggling. It must, however, be noted that "classical" slavery has been prohibited for many years in a number of international instruments including the 1926 Convention on Slavery, its 1956 Supplementary Convention, the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights. The prohibition on slavery is now recognised as *jus cogens*. There is also a prohibition on forced and compulsory labour contained in the 1930 ILO Forced Labour Convention 1957. See generally, Advisory Council of Jurists *Summary of the Advisory Council of Jurists Background Paper on Trafficking*, above n 10, at 6.

¹² *Summary of the Advisory Council of Jurists Background Paper on Trafficking*, *ibid.*, at 10–11

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime 2000 (the Trafficking Protocol).¹³ The Trafficking Protocol falls within the scope of an international regime, adopted by the UN General Assembly in 2000, that was intended to fight international crime. Included within the regime is the Convention against Transnational Crime, which is the parent instrument to the Trafficking Protocol.¹⁴ That Convention is also supplemented by the Protocol against the Smuggling of Migrants by Land, Sea and Air¹⁵ and the Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime.¹⁶ New Zealand signed the Trafficking Protocol on 14 December 2000 and ratified it on 19 July 2002.¹⁷

The Trafficking Protocol entered into force on 25 December 2003 and has two primary objectives. It seeks to prevent and combat trafficking in persons, paying particular attention to the protection of women and children, and to promote and facilitate cooperation to this end among States Parties.¹⁸ A core requirement of the Trafficking Protocol is that States Parties

¹³ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, was adopted by General Assembly resolution 55/25. It entered into force on 25 December 2003.

¹⁴ The United Nations Convention against Transnational Organised Crime was adopted by General Assembly resolution 55/25 of 15 November 2000. It opened for signature by Member States at a High-level Political Conference convened for that purpose in Palermo, Italy, on 12-15 December 2000 and entered into force on 29 September 2003. The purpose of this Convention is to promote cooperation to prevent and combat transnational organised crime more effectively. The Convention deals with the fight against organised crime in general and some of the major activities in which transnational organized crime is commonly involved, such as money laundering, corruption and the obstruction of investigations or prosecutions.

¹⁵ The Protocol against the Smuggling of Migrants by Land, Sea and Air deals with organised criminal groups who smuggle migrants for profit. It was adopted by General Assembly resolution 55/25, and entered into force on 28 January 2004

¹⁶ The objective of this Protocol is to promote, facilitate and strengthen cooperation among States Parties in order to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition. By ratifying the Protocol, States make a commitment to adopt a series of crime-control measures. It was adopted by General Assembly resolution 55/255 of 31 May 2001. It entered into force on 3 July 2005.

¹⁷ New Zealand added the following territorial exclusion:

"... consistent with the constitutional status of Tokelau and taking into account the commitment of the Government of New Zealand to the development of self-government for Tokelau through an act of self-determination under the Charter of the United Nations, this ratification shall not extend to Tokelau unless and until a Declaration to this effect is lodged by the Government of New Zealand with the Depositary on the basis of appropriate consultation with that territory..."

¹⁸ Trafficking Protocol, art 2.

must criminalise, investigate and punish trafficking.¹⁹ Article 3(a) of the Trafficking Protocol defines trafficking as:

“...the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or 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 purposes of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

Article 3(b) provides that the consent of a victim of trafficking to the intended exploitation is irrelevant where any of the means of coercion set out in art 3(a) have been used. As noted in the *Trafficking in Persons Report* released by the United States Department of State, the common denominator in trafficking scenarios for adults is the use of fraud, force or coercion to exploit a person for profit.²⁰

Finally, art 3(c) sets out special rules for children under 18. It provides that the “recruitment, transportation, transfer, harbouring or receipt” of a child for exploitation is considered “trafficking in persons” even if none of the means set out in art 3(a) have been employed.

While the Trafficking Protocol is the primary international instrument in this area, there are a number of other international instruments that will have relevance in preventing human rights breaches caused by trafficking. These include the Convention on the Rights of the Child and two Optional Protocols that developed from this Convention. The first is the Optional Protocol on the Involvement of Children in Armed Conflict which restricts the involvement of children in military conflicts.²¹ The second is the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography which obliges States to protect the rights and interests of child victims of trafficking, child prostitution and child pornography and

¹⁹ Ibid, arts 4 and 5.

²⁰ *Trafficking in Persons Report* above n 3 at 7.

²¹ The first Optional Protocol entered into force on 12 February 2002. Currently, 139 nations have ratified or acceded to this Protocol. The Protocol requires governments to ensure that, while their armed forces can accept volunteers below the age of 18, they cannot be conscripted.

child labour.²² Another important document is the Convention on the Elimination of All Forms of Discrimination Against Women.²³

Other instruments

Other non-binding international standards that can provide guidance to States in their fight against trafficking include the General Assembly Resolution entitled *Trafficking in Women and Girls*,²⁴ and the *Recommended Principles and Guidelines on Human Rights and Trafficking of the United Nations High Commissioner for Human Rights* (the UN Principles).²⁵

All these different documents encourage national governments to implement anti-trafficking laws and policies to achieve a more effective law enforcement response and to ensure monitoring of the human rights impact of anti trafficking laws, policies, programmes and interventions. A major problem is the identification of trafficking victims and therefore the documents encourage adopting and consistently using the internationally agreed definition of trafficking contained in the Trafficking Protocol and establishing research and statistics on this crime. Based on those research results, preventive measures should be introduced, eg by modifying policies that may compel people to resort to irregular and vulnerable labour migration or by establishing programmes that offer livelihood options, including basic education, skills training and literacy for minority groups. It is stressed in all documents that in order to prevent trafficking, a close cooperation is necessary between the States worldwide and a human rights approach to the issue is essential (and in particular the protection of victims).

²² The second Optional Protocol entered into force on 18 January 2002. 141 States have ratified or acceded to that Protocol. New Zealand has signed the Protocol in 2000 but is yet not a ratifying State.

²³ The Convention entered into force on 3 September 1981 and 186 States have ratified or acceded to the Convention. New Zealand ratified the Convention in 2000. It affirms principles of fundamental human rights and equality for women around the world.

²⁴ *Trafficking in Women and Girls* GA Res 51/176 (18 December 2002). The Resolution calls upon national governments to strengthen their national efforts to combat trafficking in women and girls, and to implement joint actions at the bilateral, sub regional, regional and international levels. The Assembly put forward detailed recommendations to prevent trafficking in women and girls, punish perpetrators and protect and support victims of trafficking.

²⁵ Mary Robinson *Recommended Principles and Guidelines on Human Rights and Trafficking* (text presented to the Economic and Social Council as an addendum to the report of the United Nations High Commissioner for Human Rights) E/2002/68/Add. 1 (2002).

