

Making Possibilities Realities: Compensation for Trafficked People

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Abstract

The issue of compensation for victims of trafficking in Australia has been neglected. Since 2003, Australia has invested more than AU\$84 million in anti-people trafficking measures. The victims of trafficking who have obtained compensation, however, can be counted on one hand. This article explores the obstacles to and opportunities for claiming compensation for trafficked people. While welcoming recent law reform proposals that would improve the prospects of obtaining compensation from convicted offenders, it argues that efforts to provide effective remedies for trafficked people must not focus exclusively on obtaining compensation from convicted offenders but must improve access to a range of civil remedies. Such a move would involve stepping outside the crime control paradigm that has characterised Australia's response to people trafficking and empowering exploited people to seek redress for the harm they have suffered in Australia.

I Introduction

Human trafficking takes as many different forms as its victims suffer injuries.¹ Trafficking can result in physical and mental harm, sexual assault, domestic violence, the breakdown of family relationships, lifelong psychological or physical injuries, false imprisonment, and economic loss. People who have been trafficked are left destitute and must overcome practical, psychological and legal obstacles to reconstruct their lives in an unfamiliar country. But despite the damage wrought by

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¹ In this article, the term 'people trafficking' is used as shorthand to encompass related forms of exploitation such as slavery, forced labour and debt bondage. These terms have different legal definitions although the concepts may overlap. See, eg, *Rantsev v Cyprus and Russia* (European Court of Human Rights, Chamber, Application No 25965/04, 7 January 2010) where the European Court of Human Rights held at [282] that trafficking itself falls within the prohibition of 'slavery', 'servitude' or 'forced and compulsory labour' in art 4 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953). The term 'victims of trafficking' is used interchangeably with trafficked people and should be understood to encompass victims of slavery, sexual servitude and forced labour.

traffickers upon the lives of those they exploit, only a fraction of trafficked persons identified by authorities around the world have brought claims for compensation.²

The *United Nations Trafficking Protocol* ('*Trafficking Protocol*') promises that states will provide trafficked people with the 'possibility' of obtaining compensation.³ But so far, for trafficked people in Australia, the *possibility* and *reality* of obtaining compensation have proven elusive.⁴ To date, over 190 suspected victims of trafficking have received support from the Commonwealth Government Support Program for Victims of Trafficking,⁵ but only a handful of trafficking victims have obtained compensation.⁶

The Commonwealth is the only jurisdiction within Australia that does not provide a publicly-funded compensation scheme for victims of crime. Historically, federal crimes have concerned offences against the Commonwealth. But following the criminalisation of people trafficking, child sex tourism, online sexual exploitation and terrorism, the Commonwealth must grapple with crimes that actually injure individuals. Although the *Crimes Act 1914* (Cth) ('*Crimes Act*') enables courts to order convicted offenders to pay reparations to their victims,⁷ there have been no such orders made against the 15 offenders convicted under Australia's anti-trafficking laws. Unlike the states and territories, which all have state-funded compensation schemes, the legal architecture to meet the needs of federal victims of crime has not yet been constructed: the Commonwealth lacks both a federal compensation scheme and a charter of victims' rights.

² See Anne Gallagher, *International Law of Human Trafficking* (Cambridge University Press, 2010) 354; Katy Thompson and Allison Jernow, 'Compensation for Trafficked and Exploited Persons in the OSCE Region' (Report, OSCE/ODIHR, 2008) <<http://www.osce.org/odihr/32023>> ('*OSCE Report*'); Janice Lam and Klara Skrivankova, 'Opportunities and Obstacles: Ensuring compensation for trafficked persons in the UK' (Report, Anti-Slavery International, October 2008) <http://www.antislavery.org/includes/documents/cm_docs/2009/t/trafficking_and_compensation2009.pdf>.

³ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) ('*Trafficking Protocol*') art 6.6.

⁴ The Organization for Security and Co-operation in Europe ('OSCE') notes that the term 'compensation' is used to refer to 'the overall concept of payment to a person, regardless of the source of the payment or the mechanism used or the types of losses to be compensated. Compensation thus includes awards made by state-funded schemes as well as awards made in criminal, civil or labour law proceedings. For ease of reference this article refers to the concept of compensation in the same way: Thompson and Jernow, above n 2.

⁵ Anti-People Trafficking Interdepartmental Committee, Parliament of Australia, *Trafficking in Persons: The Australian Government Response: July 2010 – June 2011: The Second Report of the Anti-People Trafficking Interdepartmental Committee* (2012) 34 ('*AGD IDC Report*').

⁶ The author is aware of a eight victims of trafficking who have successfully applied for compensation under statutory compensation schemes in NSW and Victoria, with most of the successful cases in NSW. Some applications are still to be determined: *ibid* 46. A small number of cases have been reported. See, eg, Natalie Craig, 'Sex slave victim wins abuse claim', *The Age* (Melbourne), 29 May 2007. A claim for victim's compensation in Victoria succeeded in October 2010: Email from Belinda Lo to Frances Simmons, 22 November 2010 (on file with the author). See also Drugs and Crime Prevention Committee, Parliament of Victoria, *Report of Inquiry into People Trafficking for Sex Work* (2010) 206 observing compensation has been rarely awarded.

⁷ The operation of s 21B of the *Crimes Act 1914* (Cth) is triggered by the conviction of a federal offender and a reparation order made on s 21B is treated as a civil debt.

The offences of people trafficking, slavery, sexual servitude, debt bondage and deceptive recruiting for sexual services are recent additions to the *Criminal Code Act 1995* (Cth) (*'Criminal Code'*).⁸ Australia's initial response to people trafficking prioritised prosecuting traffickers but said nothing about compensating their victims. The National Anti-People Trafficking Strategy provides no guidance to police, prosecutors or victim support services about how to ensure that trafficked people can seek compensation, and the Commonwealth Director of Public Prosecutions ('CDPP') *Victims of Crime Policy* is silent on the question of reparation orders.⁹ However, now a new bill, the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (*'Crimes Legislation Amendment Bill'*), promises to improve the availability of reparations from convicted offenders.¹⁰

This article evaluates the existing avenues to compensation for trafficked persons in Australia. While recognising the desirability of obtaining reparations from convicted offenders, offender-based compensation will only ever benefit a relatively small number of victims. In the absence of a publicly-funded federal compensation scheme, a growing number of trafficked people are claiming compensation under state and territory compensation schemes, particularly in NSW and Victoria where most of the known cases of trafficking have occurred.¹¹ Further, the growing focus on labour trafficking outside the sex industry has highlighted the important role of the Fair Work Ombudsman ('FWO') in helping exploited workers recover unpaid wages under the *Fair Work Act 2009* (Cth) (*'FWA'*). However, there are significant barriers to claiming compensation. First, the right to effective remedies cannot be realised unless trafficked people are identified, supported and informed about their rights (the 'access problem'). Second, existing remedies are not designed for trafficking victims and, in some cases, may prove inapplicable or inadequate (the 'legal problem').

This article recommends integrating the issue of access to compensation into Australia's national action plan to address human trafficking to place the right to effective remedies at the core of Australia's anti-trafficking efforts. This

⁸ In 1999, the *Criminal Code Amendment (Slavery and Sexual Servitude) Offences Act 1999* (Cth) introduced the offences of slavery (s 270.3), sexual servitude (s 270.6) and deceptive recruiting for sexual services (s 270.7) into the Criminal Code. In 2005, the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth) added the offences of trafficking in persons (s 271.2), trafficking in children (s 271.4), domestic trafficking in persons (s 271.5) and debt bondage (s 271.8). See further *R v Tang* (2008) 237 CLR 1 (explaining the meaning of slavery); *Sieders v R*; *Somsri v R* (2008) 72 NSWLR 417 (explaining the meaning of sexual servitude).

⁹ Commonwealth Director of Public Prosecutions ('CDPP'), *Victims of Crime Policy* <<http://www.cdpp.gov.au/Publications/Victims-of-Crime-Policy/>>. The policy states that '[i]n the context of this policy, a victim of crime is an identified individual who has suffered harm as a direct result of an offence or offences committed, or apparently committed, against Commonwealth law or prosecuted by Commonwealth authorities. "Harm" includes physical or mental injury, pregnancy, emotional suffering or economic loss.'

¹⁰ See further, Australian Government Attorney-General's Department, *Discussion Paper: The Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protections* (2010).

¹¹ Frances Simmons, 'Pathways to justice: Compensation for trafficked people' (Presentation delivered at Anti-Slavery Project Seminar: The Criminal Justice Response to Trafficking and Reparations, University of Technology, Sydney, 18 February 2011) <<http://www.antislavery.org.au/news/news-archive/158-the-criminal-justice-response-to-trafficking-and-reparations.html>>.

requires a paradigm shift: instead of conceptualising trafficked people as witnesses; they must be treated as rights bearing individuals. While the calls to establish a comprehensive compensation scheme for federal victims of crime deserve support, greater efforts must also be made to ensure trafficked persons have effective access to existing remedies. As Australia's anti-trafficking efforts expand to focus on all forms of trafficking, improving the capacity of vulnerable people to access remedies (whether as victims of crime, exploited workers, or plaintiffs in private suits) will help prevent trafficking by improving labour protection frameworks and ensuring that employers who exploit vulnerable workers are held legally accountable.

II The International and Australian Legal Framework

A *The International Backdrop*

The question of how many people fall prey to traffickers each year is impossible to answer accurately.¹² Data collection is complicated by confusion about the definition of trafficking.¹³ The internationally agreed definition of 'trafficking in persons' set out in *Trafficking Protocol*¹⁴ has three elements: an action by the trafficker in the form of recruitment, transportation, harbouring, or receipt of persons; the use of force, threats or other coercive, abusive or deceptive means to control the victim; and, that the action is undertaken for the purpose of exploitation.¹⁵ The end purpose of trafficking is 'exploitation', which is not exhaustively defined but can include the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices

¹² However, the International Labour Organization ('ILO') estimates that at any one time there are 12.3 million victims of forced labour in the world, of whom more than 2.4 million people are trafficked into forced labour every year. Of these 2.4 million victims, the ILO estimated about 43 per cent are exploited in the commercial sex business while 32 per cent are in other forms of economic exploitation and 25 per cent in a combination of both labour and sexual exploitation: ILO Director-General, 'A Global Alliance Against Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work' (Report No I (B), ILO, 1 March 2005) 15.

