

Trafficking in the Asia Pacific region: a never ending tale of woe

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Introduction

The criminal activity of trafficking is an assault on human dignity.² It is one of the fastest growing criminal activities in the world.³ A conservative estimate is that 24.9 million people are victims of forced labour globally.⁴ This does not include trafficking for organs or forced marriage.⁵

Out of these, 4.8 million (19 per cent) are victims of forced sexual exploitation and 16 million (64 per cent) are victims of forced labour exploitation in other economic activities, such as agriculture, construction, domestic work or manufacturing. The remaining 4.1 million (16 per cent) are in state-imposed forms of forced labour, for example in prisons, or in work imposed by the state military or by rebel armed forces.

Around 80 per cent of all detected trafficking victims are women and children.⁶ The underlying factors behind the prevalence of female victims in the trafficking industry have been identified

¹ Judge of the Supreme Court of New Zealand. This paper was prepared for the Summit of Women Judges and Prosecutors on Human Trafficking and Organized Crime, Casina Pio IV, Vatican City, 9-10 November 2017. My thanks to Supreme Court clerks, Tim Bain, Aidan Lomas and Josie Beverwijk for their assistance with this paper. This paper builds on two earlier papers written by the author: “Human Trafficking in the Asia Pacific Region” (2010 International Association of Women Judges) conference, Seoul, Korea, 14 May 2010); and “Human Trafficking and New Zealand” (AGM of the New Zealand Women Judges Association, Auckland, 13 August 2010). The author was also a member of the Advisory Council of Jurists and was involved in the report “ACJ Report on Trafficking of Persons” (December 2002 available at <www.asiapacificforum.net/resources/acj-report-trafficking-persons/>).

² United State Department of State *Trafficking in Persons Report 2017* (2017) at 12.

³ Joy Ngozi Ezeilo *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children: Identification, protection of and assistance to victims of trafficking A/HRC/10/16* (2009) at 5.

⁴ International Labour Organisation 2017 *Global Estimate of Forced Labour and Forced Marriage* (19 September 2017) available at <www.ilo.org/global/publications/books/WCMS_575479/lang-en/index.htm>.

⁵ The ILO’s definition of “Forced Labour” (as defined by the ILO Forced Labour Convention 1930 (No. 29)) does not include these activities, unlike the Trafficking Protocol definition discussed below. The ILO estimates some 15 million people are in forced marriages.

⁶ United Nations Office on Drugs and Crime *Global Report on Trafficking in Persons 2016* UNODC Research (September 2014) preface and at 7 [UNODC 2016 Report].

as the general feminization of poverty, as well as the widespread occurrence of human rights violations of women in source countries.⁷

It was estimated in 2014 the total profits from forced labour worldwide amounted to US\$150 billion per year.⁸ Globally, sexual exploitation generates the most return, at around two-thirds of the profits from forced labour.⁹ Annual profits per victim are highest in the developed economies (US\$34,800 per capita), followed by countries in the Middle East (US\$15,000 per capita), and lowest in the Asia-Pacific region (US\$5,000 per capita) and in Africa (US\$3,900 per capita).¹⁰

This paper first outlines the position at international law with regard to trafficking. It then discusses the particular risks of increased trafficking in times of conflict and environmental disasters. It then examines trafficking in the Asia-Pacific region and in New Zealand.¹¹ Finally, the paper provides suggestions for actions that can be taken by judges.

Trafficking at International Law

The primary international instrument which establishes minimum standards that State parties are required to follow with regard to trafficking is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Trafficking Protocol).¹² The Convention against Transnational Organized Crime is its parent instrument.¹³

A core requirement of the Trafficking Protocol is that parties must criminalise, investigate and punish trafficking.¹⁴ Article 3(a) of the Trafficking Protocol defines trafficking as:¹⁵

⁷ Ibid.

⁸ International Labour Organisation *Profits and Poverty: The Economics of Forced Labour* (2014) available at www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_243391/lang-en/index.htm.

⁹ At 11.

¹⁰ At 12, although this report excludes the profits generated by state-imposed forced labour, which on the basis of the ILO estimates includes 4.1 million people globally.

¹¹ The appendices to the paper deal in more detail with the position in New Zealand.

¹² *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, GA Res 55/25 A/Res/55/25 (2000). It entered into force on 25 December 2003.

¹³ *Convention against Transnational Organized Crime*, GA Res 55/25 A/Res/55/25 (2000). This entered into force on 29 September 2003 and it administered by the United Nations Office on Drugs and Crime (UNODC).

¹⁴ Ibid, arts 4 and 5.

¹⁵ Article 3(b) provides that the consent of a victim of trafficking is irrelevant where any of the means of coercion set out in art 3(a) have been used. Art 3(c) addresses children under 18 and provides for a broader scope of exploitation than art 3(a).

“...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.”

The United Nations Office on Drugs and Crime (UNODC), in its 2016 report, said that in 2003 59 per cent of countries analysed had not criminalised trafficking and 23 per cent had only partially done so. In August 2016 only three per cent had not criminalised trafficking and a further nine per cent had partially criminalised it. This means that 88 per cent of jurisdictions considered have criminalised trafficking in line with the Protocol.¹⁶

The UNODC has established the Global Programme against Trafficking in Human Beings and has developed training manuals placing an emphasis on international cooperation and holistic approaches.¹⁷ The United Nations Office of the High Commissioner for Human Rights (OHCHR) also provides principles and guidance to States in their fight against trafficking.¹⁸ These principles recognise the primacy of human rights and the importance of addressing demand as a root cause of trafficking. The principles also provide that protection and assistance should be given to trafficked persons, as well as stressing the need for criminalisation, punishment and redress. The guidelines set out considerations for states to meet these principles, such as ensuring that trafficked persons are provided safe and adequate shelter that is not contingent on the willingness of the person to participate in criminal proceedings. The guidelines also stress that trafficked persons should not be held in immigration detention centres or other detention facilities.

There are also a number of other international instruments that will have relevance in preventing human rights breaches caused by trafficking, including the Convention on the

¹⁶ UNODC 2016 *Report*, above n 6, at 48.

¹⁷ See for example UNODC and UN.GIFT *Anti-human trafficking manual for criminal justice practitioners* United Nations (New York, 2009).

¹⁸ Mary Robinson *Recommended Principles and Guidelines on Human Rights and Trafficking* E/2002/68/Add. 1 (2002); and see also Office of the High Commissioner for Human Rights *Recommended Principles and Guidelines on Human Rights and Human Trafficking* United Nations (New York and Geneva, 2010).

Rights of the Child¹⁹ and its three Optional Protocols.²⁰ Another important document is the Convention on the Elimination of All Forms of Discrimination Against Women.²¹

Finally, target 8.7 of the UN Sustainable Development Goals is to “take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms”.²² In line with this, 37 States²³ have recently endorsed a call to action²⁴ to end forced labour, modern slavery and human trafficking by 2030. Notably in the call to action, states agreed to develop regulatory or policy frameworks and work with businesses to eliminate forced labour, modern slavery, human trafficking and child labour from global supply chains. The focus on the root causes of the issue is welcome.

Increased risk of trafficking

The risk of trafficking increases markedly in times of displacement through conflict, climate change and natural disasters. At the end of 2016, 65.6 million people had been forcibly displaced.²⁵ The fastest-growing refugee population was spurred by the crisis in South Sudan. This group grew by 64 per cent during the second half of 2016 from 854,100 to over 1.4 million, the majority of which are children.²⁶ More than half of the Syrian population lived in displacement in 2016, either across borders or within Syria.²⁷ There were 24.2 million new

¹⁹ *Convention on the Rights of the Child* GA Res 44/25, XLIV (1989). The Convention came into force in September 1990 and has 193 parties. Only the United States and Somalia have signed but not ratified this Convention.

²⁰ *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* GA Res 54/263, A/Res/54/263 (2000); *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* GA Res 54/263, A/Res/54/263 (2000); and *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* GA Res 66/138, A/Res/66/138 (2012).