New Zealand

New Zealand has been identified by the United States Department of State as a source country for underage girls trafficked internally for the purpose of commercial sexual exploitation.²⁶ While the New Zealand Government has stated that there is no evidence of trafficking in New Zealand,²⁷ it is nevertheless apparent that New Zealand children are engaged in prostitution²⁸ and one estimate is that up to 200 under 18-year-olds are working in the sex industry.²⁹

New Zealand is also reportedly a destination country for women from Hong Kong, Thailand, Taiwan, the People's Republic of China, Eastern Europe, and other Asian countries, who are trafficked into forced prostitution.³⁰ A number of Asian women also come voluntarily to New Zealand to work in the legal sex trade³¹ but, according to the United States Department of State, reports indicate that traffickers subsequently coerce them to work against their will in exploitive situations or by threatening them with abuses of the law like deportation or jail.³²

²⁶The United State Department of State *Trafficking in Persons Report*, above n 6, at 251. The State Department divides countries into three tiers. Tier One is made up of countries deemed by the State Department to have a trafficking problem but fully complying with the Trafficking Victim's Protection Act's minimum standards for the elimination of trafficking. Tier Two is made up of countries, whose governments the State Department views as not fully complying with the standards but which are seen as making "significant efforts to bring themselves into compliance." The Tier Two Watch list is made up of countries that are on the border between Tier Two and Tier Three. Tier Three includes countries whose governments the State Department deems as not fully complying with those standards and as not making significant efforts to do so. New Zealand is placed in Tier One but its lack of law enforcement relating to trafficking is criticised.

²⁷ For example, the head of Immigration New Zealand, Neil Bickle, has recently stated that New Zealand has no evidence of people trafficking, see Department of Labour "Media Release 26 October 2010" <www.dol.govt.nz>.

²⁸ See for example Miriam Saphira and Averil Herbert, "The Involvement of Children in Commercial Sexual Activity (study conducted for End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes (EPACT) 2004).

²⁹ See Josh Dale "Girls of 12 working in 'young red light area', say police" *New Zealand Herald* (12 June 2010).

³⁰ See Lincoln Tan "NZ sex industry lures Asian women" *New Zealand Herald* (12 July 2010). I note that in light of the fact that New Zealand is an island nation, it must be noted that more sophisticated methods of trafficking may be required as access to the country can (largely) only be gained through air travel. A similar point can be made in relation to Australia.

³¹ The Prostitution Reform Act 2003 provides that no contract for the provision of, or arranging the provision of, commercial sexual services is illegal or void on public policy or other similar grounds: s 7. Nevertheless, s 19 states that no permit shall be granted to immigrants intending to work in the legal sex trade.

³² *Trafficking in Persons Report*, above n 3 at 222.

The United States Department of State report seems to operate on the assumption that the legalisation of the sex industry has masked the trafficking that occurs in the industry. For example, it was stated in the report that an assumption that all women engaging in prostitution do so willingly appears to underpin official policy and programmes in New Zealand and has inhibited public discussion and examination of indications that trafficking exists within both the decriminalised and illegal sex industries.³³

It is not just in the sex trade that concerns about trafficking have arisen. Some workers, who migrate to work in the agricultural sector, report that manpower agencies have placed them in positions of involuntary servitude or debt bondage by charging them escalating and unlimited recruiting fees, imposing unjustified salary deductions on them, restricting their travel by confiscating their passports, and significantly altering contracts or working conditions without their agreement.³⁴ Sigma Huda, the then United Nations Special Rapporteur on Human Trafficking, on a visit in December 2005 to New Zealand, asserted that the problem of trafficking in New Zealand may be wider than sometimes thought, pointing to mail-order brides, migrant workers, foreign fishermen and arranged marriages.³⁵

Counter measures

The development of a New Zealand action plan in relation to trafficking came to fruition with the release of the “Plan of Action to Prevent People Trafficking” (the Plan of Action) in 2009 introduced by the Department of Labour on behalf the Inter-agency Working Group on People Trafficking (the Working Group). This Plan of Action was approved by the New Zealand Government in October 2001. The plan details the scope of measures and programmes that various government agencies are actively progressing to prevent people trafficking and prepare for any future cases that may arise. Significantly, it is expected that the Plan of Action will mainstream anti-people trafficking initiatives into existing government programmes.³⁶

³³ Ibid at 223.,

³⁴ Ibid at 221. See also “Immigration trial told shipworker beaten by masters” *New Zealand Herald* (12 April 2007) and Lincoln Tan “Trio jailed for hiring illegal foreigners” *New Zealand Herald* (July 24 2010).

³⁵ Julie Middleton “UN expert warns NZ over human trafficking problem” *New Zealand Herald* (21 December 2005).

³⁶ Department of Labour “Plan of Action to Prevent People Trafficking” <www.dol.govt.nz>.

The New Zealand Human Rights Commission has been acutely aware for some time of the need to ensure the protection of victims of human trafficking. For example, in 1999, the Human Rights Commission set up a safe house programme to assist Thai women to escape prostitution in New Zealand.³⁷ Since 2002, the New Zealand Human Rights Commission has focussed on monitoring trafficking and on building relationships with other organisations that can play a fundamental role in both preventing trafficking and protecting victims (such as the New Zealand Prostitutes Collective, the New Zealand Family Planning Association, the National Collective of Independent Women's Refuges, the Police and the Department of Labour).³⁸

Future Trafficking Fears

Finally, it must be noted that it is often argued that a positive correlation exists between the demand for sex work in one place (i.e. profit-generating opportunities) and the presence of large numbers of male tourists.³⁹ Accordingly, fears have recently been expressed that the Rugby World Cup, which is to take place in 2011 will attract traffickers to use New Zealand as a source destination.⁴⁰ The New Zealand Police has emphasised that it is taking this concern seriously.⁴¹

Victims' stories

In order to understand why it is so vital that New Zealand stays active in the fight against trafficking, it is helpful to turn to the very real human stories that come from victims of trafficking. I believe in the power of stories to effect change and now share some stories here.⁴²

Stories from New Zealand

³⁷ Susan Glazebrook "Looking Outwards" (2005) 11 Otago Law. Rev 1 at 5.

³⁸ See generally, <<https://www.hrc.co.nz>>.

³⁹ Charlotte Sutherland "Human Trafficking and the 2010 FIFA World Cup" Consultancy Africa Intelligence <<http://www.consultancyafrica.com>>.

⁴⁰ Kieran Nash "Sex Trade to Boom as Cup Fans Arrive" *New Zealand Herald* (28 November 2010).

⁴¹ Charles Anderson "Rugby World Cup 'magnet for sex traffickers' *The Nelson Mail* (11 August 2010).

⁴² I believe that stories of actual victims help to turn the abstract and general into the personal, evoking proper feelings of empathy which can hopefully act as the catalyst for action to be taken.