¹³ United Nations Office on Drugs and Crime ('UNODC'), 'Global Report on Trafficking in Persons' (Report, United Nations Office on Drugs and Crime, February 2009) 18–19 <<http://www.unodc.org/unodc/en/human-trafficking/global-report-on-trafficking-in-persons.html>> ('*Global Report on Trafficking*') noting that limitations in data collection include differences in definitions adopted by different nations.

¹⁴ Article 3(a) provides that 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 purpose of exploitation. Article 3(b) also provides that the recruitment, transportation, harbouring or receipt of children by any means for the purpose of exploitation will constitute trafficking, regardless of whether consent is present. The definition of trafficking applies to trafficking that occurs across and within state borders. See UNODC, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, UN Doc V.04-50413 (October 2004) <<http://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html>>.

¹⁵ These elements capture both 'the bringing of a person into a situation of exploitation and the maintenance of that person in a situation of exploitation'. See Gallagher, above n 2, 47.

similar to slavery, servitude or the removal of organs.¹⁶ The consent of victim is irrelevant if the trafficking involves ‘coercion or an abuse of position of power or a position of vulnerability’ that leave a person with ‘no real and acceptable alternative but to submit to the abuse involved’.¹⁷

While it is clear that slavery, forced labour and servitude are end purposes for which people are trafficked, the degree to which these concepts overlap is still controversial. International instruments that predate the *Trafficking Protocol*¹⁸ define and prohibit slavery, slave-like practices, forced labour and servitude.¹⁹ In the 21st century, courts have recognised that these practices often overlap; as the former Chief Justice of the High Court of Australia observed ‘[t]hose who engage in the traffic in human beings are unlikely to be so obliging as to arrange their practices to conform to some convenient taxonomy’.²⁰

The popular perception of a trafficked person as a foreign woman trafficked into the sex industry masks the many different manifestations of human trafficking. Early anti-trafficking initiatives were constructed within a criminal control paradigm that focused upon the trafficking of women for exploitation in the sex industry, but left the broader issue of labour trafficking under-researched and under-reported.²¹ However, now the growing focus on labour trafficking outside the sex industry²² has highlighted how strengthening labour protection frameworks

¹⁶ *Trafficking Protocol* art 3a.

¹⁷ Under the *Trafficking Protocol* art 3(a), if a trafficker uses force, threats, coercion or an abuse of a position of power or vulnerability, the consent of the victim is irrelevant. UN General Assembly, *Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, 55th session, Agenda Item 105, UN Doc. A/55/383/Add.1 (3 November 2000) note 63.

¹⁸ ILO Director-General, ‘The Cost of Coercion: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work’ (Report, ILO, 12 May 2009) [29] <http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_106230.pdf>.

¹⁹ The internationally accepted definition of slavery is found in the *International Convention to Suppress the Slave Trade and Slavery*, opened for signature 25 September 1926, 212 UNTS 17 (entered into force 18 June 1927) art 1(1). The *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, opened for signature 7 September 1956, 226 UNTS 3 (entered into force 30 April 1957) art 1(a)(i) prohibits ‘practices similar to slavery’ namely, debt bondage, serfdom, servile marriage and child labour — ‘whether or not they are covered by the definition of slavery’.

²⁰ The High Court found it was ‘unnecessary and unhelpful’ to seek to draw boundaries between slavery and cognate concepts such as servitude, peonage, forced labor, or debt bondage as the various concepts are not ‘mutually exclusive’. *R v Tang* (2008) 237 CLR 1, 29 (Gleeson CJ).

²¹ The term ‘labour trafficking’ is not defined in the *Trafficking Protocol* or any other international instrument. It is used to describe trafficking that can result in different types of labour exploitation such as ‘forced labour on fishing vessels, the enslavement of migrant domestic workers, bonded labour in agricultural settings, and sweatshop labour’. See Australian Institute of Criminology, ‘Labour Trafficking: key concepts and issues’ (Transnational Crime Brief No 3, Australian Institute of Criminology, Australian Government, March 2009).

²² Roger Plant, *Trafficking for Labour Exploitation: Challenges for Criminal Law Enforcement* (Paper presented at the Cambridge International Symposium on Economic Crime, Cambridge, United Kingdom, 2 September 2009); ‘Global Report on Trafficking’, above n 13, 6 noting ‘[s]exual exploitation is by far the most commonly identified form of human trafficking (79 per cent), followed by forced labour (18 per cent). This may be the result of statistical bias ... [b]ecause it is more frequently reported, sexual exploitation has become the most documented type of trafficking, in aggregate statistics. In comparison, other forms of exploitation are under-reported:

can reduce the vulnerability of migrant workers to criminal exploitation.²³ For example, the 2010 United States *Trafficking in Persons* report observed '[e]ffective prevention lies in targeted initiatives to protect the rights of marginalised, low income workers such as domestic servants, farm workers, miners and garment workers. These workers are too often subjected to offences that span a continuum of labor exploitation, including at its worst, human trafficking'.²⁴ Similarly, the International Labour Organization ('ILO') and the Organization for Security and Cooperation in Europe ('OSCE') have recommended initiatives that focus on improving the working conditions 'of workers who are vulnerable to forced labour but who are still able to act',²⁵ as part of a comprehensive response to trafficking in persons.²⁶

The need to look beyond the criminal justice system to prevent trafficking and provide remedies to trafficked persons is now clear. The Trafficking Protocol falls under the banner of a transnational crime control convention and in the last decade many countries, including Australia, have criminalised people trafficking. To date, these new legal tools have largely failed to deliver the sought-after convictions.²⁷ In contrast to the exacting standard of proof demanded by criminal prosecutions, civil remedies only require proof on the balance of probabilities. However, 'trafficked persons are frequently left without either substantive remedies or the support necessary to access such remedies and as a result are often exposed to further human rights violations and the risk of being re-trafficked'.²⁸

forced or bonded labour; domestic servitude and forced marriage; organ removal; and the exploitation of children in begging, the sex trade and warfare.'

²³ ILO Director-General, 'The Cost of Coercion' (Report, ILO, 12 May 2009) 8, observing that the 'lessons of experience point to a very thin dividing line between coerced and non-coerced exploitation'; United States Department of State, *Trafficking in Persons Report* (2009) 13, 32–40.

²⁴ United States Department of State, *Trafficking in Persons Report* (10th ed, 2010).

²⁵ P Belser and B Andrees, 'Strengthening Labor Market Governance Against Forced Labor' in P Belser and B Andrees (eds), *Forced Labor: Coercion and Exploitation in the Private Economy* (ILO, 2009) 123; see also, OSCE, 'A Summary of Challenges on Addressing Human Trafficking for Labour Exploitation in the Agricultural Sector in the OSCE Region' (Occasional Paper, OSCE, 2009) <<http://www.osce.org/cthb/37937>> (discussing labour trafficking strategies) and ILO, *International Labour Migration: A Rights-based Approach* (ILO, 2010) 262–3 ('A Rights-based Approach').

²⁶ *A Rights-based Approach*, above n 25 262–3; OSCE, 'Human Trafficking for Labour Exploitation/Forced and Bonded Labour' (Occasional paper Series No 2, OSCE, May 2008) 17; See also, E Pearson, *The Mekong Challenge, Human Trafficking: Redefining Demand* (ILO, 2005).

²⁷ UNODC, *International Framework for Action to Implement the Trafficking Protocol* (2009) 4; noting that by 2008, 80 per cent of the 155 countries surveyed had introduced specific anti-trafficking laws. However, between 2003 and 2008 40 per cent of the 155 countries did not record a conviction for trafficking in persons, while the remaining 60 per cent recorded less than 10 convictions per year; *Global Report on Trafficking*, above n 13 22; see generally Albert Moskowitz, 'Challenges and Priorities in Prosecuting and Adjudicating Trafficking in Persons Cases' (Paper presented at the Trafficking in Persons Research and Data Forum, University of Hong Kong, 3–4 November 2008) 4 <<http://njca.anu.edu.au/Professional%20Development/People%20Trafficking/Moskowitz.pdf>>, where Moskowitz, observes 'while recognising the difficulty in compiling accurate and reliable statistics, there can be little doubt that under any reasonable estimate of the trafficking problem, the number of prosecutions and convictions of traffickers worldwide has been mostly insufficient to deter criminals and to secure justice for trafficking victims'.

²⁸ Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children — Addendum — Expert Consultation on the Right to an Effective Remedy for Trafficked Persons*, 17th Sess, Agenda Item 3, UN Doc A/HRC/17/35/Add.6 (21 March 2011).

More than a decade after the UN General Assembly adopted the *Trafficking Protocol*, the United Nations Special Rapporteur on Trafficking in Persons ('UN Special Rapporteur') used her 2011 annual report to highlight the issue of access to effective remedies for trafficked persons.²⁹ As traffickers typically leave their victims destitute, compensation has the potential to reduce the risk of re-trafficking by providing survivors with financial assistance as they seek to rebuild their lives.³⁰ Compensation may be of symbolic value, providing official acknowledgment to victims and, in some cases, their families, that they have been 'unjustly subjected to loss, damage or injury'.³¹ Awards may cover the costs of medical treatment for physical or psychological trauma, temporary childcare, and housing, as well as compensate for lost income and opportunities, acknowledge pain and suffering, and fund the education and training that will enable the trafficked person to re-enter the workplace.³² When compensation is obtained from the offender, its payment may have a deterrent effect.³³

There are three scenarios in which trafficked persons may seek remedies. In the first, the state is either engaged or implicated in the act of trafficking and is obliged to provide trafficking victims with a legal remedy for violating the state's obligation under international human rights law.³⁴ In the second scenario, the state is not involved in the trafficking process but fails to take reasonable steps to prevent trafficking and protect victims. Here, it is the failure of the state to provide

²⁹ Joy Ngozi Ezeilo, Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, 66th sess, UN Doc A/66/283 (9 August 2011); see also UN Human Rights Council, *Trafficking in Persons, Especially Women and Children: Regional and Subregional Cooperation in Promoting a Human Rights Based Approach to Combating Trafficking in Persons*, 14th sess, Agenda Item 3, UN Doc A/HRC/RES/14/2 (23 June 2010) [10] urging '[g]overnments ... to protect, assist and provide access to adequate redress to victims, including the possibility of obtaining compensation'. While the UNTOC and *Trafficking Protocol* contain a vague entreaty that states offer trafficked people the possibility of seeking compensation, the more recent *Council of Europe Convention on Action Against Trafficking in Human Beings*, opened for signature 16 May 2005, CETS 197 (partly entered into force 1 May 2008) provides that state parties should ensure that competent authorities provide victims of trafficking with information on relevant judicial and administrative proceedings (including the possibility of obtaining compensation in a language which they can understand) and ensure the domestic legal mechanisms enable trafficking victims to seek compensation from the perpetrators: art 15(1), 23.