²¹ *Convention on the Elimination of All Forms of Discrimination Against Women* GA Res 34/180, A/Res/34/180 (1979). The Convention entered into force on 3 September 1981 and 186 States have ratified or acceded to the Convention

²² For more, see < <http://indicators.report/targets/8-7/>>.

²³ Being Argentina, Australia, Bahrain, Bangladesh, Belgium, Brazil, Bulgaria, Canada, China, Colombia, Côte D'Ivoire, Denmark, Ethiopia, Ghana, Holy See, Italy, Japan, Jordan, Kenya, Lichstenstein, Malaysia, Malta, Nepal, New Zealand, Nigeria, Norway, Qatar, Republic of Korea, Saudi Arabia, Senegal, Slovakia, Spain, Sri Lanka, Turkey, the United Kingdom, the United States of America and Zambia.

²⁴ The document notes that this is “not legally binding and does not affect the states’ existing obligations under applicable international and domestic law, but rather reflects the political commitments of the states represented”.

²⁵ UNHCR *Global Trends: Forced Displacement in 2016* (June 2017) at 2.

²⁶ At 2 and 30–33.

²⁷ At 6.

displacements as a result of natural disasters in 2016.²⁸ Climate and weather related disasters were responsible for 97 per cent of this figure.²⁹ Major events in 2016 included Typhoon Nina and Haimi in the Philippines, the Yangtze River floods in China and the Bihar floods in India.³⁰

These increases can have both direct and indirect impact on human trafficking. For example, it has been reported that criminal gangs are taking advantage of Europe's migration crises and in particular unaccompanied children.³¹ The trafficking of Nigerian women from Libya to Italy has been described as reaching crisis levels, with traffickers using migrant reception centres as pick up points for women deliberately brought in to Italy and then across Europe to be forced into prostitution.³² The Inter-Agency Coordination Group against Trafficking in Persons (ICAT)³³ says:

Responding to trafficking in persons must be understood as life-saving and core to humanitarian programming. National and international actors should address this issue and take action before, during, and after a crisis. In particular, the inclusion of counter-trafficking as part of a protection response within the international humanitarian architecture needs to be reinforced to ensure preparedness as well as an immediate, system-wide response from the outset of an emergency.

Asia-Pacific Region

Nine of the twenty countries which are not States Parties to the Trafficking Protocol are in the East Asia and Pacific region (Asia-Pacific): Brunei, Fiji, Japan, North Korea (DPRK), Marshall Islands, Palau, Papua New Guinea, Solomon Islands and Tonga.

The US Department of State releases an annual report ranking governments based on their efforts to meet the standards in the Victims of Trafficking and Violence Protection Act of 2000,

²⁸ Internal Displacement Monitoring Centre *Global Report on Internal Displacement 2017* (May 2017) at 31.

²⁹ At 30.

³⁰ At 32.

³¹ Jennifer Rankin "Human traffickers 'using migration crisis' to force more people into slavery" *The Guardian* 19 May 2016.

³² Annie Kelly and Lorenzo Tondo "Trafficking of Nigerian women into prostitution in Europe 'at crisis level'" *The Guardian* 8 August 2016.

³³ Inter-Agency Coordination Group against Trafficking in Persons "Trafficking in Persons in Humanitarian Crises" (Issue Brief 2, 2017). This group is a policy forum mandated by the UN General Assembly. For more information see: <www.icat.network>.

more commonly referred to as the Trafficking Victims Protection Act (TVPA).³⁴ The minimum standards in this Act are generally consistent with the Trafficking Protocol.³⁵

The reports categorise countries into risk classes from Tier One to Three. Tier One is made up of countries whose governments have acknowledged the existence of human trafficking, made efforts to address the problem and fully comply with the 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.”³⁶ Tier Three consists of countries the State Department deems as not fully complying with the standards in the Act and as not making significant efforts to do so. The Tier Two Watch list is made up of countries that are on the border between Tier Two and Tier Three.

In the latest report, in the Asia-Pacific region,³⁷ DPRK and China³⁸ are ranked as Tier Three.³⁹ Countries in the Asia/Pacific region on the Tier Two Watch list are Burma, Hong Kong, Macau, Marshall Islands, Thailand, Laos, Papua New Guinea and Bangladesh. The rest of the countries in the region, even if they are not parties to the Trafficking Protocol, are Tier One⁴⁰ or Tier Two.⁴¹

The UNODC 2016 *Global Report on Trafficking in Persons*⁴² notes that in countries the report covers in the East Asia and the Pacific regions 61 per cent of the exploitation is for sexual purposes and 32 per cent for forced labour. In Central Asia the inverse is true.⁴³ East Asia and

³⁴ 22 USC § 7101. This is US legislation. It was enacted on October 28 2000 and predates the Trafficking Protocol which was “Adopted and opened for signature, ratification and accession” on 15 November 2000.

³⁵ *Trafficking in Persons Report 2017*, above n 2, at 25.

³⁶ At 25–28.

³⁷ See *Trafficking in Persons Report 2017*, above n 2, at 48, and specific country profiles.

³⁸ China is a party to the Trafficking Protocol. The State Department was of the view, however, that China does not meet the minimum standards for the elimination of trafficking and was not making significant efforts to do so. While there was some steps made by the government to address trafficking, the report noted unverified accounts of government complicity in forced labour and further that the law of China does not fully criminalise all forms of trafficking: at 126.

³⁹ At 234–236 and 126–129.

⁴⁰ Being Australia, New Zealand, the Philippines, South Korea and Taiwan.

⁴¹ Being Brunei, Cambodia, Fiji, Federated States of Micronesia, Indonesia, Japan, Malaysia, Mongolia, Palau, Timor-Leste, Singapore, Solomon Islands, Tonga and Vietnam.

⁴² The report does not “cover” New Zealand. No explanation is given for this or for the other countries not “covered” in the report of which there are many.

⁴³ UNODC 2016 *Report*, above n 6, at 8.

the Pacific had a high “within subregion” trafficking whereby 93 per cent of trafficking victims came from within the subregion.⁴⁴

The Asia-Pacific region established a forum in 2002 (the Bali Process) “for policy dialogue, information sharing and practical cooperation to help the region address these challenges.”⁴⁵ The sixth Bali Process Ministerial Conference was held in March 2016. It endorsed the Bali Process Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime. The Declaration acknowledges the growing scale and complexity of irregular migration challenges both within and outside the Asia Pacific region and supports measures that would contribute to comprehensive long term strategies addressing the crimes of people smuggling and human trafficking as well as reducing migrant exploitation by expanding safe, legal and affordable migration pathways.

One positive aspect of this regional forum is that it acknowledges and addresses the fact that the Asia Pacific region raises unique problems with the vast expanses of ocean and mixed development of nations. This makes nationals of less developed nations particularly vulnerable to being promised a better life in a more developed country.⁴⁶

New Zealand

New Zealand is ranked in Tier One in the US State Department report as it meets all legislative requirements under the Trafficking Protocol. There is specific trafficking legislation, as well as other legislation that is relevant and there have been prosecutions under the various provisions. The specific legislation aimed at trafficking and the prosecutions under it are discussed in Appendix A. Other legislation relevant to trafficking is outlined in Appendix B.

Even though New Zealand is in Tier One, the US State Department report considers that “New Zealand did not consistently identify victims in vulnerable sectors, provide shelter services

⁴⁴ At 41–43. It is worth noting that the report suffers from a lack of data in certain regions: for instance, South Asia is said to have “very poor” information available to the extent that “lack of data means that no conclusive regional information for the 2012-2014 period can be presented”: at 109.