The first story that I would like to share occurred in New Zealand in 2001.⁴³ Here, a Thai woman turned herself in to the border investigation group of the New Zealand Department of Immigration. She said that she and other Thai women had been told that for NZ\$10,000 they could get a job at a restaurant in Auckland. They agreed to pay that sum to a recruiting agent in Thailand at an interest rate of 36 percent.

When they were picked up at the airport on their arrival in New Zealand their money, return tickets and passports were taken from them. They were taken to live in a house with 14 other Thai women where they slept six to a room. Some \$150 a week in rent was added to their debt, even though rent on the whole house was only \$450 a week. Every day at 1pm the women were picked up and taken to a brothel. Every night they were picked up at the brothel at 3am and brought back to the house, with all the money they had earned that night taken from them to repay their debt.

As a result of the woman's complaint, immigration officials obtained a warrant to search the house and the police accompanied those officials on the execution of the warrant. The women living in the house were removed from the house within a week and were, I understand, removed from the country. No case was ever brought against anyone, including the brothel owners. The police at that time considered that, without bondage or physical restraints, the women were free to come and go from the home and the brothel. They therefore did not think that they had any grounds for prosecution.

However, I would suggest that the police were clearly wrong not to prosecute in that case in 2001. They did not need the trafficking amendments to the Crimes Act to do so. It seems to me that there had been any number of ordinary offences committed. For example, those involved could possibly have been charged with fraud, obtaining money by deception, kidnapping and perhaps even theft of the victims' earnings.⁴⁴

⁴³ For a fuller discussion see Susan Coppedge *People Trafficking: An International Crisis fought at the Local Level* (2006). Susan Coppedge is a US Federal Prosecutor, who reported on New Zealand. She was based at the Ministry of Justice and worked with the New Zealand Police and Immigration New Zealand, investigating recent New Zealand cases and laws passed to curtail and punish human trafficking, smuggling and commercial sexual exploitation in order to determine whether they are being effectively implemented by those in local law enforcement.

⁴⁴ It is also surely problematic where a trafficked person psychologically feels restrained even if no true physical barrier exists. Further the lack of a passport in order to leave the country could be form of physical restraint and of course language barriers also.

A similar case the year before had, however, had an interesting legal aftermath, even if the prosecution that should have resulted did not eventuate.⁴⁵ One woman pursued a civil action through the New Zealand Disputes Tribunal (which is a small claims tribunal) and was awarded the money that she had paid to her traffickers, supposedly for work in a restaurant in New Zealand. This case was the first civil claim made in New Zealand where money was successfully retrieved from traffickers who cheated a victim.⁴⁶

The stories that have emerged from New Zealand illustrate the importance of educating those in the justice system so that they are aware that many of the behaviours associated with trafficking can in fact be sanctioned through different provisions in our Crimes Act. This is of particular importance for it appears that many cases of concern are still occurring in New Zealand. For instance, the case of a Malaysian sex worker who needed police help to retrieve her passport from her brothel owner has been recently reported in New Zealand.⁴⁷

Furthermore, there is room for some creativity in using the legal system to sanction traffickers, as shown by the civil action taken. Finally, the fact that the Thai women involved in the story from 2001 were sent back to their country raises important issues with regard to the questions as to how trafficking victims can be adequately protected. It is vital that the courts ensure that the appropriate legal frameworks are used to ensure protection of victims. If victims are sent back to their home countries without being given any assistance, they are very likely to find themselves in the same situation and thus are at real risk of re-trafficking. Moreover, it must be borne in mind that victims who are sent back to their home countries are unavailable as witnesses.

Victims' rights

The question of victims' rights bring me to the next story. In 2002, I was involved in preparing a report on trafficking for the Advisory Council of Jurists (ACJ) for the Asia-

⁴⁵ See Brownyn Sell "Sex Traffickers get 'soft' message" *New Zealand Herald* (May 25, 2000). I think some of the reluctance to prosecute was the concern that there was insufficient evidence but even unsuccessful prosecutions act as a deterrent.

⁴⁶ "Money returned in sex trafficking case" *Tirohia, Quarterly Newsletter of the New Zealand HumanRights Commission* (April 2001) cited in Coppedge, above n 43, at 59. For discussion of a civil claim in England against traffickers see O'Driscoll, above n 5.

⁴⁷ Lincoln Tan "NZ's sex-slave cases 'slip under radar'" *New Zealand Herald* (4 August 2010).

Pacific Forum of National Human Rights Institutions (APF).⁴⁸ The ACJ Trafficking Report⁴⁹ explored the position at international law with regard to trafficking and also made seven core recommendations in relation to steps that should be taken to combat trafficking in the Asia Pacific region. While I was involved with the preparation of this report, we had the opportunity to visit some NGOs in the Asian region who rescued trafficked children. On one occasion, we were being taken to visit a centre which housed some rescued children. On the way our guide said that she wanted to stop into another centre because a young rescued woman was going to be married the following day and she wanted to congratulate her. Well we duly drove into the centre and met the young woman who was having her hair and makeup done by the other women in the centre in preparation for the wedding. We were told that the NGO taught the rescued young women skills so they could find jobs in the outside world and did not need to return to prostitution.

This all of course sounded fine but I was uneasy. The marriage worried me. I asked about it. We were told that the young woman was marrying a young man that she had known before she was trafficked and that it was a love match with the full support of both sets of parents. Well I was still sceptical but I hope that was the case and that she was not swapping one form of bonded labour and abuse for another. But what was bothering me more was that when we were driving to the centre we had passed through a very tall fence with razor wire at the top.

On pressing our guide, she explained that the young women in the centre were in detention because it was a country where prostitution was illegal and they were to be prosecuted. It also transpired that I was right to be uneasy about the marriage. It appears that marriage was one of the ways to ensure release from detention and, as I understood it, a discharge from

⁴⁸ The APF is a regional human rights organisation in the Asia Pacific. It was established in 1996 as a member-based organisation that supports the establishment and strengthening of national human rights institutions (NHRIs) in the region. The NHRIs of Afghanistan, Australia, India, Indonesia, Jordan, Malaysia, Mongolia, Nepal, New Zealand, the Palestinian Territories, the Philippines, Qatar, the Republic of Korea, Thailand and Timor Leste are all full members of the APF. See generally <<http://www.asiapacificforum.net>>. The ACJ is a body of jurists that advises the APF on the interpretation and application of international human rights law. It was established in 1998.

⁴⁹ Advisory Council of Jurists *Consideration of the Issue of Trafficking: Final Report* (2002).

prosecution. So there was a concern that the marriage was in some measure arguably another form of trafficking: effectively possibly a forced marriage sanctioned by the State.⁵⁰

What becomes clear from such a story is that trafficking victims are just that – victims and not criminals. Therefore, as judges we must be vigilant in trying to identify trafficking victims who might come before us in courts. Moreover, if we are uneasy about a situation then we should not hesitate to ask questions and strive to ensure that victims are given adequate protection.