³⁰ UNODC, 'Module 13: Compensation for victims of trafficking in persons' in *Anti-human Trafficking Manual for Criminal Justice Practitioners* (United Nations, 2009) 1 <http://www.unodc.org/documents/human-trafficking/TIP_module13_Ebook.pdf> ('*Trafficking Manual*').

³¹ *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/ Res/40/34 (29 November 1985).

³² See UNODC, *Model Law against Trafficking in Persons*, V.09-81990 (E), 55–6 noting that neither the immigration status nor the return of the victim to his or her home country, or other absence of the victim from the jurisdiction, should prevent the court from ordering compensation.

³³ See, eg, Thompson and Jernow, above n 2.

³⁴ Anne Gallagher, 'The right to an Effective Remedy for Victims of Trafficking in Persons: A Survey of International Law and Policy' (Paper submitted to the UN Special Rapporteur on Trafficking in Persons, Especially Women and Children, 22–3 November 2010) 3 ('*Effective Remedies*') <http://www.ohchr.org/Documents/Issues/Trafficking/Bratislava_Background_paper1.pdf>; Gallagher, above n 2, 359. This is in accordance with the *Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN GAOR, 60th sess, 64th plen mtg, UN Doc A/Res/60/147 (21 March 2006). The concept of reparations encompasses restitution, compensation, satisfaction and guarantees of non-repetition.

an adequate response to people trafficking that demands a remedy, not the original act of trafficking itself.³⁵ For example, in *Rantsev v Cyprus and Russia*,³⁶ a case brought by the father of a young woman who died after being trafficked from Russia to Cyprus, the European Court of Human Rights found that Cyprus failed to implement its obligations to protect Ms Rantsev from trafficking while she was alive and adequately investigate her subsequent death, while Russia also failed to investigate her trafficking. The Court ordered both states to pay damages to Ms Rantseva's father who had suffered anguish and distress as a result of the unexplained circumstances of his daughter's death and the failure of the Cypriot authorities to take steps to protect her from trafficking.³⁷

The final category concerns the obligation of states to provide victims of trafficking with the opportunity to seek remedies for the harm they have suffered as a result of the criminal acts of individuals. The specific international laws that address trafficking do address the obligations of states to facilitate access to compensation for trafficking victims. The *Trafficking Protocol* and its 'parent' instrument, the *United Nations Convention against Transnational Organized Crime*, ('UNTOC'), only oblige state parties to offer trafficked people legal possibility of obtaining compensation. UNTOC obliges state parties to 'establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention'³⁸ and encourages states to consider using the proceeds of crime to compensate victims of crimes.³⁹ Article 6(6) of the *Trafficking Protocol* requires that 'each state shall ensure its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered'.

While the *Trafficking Protocol* 'does not specify any potential source of compensation', the United Nations Office on Drugs and Crime ('UNODC') suggests funding compensation through the assets of offenders and through state-funded compensation schemes.⁴⁰ According to UNODC 'any or all' of the following options offer trafficked people the possibility of claiming compensation: allowing victims to sue offenders under statutory or common law torts; enabling criminal courts to award damages or to make orders for restitution; and/or, establishing dedicated victims' compensation schemes whereby the victim can claim compensation from the state.⁴¹

³⁵ Gallagher, above n 34, 3.

³⁶ *Rantsev v Cyprus and Russia* (European Court of Human Rights, Chamber, Application No 25965/04, 7 January 2010).

³⁷ *Ibid* [342]–[343]. Cyprus and Russia were ordered to pay non-pecuniary damages, of €40,000 and €2,000 respectively.

³⁸ GA Res 55/25, UN GAOR, 55th sess, 62nd plen mtg, Agenda Item 105, Supp No 49, UN Doc A/RES/55/25 (8 January 2001) art 25(2).

³⁹ In some circumstances, UNTOC art 14 requires states parties to give priority consideration to returning confiscated proceeds of crime or property to a requesting state party so that it can give compensation to victims.

⁴⁰ UNODC, *Toolkit to Combat Trafficking in Persons: Global programme against trafficking in human beings* (United Nations, 2006) 141 <http://www.unodc.org/pdf/Trafficking_toolkit_Oct06.pdf>.

⁴¹ *Ibid*.

However, obtaining compensation will only become a reality if procedural steps are taken to ensure trafficked people understand their legal options.⁴² While the *Trafficking Protocol* does not contain a specific obligation to arm victims with information on their right to seek compensation, art 6(2) obliges states to provide information to victims on relevant court proceedings.⁴³ The provision of accurate information and legal advice is critical as international experience illustrates that the pathway to compensation may vary widely depending on the type of harm attributable to the trafficking experience.⁴⁴ Victims of labour trafficking may have rights under laws protecting workers rights or prohibiting discrimination. In some countries, laws have been introduced to make specific provision for mandatory restitution by convicted offenders,⁴⁵ or provide dedicated compensation schemes for trafficking victims.⁴⁶

The UN Special Rapporteur has sought to provide states with guidance on how to ensure trafficked people have an effective remedy for the harms committed against them, by publishing draft principles on implementing the right to effective remedies for trafficked people.⁴⁷ These principles provide that states shall ensure that laws, mechanisms and procedures are in place to enable trafficked people to obtain civil damages including breaches of labour laws; secure court orders for compensation in cases where offenders are convicted of trafficking crimes; and ‘gain access to compensation from the State for injuries and damages’.⁴⁸ The UN Special Rapporteur urges states to ensure all trafficked persons have a legally enforceable right to obtain compensation, irrespective of their immigration status and of whether their perpetrators have been convicted. Implementing the principles involves promptly informing trafficked persons about their legal rights, facilitating access to free legal representation and interpreters and allowing trafficked persons to remain lawfully in the country in which the remedy is sought for the duration of any criminal, civil, labour or administrative proceedings.⁴⁹

⁴² See UNODC, *Model Law against Trafficking in Persons*, above n 30, 45 recommending that ‘information regarding [free or low-cost] legal assistance to [trafficked persons] to represent his or her interests in any criminal investigations, including the obtaining of compensation, [to pursue civil actions against his or her applications] and, where applicable, to assist with applications for regular immigration status’.

⁴³ Soft law is more ambitious. See, in particular, UN Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, UN Doc E/2002/68/Add.1 (20 May 2002), guideline 9.

⁴⁴ See, eg, Joy Ngozo Ezeilo, ‘State Practices, Concrete Strategies and Implementation of the Right to an Effective Remedy for Trafficked Persons’ (Background Paper to the Expert Consultation of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, 22–3 November 2010); Thompson and Jernow, above n 2.

⁴⁵ See, eg, *Trafficking and Violence Protection Act of 2000*, 22 USC § 7101 (2000).

⁴⁶ See eg, Thompson and Jernow, above n 2.

⁴⁷ Ezeilo, *Report of the Special Rapporteur*, above n 28.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

B *Australia's Response to People Trafficking*

Since ratifying UNTOC in 2004 and the *Trafficking Protocol* in 2005, Australia has invested more than AU\$84 million in anti-people trafficking measures.⁵⁰ Australia's early anti-trafficking strategy focused on prosecuting traffickers and supporting the victims who were willing and able to give evidence against them.⁵¹ In 1999, the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) created offences of slavery, sexual servitude and deceptive recruiting for sexual services. This suite of anti-trafficking laws was expanded by the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth), which introduced offences of trafficking in persons, domestic trafficking in persons and debt bondage. In 2004 a government-funded support program, currently delivered by the Australian Red Cross, was established to support victims of trafficking identified by the Australian Federal Police ('AFP').

The early legislative focus on sex trafficking overshadowed the broader issue of labour trafficking.⁵² Although there are specific offences of sexual servitude⁵³ and deceptive recruiting for sexual services, there are no stand-alone offences of servitude, forced labour or deceptive recruitment for labour services.⁵⁴ Existing Australian laws do not fully capture the entire range of exploitative conduct that is prohibited by the *Trafficking Protocol* or international instruments prohibiting forced labour, practices similar to slavery and servitude.⁵⁵ To address these shortcomings, in May 2012 the Australian government introduced the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (Cth), which creates stand-alone offences of forced labour, organ trafficking, and forced marriage, broadens the scope of existing trafficking laws to cover the harbouring and receipt of trafficked persons, and amends the *Crimes Act*

⁵⁰ Australian Government, Attorney-General's Department, *People Trafficking*, <http://www.ag.gov.au/www/agd/agd.nsf/Page/PeopleTrafficking_PeopleTrafficking>. Australia ratified the UNTOC Convention on 27 May 2004 and the *Trafficking Protocol* on 14 September 2005.

⁵¹ For an overview see Marie Segrave and Sanja Milivojevic, 'Auditing the Australian Response to Trafficking' (2010) 22 *Current Issues in Criminal Justice* 63. See also Marie Segrave, 'Human Trafficking and Human Rights' (2009) 14(2) *Australian Journal of Human Rights* 71; *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (Global Alliance Against Trafficking in Women, 2007) <http://www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf>.

⁵² Parliamentary inquiries into trafficking in Australia have focused on trafficking for sexual servitude: see eg, Senate Legal and Constitutional Legislation Committee, *Inquiry into Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004* (2004); Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Trafficking of Women for Sexual Servitude* (2004). The title of the Transnational Sexual Exploitation and Trafficking Team, established in 2003, reflected the focus of initial law enforcement efforts.

⁵³ The offence of sexual servitude only covers commercial servitude. For the purposes of 'sexual servitude', 'sexual service' is defined in the *Criminal Code Act 1995* (Cth) s 270.7(2) as 'the commercial use or display of the body of the person providing the service'. See generally, Segrave and Milivojevic, above n 51.