⁴⁵ See <www.baliprocess.net/>. Countries who are members of the Bali Process are: Afghanistan, Australia, Bangladesh, Bhutan, Brunei, Cambodia, China, DPR Korea, Fiji, New Caledonia, Hong Kong, India, Indonesia, Iran, Iraq, Japan, Jordan, Kiribati, Laos, Macau, Malaysia, Maldives, Mongolia, Myanmar, Nauru, Nepal, New Zealand, Pakistan, Palau, Papua New Guinea, Philippines, Korea, Samoa, Singapore, Solomon Islands, Sri Lanka, Syria, Thailand, Timor-Leste, Tonga, Turkey, Vanuatu, Vietnam, the United States of America and the United Arab Emirates.

⁴⁶ There is also the United Nations Action for Cooperation against Trafficking in Persons which was established in 2014 to coordinate efforts to combat human trafficking in the Greater Mekong sub-region (Cambodia, Laos, Myanmar, Thailand, Vietnam and the Chinese province of Yunnan).

designed specifically for trafficking victims, or adequately conduct campaigns to raise general awareness of human trafficking.”⁴⁷

New Zealand developed an action plan in relation to trafficking which came to fruition with the release of the ‘Plan of Action to Prevent People Trafficking’ (the Plan of Action) in 2009.⁴⁸ This plan is a whole-of-government response to human trafficking and focusses on prevention, protection and prosecution in line with New Zealand’s international obligations. The Plan of Action sets out 28 objectives, the actions to be taken in furtherance of each objective, the agency responsible and how the success or failure of the action is to be measured. The objectives and actions range from the specific, such as amending the “Special Needs Grant”⁴⁹ to be available for victims of trafficking, to the broad, such as “use victim-friendly interviewing techniques”. An update was due in 2016 but this is now due to be completed in 2018.⁵⁰

There are a number of non-governmental organisations working in the area of trafficking in New Zealand, including Child ALERT (NZ),⁵¹ Hagar NZ, The Préscha Initiative and Stand Against Slavery. Stand Against Slavery estimate “conservatively” that there are 800 slaves in New Zealand.⁵²

Academic research is also continuing.⁵³ The latest is a report published in December 2016 by Dr Christina Stringer of the University of Auckland Business school entitled: “Worker Exploitation in New Zealand: A Troubling Landscape”. This is a “desk review” as well as 105 semi-structured interviews with workers. The report does not claim to be all encompassing but highlights the key industries in New Zealand where worker exploitation is taking place:

- (a) construction;
- (b) dairy;

⁴⁷ Trafficking in Persons Report 2017, above n 2, at 298.

⁴⁸ Department of Labour *Plan of Action to Prevent People Trafficking* (July 2009).

⁴⁹ The Special Needs Grant Programme provides non-recoverable financial assistance to those in certain circumstances specified in the Programme. This has been amended to include victims of trafficking: see Special Needs Grants Amendment 2010.

⁵⁰ See <npa.hrc.co.nz/#/action/20> for more.

⁵¹ Ending Child Prostitution, Child Pornography and Child Trafficking for Sexual Purposes.

⁵² See <www.standagainstsavery.com/>. I make no comment on the accuracy of this figure.

⁵³ See for example Thomas Harré “Confronting the Challenge of Human Trafficking for Forced Labour in the Pacific: Some Thoughts from New Zealand” (2012) 10 NZYIL 1.

- (c) fishing and especially the foreign charter vessel sector; horticulture and viticulture; the particular issues relating to foreign fishing vessels are discussed in Appendix C to this paper.
- (d) hospitality;
- (e) international education sector; and
- (f) prostitution. New Zealand studies have found that girls as young as 12 are being forced into prostitution.⁵⁴

Dr Stringer's paper also notes the Christchurch rebuild after the earthquakes⁵⁵ as a problematic area. It says:⁵⁶

Accounts have emerged of Filipino workers paying exorbitant recruitment fees (between \$3,000 and \$15,000 each) to immigration agencies in the Philippines in order to obtain work in Christchurch. The promise of employment in Christchurch, and relatively high wages of between \$18 and \$25 an hour, is seen by many to be life-changing, and many have subsequently entered into debt bondage in order to obtain employment.

What can judges do?

In light of the proliferation of trafficking activity that has occurred both in the Asia Pacific region and across the globe, it is vital that all relevant institutions and organisations, including courts, remain active in their attempts to combat human trafficking. I recognise that there will be some inherent limitations in the role of a judge and differences between what might be deemed appropriate in different jurisdictions but I make some suggestions as to possible actions that could be taken.⁵⁷

⁵⁴ James Paul "NZ's underbelly of forced sex trade involves Kiwis as young as 12, researcher says" 12 September 2017<www.stuff.co.nz>.

⁵⁵ In September 2010 and February 2011 the city of Christchurch, New Zealand suffered two debilitating earthquakes (and many aftershocks) which has resulted in the need to rebuild the CBD and repair many buildings.

⁵⁶ Christina Stringer "Worker Exploitation in New Zealand: A Troubling Landscape" University of Auckland (December 2016) at vi.

⁵⁷ Judges are, of course, not the only people who can take positive actions to assist the fight against trafficking. Prosecutors in particular have an important role to play. Much of what I discuss in the following paragraphs applies even more strongly to prosecutors.

Identifying and combating crimes associated with trafficking

It seems to me that judges should play an active role in ensuring the application of national laws in order to combat trafficking. Regardless of the scope of legislation that specifically prohibits trafficking, judges should both be alert to and use national laws that prohibit actions commonly associated with the activity of trafficking. Even where there are no specific trafficking offences, traffickers must have committed a number of ordinary offences. These could include for example laws criminalising assault, kidnapping, and extortion. But, where possible, prosecutions should be brought under specific trafficking provisions. Even if a prosecution is ultimately unsuccessful, this gives the crime its proper name, raises awareness and underlines the state's determination to fight trafficking.

Judges should also 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 it be investigated.⁵⁸

Judges should also seek to ensure that appropriate sentences for trafficking offenders are 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. As UNODC has outlined, there will be other aggravating factors which must be taken into account in the sentencing process. Such aggravating factors can include: the use of weapons; the targeting of vulnerable victims; the use of narcotics to control the victim; and the fact that the offence was motivated by financial or material gain.⁵⁹ 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.

Further, as the UNODC report also notes "victims and traffickers often have the same background". Thus legal immigrants from a country can become the traffickers of future victims; a modern Trojan horse type effect. So too can trafficking victims become the

⁵⁸ While a comprehensive approach is required to prosecute traffickers, this is in no way to suggest that their fair trial rights should be diminished or trammelled. Traffickers should be prosecuted to the full extent of the law but no further.

⁵⁹ United Nations Office on Drugs and Crime *Anti-Human Trafficking Manual for Criminal Justice Practitioners* at 13. See for an example of harsh sentences in the UK "Sentencing for Trafficking" *R v Pacan, Arslan, Facuna and Doci* [2009] EWCA Crim 2436.

traffickers of future victims. This victim to trafficker phenomenon provides challenging sentencing issues because of the duress involved on ex-victims of trafficking and the extent to which this can or should be treated as a mitigating factor. There are possibly even liability issues, depending on the way a jurisdiction treats duress. There are also difficult issues of proof if the duress consists of alleged threats to family in another jurisdiction.

Protecting Victims

The judiciary can also play an important role in ensuring the adequate protection of victims of trafficking. It is well recognised that an essential factor in ensuring the protection of victims of trafficking is that victims must not be prosecuted for offences directly associated with their being trafficked.⁶⁰ As outlined by principle 7 of the UNODC Recommended Principles on Human Rights and Human Trafficking, trafficked persons should not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in illegal activities to the extent that such involvement is a direct consequence of their situation as a trafficked person.⁶¹ It is vital that decision-makers around the world bear this principle in mind when faced with cases that may have originated from the activity of human trafficking. For example, in countries where prostitution is illegal, judges should attempt to ascertain whether the person charged has voluntarily entered into prostitution (to the extent any entry into prostitution can be seen as truly voluntary) or been forced into it. It is difficult to see how prosecution of a coerced victim can be justified. At the least, any penalties should concentrate on rehabilitation rather than punishment.⁶²

Steps should also be taken by the courts to protect victims in situations where trafficking offenders are on trial. As acknowledged by the UNODC, a number of measures can be taken at the trial stage to protect the victims of trafficking. For instance, the use of testimony by video-link can protect the witness from direct confrontation with and intimidation by the accused. Moreover, additional measures such as video-linked testimonies combined with

⁶⁰ United Nations Office on Drugs *Toolkit to Combat Trafficking in Persons* (2006) at 103, UNODC 2016 *Report*, above n 6, at 22.