What can judges do?

It is vital that all relevant institutions and organisations, including courts, remain active in their attempts to combat the egregious crime of human trafficking.

Identifying and combating crimes associated with trafficking

Judges should, I think, be vigilant in attempting to identify instances of trafficking. It might be that you come to suspect that a person appearing before you is in actual fact a trafficker. They could, for example, come before you for labour law violations. In that case it must be our duty to report the matter in some way and ask that this be investigated.

New Zealand has introduced a number of provisions over the years dealing with trafficking.⁵¹ When offenders have been convicted of trafficking offences, we should seek to ensure that appropriate sentences for trafficking offenders are imposed. As UNODC has outlined, the activity of trafficking will often result in a number of aggravating factors which must be taken into account in the sentencing process. Such aggravating factors can include: the use of weapons; vulnerable victims were targeted; the use of narcotics to control the victim; the offence was motivated by financial or material gain.⁵² Where possible, reparation to the victim and confiscation of profits should be ordered. Moreover, judges should be wary of granting bail to alleged traffickers, given the very high risk of flight.

⁵⁰ I freely admit that I may have misunderstood what was occurring. I also stress that this was in 2002 and that now no doubt the young trafficked women would be recognised as victims and not criminals in that country also.

⁵¹ See the Appendix for further discussion.

⁵² United Nations Office of Drugs and Crime *Anti-Human Trafficking Manual for Criminal Justice Practitioners* (2009) at 13. See for a recent example of sentencing in England *R v Ducan, Arslan, Facuna and Dolce* [2009] EWCA Crim 2436.

If a person is clearly a trafficker and being sentenced for a crime other than the specific trafficking offences (eg kidnapping) then suitable deterrent sentences should be imposed. The fact that offences have been committed in the course of trafficking a human being has to be a seriously aggravating factor for sentencing purposes. Trafficking is after all a form of slavery.

Protecting Victims

Judges can also play an important role in ensuring the adequate protection of victims of trafficking.⁵³ It seems to me that we need as judges to inform ourselves of the services⁵⁴ that might be available to victims of trafficking and to forge links with those services, whether provided by NGOs or the State and, if these seem inadequate, to say so (in the manner and to the extent that it might be appropriate for judges to do this). Attempts should be made, to the extent that it is appropriate, to put the victim in contact with appropriate rehabilitative services.

Steps should also be taken by the courts to protect victims in situations where trafficking offenders are on trial. The sections of our Evidence Act 2006 that aim to protect witnesses at trial will be of the utmost importance in any trafficking trial. For instance, ss 110 and 112 of the Act enable judges to grant witness anonymity orders and once such orders are granted, a judge has the power to make directions under s 116 which are considered necessary to necessary to preserve the anonymity of the witness. Such directions can include: that the court be cleared of members of the public; that the witness be screened from the defendant; and that the witness give evidence by closed-circuit television or by video link.⁵⁵

It is also necessary that we are vigilant in our courtrooms to identify anyone who might be a victim of trafficking. Such people could come to court for a variety of reasons – immigration

⁵³ In the course of discussion during a presentation on trafficking I made at the International Association of Women Judges conference in Korea this year, reference was made to the phenomenon of trafficking victims becoming themselves traffickers exploiting other victims. The question was asked as to when these persons ceased to be victims and became criminals. The answer I gave was that they will of course also become criminals when they involve themselves in exploiting others. However, they will never cease to be victims, given the coercion or fraud they suffered to get them into that position (and any continuing coercion would of course diminish their criminality). This applies in particular to children.

⁵⁴ For example, medical, housing, trauma counselling, immigration services, resettlement services and vocational training.

⁵⁵ Evidence Act 2006, s 116(1).

issues, petty crimes, prostitution (in countries where that is illegal), or as witnesses perhaps in assault or domestic violence cases. If we do have any suspicions then it has to be our duty to ask further questions or to ask someone else to do so, such as the lawyer acting for the person accompanied by a social worker, who is expert in trafficking matters.

It might be that you can see someone in court obviously controlling the victim. You could then perhaps clear the court to make any further inquiries and make sure that the person is excluded from any subsequent interview even if they pose as a supporting partner. Active measures should be taken by the judiciary when it is clear that criminal activity has occurred as a direct consequence of trafficking. For instance, where it is evident that an accused is a victim of trafficking, victim co-operation with the police should be encouraged, and the step of adjourning the case to facilitate such co-operation is recommended.

If we are obliged to allow victims to be sent back to their home countries then at least we can inquire whether they will have access to proper services from the State or NGOs when they are sent back, including counselling and medical services, and that they will be protected from being trafficked again. If possible we could refuse to send a person back without being assured services are available. In addition, there might need to be services to the family and the community in the home country to allow re-integration (and protect against re-trafficking).

We also need to think of creative ways that victims might be protected. A judge could examine whether the victim could feasibly fall within the scope of the definition of a refugee provided by the 1951 Convention Relating to the Status of Refugees, in order to benefit from the obligation of *non-refoulement* encompassed within the Convention.⁵⁶ Judges could also consider if other international human rights obligations which would allow victims to stay in New Zealand would be applicable in the situation before them.⁵⁷ The use of protections under employment laws could also be considered (as well as other civil remedies, such as

⁵⁶ See Jenna Shearer Demir “The Trafficking of women for sexual exploitation: a gender-based and well-founded fear of persecution?” <<http://www.jha.ac>> (2003).

⁵⁷ For instance, under s 130 (1) of the Immigration Act 2009, a person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand and under s 131(1) a person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.

damages or accounts of profits). Judges should also remain cognisant of international human rights instruments outside the Trafficking Protocol that may assist in the protection of victims and prevention of trafficking.

Education and Cooperation

Judges have a role in education both of themselves and of others (including the public) about human trafficking. Of course, in order for the judiciary to take such measures it is vital that judicial awareness about the differing facets of trafficking exists. The fundamental need for judicial education in this field cannot be under-emphasised. As noted by Gallagher and Holmes, international practice has illustrated that there is an inherent value in judges and prosecutors receiving awareness training on trafficking. As to what such training should consist of, it has been suggested that the focus of such training should be on the applicable legal framework surrounding trafficking and related offences, the roles and responsibilities of the judiciary and prosecutors and on best practice.⁵⁸

Finally, a willingness to cooperate with others in the fight against trafficking is vital. Increased judicial awareness of trafficking can be enhanced through cooperation both with judges across the world and agencies that work with trafficked persons. To the extent appropriate to our role, I think that judges should have some role in action plans dealing with trafficking as they have a particular perspective to add, given their role in the criminal justice system. Additionally, cross-jurisdictional cooperation is a key aspect in combating trafficking and judges should be prepared to cooperate and share information about best practice with judges in other jurisdictions.