⁵⁴ See generally Frances Simmons and Jennifer Burn, 'Evaluating Australia's response to all forms of trafficking: Towards rights-centred reform' (2010) 84 *Australian Law Journal* 712.

⁵⁵ Fiona David and Anne Gallagher, Submission to the Australian Government Attorney-General's Department, *The Criminal Justice Response to Slavery and People Trafficking, Reparations, and Vulnerable Witness Protections*, 3 March 2011.

to make it easier for trafficking victims to obtain reparations from convicted offenders.

Information about the nature and extent of trafficking in Australia is imperfect. To date, more than 190 people identified as suspected victims of trafficking by the Australian Federal Police ('AFP') have been placed on the support program, with approximately 80 people, mostly in located in NSW and Victoria, currently receiving assistance.⁵⁶ Although trafficking can occur across or within borders, to date, suspected victims of trafficking have typically been women from poor countries in the Asia-Pacific region who have been exploited in the sex industry.⁵⁷ However, as the Attorney-General's Department has acknowledged, 'it is possible that women working in the sex industry are over-represented among statistics on identified victims of trafficking simply because other forms of trafficking are under-reported and under-researched'.⁵⁸ In 2009-10, approximately 30 per cent of the 45 investigations carried out by the AFP involved trafficking outside of the commercial sex industry.⁵⁹ The types of offending investigated outside the sex industry context vary widely from domestic servitude to forced labour in the hospitality industry, to attempted organ trafficking (this investigation was later discontinued).⁶⁰

Although our picture of trafficking in Australia is incomplete, the reported cases provide an invaluable insight into trafficking crimes and the difficulty of successfully prosecuting traffickers. Since 2004, the AFP has undertaken over 325 anti-trafficking investigations and referring 39 matters to the CDPP.⁶¹ To date, these investigations have led to the conviction of 15 offenders involved in nine separate transnational trafficking operations.⁶² Twelve of the 15 convictions involved trafficking of women from South-East Asia into the sex industry. Of the 15 individuals, 10 were convicted of slavery offences (s 270.3 of the Criminal Code); three of sexual servitude offences (s 270.6); and two of people trafficking offences (s 271.2).

⁵⁶ AGD IDC Report, above n 5, 13.

⁵⁷ Ibid 26. The suspected victims of trafficking have been identified as nationals of Thailand, Malaysia, the Republic of Korea, China, India, Indonesia, Taiwan, Vietnam, and the Philippines.

⁵⁸ Australian Government Attorney-General's Department, *Discussion Paper: The Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protections* (2010) [21]–[23] noting that '[i]ncreasingly, Australian authorities are becoming aware of trafficking victims identified in sectors other than the sex industry, including in agriculture, construction, hospitality, domestic services and recreation industries'.

⁵⁹ Joy Ngozi Ezeilo, Special Rapporteur, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children – Mission to Australia*, GE.12-13548, UNHRC, 20th Session, Agenda Item 3, UN Doc A/HRC/20/18/Add.1 (18 May 2012) [9].

⁶⁰ Andreas Schloenhardt and Samantha Garbutt, 'Trafficking in Persons for the Purpose of Organ Removal: International law and Australian practice' (2012) 36 *Criminal Law Journal* 145.

⁶¹ Ezeilo, above n 59, [5], [59].

⁶² *R v DS* (2005) 153 A Crim R 194; *R v Tang* (2008) 237 CLR 1; *R v Wei Tang* (2009) 233 FLR 399; *Director of Public Prosecutions (Cth) v Kam Tin Ho* [2009] VSC 437; *DPP (Cth) v Kam Tin Ho* [2009] VSC 495; *Kam Tin Ho v The Queen* [2011] VSCA 344; *R v Kovacs & Kovacs* (Supreme Court of Queensland, Indictment No 2 of 2007, Jones J, 18 February 2010); *R v Dobie* (2009) 236 FLR 45; *McIvor v The Queen* (2009) 247 FLR 363; *R v McIvor and Tanuchit* [2010] NSWDC 310; *R v Sieders & Yotchomchin* [2006] NSWDC 184 (first trial); *Sieders v Queen* (2008) 72 NSWLR 417; *R v Netthip* [2010] NSWDC 159 *R v Nantahkhum* (Unreported, Supreme Court of the Australian Capital Territory, Refshauge J, 24 May 2012).

After visiting Australia in 2011, the UN Special Rapporteur, Joy Ngozi Ezeilo, recommended moving away from ‘the over-sexualising discourse on trafficking’ and placing ‘equal emphasis on all forms and manifestations of trafficking’.⁶³ The Australian government has taken some important steps in this direction: in 2012 it moved to create a stand-alone offence of ‘forced labour’, and in 2011, nearly \$500,000 in government funding was awarded to a range of organisations including unions, an industry association, and the Australian Red Cross, to undertake awareness campaigns to combat ‘labour exploitation and trafficking’.⁶⁴ In the initial years of the support program, the only beneficiaries were victims of sex trafficking, but in the last two years 19 male victims of labour trafficking have received support, as well as 14 women who have been identified of victims of labour trafficking outside the sex industry.

The shift in focus from sex trafficking to the broader issue of labour trafficking has helped move the discussion of prevention strategies beyond vexed arguments about prostitution to the role of labour protection frameworks in reducing demand for vulnerable, exploitable migrant labour.⁶⁵ As the UN Special Rapporteur observed on her recent visit to Australia, ‘the lack of regulations and labour rights...[is] one of the key structural factors fostering trafficking in persons, whether for sexual exploitation or forced labour or domestic servitude or other services’.⁶⁶ The Special Rapporteur’s findings are buttressed by the first major report on labour trafficking in Australia, which found a significant number of cases ‘involving unlawful conduct perpetrated against migrant workers in Australia, including under-payment or non-payment, sexual harassment, deception or fraud about working conditions and sponsorship for permanent residency’.⁶⁷ Although many of these cases would not constitute trafficking, the report acknowledged exploitative working conditions are ‘potential breeding grounds for more serious forms of exploitation’.⁶⁸

Unlike those in other countries, traffickers in Australia do not rely on overt force. Australian cases of trafficking and slavery in Australia have not involved overt force. Instead, traffickers rely on more subtle means of psychological coercion, playing upon their victims’ fears of ‘deportation’ by providing false information about the consequences of contacting authorities, threatening family members, and creating a sense of obligation by imposing illegal ‘debt contracts’. Following the landmark High Court decision in *R v Tang*⁶⁹ it is clear that exploitation can be extreme enough to be characterised as slavery even if it does

⁶³ Ezeilo, above n 59.

⁶⁴ Anti-People Trafficking Interdepartmental Committee, Attorney-General’s Department *Trafficking in Persons: The Australian Government Response: 1 July 2010 – 30 June 2011: The Third Report of the Anti-People Trafficking Interdepartmental Committee* (Commonwealth of Australia, 2011) 9–10.

⁶⁵ Plant, above n 22.

⁶⁶ Joy Ngozi Ezeilo ‘The UN Special Rapporteur in Trafficking in Persons, Especially Women and Children Concludes her Country Visit to Australia’ (Media Release, 30 November 2011) <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11664&LangID=E>>.

⁶⁷ Fiona David, *Labour Trafficking* (Report No 108, Australian Institute of Criminology, 2010) xii.

⁶⁸ *Ibid* 59.

⁶⁹ (2008) 237 CLR 1.

not fit traditional ideas about what slavery looks like.⁷⁰ In this case, the five Thai victims were required to service around 700 customers at a Melbourne brothel to pay for ‘debts’ of \$40 000 to \$45 000. The brothel owner, Ms Wei Tang, had a 70 per cent share in a syndicate that ‘purchased’ four of the women for \$20 000 each.⁷¹ The women had little money and limited English and their passports were retained but they were not physically detained. When their ‘debts’ were paid, their freedoms were restored and two of the women continued working in the sex industry.⁷²

Most of the women who have been subjected to trafficking crimes in the Australian sex industry travelled to Australia intending to work in the sex industry. In these cases, it is the working and living conditions the women were required to engage in upon arrival that were found to be extremely exploitative: trafficked women work extremely long hours without pay to pay ‘debts’ of between \$35 000 and \$56 000 to the ‘contract owner’.⁷³ The slavery offence can also apply to egregious forms of exploitation in other industries if the prosecution can establish the requisite elements of the offence.⁷⁴ For example, a married couple in Queensland was found guilty of enslaving a domestic worker from the Philippines⁷⁵ and, more recently, a restaurant owner was convicted of trafficking an Indian man to Australia for forced labour.⁷⁶

III Pathways to Compensation for Trafficked Persons in Australia

The 15 convicted trafficking offenders exploited 36 victims. Although the criminal justice process in these cases typically led to significant sentences being imposed on the offenders, none of the offenders were ordered to pay reparations to their victims. Australia’s official response to trafficking has prioritised prosecuting traffickers but the issue of compensating their victims has not yet been integrated into Australia’s National Anti-Trafficking Strategy. This strategy is described as having four pillars: prevention; detection and investigation; prosecution; and victim support and rehabilitation.⁷⁷ However, while compensation may enable rehabilitation and facilitate prevention, Australia’s anti-trafficking strategy does not identify what measures are in place to provide trafficked persons with meaningful opportunities to claim compensation.

⁷⁰ See, generally, Jean Allain, ‘*R v Tang*: Clarifying the Definition of “Slavery” in International Law’ (2009) 10 *Melbourne Journal of International Law* 246.

⁷¹ The remaining 30 per cent share was held by associates of Ms Tang. A fifth woman was brought to Australia by other ‘owners’ before being moved to the brothel owned by Wei Tang.

⁷² (2008) 237 CLR 1, 13 [12].

⁷³ See *Sieders v The Queen* (2008) 72 NSWLR 417 and *R v Netthip* [2010] NSWDC 159.

⁷⁴ M Cullen and B McSherry, ‘Without Sex: Slavery, Trafficking in Persons and the Exploitation of Labour in Australia’ (2009) 34 *Alternative Law Journal* 4; see also: Andreas Schloenhardt and Jarrod Jolly, ‘Honeymoon from Hell: Human trafficking and Domestic Servitude in Australia’ (2010) 32 *Sydney Law Review* 671 (discussing Australia’s evolving jurisprudence on slavery).

⁷⁵ *R v Kovacs* (Unreported, Supreme Court of Queensland, Stanley J, 11 February 2010).