⁶¹ Recommended Principles on Human Rights and Human Trafficking, above n 18.

⁶² In the course of discussion during the oral presentation of an earlier version of this paper at the IAWJ conference, 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.

image and/or voice altering devices can protect the physical security of the trafficking victim. Other steps can also be taken to assist in lessening the trauma of giving evidence, through support persons, pre-recording of evidence, different questioning methods and familiarising court visits.⁶³

We must be also 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 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 proceedings 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.

It seems to me that we need as judges to inform ourselves of the services⁶⁴ 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 in your jurisdiction 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.

If we are legally obliged to send victims 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

⁶³ See for example Kirsten Hanna and Emily Henderson “Vulnerable witnesses: children” (New Zealand Law Society, Wellington, 2015); and Emily Henderson and others “Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy” New Zealand Law Foundation (2010). Some jurisdictions allow for the recording of complainant evidence: see for example the Northern Territory of Australia (Evidence Act (NT), s 21E), South Australia (Evidence Act 1929, s 13D) and Victoria (Criminal Procedure Act 2009 (Vic), s 379.

⁶⁴ For example, medical, housing, trauma counselling, immigration services, resettlement services and vocational training.

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 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.⁶⁵ A judge could also consider other international human rights obligations which might allow victims to stay in the destination country and not be sent back to the home country if they do not want to go. The use of protections under employment laws could also be considered (as well as other civil remedies, such as 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. For instance, in the European context, the European Court of Human Rights has held that the Convention has to be interpreted as a living instrument and therefore that trafficking in human beings falls within the scope of art 4 of the European Convention on Human Rights which prohibits slavery, servitude and forced labour.⁶⁶ It has been held that art 4 requires States to put in place adequate measures regulating businesses often used as a cover for human trafficking and if authorities are aware of a situation of human trafficking or a risk that an individual will get into such a situation, it will be obliged to take measures such as investigating situations of human trafficking.⁶⁷

⁶⁵ See Jenna Shearer Demir “The Trafficking of women for sexual exploitation: a gender-based and well-founded fear of persecution?” (2003) <www.jha.ac/articles/al15.pdf>.

⁶⁶ *Rantsev v. Cyprus and Russia* Application no 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010, <www.unhcr.org/refworld/docid/4b4f0b5a2.html>; *Siliadin v. France* Application no 73316/01, Council of Europe: European Court of Human Rights, 26 July 2005, <www.unhcr.org/refworld/docid/4406f0df4.html>; and (Pending cases: *L R v United Kingdom* Application no 49113/09 and *Lilyana Sashkova Milanova and Others v Italy and Bulgaria* Application no 40020/03).

⁶⁷ Antoine Buyse “Landmark Judgment on Human Trafficking” (January 2010) <echrblog.blogspot.com/2010/01/landmark-judgment-on-human-trafficking.html>.

The Need for Education and Cooperation

Judges have a role in educating themselves and others (including the public), about the crime of 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 over-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.⁶⁸ Increased judicial awareness can be further enhanced through cooperation both with judges across the world and agencies that work with trafficked persons.

Finally, cooperation is another key aspect in the fight against trafficking. In most of our countries there will be some government action to try to combat trafficking as political awareness has grown over recent years. To the extent appropriate in our particular jurisdictions I think that judges should have some role in contributing to the content of government action plans as they have a particular perspective to add, given their role in the criminal justice system. Judges should also be prepared to cooperate and share information about best practice with each other.

Organisations of judges, such as the International Association of Women Judges (the IAWJ) could have a real role to play in this regard.⁶⁹ The IAWJ could for example collect cases and best practices from its members. A network of members could be established so that cross-border cooperation could be encouraged in trafficking cases. It could also build networks with other organisations dedicated to combat trafficking. Cross-border cooperation is a key aspect in a globalized crime such as trafficking and the IAWJ can use existing collaborations to raise awareness for this crime and how to deal with it.

⁶⁸ Anne Gallagher and Paul Holmes “Developing an Effective Criminal Justice Response to Human Trafficking: Lessons From the Front Line” (2008) 18 *International Criminal Justice Review* 318 at 328.

⁶⁹ It has already been extensively involved in training programmes on trafficking.

Conclusion

As many fundamental human rights are breached through the crime of human trafficking, it is imperative that we all remain committed to combating this egregious crime. This requires a willingness to educate ourselves, to cooperate with each other and to ensure that we make use of our national legal frameworks not only to ensure the denunciation of all activities associated with trafficking but that all victims are adequately protected. Everyone can play an important role in the fight against trafficking and our duty in this regard should not be forgotten.

Appendix A

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.⁷⁰ Under s 98D(1) as first enacted, 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.⁷¹ 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.⁷²

After a 2015 amendment there is an additional alternative offence. This offence covers the same actions described above but instead of having a knowledge element has a purpose element: for the purpose of “exploiting or facilitating exploitation”.⁷³ This means that, even if persons have no knowledge of the fraud or coercion, they could still be liable if their purpose in undertaking the actions was to exploit the victim. The section defines exploitation in relation to a person as meaning to cause, or to have caused, that person, by an act of deception or coercion, to be involved in prostitution or other sexual services, slavery or similar services or the removal of organs.

The amended provision has come under some criticism. Kris Gledhill in the New Zealand Criminal Law Review has critiqued the complexity of the provision noting the multiple alternative activities and mental states.⁷⁴ He also raises the concern that the complicated nature

⁷⁰ Section 98D was inserted into the Crimes Act in 2002 pursuant to s 5 of the Crimes Amendment Act 2002. See generally, Simon France (ed) *Adams on Criminal Law* (Online looseleaf ed, Brookers) at [CA 98AA.01].

⁷¹ Crimes Act 1961, s 98D(1)(a).

⁷² Crimes Act, s 98D(1)(b).

⁷³ Replaced by s 5 Crimes Amendment Act 2015 with effect from 7 November 2015.

⁷⁴ Kris Gledhill “Legislation Note: The Crimes Amendment Act 2015” [2016] NZCLR 31 at 33–35.

of the provision might put off prosecutors charging under it. There is thus a danger that prosecutors may “under-charge”, that is bring charges under provisions with lesser penalties for offending which deserves to be punished as trafficking. As Appendix B shows many activities of trafficking could form the basis of alternative charges. Mr Gledhill makes another criticism of the amendment. He suggests that the addition of “exploitation” may in fact have narrowed the extent of the section despite the stated intent being an “augmentation” to better match the wording of the relevant international instruments.

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.⁷⁵ An “act of deception” includes fraudulent action.⁷⁶ The breadth of these definitions may well help to minimise concerns as to the complexity of the section.

The fundamental requirement of the offence is that of entry into or out of New Zealand or any other state. Thus New Zealand’s trafficking provisions are focussed solely upon external trafficking.⁷⁷ 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.⁷⁸

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.⁷⁹ 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

⁷⁵ Crimes Act 1961, s 98B.

⁷⁶ 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).

⁷⁷ See discussion in Susan Coppedge “People Trafficking: An International Crisis fought at the Local Level” (2006) <www.fulbright.org.nz/publications/2006-coppedge/> at 15. Susan Coppedge is a US Federal Prosecutor, who reported on human trafficking in 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.

⁷⁸ Crimes Act 1961, s 98D(3).

⁷⁹ 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.

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 sentencing 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.⁸⁰ This suggests that in practice those convicted under s 98D satisfying the newer “for the purpose of exploiting” limb will face higher sentences.