Conclusion

As many fundamental human rights are breached through the crime of human trafficking, it is imperative that as judges we remain committed to combating this egregious crime. This requires a willingness to educate ourselves and to cooperate with relevant agencies and each other. While there has not yet been a trafficking case that has been prosecuted in New Zealand's courts, when faced with such cases in the future we must make use of New Zealand's legal framework not only to ensure the denunciation of all activities associated

⁵⁸ Gallagher and Holmes above n 11 at 328.

with trafficking but that all victims are adequately protected. All judges can play an important role in the fight against trafficking and our duty in this regard should not be forgotten.

APPENDIX

Trafficking Provisions in New Zealand

Trafficking in People By Means of Coercion or Deception

Section 98D of the Crimes Act 1961 was inserted on 18 June 2002 in order to introduce a transnational definition of people trafficking into New Zealand legislation and establish the offence of trafficking in people by means of coercion or deception.⁵⁹ Under s 98D(1), it is an offence to arrange the entry of a person into New Zealand or any other state by one or more acts of coercion against the person, one or more acts of deception of the person, or both.⁶⁰ It is also an offence to arrange, organise, or procure the reception, concealment, or harbouring in New Zealand or any other state of a person, knowing that the person's entry into New Zealand or that state was arranged by one or more acts of coercion against the person, one or more acts of deception of the person, or both.⁶¹

For the purpose of the section, an 'act of coercion against the person' includes: abducting the person; using force in respect of the person; harming the person; or threatening the person (expressly or by implication) with the use of force in respect of, or the harming of, the person or some other person.⁶² An 'act of deception' includes fraudulent action.⁶³

The fundamental requirement of the offence is that of entry into New Zealand. Thus New Zealand's trafficking provisions are focussed solely upon external trafficking.⁶⁴ However, proceedings may be brought under s 98D even if the person who was coerced or deceived did not in fact enter the state concerned; or (as the case may be) was not in fact received, concealed, or harboured in the state concerned.⁶⁵

⁵⁹ Section 98D was inserted into the Crimes Act in 2002 pursuant to s 5 of the Crimes Amendment Act 2002. See generally, Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at CA 98AA.01.

⁶⁰ Crimes Act 1961, s 98D(1)(a).

⁶¹ Crimes Act 1961, s 98D(1)(b).

⁶² Crimes Act 1961, s 98B.

⁶³ *Ibid.* It is important to also note that proceedings may be brought even if parts of the process by which the person coerced or deceived was brought or came to or towards the state concerned were accomplished without an act of coercion or deception: s 98D(4).

⁶⁴ See discussion in Susan Coppedge above n 43 at 15. This may be a reason why there have been no prosecutions under the section. There may be clear difficulties in proof with regard to what occurred outside New Zealand.

⁶⁵ Crimes Act 1961, s 98D(3).

Section 98F(1) of the Crimes Act provides that proceedings for an offence under s 98D cannot be brought in a New Zealand court without the Attorney-General's consent. However, under s 98F(2) a person alleged to have committed an offence against s 98D may be arrested, or a warrant for the person's arrest may be issued and executed, and the person be remanded in custody or on bail, even though the Attorney-General's consent to the bringing of proceedings against the person has not been obtained.

The maximum penalty for offending under s 98D is imprisonment for a term not exceeding 20 years, a fine not exceeding \$500,000 or both.⁶⁶ Section 98E provides factors that the sentencing court must take into account when sentencing under s 98D. Section 98E(1) provides that a court when sentencing under s 98D must consider: whether bodily harm or death (whether to or of a person in respect of whom the offence was committed or some other person) occurred during the commission of the offence; whether the offence was committed for the benefit of, at the direction of, or in association with, an organised criminal group; whether a person in respect of whom the offence was committed was subjected to inhuman or degrading treatment as a result of the commission of the offence; and if during the proceedings concerned the person was convicted of the same offence in respect of two or more people, the number of people in respect of whom the offence was committed.

It is also explicitly provided that, when dealing with a person convicted under s 98D, the court must consider: whether a person in respect of whom the offence was committed was subjected to exploitation as a result of the commission of the offence; the age of the person in respect of whom the offence was committed and, in particular, whether the person was under the age of 18 years; and whether the person convicted committed the offence, or took actions that were part of it, for a material benefit.⁶⁷ There have been no prosecutions brought under s 98D since its introduction in 2002.⁶⁸

⁶⁶ Crimes Act 1961, s 98D(2). This can be contrasted with the maximum term of imprisonment for the UK offences which is 14 years of imprisonment for conviction on indictment or a term of imprisonment for six months for a summary conviction: Sexual Offences Act 2003, ss 57, 58 and 59.

⁶⁷ Crimes Act, s98E(2).

⁶⁸ US Department of State *Trafficking in Persons Report* (2010) at 251.

Position relating to children

A criticism that can be made of this regime is the failure of s 98D of the Crimes Act to distinguish between trafficking in children and adults, contrary to the Trafficking Protocol. There is admittedly a special regime provided by section 98AA of the Crimes Act (which relates to dealing in people under 18 for sexual exploitation, removal of body parts, or engagement in forced labour) but this section carries lesser penalties. The new clause 30 of the Family Protection Bill 2010 will also create a new offence prohibiting the improper inducement of consent for the adoption of a child. The penalty will increase with the enactment from a very low 3 months' imprisonment to 7 years' imprisonment. This legislation is applicable to extraterritorial offences.

Position in the UK

The limitation of New Zealand's provision to external trafficking can be contrasted with the United Kingdom's legislation. The Sexual Offences Act 2003 not only creates the offence of trafficking into the United Kingdom for sexual exploitation,⁶⁹ it creates the offence of trafficking within the United Kingdom for sexual exploitation⁷⁰ and trafficking out of the United Kingdom for sexual exploitation.⁷¹ Thus, the United Kingdom provides legislative proscription of both internal and external trafficking.

Interestingly, under the sentencing guidelines provided by the United Kingdom Sentencing Guidelines Council, there is no distinction made between the sentences that should be accorded for external trafficking offences and internal trafficking offences.⁷² The guidelines do, however, outline the factors that are to be taken into account when sentencing for trafficking offences. For instance, it is highlighted that the degree of coercion used and the level of control over the trafficked person's liberty will be relevant to assessing the seriousness of the offender's behaviour. The nature of the sexual exploitation to which the

⁶⁹ Sexual Offences Act 2003 (UK), s 57.

⁷⁰ Sexual Offences Act 2003 (UK), s 58.

⁷¹ Sexual Offences Act 2003 (UK), s 59.