⁷⁶ *R v Trivedi* (2011) (unreported NSWDC), University of Queensland Case Report <<http://www.law.uq.edu.au/documents/humantrafficking/case-reports/trafficking-offences/Trivedi.pdf>>.

⁷⁷ *AGD IDC Report*, above n 5.

Without a specific scheme designed to compensate victims of trafficking, the legal avenues for trafficked people to seek compensation in Australia will differ depending on the type of offence, where it occurred, and the harm that is attributable to the experience of being trafficked. Trafficking cases are not homogenous; there is no typical victim. The injuries that are suffered by a man who is trafficked for labour exploitation in the kitchen of a suburban restaurant may differ from those of a domestic worker who is subjected to both sexual assaults and domestic servitude. Despite the many different manifestations of human trafficking, trafficking victims often face common obstacles on the road to effective remedies. Although trafficking can occur across or within national borders, to date, all of the victims of trafficking identified in Australia have been non-citizens who do not understand the laws or language in Australia. Immigration fraud is typically ‘part and parcel’ of the trafficking process⁷⁸ and the involvement of trafficked people in breaches of immigration law may complicate their path to compensation.⁷⁹ There is, moreover, sometimes what one prosecutor described as ‘a quality of ambivalence or ambiguity in the nature of relationships between trafficker, trafficker client and victim’.⁸⁰ Indeed, at least three of the convicted trafficked offenders were former victims of slavery in Australia.⁸¹

Under the *Crimes Act* s 21B, courts have the discretionary power to order a convicted federal offender to pay reparation to their victim.⁸² Defendants charged with people trafficking or slavery crimes are tried and sentenced in state and territory courts but these courts apply the *Crimes Act* when sentencing federal offenders and making reparation orders.⁸³ A reparation order is treated as a final judgment of the court and can be enforced as a civil debt⁸⁴ and does not affect a victim's right to commence civil proceedings.⁸⁵ Although the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (Cth) should increase the possibility of obtaining reparation orders from convicted traffickers, these reforms will not assist victims in cases where a prosecution cannot proceed or a conviction is not obtained.

⁷⁸ See eg. *R v Netthip* [2010] NSW DC 159 (involving the lodgement of false protection visa applications); *R v Kovacs* (2008) A Crim R 345 (involving a sham marriage).

⁷⁹ These complications may arise as a result of the *Migration Act 1958* (Cth) s 235, whereby working without a valid visa or in breach of visa condition is a strict liability offence, or where the actual ‘work’ which the person is forced to do is illegal.

⁸⁰ Christopher Craigie SC, ‘Prosecuting human trafficking in Australia’ (Speech delivered at International Association of Prosecutors 15th Annual Conference, The Hague, 6 September 2010).

⁸¹ See, eg. *R v DS* (2005) 153 A Crim R 194; *Kam Tin Ho v The Queen* [2011] VSCA 344; *R v Nantahkhum* (Unreported, Supreme Court of the ACT, Refshauge J, 24 May 2012).

⁸² Provision for courts to order convicted offenders to pay compensation to the victim also exists in state legislation. See, eg. *Victim Support and Rehabilitation Act 1996* (NSW) s 71; *Sentencing Act 1991* (Vic) s 85B; *Criminal Law (Sentencing) Act 1988* (SA) s 53; *Penalties and Sentences Act 1992* (Qld) s 35; *Sentencing Act 1997* (Tas) s 58; *Crimes (Sentencing) Act 2005* (ACT) s 18; *Sentencing Act 1995* (NT) s 88; cf *Sentencing Act 1995* (WA) s 116 (but only with respect to property damage).

⁸³ *Judiciary Act 1903* (Cth) ss 39, 39A, 70 and 70A. State and territory courts sentencing federal offenders must apply the sentencing principles outlined in the *Crimes Act 1914* (Cth) div 2 pt 1B. However, the *procedure* for sentencing federal offenders must be in accordance with applicable state or territory procedures via ss 68 and 79 of the *Judiciary Act 1903* (Cth).

⁸⁴ *Crimes Act 1914* (Cth) s 21B(3).

⁸⁵ *Ibid* s 15F.

Without a comprehensive national framework to provide compensation for victims of federal crime, the only way a trafficked person might obtain compensation from the Australian government is as the result of a discretionary decision to recognise that person's unique circumstances. Depending on the circumstances of the individual case, this could theoretically occur through the discretionary Scheme for Compensation for Detriment caused by Defective Administration ('CDDA'), which provides compensation of those who have suffered as a result of government maladministration;⁸⁶ act of grace payments to those who have suffered as a result of the unintended and unacceptable consequences of federal laws or policy;⁸⁷ or, ex gratia payments, which are made in special circumstances (such as the payments that were made to the victims of the Bali bombings in 2002).⁸⁸

In the absence of a federal compensation scheme, a growing number of trafficked people are claiming compensation under the victims' compensation schemes funded by state and territory governments. All eight Australian states and territories have statutory victims' compensation schemes, but the eligibility criteria, the size of the awards, and the assessment processes vary in different jurisdictions.⁸⁹ The increasing focus on labour trafficking has also highlighted the important role of the FWO in helping trafficked people to recover unpaid wages from abusive employers. Trafficked people may also be able to seek redress under discrimination law, while state-based workers' compensation schemes may compensate people for workplace injuries. Finally, it may be possible for trafficking victims to sue in tort, for actions such as battery, assault or false imprisonment.

A Improving the Availability of Offender-based Compensation

Section 21B of the *Crimes Act* empowers courts with the discretion to make reparation orders⁹⁰ following the conviction of a federal offender.⁹¹ A reparation order requires the convicted offender to make financial reparation to an individual victim of a Commonwealth offence in respect of 'loss suffered ... as a direct result

⁸⁶ Australian Government Department of Finance and Deregulation, *Discretionary Compensation and Waiver of Debt Mechanisms*, Finance Circular No 2009/09 (2009) 2.

⁸⁷ *Financial Management and Accountability Act 1997* (Cth) s 33.

⁸⁸ These payments are made by the Prime Minister or Cabinet under s 61 of the Constitution. See generally, Australian National Audit Office, *Compensation Payments and Debt Relief in Special Circumstances*, Audit Report No 35 (2004).

⁸⁹ See *Victims of Crime (Financial Assistance) Act 1983* (ACT); *Victim Support and Rehabilitation Act 1996* (NSW); *Crime (Victims Assistance) Act 2006* (NT); *Victims of Crime Assistance Act 1996* (Vic); *Criminal Injuries Compensation Act 2003* (WA); *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Act 2001* (SA); *Victims of Crime Assistance Act 1976* (Tas).

⁹⁰ The Australian Law Reform Commission ('ALRC') has described 'reparation as a broad term used to describe any attempt to make amends for a wrong or injury [and] encompassing both restitution [return of property to owner] and compensation [recompense for any loss, damage or injury suffered as a result of the crime].' See ALRC, *Australian Government Same Time, Same Crime: The Sentencing of Federal Offenders* (Report No 103, 2006) [8.3].

⁹¹ Reparations orders can also be made following a non-conviction order (*Crimes Act 1914* (Cth) s 19B), the conditional release of an offender (s 20(1)) or when a Sentencing Alternative is imposed (s 20AB(4)(b)).

of the offence'.⁹² Under these provisions it is easier for the Commonwealth to obtain reparations than an individual victim of a federal crime. This is because where s 21B(1)(c) an offender may be ordered to make reparation to the Commonwealth in respect of 'any loss suffered or any expense incurred by reason of the offence', under s 21B(1)(d) an offender may only be ordered to pay reparations to an individual victim of a federal crime if the loss was suffered as 'a direct result of the offence'.⁹³ Unsurprisingly, the typical beneficiary of reparation orders is the Commonwealth (for example, the Commissioner of Taxation or the Department of Social Security).⁹⁴

The Crimes Legislation Amendment Bill will remove the words, 'by the person as a direct result of the offence' from s 21B(1)(d) and insert, 'or any expense incurred, by the person by reason of the offence'. This removes the difference in operation between ss 21B(1)(c) and 21B(1)(d) so that an individual victim of a federal offence is eligible for reparations in the same circumstances as the Commonwealth. The explanatory memorandum notes these changes are intended to ensure that reparation can be made to individual victims of any federal offence 'for loss suffered by reason of the criminal conduct, even if the loss was not a direct result of that conduct'.⁹⁵

The proposed amendments do not explicitly state that a court may order a federal offender to make reparations for non-economic loss. This clarification was recommended by the Australian Law Reform Commission ('ALRC') after it found that there was no reason, in principle, that the existing s 21B cannot be relied upon to make an order for non-economic loss.⁹⁶ While reparations orders have traditionally been used in cases involving economic loss, there is, as the ALRC observed, no reason why orders could not be made in respect of non-economic loss.⁹⁷ Therefore it would be helpful to provide statutory clarification that the concept of 'loss' can encompass psychological injuries because, while trafficking typically involves the economic exploitation of the labour and services of its victims, the process by which traffickers profiteer from their victims also results in non-economic loss such as pain, suffering and humiliation.⁹⁸

Trafficking is a new crime type in Australia and further research is required about the impact of trafficking on its victims. Part of the problem is that the voices of trafficked people themselves are absent from official evaluation of Australia's response to trafficking. In court proceedings victim impact statements are rarely

⁹² *Crimes Act 1914* (Cth) s 21B(d).

⁹³ *R v Foster* [2008] QCA 90, [71].

⁹⁴ See eg Commonwealth Director of Public Prosecutions, *Annual Report: 2009–2010* (20 October 2010) 100 <<http://www.cdpp.gov.au/Publications/AnnualReports/CDPP-Annual-Report-2009-2010.pdf>> noting in 2009–10 the CDPP obtained reparation orders to the value of \$44 574 000.

⁹⁵ Explanatory Memorandum, Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (Cth).

⁹⁶ ALRC, above n 90, Recommendation [8.2]. The ALRC also recommended replacing the term reparation with the terms restitution and compensation and defining them appropriately and clarifying that nothing in that legislation affects the right of any person who is aggrieved by conduct punishable as a federal offence to institute civil proceedings in respect of that conduct, but the person shall not be compensated more than once for the same loss.

⁹⁷ ALRC, above n 90 [8.41]–[8.46].