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. Section 27A of the Adoption Act 1955 also creates an offence prohibiting the improper inducement of consent for the adoption of a child. The penalty is imprisonment for a term not exceeding 7 years. This legislation is applicable to extraterritorial offences.⁸¹

Prosecutions under s 98D

There has now been one successful prosecution⁸² and one unsuccessful for trafficking in New Zealand.⁸³ The successful prosecution was of Faroz Ali and included 15 counts of human trafficking. The victims were all Fijian residents who responded to an advert in the *Fiji Sun* newspaper. Two adverts were run by separate “travel agencies”. One agency was run by

⁸⁰ Crimes Act, s 98E(2).

⁸¹ Section 27C.

⁸² United States of America Department of State *Trafficking in Persons Report: June 2017* available at <www.state.gov/j/tip/rls/tiprpt/2017/> at 298.

⁸³ Dr Christina Stringer, above n 56.

Mr Ali's de facto wife and one agency by Mr Ali's wife's twin sister. The adverts offered work in New Zealand at a significantly better income than was available in Fiji. The victims claimed that they expected to earn seven to eight times more per week in New Zealand than Fiji. All the victims sought this money to support their families and wider village communities. "Extortionate" fees were charged by the travel agents before the victims left Fiji and most victims had borrowed from their communities to meet such fees. Such borrowing was secured on the promise of their future income in New Zealand.

Mr Ali met the victims in New Zealand and was in constant contact with his wife and her twin as to organising the trafficking of the victims. Mr Ali organised the transport within New Zealand of the victims from Auckland to the Bay of Plenty to work in the horticulture industry (some stayed in Auckland and worked in construction). Once there, the victims were housed in accommodation the judge described as "shamefully poor". Compounding this was the lack of bedding while the victims were exposed to a New Zealand winter, which is significantly harsher than in Fiji.

Alongside Ali the man who supervised the workers in the Bay of Plenty, Jafar Kurisi, was also prosecuted. Mr Kurisi was charged and pleaded guilty to exploitation offences but was not charged with human trafficking. Even though the punishment is lower, the fact that ancillary charges can cover aspects of the trafficking "story" is a useful tool for prosecutors. Mr Kurisi provided the "shamefully poor" accommodation, underpaid wages, over charged fees and a victim, over the course of three weeks' work, had been paid only \$75 in cash and Mr Kurisi maintained that they owed *him* money.

Mr Kurisi's actions took place before the 2015 amendment. It is well open to argument that, had they taken place after the amendment, Mr Kurisi's actions would have been covered by the new trafficking offence. Mr Kurisi's actions could amount to "transporting", "concealing" or "harbouring" a person in New Zealand with the purpose of exploiting the person. This suggests, despite the criticisms noted above, that the amendment has resulted in a positive broadening of the trafficking provision.⁸⁴

Mr Ali was sentenced to nine years and six months' imprisonment. Mr Ali's case highlights the difficulty in gaining some degree of economic recompense for victims.⁸⁵ Mr Ali was to be

⁸⁴ See further Appendix B where some of these alternative/ancillary charges are set out.

⁸⁵ *R v Ali* [2016] NZHC 3077. There were also some interesting evidence issues discussed in *R v Ali* [2016] NZHC 1068; and *R v Ali* [2016] NZHC 2223.

adjudged bankrupt for tax arrears and most of his money was in Fiji. These factors meant that only a small portion of the money owing to the victims could be the subject of a reparation order against Mr Ali. The sentencing judge, Heath J, concluded:

[66] Before I conclude the sentencing, I express the community's gratitude to the immigration officials involved in the difficult and time consuming investigation that led to the detection and prosecution of the offending involving Mr Ali and Mr Kurisi. It is vital that the Ministry should be taking steps to stamp out conduct of this type. The means by which the investigation took place should be commended.

Mr Kurisi was sentenced on representative charges involving aiding and abetting people to breach conditions of their visas; aiding and abetting people to remain unlawfully in New Zealand; exploitation of employees by failing to pay moneys due to them under the Holidays Act 2003; and exploitation of employees by failing to pay the minimum wage due under the Minimum Wage Act 1993. Heath J sentenced Mr Kurisi to 12 months home detention and ordered him to pay \$55,000 in reparations. The starting point was three years and six months' imprisonment. Mr Kurisi's significant ill health and offer to pay \$55,000 in reparations provided a one year reduction, good character and guilty pleas reduced this to one year six months which was commuted to home detention, the judge concluding:

[39] ... I wish to make one thing very clear. My decision to commute to home detention has been made on the basis that the reparation will be paid in accordance with the order that I am about to make. If there were default in payment of reparation, it would be open to the Crown to seek permission to appeal out of time against the sentence of home detention. Were that to occur, the Court of Appeal will be aware of my own view that, in the absence of reparation a sentence of imprisonment would have been required. In other words, if you do not pay reparation, you are at risk of going to jail.

The prosecution of Mr Ali and Mr Kurisi is an important step in the right direction. However, the fact there has been only one successful prosecution since 2002, when the provision was introduced, highlights the difficulty with uncovering and bringing to Court human traffickers.

There has also been an unsuccessful trial, which preceded Mr Ali's, it is described in these terms by a report writer Dr Christina Stringer:⁸⁶

In the first trial, three males — Kulwant Singh, Jaswinder Singh Sangha and Satnam Singh — were charged with deceiving workers in India with the promise of employment in New Zealand. The workers each paid between \$30,000 to \$40,000 for a two-year work visa and were promised permanent residency. At the departure airport in India they were informed that their visas were only for 7 months and further on arrival in New Zealand were told there was no work available. Some did obtain work but were

⁸⁶ Dr Christina Stringer, above n 56, at 13.

not paid or alternatively they worked for rent and groceries. In December 2015, the three were found not guilty of the lead charge of human trafficking under the Crimes Act but Kulwant Singh and Jaswinder Singh Sangha were found guilty of making false statements to Immigration New Zealand.

Sixteen witnesses in this trial subsequently had their applications for residency declined by Immigration NZ. The witnesses said they had all been given certification by police as being victims of trafficking and had received death threats in India after giving evidence. An appeal has been lodged to the Immigration and Protection Tribunal.⁸⁷

⁸⁷ Matt Stewart “Witnesses in human trafficking trial claim Immigration NZ has hung them out to dry” 21 June 2017 <www.stuff.co.nz>.

Appendix B

Extraterritoriality

A significant hurdle in dealing with trafficking is its multi-jurisdictional aspect. This can mean that no one country is able to charge a person for all of their trafficking actions as they occurred “extraterritorially”. Section 7A of the Crimes Act expressly confers extraterritorial jurisdiction in relation to offences under ss 98AA, 98A and 98D. These sections criminalise: dealing in people under 18 for sexual exploitation, removal of body parts, or engagement in forced labour; participation in organised criminal group; smuggling migrants; and trafficking in persons. Thus the scope of these sections extend to conduct outside of New Zealand. There are requirements for a degree of connection to New Zealand, usually that the person to be charged is a New Zealand citizen or ordinarily resident in New Zealand.⁸⁸ With regards to trafficking and smuggling migrants s 7A(2) provides the New Zealand connection is that the offence was related to entry into New Zealand. This provision allows the New Zealand justice system to investigate and hold to account people for actions usually outside the New Zealand criminal jurisdiction.

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

Section 98AA of the Crimes Act creates the offence of “dealing in people under 18 for sexual exploitation, removal of body parts, or engagement in forced labour” and was introduced in 2006 pursuant to s 6 of the Crimes Amendment Act 2005 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.⁸⁹ There is some overlap with the trafficking provisions.⁹⁰

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.⁹¹ It also includes the person’s participation in a performance or

⁸⁸ The Attorney-General must consent to any prosecution which relies upon s 7A. The New Zealand Attorney-General is a Government Minister and is the Senior Law Officer of the Crown.