⁷² United Kingdom Sentencing Council Council *Sexual Offences Act 2003: Definitive Guideline* (2007) at 131. In the recent decision of *R v Pacan* [2009] EWCA Crim 2436, the Court of Appeal emphasised that the guidelines with regard to trafficking offences could be departed from in circumstances where the seriousness of the case required it.

victim is exposed is also noted to be relevant, as is the victim's age and vulnerability.⁷³ A number of additional aggravating factors are also listed. Some of these factors are: that the trafficking was part of a large scale operation; that there was a large number of people trafficked; there was a degree of planning and sophistication in the operation; and that the victim's passport was confiscated.⁷⁴

The guidelines also provide for mitigating factors that must be considered. For instance, it is noted that circumstances such as the fact that the offender is also a victim of trafficking and that his or her actions were governed by fear could be a mitigating factor if this is not accepted as a defence.⁷⁵ Other mitigating factors are noted to include that there was coercion of the offender by a third party, there was no evidence of personal gain and the offender had limited involvement in the trafficking.⁷⁶

In the recent case *R v Pacan*,⁷⁷ the English Court of Appeal upheld sentences of between 11 and 14 years' imprisonment in a case involving both the control of prostitutes and the trafficking of young and vulnerable girls whose submission was obtained by coercion. The Court of Appeal agreed with the trial judge that that the age and vulnerability of the victims, set against the coercion involved, significantly aggravated the case, taking the sentence outside the normal maximum of nine years' imprisonment specified in the SGC's guidelines.⁷⁸

As to compensation of victims of trafficking, there has been one successful award of damages to victims of trafficking made in the UK in *AT and other v Dulghieru*.⁷⁹ The claimants were four women, trafficked to the UK by the defendants on the false promise to work as dancers and instead were forced into prostitution. They were imprisoned and subjected to violence. The defendants generated profits of approximately £786,000. The Court found that there were three aspects to the general damages recoverable: pain suffering and loss of amenity, aggravated damages and exemplary damages. Exemplary damages are generally inappropriate where a defendant has already been punished under criminal law. However,

⁷³ Ibid, at 130.

⁷⁴ Ibid, at 131.

⁷⁵ Ibid, at 130.

⁷⁶ Ibid, at 131.

⁷⁷ *R v Pacan* [2010] 2 Cr App R 2 (CA).

⁷⁸ At 13.

⁷⁹ *AT and other v Dulghieru* [2009] EXHC 225 (QB).

these damages were awarded on the basis that the defendants had a profit motive and disregarded the claimants' rights.

Other Provisions that may relate to trafficking

Dealing in people under 18 for sexual exploitation, removal of body parts, or engagement in forced labour

Section 98AA of the Crimes Act was introduced in 2006 pursuant to s 6 of the Crimes Amendment Act 2005. The section was introduced to implement provisions of the Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.⁸⁰ As Coppedge notes, the subsections of s 98AA that have the most overlap with trafficking offences are s 98AA(1)(a), which provides that it is an offence to sell, buy, transfer, barter, rent, hire, or in any other way enter into a dealing involving a person under the age of 18 years for the purpose of: the sexual exploitation of the person; or the removal of body parts from the person; or the engagement of the person in forced labour, and s 98AA(f) which provides that it is an offence to induce a person under the age of 18 years to sell, rent, or give himself or herself for those purposes.⁸¹

It is also important to note that s 7A of the Crimes Act expressly confers extraterritorial jurisdiction in regard to offences under s 98AA. Thus its scope is able to extend to conduct outside of New Zealand. Recently a man was accused charged with organising and promoting child sex tours, publishing information promoting child sex tours to Southeast Asia and dealing with people under the age of 18 for sexual exploitation.⁸²

The term 'sexual exploitation' under s 98AA is defined to include the taking or transmission by any means of images of the person engaged in explicit sexual activities or of the person's genitalia, anus or breasts.⁸³ It also includes the person's participation in a performance or display or undertaking of an activity (such as employment in a restaurant) that is undertaken for material benefit and involves the exposure of the person's genitalia, anus or breasts.⁸⁴ The taking or transmission of such images for purposes other than primarily for sexual

⁸⁰ Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at CA 98AA.01.

⁸¹ Coppedge, above n 43, at 17.

⁸² Kieran Nash, "Man in court on child sex tours charges" *New Zealand Herald* (22 August 2010).

⁸³ Crimes Act 1961, subss 98AA(3)(a) and (b).

⁸⁴ Crimes Act 1961, subss 98AA (3)(c) and (d).

gratification, and for medical and health matters is explicitly excluded from the scope of the definition.⁸⁵ No statutory definition is provided for the term ‘forced labour’ in the section.

The maximum penalty for offending under s 98AA is a term of 14 years imprisonment. Significantly, a New Zealand brothel owner has been convicted under s 98AA(1)(a)(i) relating to the sexual exploitation of a person under the age of 18 years. Interestingly, on the facts of the case, the Crown accepted that it was the two teenagers who approached the brothel owner for employment and who voluntarily agreed to provide their services. Examining this situation, the High Court held that the provision does cover the situation where the young person is a willing party.⁸⁶ The Crown submitted (and the Court accepted) that the section creates a range of offences prohibiting the exploitation of young persons and that the use of children in prostitution is inherently exploitative. Accordingly, whether or not the complainants consider themselves to have been exploited and regardless of whether they were willing participants, the law considers them to have been exploited and hence offers them protection.⁸⁷ This interpretation accords with art 3(d) of the Trafficking Protocol but the issue has not yet come on appeal before the Court of Appeal (or Supreme Court).

Dealing in Slaves

Other provisions in the Crimes Act could be used to prosecute individuals for conduct that is closely linked to the conduct involved in trafficking. For instance, s 98 of the Crimes Act proscribes the various actions of dealing in slaves, the maximum penalty for offending under this section being a term of 14 years imprisonment. Under the section, a slave is defined to include, without limitation, a person subject to debt-bondage or serfdom.⁸⁸ Section 98 provides that it is an offence to partake in actions such as selling, purchasing or hiring slaves,⁸⁹ employing or using any person as a slave,⁹⁰ receiving, transporting or importing any person as a slave.⁹¹ The provision also provides that it is an offence for any individual who

⁸⁵ Crimes Act 1961, ss 98AA(4), (5) and (6).

⁸⁶ *Horlor v District Court at Christchurch* HC Christchurch CIV-2009-409-002499, 12 March 2010.

⁸⁷ Ms Horlor was recently sentenced to six months home detention and 200 hours community work. Judge David Saunders at sentencing took account of Ms Horlor’s guilty plea and the fact she had always sought legal advice regarding her obligations. See *R v Horlor* DC Christchurch CRI-2007-009-016466, 10 December 2010. The Solicitor-General is currently seeking to appeal this sentence to the Court of Appeal.