⁹⁸ Ezeilo, above n 59 [62].

provided. Although international research suggests the psychological impact of sex trafficking may become more severe over time,⁹⁹ in the Australian context there has been no empirical research on the impact of trafficking crimes upon their victims. Practical experience tells us victims of labour trafficking are forced to work long hours with little or no pay and the deprivation of their freedom may take a physical or psychological toll. Sexual assault can occur as a result of labour trafficking (for example, *R v Kovacs*) and trafficking into the sex industry (for example, *R v Nantakhum*). The transnational character of trafficking crimes can also have devastating impact on families. For example, many of the women trafficked to Australia have young children in their country of origin and, as a consequence of being enslaved, may be separated from their children for many years.

The CDPP has a critical role to play in seeking reparations orders, explaining their operation to victims, and presenting evidence of the loss suffered by victims to the court. Under the proposed reforms, making a reparation order is still discretionary; there is no mandatory requirement for courts to consider making such orders and there is no specific provision for victim impact statements in trafficking matters. However, s 16A(2) of the *Crimes Act* does provide that, in addition to any other matters, the court must take into account where known and relevant to the court, the personal circumstances of any victim of the offence, as well as any injury, loss or damage resulting from the offence.

There was no attempt to seek reparations from any of the 15 individuals who have been convicted of trafficking crimes in Australia and it is unclear whether the CDPP would even have considered seeking such orders. The CDPP's Victims policy does not require the CDPP to consider seeking reparations orders on behalf of individual victims of crime and historically reparations orders are sought on behalf of the Commonwealth. This should change. Where a conviction is obtained, the CDPP should, as a matter of policy, always consider seeking a reparations order and ensure that trafficking victims receive advice about doing so. One weakness of the existing scheme is that the trafficked person does not have independent legal representation: the CDPP is responsible for presenting material to the court about the impact of the offence on the victim and there is no mechanism for an independent representative to make an application to the court for a reparations order. In contrast, the reparations provision contained in s 71 of the *Victim Support and Rehabilitation Act 1996* (NSW) ('*VSRA*') enables a court to order that a convicted offender pay the victim compensation any time after the offender is convicted, either on the court's own initiative or on an application made to it by or on behalf of the aggrieved person or any other person (for example, a family member) who has been injured as a result of the offence.

⁹⁹ In the international context see, eg, Cathy Zimmerman, 'The Health Risks and Consequences of Trafficking in Women and Adolescents: Findings from a European Study' (London School of Hygiene and Tropical Medicine, 2003); Zimmerman et al, 'Stolen Smiles: a summary report on the physical and psychological health consequences of women and adolescents trafficked in Europe' (Summary Report, London School of Hygiene and Medicine, 2006). Problems that may increase as time passes include, amnesia, sleeping problems, symptoms associated with depression and problems with interpersonal relationships.

Obtaining compensation from a convicted offender is ideal; the offender pays, not the state; the making of such orders may have a deterrent effect; and, obtaining such an order '[eliminates] the need for separate civil and criminal proceedings in relation to the same conduct'.¹⁰⁰ However, even if a reparation order is obtained, convicted offenders may lack the financial means to pay¹⁰¹ and the victim may bear the burden of trying to enforce the reparation order as a civil debt.¹⁰² This problem may be ameliorated through greater efforts to freeze or confiscate the assets of the wrongdoer at the beginning of the criminal justice process. However, such steps cannot overcome the inherent limitations of relying on offender-based compensation in a field where very few investigations result in successful convictions.

B *The Limitations of State and Territory Compensation Schemes*

Despite the obvious limitations of offender-based compensation, the recent Australian government consultation on the criminal justice response to slavery and people trafficking did not consider the availability of state-funded compensation for trafficking victims.¹⁰³ In principle, state-funded compensation schemes should provide the most accessible route to compensation for trafficked people. Whereas reparation orders depend on the conviction of the offender, the standard of proof for establishing an entitlement to an award of statutory compensation is the balance of probabilities.¹⁰⁴ Instead of relying on the offender to pay, the award is publicly funded.

Although the Commonwealth has not established a publicly-funded compensation scheme for victims of federal crimes, all Australian states and territories have statutory compensation schemes for victims of criminal acts of violence, and many also provide free counselling for victims of crimes.¹⁰⁵ Compensation can be sought by primary victims and, in some circumstances, their dependents.¹⁰⁶ But these state and territory schemes were not designed to compensate victims of new federal crimes of trafficking, sexual servitude and slavery and generally do not specifically recognise federal trafficking crimes as

¹⁰⁰ Australian Government Attorney-General's Department, above n 10, [94].

¹⁰¹ There is no requirement that the courts consider the offender's financial means but in the course of exercising discretion the court may consider the financial means and personal circumstances of the offender: see, eg, *Vlahov v Federal Commissioner of Taxation* (1993) 26 ATR 49.

¹⁰² *Crimes Act 1914* (Cth) s 21B(3). Section 21B(2) provides that a convicted offender cannot be imprisoned for failing to pay reparation.

¹⁰³ Australian Government Attorney-General's Department, above n 10, [97]–[112].

¹⁰⁴ See *Criminal Injuries Compensation Act 2003* (WA) s 12; *Victims of Crime Assistance Act 1996* (Vic) s 31; *Victims of Crime Act 2001* (SA) s 22; *Victims of Crime Assistance Act 2009* (Qld) s 78, *Victim Support and Rehabilitation Act 1996* (NSW) s 29; *Victims of Crime (Financial Assistance) Act 1983* (ACT) s 29; *Victims of Crime Assistance Act 1976* (Tas) s 5.

¹⁰⁵ For an overview of the emergence of criminal injuries compensation schemes see Christine Forster, 'Good Law or Bad Lore? The Efficacy of Criminal Injuries Compensation Schemes for Victims of Sexual Abuse: A New Model of Sexual Assault Provisions' (2005) 32 *University of Western Australia Law Review* 264, 272–3.

¹⁰⁶ The schemes also make provision for applications by family members or related victims. *Criminal Injuries Compensation Act* (WA) s 4; *Victims of Crime Assistance Act 1976* (Tas); s 2(1); *Victim Support and Rehabilitation Act 1996* (NSW) s 8; *Crime (Victims Assistance) Act 2006* (NT) s 11; *Victims of Crime Assistance Act 1996* (Vic) s 9; *Victims of Crime Assistance Act 2009* (Qld) s 26.

acts of violence or compensable injuries.¹⁰⁷ This means that compensation awards may be available to victims of trafficking who can establish they experienced discrete acts of violence as part of the trafficking process (for example, sexual assault or assault) or can show they have suffered severe psychological injuries. However, victims of trafficking for forced labour and debt bondage may be unable to claim compensation even where a criminal convictions has been obtained.

Relying on state schemes to compensate the victims of federal crimes is an inequitable solution to the small but serious problem of human trafficking. The prospects of a trafficked person obtaining state-funded compensation will vary depending on where the crime occurred, as assessment procedures and eligibility requirements differ from state to state. In New South Wales, Queensland and Western Australia, applications are decided on the papers, while in Victoria, South Australia and the Australian Capital Territory the applicant is required to attend a formal hearing. The composition of awards differs from state to state and some schemes are more generous than others: the maximum amount of compensation available varies from \$30 000 to \$75 000.¹⁰⁸ Each of the schemes reflects the principle that an award of compensation may be reduced if the applicant contributed to their own injuries.¹⁰⁹ However, 'contributory clauses' that enable awards of compensation to be reduced because of the conduct or criminality of the claimant may unfairly penalise trafficked people who have been involved in illegal activity (for example, breaching immigration laws) as a direct result of the trafficking process.

State and territory compensation schemes are not designed to compensate victims of crimes that traverse national and state borders and involve multiple offenders in different jurisdictions. The trafficking process typically occurs across a period of time in multiple locations involving intermediaries in the country of origin and destination. After women trafficked into the sex industry arrive in Melbourne or Sydney they are frequently moved between state capitals to work in conditions of debt bondage in a string of different brothels. For example, in *R v Netthip*,¹¹⁰ 11 Thai women were trafficked to Australia to pay off 'debts' of \$53 000. Some of the complainants were exploited over many months during which time they were moved between brothels in NSW, Victoria and South Australia. However, state compensation schemes only offer redress to victims of crime for injuries sustained within their jurisdiction: compensation cannot be sought in Victoria for what happened in New South Wales. Although it is beyond the scope of this article to examine each of the eight schemes, a brief overview of

¹⁰⁷ For example, NSW includes sexual assault but not sexual servitude in the list of compensable injury. In contrast, the ACT explicitly includes sexual servitude offences in the definition of 'violent crime': *Victims of Crime (Financial Assistance) Act 1983* (ACT) s 3.

¹⁰⁸ A maximum award of \$30 000 is available under the *Victims of Crime Regulations 2000* (Tas) while in Western Australia (*Criminal Injuries Compensation Act 2003* (WA) s 31) and Queensland (*Victims of Crime Assistance Act 2009* (Qld) s 38) victims can claim up to \$75 000.

¹⁰⁹ See, eg, *Criminal Injuries Compensation Act 2003* (WA) s 39, s 41; *Victims of Crime Assistance Act 1976* (Tas), s 5; *Victim Support and Rehabilitation Act 1996* (NSW) s 30; *Victims of Crime Assistance Act 1996* (Vic) s 54; *Victims of Crime Assistance Act 2009* (Qld) s 85.

¹¹⁰ [2010] NSWDC 159.

the schemes in New South Wales and Victoria, where a growing number of trafficked people are making compensation claims is provided below.¹¹¹

1 *The New South Wales Compensation Scheme*

The *VSRA* establishes a statutory compensation scheme for support and rehabilitation for victims of acts of violence that occurred in commission of an offence in New South Wales.¹¹² Counselling is also available.¹¹³ A primary victim of an act of violence who has suffered psychological or psychiatric harm can claim compensation for a ‘compensable injury’.¹¹⁴ It is possible to bring an application on behalf of a victim who is outside of Australia. Claims are determined on the papers and oral hearings are only held for appeals. The process of applying for victims’ compensation is slow (it can take 25 months to assess a claim), although applicants facing financial hardship may seek an interim award.¹¹⁵

The list of compensable injuries in schedule 1 of the *VSRA* covers burns and scarring, brain damage, serious physical injuries, domestic violence, sexual assault, and psychological or psychiatric disorders, but only where such a disorder is severely disabling.¹¹⁶ Claims for compensation for ‘moderately’ disabling psychological or psychiatric disorders can only be made if the act of violence occurred during an armed robbery, abduction or kidnapping. There are no specific provisions that cover injuries sustained by victims of sexual servitude, slavery or forced labour. While the maximum award of \$50,000 (available for category 3 sexual assault and severe psychological disorder) may seem meagre in the context of the harm suffered, the New South Wales scheme does not require the applicant to identify specific expenses that resulted from their injuries or the costs of recovery.