⁸⁹ Simon France (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers) at [CA98AA.01].

⁹⁰ Coppedge, above n 77, at 17.

⁹¹ Crimes Act 1961, subss 98AA(3)(a) and (b).

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.⁹² The taking or transmission of such images for purposes other than primarily for sexual gratification, and for medical and health matters is explicitly excluded from the scope of the definition.⁹³ 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.⁹⁴ 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.⁹⁵ 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

Section 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.⁹⁶ Section 98 provides that it is an offence to partake in actions such as selling, purchasing or hiring slaves,⁹⁷ employing or using any person as a slave,⁹⁸ receiving, transporting or importing any person as a slave.⁹⁹ The provision also provides that it is an

⁹² Crimes Act 1961, subss 98AA (3)(c) and (d).

⁹³ Crimes Act 1961, ss 98AA(4), (5) and (6).

⁹⁴ *Horlor v District Court at Christchurch* HC Christchurch CIV-2009-409-002499, 12 March 2010.

⁹⁵ Ms Horlor was 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.

⁹⁶ Crimes Act, s 98(2).

⁹⁷ Crimes Act, s 98(1)(a).

⁹⁸ Crimes Act, s 98(1)(b).

⁹⁹ Crimes Act, s 98(1)(c).

offence for any individual who for gain or reward gives in marriage or transfer any women to another person without her consent.¹⁰⁰ 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.¹⁰¹ The underlying facts of the case were that a 26 year old woman had come to New Zealand under arrangements made by the accused. She travelled with a man associated with the accused, under the pretence that she was married to her travel companion. The accused paid for her return air fare and visa and held the return ticket and her passport. In Auckland she lived initially 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 most 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.¹⁰²

From the motel the complainant moved to live successively in two houses. She was unhappy and befriended a colleague at the bar, Mr Stott. Evidently antipathy arose between Mr Stott 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 Mr Stott. As a result of information given by Mr Stott to the immigration authorities an assignation was arranged between the accused and an undercover police officer, Shamus Duncan. The price paid by Shamus Duncan to the accused was \$3,000 in cash.¹⁰³ The decision illustrates the way in which the provision can be effectively used to criminalise conduct associated with human trafficking.

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

¹⁰⁰ Crimes Act, s 98(1)(g).

¹⁰¹ *R v Decha-Iamsakun* [1993] 1 NZLR 141 (CA).

¹⁰² At 142.

¹⁰³ At 142.

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.¹⁰⁴ 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.¹⁰⁵ 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 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. It was also considered that decriminalisation and regulation help to prevent

¹⁰⁴ Coppedge, above n 77, at 14.

¹⁰⁵ Coppedge, above n 77, at 18.

the spread of sexual diseases.¹⁰⁶ Despite prostitution being legal, the act of inducing or compelling another person to provide commercial sexual services or earnings from prostitution remains an offence.¹⁰⁷ The maximum penalty for this offence is a term of 14 years imprisonment.¹⁰⁸ The Act also criminalises the act of assisting a person under 18 years of age in providing sexual services,¹⁰⁹ contracting with a person under the age of 18 years for commercial sexual services¹¹⁰ and receiving earnings from the commercial sexual services of a person under 18 years.¹¹¹ The maximum penalty for these three offences is seven years imprisonment.¹¹² There have been a number of successful prosecutions under the Prostitution Reform Act.¹¹³

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 connection¹¹⁴ 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.¹¹⁵ 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

¹⁰⁶ 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.

¹⁰⁷ Prostitution Reform Act 2003, s 16(1).

¹⁰⁸ Prostitution Reform Act, s 16(3).

¹⁰⁹ Prostitution Reform Act, s 20.

¹¹⁰ Prostitution Reform Act, s 22.

¹¹¹ Prostitution Reform Act, s 21.

¹¹² Prostitution Reform Act, s 23. This can be contrasted with s 98AA, which provides for a maximum term of imprisonment of 14 years.

¹¹³ See for instance: *R v Gillanders* DC Christchurch TO313661/05; *R v Prendeville and Campbell* DC Wellington 0855975/05, September 2005; *R v Pahl* DC Dunedin, T 03-13150, May 13, 2004; *R v King* [2012] NZHC 3353; *Stevenson v R* [2012] NZCA 189, (2012) 25 CRNZ 755; *Hastie v R* [2011] NZCA 498; *Bushby v R* [2017] NZCA 192.

¹¹⁴ 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)”.

¹¹⁵ 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).

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.

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 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.¹¹⁶

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).¹¹⁷ 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

¹¹⁶ Crimes Act, s 98C(3).

¹¹⁷ *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.

Israeli passport.¹¹⁸ 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.¹¹⁹ 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.¹²⁰

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.¹²¹ 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.¹²²

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, old, Immigration Act 1987 for aiding and abetting persons to remain

¹¹⁸ As outlined by the Court of Appeal in *R v Chechelnitski* CA160/04, 1 September 2004.

¹¹⁹ *R v Setiadi* HC Napier CRI-2005-041-002770, 1 June 2006.

¹²⁰ At [8].

¹²¹ At [7]–[10].

¹²² In hindsight the victims should have never been sentenced for their behaviour – instead public authorities should have treated them as victims of trafficking.

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.¹²³

Part 10 of the Immigration Act 2009 sets out offences and penalties. A number of these could potentially cover trafficking operations, for instance, providing false information in relation to immigration matters,¹²⁴ aiding and abetting as discussed,¹²⁵ obstruction or failing to meet requirements,¹²⁶ improper dealings with immigration or identity documents,¹²⁷ impersonation,¹²⁸ alteration of forms¹²⁹ and perhaps most directly exploitation of unlawful and temporary workers amongst others.¹³⁰

In response to “exploiting” workers 70 firms were recently banned from hiring migrant workers for a six-month period. The ban followed from a range of breaches such as not having written employment contracts, underpaying staff and breaching the Holidays Act.¹³¹ Unfortunately, their appear to be persistent problems in ensuring sufficient labour inspectors to catch all such breaches.¹³² Nevertheless, the existence and enforcement of this new power by the labour inspectorate is a positive step.

¹²³ *Setiadi*, above n 119, at 5. This provision has now been replaced with s 343 of the Immigration Act 2009. The new provision is in materially similar terms.

¹²⁴ Section 342.

¹²⁵ Section 343.

¹²⁶ Section 344.

¹²⁷ Section 345.

¹²⁸ Section 346.

¹²⁹ Section 347.

¹³⁰ Section 351. See also the *Ali* cases discussed above at 85.

¹³¹ Emile Donovan “Migrant worker bans: 70 firms fall foul of new rules” *Radio New Zealand* (online ed, New Zealand, 4 October 2017).

¹³² See “Migrant worker bans”; and Jacob McSweeney “‘Too easy’ to flout employment laws, says union” *Radio New Zealand* (online ed, New Zealand, 19 July 2017).

Appendix C

Appendix – Human Trafficking and Foreign Fishing Vessels¹³³

Background

The Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 provides that the area within 200 nautical miles of the New Zealand’s coastline is our Exclusive Economic Zone.¹³⁴ All of these waters are New Zealand fisheries waters.¹³⁵ Under the United Nations Convention on the Law of the Sea (UNCLOS), states exercise a limited form of sovereignty over their EEZ.¹³⁶ The sea within 12 nautical miles of the coastline is New Zealand’s territorial waters,¹³⁷ over which New Zealand has full sovereignty (subject to its obligations under UNCLOS).¹³⁸

Under UNCLOS, on the open seas, the jurisdiction to which a ship is subject is determined by its flag.¹³⁹ Ships may only have one flag, and must have a “genuine link” to the flag state.¹⁴⁰ The jurisdiction of the flag nation is exclusive, subject to UNCLOS.¹⁴¹

In the late 1970s, New Zealand did not have a sufficient fishing fleet to maximise productivity of the EEZ fisheries.¹⁴² Foreign licence agreements were entered into between the New Zealand government and the governments of Japan, Korea and the USSR. Vessels from these countries caught over 200,000 tonnes of fish each year, which was returned to foreign ports for processing. During this period, New Zealand fisheries operators were encouraged to engage in joint ventures with overseas fishery companies (such joint ventures required government approval).¹⁴³ It was hoped that these arrangements would facilitate the expansion of the New

¹³³ My gratitude to Supreme Court clerk, Tim Bain, who prepared this summary.