⁸⁸ Crimes Act, s98(2).

⁸⁹ Crimes Act s98(1)(a).

⁹⁰ Crimes Act s98(1)(b).

⁹¹ Crimes Act s98(1)(c).

for gain or reward gives in marriage or transfer any women to another person without her consent.⁹² Section 7A confers extraterritorial jurisdiction on offences under s 98, so this provision also has a relatively wide scope.

The potential utility of the provision was demonstrated in the New Zealand case of *R v Decha-Iamsakun* in which the Court of Appeal upheld a conviction of a Thai national under s 98 of the Act for the offences of selling a woman as a slave and with offering to sell her as a slave and upheld his sentence of five years imprisonment.⁹³ The underlying facts of the case were that the young woman, who was aged 26, had come to New Zealand under arrangements made by the accused. She travelled by air with a man associated with the accused, under the pretence that she was married to that man. The accused paid for her return air fare and visa and held the return ticket and her passport. In Auckland she lived for about five weeks in a motel with other Thai women and the accused himself. She worked first in a massage parlour and then in a go-go bar. The accused insisted that she pay by far the greater part of her earnings to him. The evidence for the Crown suggested that the accused carried on the business of bringing Thai girls to New Zealand and living on their earnings.⁹⁴

From the motel the complainant moved to live successively in two houses, one owned or occupied by the proprietor of the bar, the other by an employee in the bar (sometimes described as the manager). She was unhappy and the latter befriended her. Evidently antipathy arose between him and the accused. The charge of offering to sell her as a slave related to an offer allegedly made by the accused to sell her to that person, Mr Stott. As a result of information given by Mr Stott to the immigration authorities an assignation was arranged between the accused and the Shamus Duncan named in the charge of selling, who unbeknownst to the accused was an undercover police officer. The price paid by Shamus Duncan to the accused was \$3000 in cash.⁹⁵ The decision thus illustrates the way in which the provision can be effectively used to criminalise conduct associated with human trafficking.

⁹² Crimes Act s98(1)(g).

⁹³ *R v Decha-Iamsakun* [1993] 1 NZLR 141 (CA).

⁹⁴ At 142.

⁹⁵ *Ibid.*

Abduction for Purposes of Marriage or Sexual Connection and Kidnapping

Section 208 of the Crimes Act criminalises abduction for the purposes of marriage or sexual connection. The section proscribes the act of unlawfully taking away or detaining a person without his or her consent, or with his or her consent obtained by fraud or duress; with intent to marry him or her; or with intent to have sexual connection with him or her; or with intent to cause him or her to be married to or to have sexual connection with some other person. Coppedge notes that, as the provision punishes sexual activity which occurs due to force, fraud or duress, it is comparable to the wide sex trafficking laws found in the United States.⁹⁶ The penalty for breach of this provision is 14 years imprisonment.

There are two additional provisions relating to the abduction of persons under the age of 16 years found in the Crimes Act. Section 209A provides that a person under the age of 16 cannot consent to being taken away or detained, and s 210 provides for a penalty of seven years imprisonment for the act of unlawfully taking, enticing or detaining a young person with the intent to deprive a parent or lawful guardian with possession of that young person.

Section 209 creates New Zealand's kidnapping offence. Under the provision, it is an offence to take away unlawfully or detain a person without his or her consent or with his or her consent obtained by fraud or duress with intent to hold him or her for ransom or to service; or with intent to cause him or her to be confined or imprisoned, or with intent to cause him or her to be sent or taken out of New Zealand. This section also has as its maximum penalty a term of 14 years imprisonment.

Participation in an Organised Criminal Group

Another way in which individuals in New Zealand could be prosecuted for engagement in trafficking activities is through the offence created by s 98A of the Crimes Act for participation in an organised criminal group.⁹⁷ Under s 98A(1), an 'organised criminal group' must contain three or more people who share the common objective to benefit materially from the commission of an offence that is punishable by imprisonment for a term of 4 years

⁹⁶ Coppedge, above n 43, at 14.

⁹⁷ Ibid, at 18.

or more. The maximum penalty for this form of offending is a sentence of 10 years imprisonment.

Prostitution Reform Act 2003

The enactment of the Prostitution Reform Act 2003 decriminalised prostitution in New Zealand. One of the arguments in favour of decriminalising prostitution was that it provides those in the industry, (both prostitutes and their customers), with a safer environment in which to operate. Decriminalisation and regulation also help to prevent the spread of sexual diseases.⁹⁸ Despite prostitution being legal, the act of inducing or compelling another person to provide commercial sexual services or earnings from prostitution remains an offence.⁹⁹ The maximum penalty for this offence is a term of 14 years imprisonment.¹⁰⁰ The Act also criminalises the act of assisting a person under 18 years of age in providing sexual services,¹⁰¹ contracting with a person under the age of 18 years for commercial sexual services¹⁰² and receiving earnings from the commercial sexual services of a person under 18 years.¹⁰³ The maximum penalty for these three offences is seven years imprisonment.¹⁰⁴

There have been a number of successful prosecutions under the Prostitution Reform Act. For instance, in *R v Gillanders*, a Christchurch brothel owner pleaded guilty to assisting a female under the age of 18 years provide sex for money and to receiving payments for her engagement in commercial sexual activity.¹⁰⁵ Similarly, in *R v Prendeville and Campbell*, two women who had been prosecuted for employing a 14 year old and 17 year old in a brothel pleaded guilty to charges of entering into an arrangement for commercial sex and facilitating commercial sex with girls under 19.¹⁰⁶ In *R v Pahl*, a Dunedin man was convicted

⁹⁸ However, Sigma Huda in *Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children* E/CN.4/2006/62 (2006) at 16 argued that States could discourage the demand side of trafficking through the criminalisation of the use of prostituted persons. It was, however, emphasised that any criminal sanction relating to the sex industry should not be used to penalise prostituted trafficked women and children.

⁹⁹ Prostitution Reform Act 2003, s 16(1).

¹⁰⁰ Prostitution Reform Act 2003, s 16(3).

¹⁰¹ Prostitution Reform Act 2003, s20.

¹⁰² Prostitution Reform Act 2003, s 22.

¹⁰³ Prostitution Reform Act 2003, s 21.

¹⁰⁴ Prostitution Reform Act 2003, s 23. This can be contrasted with s 98AA, which provides for a maximum term of imprisonment of 14 years.

¹⁰⁵ *R v Gillanders* DC Christchurch TO313661/05.