Women who have been trafficked to Australia into sexual servitude or slavery have successfully sought compensation for the ‘compensable injury’ of

¹¹¹ Simmons, above n 11.

¹¹² The *Victims Support and Rehabilitation Act 1996* (NSW) s 5 (‘*VSRA*’) defines an ‘act of violence’ as ‘an act or series of related acts, whether committed by one or more persons: (a) that has apparently occurred in the course of the commission of an offence, and (b) that has involved violent conduct against one or more persons, and (c) that has resulted in injury or death to one or more of those persons ... (2) For the purposes of this section, violent conduct extends to sexual assault and domestic violence (as defined in the Dictionary). The terms ‘sexual assault’ and ‘domestic violence’ are defined in the *VSRA* with reference to the definitions that are found *Crimes Act 1900* (NSW) and the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) respectively. The concept of ‘violent conduct’ is not exhaustively defined in s 5(2) and would appear open to be interpreted to include conduct constituting slavery or sexual servitude. Accordingly, cases of sexual servitude may be categorised as a pattern of sexual assaults or, in the alternative ‘sexual servitude’.

¹¹³ *VSRA* ss 21, 21A.

¹¹⁴ *VSRA* s 7 provides that a ‘primary victim’ of an act of violence is a person who receives a compensable injury, or dies, as a direct result of that act. *VSRA* s 10 provides that a ‘compensable injury’ is to be identified by reference to the Schedule of compensable injuries in *VSRA* sch 1.

¹¹⁵ *Ibid* s 33.

¹¹⁶ The schedule of compensable injuries provide for a category of Chronic or Psychological or Psychiatric harm (category 2): *VSRA* sch 1, cl 5.

category 3 sexual assault.¹¹⁷ The first Australian award of compensation to a trafficked person was in 2007 when a Thai woman was awarded compensation under the NSW scheme.¹¹⁸ Ning Chaladone was trafficked from Thailand to a Sydney brothel when she 13 years old. Those who exploited Ning in Australia were never prosecuted but years later an Australian filmmaker helped her lodge a compensation application. The compensation assessor found Ning suffered the compensable injury of category 3 sexual assault, which involves a pattern of sexual abuse. Consent was not an issue because Ning was only 13 years old when she was exploited. She received the maximum award of \$50,000.¹¹⁹

While Ning's compensation claim was successful, her case is unlike most of the reported cases of trafficking in Australia, which involve adult victims who travelled to Australia intending to work in sex industry. For example, in *Sieders v The Queen*,¹²⁰ four Thai women were exploited in a condition of 'sexual servitude' in a Sydney brothel. On appeal, the court observed that it was possible that all but one of the women made a deliberate choice in Thailand to undertake a debt bondage arrangement whereby each woman worked in the brothel to pay off \$45,000.¹²¹ In finding it was open to conclude that the women were in a condition of sexual servitude, the court noted:

A person can be free to do a multitude of different things, but if she is not free to cease providing sexual services, or not free to leave the place or area where she provides sexual services, she will, if the other condition of the section is met, be in sexual servitude.¹²²

In cases of sexual servitude involving adult victims, the applicant may claim category 3 sexual assault if she can show that that sexual intercourse that occurred while she was in a condition of sexual servitude was non-consensual. In establishing the sexual intercourse is non-consensual, regard should be had to s 61HA(2) of the *Crimes Act 1900* (NSW), which provides that '[a] person 'consents' to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse'.¹²³ If it is not possible to establish specific sexual acts were non-consensual, it may possible to argue that the injury of 'sexual servitude' is similar to the injury of category 3 sexual assault and therefore covered by cl 8 of the schedule, which permits awards of compensation for injuries that are 'similar'

¹¹⁷ The schedule of compensable injuries establishes three categories of sexual assault. The most severe category is category three, which involves 'a pattern of abuse' or 'unlawful sexual intercourse in which two or more offenders are involved or the offender uses an offensive weapon': *VSRA* sch 1, cl 6.

¹¹⁸ Craig, above n 6.

¹¹⁹ A media report suggested Ning would bring Australia's first civil action against a trafficker: Natalie Craig, 'Avenging Angels', *The Age* (Melbourne), 4 September 2011, 19.

¹²⁰ (2008) 72 NSWLR 417.

¹²¹ *Ibid* 439 [142].

¹²² *Ibid* 425 [95].

¹²³ The *VSRA* defines 'sexual assault' as including sexual intercourse (within the meaning of s 61H of the *Crimes Act 1900* (NSW)) with a person without their consent or with consent obtained by means of threat. When sexual intercourse occurs without consent, it is an unlawful sexual assault for the purposes of s 61I of the *Crimes Act 1900* (NSW). The *VSRA* refers to former ss 61R and 65A of the *Crimes Act 1900* (NSW) in relation to consent. These provisions have now been repealed and section 61HA(2) provides that 'A person "consents" to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse'.

to those specifically set out in sch 1 and the injury has caused symptoms or disability lasting for at least six weeks.¹²⁴

However, simply satisfying the Tribunal that the applicant is a victim of violent conduct, namely category 3 sexual assault or a similar injury listed in Schedule 1 (eg, sexual servitude) is not sufficient to obtain an award of compensation. Under the VSRA the applicant will also have to provide evidence of the mental or physical injury suffered as a result of the sexual assault.¹²⁵ The evidence could take the form of medical evidence such as a victim services approved counsellor's report or an expert psychologist's report.¹²⁶ Practically this means that victims of sexual servitude must provide evidence that being subjected to sexual servitude resulted in psychological or psychiatric harm.¹²⁷

The requirement to provide evidence of psychological harm caused by sexual servitude, slavery and trafficking is often problematic for trafficked people who, in the experience of the author, may be re-traumatised by the process of speaking with psychologists and counsellors. Many trafficked people have never been to counsellors or psychologists, and victims' impact statements either do not exist or do not delve into the long-term psychological impact of the crime upon the victim. Some trafficked people may also have been the victims of serious violent crimes in their country origin and it may be difficult to determine whether psychological disorders are partly attributable to causes that pre-dated their exploitation in Australia.

The author is aware of five cases where women trafficked into the sex industry were awarded compensation for category 3 sexual assault claims, with more than 20 cases awaiting determination. However, the VSRA does not provide an obvious pathway to compensation for victims of labour trafficking outside the

¹²⁴ Clause 8 of sch 1 provides that a compensation assessor may determine an injury not specifically mentioned in sch 1 is a compensable injury, if in the opinion of the Tribunal or compensation assessor dealing with the application for statutory compensation: (a) *The injury is similar to an injury specifically mentioned in the table [of compensable injuries], and (b) The injury has caused symptoms or disability lasting for at least 6 weeks.* In this case the standard amount of compensation for the injury is the standard amount for that similar injury.

¹²⁵ *Victims Compensation Fund Corporation v GM* (2004) 60 NSWLR 310,331 [125]. In this case the NSW Court of Appeal held sexual assault victims are required to establish proof of 'injury'. Five children who were sexual abused by an identified offender were not entitled to compensation because they had failed to provide medical evidence of their injuries. See generally Christine Forster and Vedna Jivan, 'Opportunity Lost: In Search of Justice for Victims of Sexual Assault; a Note on *Victims Compensation Fund Corporation v GM*' (2005) 28 *University of New South Wales Law Journal* 758.

¹²⁶ A report by an authorised report writer is only necessary if claiming a compensable injury of Chronic or Psychological or Psychiatric harm (category 2). A guideline on sexual assault and domestic violence states that: '[T]he evidence of harm need not be from an authorised report writer or person with equivalent qualification. However, there must be some medical evidence that establishes that psychological or psychiatric harm is present': C Brahe, *S.65 Guidelines — Sexual Assault and Domestic Violence* (Victims Services, NSW Attorney General and Justice, 22 December 2006) <http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll_vs.nsf/pages/VS_legislation65guidelinessexualassault>.

¹²⁷ Following amendments in 2006, the term 'injury' in s 5(1)(c) of the VSRA is defined in the dictionary as (a) actual physical bodily harm, (b) psychological or psychiatric harm, but does not include injury arising from loss or damage to property. The problem of providing 'proof' of 'injury' in the compensation claims brought by victims of sexual abuse is discussed in Forster, above n 105.

sex industry. This is because the list of compensable injuries in sch 1 of the *VSRA* does not include 'forced labour', debt bondage or even slavery. In other words, unless the claimant can show the trafficking crime resulted in sexual assault, permanent physical injuries, domestic violence or a severe psychological disorder, compensation will remain out of reach. As a result, while a 13-year-old victim of sex trafficking may be able to claim category 3 sexual assault, it is unclear what 'compensable injury' could be identified in the case of a 13-year-old victim of forced labour. Other problems are also apparent: under s 5(3) of the *VSRA* the definition of 'act of violence' covers 'related acts', which are acts 'committed over a period of time by the same person or group of persons'. This is likely to prevent a victim of sexual servitude, who is exploited in different brothels over many months and who claims compensation for category 3 sexual assault, from receiving more than one award of \$50,000.