¹³⁴ Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, s 9.

¹³⁵ Section 10.

¹³⁶ United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994) [UNCLOS], pt 5.

¹³⁷ Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act, s 3.

¹³⁸ UNCLOS, art 2.

¹³⁹ Arts 91 and 92.

¹⁴⁰ Art 92(1).

¹⁴¹ The exceptions to this exclusivity in regards to the exercise of criminal and civil jurisdiction on a foreign-flagged ship are narrow and apply only to territorial waters: see arts 27–28.

¹⁴² *Report of the Ministerial Inquiry into the Use and Operation of Foreign Charter Vessels* (February 2012) [*Ministerial Inquiry*] at [29].

¹⁴³ At [30].

Zealand fishing industry to the point that foreign involvement would no longer be necessary. However foreign vessels still play a major role in the New Zealand fishing industry.

The Fisheries Act 1996, which governs the modern quota system,¹⁴⁴ provides for regulated foreign access to fish stocks within the EEZ.¹⁴⁵ The Minister for Primary Industries controls the amount of the fish take that can be allocated to foreign operators. Foreign vessels must be licensed before they are permitted to take fish.¹⁴⁶ In determining whether to grant a license, the Minister must take into account the “previous offending history” of the vessel, its crew and its master.¹⁴⁷ A license can be granted with conditions.¹⁴⁸ Both the Minister for Primary Industries and the Minister of Finance must approve any investment which results in an overseas person owning or controlling interests in the fishing quota.¹⁴⁹

Part 12 of the Act provides for observers to be placed on fishing vessels at the instigation of the Ministry. Observers have powers of search and inspection, and can demand certain information from ship masters. Until recently, however, the role was confined to collecting information relating to quota management (and enforcement) and pollution caused by fishing activities.

The number of foreign charter vessels (FCV) operating in the EEZ declined significantly between 1996 and 2011, while the number of New Zealand fishing ships increased slightly over the same period.¹⁵⁰ In the 2010/2011 fishing year, there were 29 New Zealand vessels and 27 FCV fishing in the EEZ.¹⁵¹ Thirteen of those FCV were flagged to South Korea, seven to Japan, four to the Ukraine and two to Dominica (it is not clear to where the last remaining ship was flagged).¹⁵²

Following a number of high-profile allegations of the abuse of sailors working on FCV, the Ministerial Inquiry into the Use and Operation of Foreign Charter Vessels (the Ministerial

¹⁴⁴ Catch limits are set for each fish species subject to the quota management system. Fishing quota based on these catch limits are allocated to individual fishing entities. A quota is a proprietary right to catch fish, and can be more or less freely traded (with a few limitations such as apply to certain quota received through Treaty of Waitangi settlements).

¹⁴⁵ Fisheries Act 1996, pt 5.

¹⁴⁶ Sections 83 and 84.

¹⁴⁷ Section 83(3)(a).

¹⁴⁸ Section 83(4).

¹⁴⁹ Section 56–62.

¹⁵⁰ Ministerial *Inquiry*, above n 142, at 22, fig 2.

¹⁵¹ At [85].

¹⁵² At [84].

Inquiry) was convened in August 2011.¹⁵³ The aim of the Ministerial Inquiry was to ensure that the use of FCV in the fishing industry complied with a number of government objectives:¹⁵⁴

- (a) protect New Zealand’s international reputation and trade access;
- (b) maximise the economic return to New Zealand from our fisheries resources;
and
- (c) ensure acceptable and equitable New Zealand labour standards (including safe working environments) are applied on all fishing vessels operating in New Zealand’s fisheries waters.

The Ministerial Inquiry reported back in February 2012. It made a number of wide-ranging recommendations, ultimately resulting in the enactment of the Fisheries (Foreign Charter Vessels and Other Matters) Amendment Act 2014. The major reforms in the Amendment Act came into force on 1 May 2016.¹⁵⁵

Reported abuse of sailors

Unless otherwise indicated, the following summary is taken from the article by Thomas Harré on forced labour in the Pacific.¹⁵⁶

In September 2005, the crew of a Korean FCV jumped ship in Nelson. They laid a complaint with police alleging that they had been fed rotten food; had been made to shower by standing on deck in high seas; had been physically and emotionally abused; and had not been paid their promised wage (which itself was well below the minimum wage).¹⁵⁷

¹⁵³ At [1].

¹⁵⁴ Ministerial *Inquiry*, above n 142, at [2].

¹⁵⁵ Fisheries (Foreign Charter Vessels and Other Matters) Amendment Act 2014, s 2(2).

¹⁵⁶ Thomas Harré “Confronting the Challenge of Human Trafficking for Forced Labour in the Pacific: Some Thoughts from New Zealand” (2012) 10 NZYIL 1 at 2–3. Civil proceedings have been taken by former crew members seeking relief for alleged underpayment of wages: see, for example, *Hartono v Ministry for Primary Industries* [2017] NZSC 117; granting leave to appeal from *Sajo Oyang Corp v Ministry for Primary Industries* [2017] NZCA 182, [2017] NZAR 611. The *Ministerial Inquiry*, above n 142, noted that enforcement action had been taken by the Department of Labour in relation to allegations of underpayment: see at [424] and [433]. The Inquiry also “heard testimony that backs up many of” the alleged human rights abuses: see at [421]. Allegations of human rights abuse have not yet been tested in court, however.

¹⁵⁷ Clause 4 of the Minimum Wage Order 2017, issued under s 4 of the Minimum Wage Act 1983, prescribes a minimum wage of \$15.75 per hour worked for adult workers.

In 2010, a Korean FCV sank (due to the captain failing to release an oversize catch), killing six. The surviving crew were taken to Christchurch, where private security guards (paid for by the operating company) escorted them to and from police interviews and allegedly refused them adequate food, clothes or money.

In 2011, crew from another of that company's ships jumped ship in Lyttelton claiming physical and verbal abuse and the non-payment of wages. The alleged abuse included being beaten for working too slowly and being forced to stand motionless for long periods of time as a punishment. The company notified Immigration New Zealand that the crew were in violation of their visas.¹⁵⁸ This prompted concerns that the crew would be lost as witnesses in a subsequent prosecution against the company for illegal dumping.¹⁵⁹

Over the same time period, crew members on other FCV reported low (usually around USD200 per month) and unpaid wages, physical abuse and highly unsafe working conditions. Crew members on some ships were allegedly forced to work for up to 30 hours without breaks, with no time given off for sickness or injury. Several crew members on FCV died, with little or no follow-up from New Zealand law enforcement. On a number of vessels, systemic sexual abuse by officers against crew was alleged.

Those crew who jumped ship often did so despite reporting threats of repercussions. In one case, a crew member's contract apparently specified that his family would be charged USD3,5000 (over a years' salary) if he failed to complete his employment.¹⁶⁰ That crew member had allegedly been required to submit the title to his family's land as collateral and to give the names and addresses of his family members to the recruitment agent. It appears that anyone who spoke to reporters or investigators suffered a backlash. The same crew member (who spoke to the author of a *Businessweek* article on abuses on New Zealand FCV) allegedly had USD1,100 in pay withheld from him. The recruiting agency also refused to return his birth certificate or his family papers. The families of others who spoke out were allegedly physically and financially threatened.¹⁶¹

¹⁵⁸ Andrea Vance "Oyang fishermen face deportation" *Stuff.co.nz* (online ed, 11 August 2011).