¹⁰⁶ *R v Prendeville and Campbell* DC Wellington 0855975/05, September 2005.

for contracting for commercial sex with an underage girl after agreeing to pay \$500 for sex with a 15 year old girl as part of an undercover sting operation.¹⁰⁷

General Sexual Offending Provisions

The Crimes Act also criminalises sexual conduct with young persons generally. Thus, s 132(1) provides that any individual who has sexual connection¹⁰⁸ with a child under the age of 12 years is liable to imprisonment for a term not exceeding 14 years and, under s 132 (3), any individual who performs an indecent act on a child is liable to imprisonment for a term not exceeding ten years. Under s 132 (5), it is not a defence to a charge under this section that the child consented.¹⁰⁹ Additionally, s 134(1) provides that any person who has sexual connection with a young person under the age of 16 years is liable to imprisonment for a term not exceeding ten years and, pursuant to s 134(3), any person who does an indecent act on a young person under the age of 16 years is liable to imprisonment for a term not exceeding seven years. Under s 134(5) the young person in respect of whom an offence against this section was committed cannot be charged as a party to the offence if the person who committed the offence was of or over the age of 16 years when the offence was committed.

Illegal Immigration

Smuggling Migrants

The offences of migrant smuggling and human trafficking differ. However, in light of the transnational element of people smuggling, it is useful to explore briefly the New Zealand provision that proscribes this conduct. The prohibition on smuggling migrants found in s 98C of the Crimes Act was introduced at the same time as the trafficking provisions. Under s 98C(1), it is an offence for an individual to arrange for an unauthorised migrant to enter New Zealand or any other state, if this arrangement is made for a material benefit and the

¹⁰⁷ *R v Pahl* DC Dunedin, T 03-13150, May 13, 2004.

¹⁰⁸ Sexual connection is defined by s 2 of the Crimes Act as being “(a)connection effected by the introduction into the genitalia or anus of one person, otherwise than for genuine medical purposes, of (i)a part of the body of another person; or (ii)an object held or manipulated by another person; or (b)connection between the mouth or tongue of one person and a part of another person's genitalia or anus; or (c)the continuation of connection of a kind described in paragraph (a) or paragraph (b)”.

¹⁰⁹ Of course, the Crimes Act includes offences that govern sexual crimes that occurs without the consent of an adult such as indecent assault (s 135) and sexual violation, which includes the acts of rape and unlawful sexual connection (s 128).

individual either knows that the person is, or is reckless as to whether the person is, an unauthorised migrant. Under s 98C(2) an offence is created for individuals who arrange for an unauthorised migrant to be brought to New Zealand. Under s 98C(2) there is the additional qualification that the individual must either know that the person intends to try to enter the state or is reckless with regard to this. The maximum penalty for offending under this section is a term of 20 years imprisonment, a fine not exceeding \$500,000 or both.¹¹⁰

There have been successful prosecutions in New Zealand under s 98C. For instance, in *R v Chechelnitski*, the defendant pleaded guilty and was sentenced concurrently to three and half years imprisonment to three charges under s 98C(1).¹¹¹ According to the summary of facts, in 2003 three Ukraine nationals made arrangements with an associate of Mr Chechelnitski to migrate to New Zealand. They each paid US\$7,800 to that associate and were provided with false Israeli passports. The three Ukrainians were advised that they could not obtain a visa to enter New Zealand using their own genuine Ukrainian passports but that Israeli passport holders do not require entry visas. They were also promised a guide to take them to New Zealand and to provide assistance to obtain accommodation and work in New Zealand. Mr Chechelnitski was to fulfil that role. Mr Chechelnitski was a citizen of Israel and held an Israeli passport.¹¹² He was sentenced on 6 April 2004 by Paterson J to three years six months imprisonment on each charge, to be served concurrently.

In *R v Setiadi*, the defendant pleaded guilty to four charges laid under s 98C and was sentenced to four concurrent sentences of four and a half years imprisonment in June 2006.¹¹³ Here, the defendant was the New Zealand contact for an Indonesian based organisation, which obtained false photo substituted passports to enable people to come to New Zealand to work as labourers in Hawkes Bay orchards. The defendant was responsible for meeting incoming migrants who had paid large sums of money for what they considered was a legitimate opportunity to come to New Zealand for legal employment. Each migrant arrived with an envelope containing money which was given to the defendant.¹¹⁴

¹¹⁰ Crimes Act 1961, s98C(3).

¹¹¹ *R v Chechelnitski* HC Auckland CRI-2004-001239, 6 April 2004. This sentence was upheld by the Court of Appeal: *R v Chechelnitski* CA160/04, 1 September 2004.

¹¹² As outlined by the Court of Appeal in *R v Chechelnitski* CA160/04, 1 September 2004.

¹¹³ *R v Setiadi* HC Napier CRI-2005-041-002770, 1 June 2006.

¹¹⁴ At [8].

The defendant arranged work for the migrants and accommodated them in a three bedroomed house which at one stage housed up to 11 migrant workers. They paid \$60 a week in rent. The four victim impact statements gave similar accounts. All four paid an agent in Indonesia approximately \$8,000 for what they thought were airfares, passport, a job offer and of course an agent's commission. They also confirmed that they paid the defendant \$60 per week rent and \$3 per day transport. The victims claimed that they came to New Zealand in the hope of making a better future for their families and were assessed to be economic migrants. They claimed they did not know they were working in New Zealand illegally and felt they had been cheated because they were first and foremost treated as illegal immigrants for which each had served a prison sentence for offences relating to false photo substituted passports.¹¹⁵ Instead they were victims of a crime under s 98C of the Crimes Act 1961 and s142(1)(eb) of the Immigration Act 1987. The judge acknowledged this view by mentioning a possible right of reparation for the victims.¹¹⁶

Immigration Provisions

New Zealanders who employ illegal workers can also be prosecuted under the Immigration Act 2009. For instance, Deny Setiadi, discussed above, also pleaded guilty to charges under s 142(1)(ea) of the Immigration Act 1987 for aiding and abetting persons to remain unlawfully in New Zealand for material benefit and to charges under s 142(1)(eb) for aiding and abetting persons to enter New Zealand unlawfully.¹¹⁷

Recently three men have been sentenced to jail for three years under these Immigration Act provision after pleading guilty to conspiring for material benefit to aid and abet foreign nationals to stay and work illegally in New Zealand. Here, the jailed men were directors of a labour supply company, Contract Labour Services, which at its peak was running an illegal workforce of around 500 workers. The company arranged for illegal workers from Thailand, China, Vietnam and India to work in the horticulture and viticulture industries in New Zealand.¹¹⁸

¹¹⁵ At [7]–[10].

¹¹⁶ In hindsight the victims should have never been sentenced for their behaviour – instead public authorities should have treated them as victims of trafficking.

¹¹⁷ *Setiadi*, above n 113, at 5.

¹¹⁸ Lincoln Tan “Trio jailed for hiring illegal foreigners” *New Zealand Herald* (24 July 2010).