¹⁵⁹ David Clarkson "Ministry warns against deportation of crew" *The Press* (online ed, Christchurch, 20 January 2012). Illegal dumping is the practice of discarding caught fish back into the sea, with the effect that the reported catch is lower than the actual amount of fish taken from fish stocks.

¹⁶⁰ See Benjamin Skinner "The Fishing Industry's Cruellest Catch" *Businessweek* (online ed, 23 February 2012).

¹⁶¹ Michael Field "Families of fishing crew face backlash" *Sunday Star Times* (online ed, 9 July 2011).

There were also reports of inaction from the fishery observers present on vessels while the alleged abuse was taking place. The *Businessweek* article reported that a crew member had sought help from an observer, who had expressed sympathy with his condition but replied that it was “not my job” to intervene.¹⁶²

Reforms

The Ministerial Inquiry noted that, in theory, the Minimum Wage Act 1983 and the Wages Protection Act 1983 already applied to all FCV by virtue of s 103(5) of the Fisheries Act (as in force at the time).¹⁶³ A compulsory Code of Practice (required for the companies in question to receive immigration clearance) imposed additional protection (including a \$2 increment on the minimum wage, minimum requirements for working conditions and jurisdiction for New Zealand employment institutions).¹⁶⁴

These protections were, in practice, unenforced. The Code of Practice mechanisms proved unable to prevent human rights abuses and underpayment – in part because of the opaque structure of the employment relationship and the fact that most wages were paid through recruitment agents overseas.¹⁶⁵ This was particularly a problem in relation to Indonesian crew.¹⁶⁶

The Inquiry concluded that “it was clear” both that serious breaches of the Code of Practice had taken place and “that the response of both the industry and government agencies has been inadequate”.¹⁶⁷

A number of recommendations were put forward in order to reshape the regulatory regime so as to protect “New Zealand’s international reputation”.¹⁶⁸ Most of these related to practical steps that the relevant government agencies could take in order to improve enforcement efforts (such as improved data sharing).¹⁶⁹ However, a number of significant legislative changes were suggested, including:

¹⁶² Skinner, above n 160.

¹⁶³ *Ministerial Inquiry*, above n 142, at [393].

¹⁶⁴ At [405]–[409].

¹⁶⁵ At [420]–[423].

¹⁶⁶ At [430].

¹⁶⁷ At [441].

¹⁶⁸ At [447].

¹⁶⁹ See at [455].

- (a) strengthening the power of the Ministry to impose conditions on FCV registrations and including in the Fisheries Act an explicit power to suspend or revoke individual registrations;¹⁷⁰
- (b) making FCV explicitly subject to health and safety legislation;¹⁷¹
- (c) considering adoption of international conventions on fishing vessel safety;¹⁷²
- (d) requiring fishing crews to be employed by a New Zealand employer and to be covered by a New Zealand employment agreement (known as “demise chartering”);¹⁷³
- (e) introducing a power into the Fisheries Act for the Minister to require some or all FCV to reflag as New Zealand vessels;¹⁷⁴ and
- (f) investigating how the Crimes Act 1961 could be applied to FCV working in New Zealand’s EEZ.¹⁷⁵

Later in 2012 the Fisheries (Foreign Charter Vessels and Other Matters) Amendment Bill 2012 (75–1) was introduced into Parliament. The Bill was the Government’s response to the Ministerial Inquiry and adopted many of its recommendations.¹⁷⁶

The Bill went further than the Inquiry recommended, however, in that it required all FCV to re-flag as New Zealand vessels by 1 May 2016.¹⁷⁷ This was intended to “create a level playing field for the management of vessels” (that is, to ensure that foreign vessels incurred the same compliance costs as New Zealand vessels) and to strengthen “the Government’s ability to enforce New Zealand laws” by placing all fishing vessels “under full New Zealand jurisdiction”.¹⁷⁸ In addition, the Bill provided that all fishing vessels (not just those that were foreign-owned) would be required to seek the Ministry’s consent prior to registration.¹⁷⁹

¹⁷⁰ Recommendation 7.

¹⁷¹ Recommendations 8–10.

¹⁷² Recommendation 11.

¹⁷³ Recommendation 12.

¹⁷⁴ Recommendation 13.

¹⁷⁵ Recommendation 14.

¹⁷⁶ Fisheries (Foreign Charter Vessels and Other Matters) Amendment Bill 2012 (75–1) (explanatory note) at 1.

¹⁷⁷ Clause 10.

¹⁷⁸ Explanatory note at 2.

¹⁷⁹ Clause 10.

The Select Committee made several significant changes to the Bill, but retained its core elements. The Ministry's powers were reduced in terms of New Zealand-owned vessels.¹⁸⁰ As well, (narrow) exceptions were introduced to the rule requiring all vessels to be flagged to New Zealand, to allow those fishing migratory species to be exempted.¹⁸¹ This latter amendment was done in preference to the option of "deeming" all FCV to be within New Zealand jurisdiction while in the EEZ (a model used in Australia and advocated for by submitters). It was thought that the "deeming" model would not be sufficient to ensure that the Bill's objectives were met.

During the Committee of the Whole House, the exemption for vessels fishing migratory species was removed, meaning all vessels would need to reflag except for those engaged in fisheries research under a special permit.¹⁸²

As enacted, the Fisheries (Foreign Charter Vessels and Other Matters) Amendment Act provided for mandatory reflagging of vessels by 1 May 2016; expanded the role of fisheries observes to include reporting on health, safety and employment conditions (in addition to their roles relating to quota and pollution management); and introduced new powers to suspend the registration of foreign-owned vessels.

Implementation and effectiveness

It was reported by University of Auckland research fellow Glenn Simmons (whose research prompted the Ministerial Inquiry) in late 2015 that alleged abuses were not limited to FCV, but also occurred on New Zealand-flagged ships.¹⁸³ He was of the view that "while wages and working conditions on foreign vessels had improved since [2012], Indonesian crew members working on New Zealand boats were also being exploited."

An article in *The New Zealand Herald* on 1 May 2016 reported that twelve FCV had either re-flagged or were in the process of re-flagging, but that another nine vessels had chosen not to re-flag and thus had abandoned fishing in New Zealand waters.¹⁸⁴

¹⁸⁰ Fisheries (Foreign Charter Vessels and Other Matters) Amendment Bill 2012 (75–2) (Select Committee report) at 2.

¹⁸¹ At 3–4.

¹⁸² Supplementary Order Paper 2014 (429) Fisheries (Foreign Charter Vessels and Other Matters) Amendment Bill 2012 (75–2).

¹⁸³ "Foreign crews may still face mistreatment – researcher" *Radio New Zealand* (5 December 2015).

¹⁸⁴ Claire Trevett "Fishing changes: Foreign vessels yet to re-flag with Government" *The New Zealand Herald* (online ed, Auckland, 1 May 2016).

A report prepared in December 2016 by Dr Christina Stringer for the Human Trafficking Research Coalition indicates improvement in deep-sea fishery worker conditions following the industry reforms.¹⁸⁵ However, exploitation is still possibly occurring in inshore fisheries.¹⁸⁶ Such exploitation appears to take the form of the payment of recruitment fees to agents prior to arriving in New Zealand and non-adherence to employment agreement terms once in New Zealand. For example, interviewed workers reported being required to work in a New Zealand-based processing factory (rather than immediately being placed on vessels as their contracts specified). While doing so, they lived in a boat shed. Similarly, the report suggests that underpayment of sailors continues to be a problem. A particular problem identified by Dr Stringer was that, even where enforcement agencies had followed up on complaints, the amount of compensation eventually paid to workers reflected their contractually specified hours (usually 42) rather than the hours they had actually worked (often reported as twice that).

The report (which examined migrant worker exploitation across a number of industries) noted with concern that many migrant workers were reluctant to speak out because of poor experiences with enforcement agencies or fears related to their “precarious” immigration status.¹⁸⁷

¹⁸⁵ Dr Christina Stringer, above n 56, at 33.

¹⁸⁶ At 34.

¹⁸⁷ At 41–42.