Despite a growing number of women who have been trafficked into sexual servitude successfully claiming compensation under the *VSRA*, the scheme is not designed to compensate trafficking victims. First, victims of labour trafficking outside the sex industry are unlikely to be able to claim compensation unless there is evidence the applicant was sexually assaulted during the trafficking process or experienced severe psychological injuries as a result of their experience of forced labour and slavery. Second, the requirement to provide evidence of psychological harm for category 3 sexual assault claims may result in the re-traumatisation of women who have experienced sexual servitude or deter victims from claiming compensation. Finally, without a sustainable source of funding, the New South Wales compensation scheme may struggle to respond to the growing number of claims (typically for the maximum award of compensation) by federal victims of trafficking crimes: there is currently an estimated liability of \$239.2 million with respect to outstanding compensation claims and this does not capture a projected amount for claims on injuries that have already occurred but have not yet been reported.¹²⁸

2 *The Victorian Financial Assistance Compensation Scheme*

In 2010, the *Victorian Inquiry into Trafficking for Sex Work* recommended that 'any person found to have been a victim of trafficking be eligible for compensation under the relevant state or territory scheme'.¹²⁹ The same year, the first victim of trafficking successfully sought compensation under the *Victims of Crime Assistance Act 1996* (Vic) ('*VOCA Act*').¹³⁰ The magistrate awarded a woman forced into sexual servitude two amounts of financial assistance for two separate acts of violence: forced deprivation of liberty for the purposes of sexual penetration and threats of death. Although the perpetrator was never prosecuted, the applicant was able to establish that special circumstances existed, which

¹²⁸ Price WaterHouse Coopers, 'Review of NSW Victims Compensation Scheme' (Issues Paper, Department of Attorney general and Justice, 22 March 2012) <[http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll_vs.nsf/vwFiles/IssuesPaper-VicsCompReview.pdf/\\$file/IssuesPaper-VicsCompReview.pdf](http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll_vs.nsf/vwFiles/IssuesPaper-VicsCompReview.pdf/$file/IssuesPaper-VicsCompReview.pdf)>.

¹²⁹ Parliament of Victoria, above n 6, Recommendation 24, xi.

¹³⁰ Email from Belinda Lo to Frances Simmons, 22 November 2010 (on file with the author).

explained why she had been too afraid to talk to the police.¹³¹ All up, the applicant received almost \$30 000. The applicant's solicitor, Belinda Lo, observed, 'it seems like a paltry amount but it's enough to help this woman start rebuilding her life'.¹³² Since that time, further claims for compensation have been made on behalf of trafficked people with some success.

The Victims of Crime Assistance Tribunal can award financial assistance if the Tribunal member is satisfied, on the balance of probabilities, that the violent act occurred and that a person requires financial assistance as a result of that act of violence.¹³³ An act of violence is defined as a 'relevant offence' that occurs in Victoria and directly injures the victim.¹³⁴ Although the *Victorian Inquiry into Trafficking for Sex Work* questioned the applicability of state-based compensation schemes to federal crimes,¹³⁵ it is apparent that victims of the federal trafficking crimes may claim financial assistance if the criminal act occurred in Victoria and the injury occurred as a direct result of the criminal act.¹³⁶ 'Injury' is defined in the *VOCA Act* to encompass actual physical bodily harm, mental illness or disorder or an exacerbation of a mental illness or disorder (whether or not flowing from nervous shock), and pregnancy.¹³⁷ The requirement to establish an 'injury' can pose challenges for victims who are unwilling to speak about their experience of sexual servitude to medical experts. The requirement that the tribunal consider any criminal conduct and the attitude of the applicant in deciding whether to make or reduce an award¹³⁸ may present particular obstacles for trafficked people who have been involved in illegal activity as a result of the trafficking process.¹³⁹

Under the Victorian scheme, financial assistance only extends to expenses or losses actually incurred, or reasonably likely to be incurred, as a 'direct result' of the act of violence.¹⁴⁰ A primary victim may be awarded up to \$60 000 under

¹³¹ *Victims of Crime Assistance Act 1996* (Vic) s 52 provides that the act of violence must be reported to the police within a reasonable time, and the applicant must reasonably assist in any subsequent investigation or prosecution, unless 'special circumstances' apply.

¹³² Email from Belinda Lo to Frances Simmons, 22 November 2010 (on file with the author).

¹³³ The assessment process is administered by the Victims of Crime Assistance Tribunal, which holds hearings in the Victorian Magistrates Court.

¹³⁴ *Victims of Crime Assistance Act 1996* (Vic), s 7(1) defines a primary victim of an act of violence as 'a person who is injured or dies as a direct result of an act of violence committed against him or her'. An act of violence is defined in s 3 as 'a criminal act or series of criminal acts, whether committed by one or more persons, that has (a) occurred in Victoria; and (b) directly resulted in the injury or death to one or more persons, irrespective of whether the death or injury occurs'. A *criminal act* is defined in s 3 as 'an act or omission constituting a relevant offence or that would constitute a relevant offence if the person had not been and a relevant offence is defined (in relevant part) as an offence, punishable on conviction by imprisonment that involves an assault on, or injury or threat of injury to a person'.

¹³⁵ Parliament of Victoria, above n 6, 284.

¹³⁶ This is by virtue of the fact that a relevant offence is defined as 'an offence that involves an assault on, or injury or a threat of injury to a person, that is punishable on conviction by imprisonment': *Victims of Crime Assistance Act 1996* (Vic) s 3(1).

¹³⁷ *Ibid* ss 3(1), (2).

¹³⁸ *Ibid* s 54.

¹³⁹ Victoria's sex industry is regulated under the *Sex Work Act 1994* (Vic) and under s 23 of this act it is an offence for sex work service to be provided without a licence, subject to exceptions for small, owner-operated businesses.

¹⁴⁰ *Victims of Crime Assistance Act 1996* (Vic) s 8(1).

four heads of financial assistance¹⁴¹ and an additional award for ‘special financial assistance’ of up to \$10 000 may be made to primary victims who can show they have suffered a ‘significant adverse effect’ (defined to capture any grief, distress, trauma or injury) as a direct result of an act of violence.¹⁴² In cases of financial hardship, interim awards may be available. Most of these awards cover the cost of counselling but they could also be directed to the cost of urgent relocation, security and accommodation, and, in the case of trafficking victims who are often separated from young children abroad, family reunification.

C Remedies for Labour Law Violations

There is broad consensus that rights-based initiatives to improve access to labour law systems are a critical element of any strategy to prevent labour trafficking.¹⁴³ As a result, the FWO has a vital role to play in ensuring that vulnerable migrant workers receive the same workplace protections as their Australian counterparts. Over the last three years, workplace inspectors have conducted approximately 1500 investigations into minimum workplace entitlements owed to foreign workers and recovered more than \$2.5 million in underpaid wages.¹⁴⁴ Migrant workers may have travelled to Australia after being sponsored by Australian employers to work in Australia on temporary 457 visas, or they may have arrived on a temporary student or working holiday visa. The *FWA* protects these workers as well as the small minority of migrants who work without a valid visa or in breach of their visa conditions.¹⁴⁵ The FWO identifies foreign workers as ‘vulnerable’, and likely to require more specific support and protection from other workers because of a multiplicity of factors, including language and cultural barriers, limited knowledge of Australian workplace law, increased likelihood of being targeted for exploitation, and precarious visa arrangements leading to fears of deportation.¹⁴⁶

The *FWA* may offer a road to redress for people who have been trapped in situations of forced labour and debt bondage. Under the *FWA*, the FWO is empowered to investigate complaints, conduct searches of work places, make orders relating to wages, and commence court proceedings against employers in

¹⁴¹ Ibid. Section 8(1) sets out the following heads of assistance: reasonable counselling services, medical expenses actually and reasonably incurred, or reasonably likely to be incurred, as a direct result of violence; up to \$20,000 for loss of earnings suffered or reasonably likely to be suffered by the primary victim as a direct result of the act of violence, loss of or damage to clothing; safety-related expenses, in accordance of s 8(3) in exceptional circumstances, other expenses to assist recovery.

¹⁴² *Victims of Crime Assistance Act 1996* (Vic) s 8A(1). The amount of special financial assistance available is determined by the type of harm that is suffered. These are set out in table in s 8A(5).

¹⁴³ Gallagher, above n 2, 439; ILO, *A Rights-based Approach*, above n 25, 262–3; OSCE, above n 26, 3, 6 citing Roger Plant, ‘[f]orced labour and human trafficking: the challenges ahead’ (Speech delivered at OSCE High-Level Conference, Vienna, 7–8 November 2005), explaining ‘[c]riminalizing forced labour is not enough ... For an effective prosecution it is necessary to criminalize specific acts of coercion, while at the same time separately punishing substandard labour conditions. Of vital importance is that workers have access to labour tribunals and compensation, without running the risk of immediate deportation.’

¹⁴⁴ Michael Campbell, ‘Perspectives on the Working Conditions of Temporary Migrants in Australia’ (Speech delivered at the Workshop on Temporary Migrant Work and Social Justice, University of Melbourne Law School, 7 April 2010).

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

breach of the civil penalty provisions of the *FWA*.¹⁴⁷ The FWO can initiate court action to penalise employers who contravene the *FWA*, the *Fair Work* regulations, a fair work instrument, the minimum National Employment Standards, a national minimum wage order, an equal remuneration order, or any other legislation over which the FWO has jurisdiction.¹⁴⁸ The court may, on application, order a person to pay a pecuniary penalty if the court is satisfied that the person has contravened a civil remedy provision.¹⁴⁹ The penalty may be paid to the Commonwealth or the exploited worker.¹⁵⁰ Under the *FWA* courts may also make an order ‘awarding compensation for loss that a person has suffered because of the contravention’.¹⁵¹ By enabling the FWO to enter workplaces¹⁵² and pursue legal action against employers who breach workers’ rights, the *FWA* eases the burden on individual complainants to take action to assert their rights.

Official government reports underline the ‘important distinction to be drawn between people in forced labour situations and those who may be working in substandard employment situations’.¹⁵³ But this distinction may not be immediately apparent. For example, when the first attempt to prosecute a case of labour trafficking in Australia failed, the Workplace Ombudsman successfully recovered unpaid wages for the exploited worker. The case concerned the exploitation of an Indian man in the hospitality industry.¹⁵⁴ A jury ultimately acquitted the restaurant owner of ‘trafficking a person’,¹⁵⁵ and ‘intentionally exercising control over a slave’.¹⁵⁶ Following the conclusion of the criminal trial, the then Workplace Ombudsman successfully recovered the worker’s unpaid wages.¹⁵⁷ In contrast to the victims of slavery in *Tang* who never obtained compensation, the exploited restaurant worker recovered his unpaid wages. If the penalty order had been awarded to the worker rather than the Commonwealth (as is possible to do under s 546 of the *FWA*) the exploited worker may have obtained a greater measure of material justice.

Empowering exploited sex workers to assert their rights under the *FWA* should be an important element of an effective anti-trafficking strategy: on an individual level, exploited workers may recover unpaid wages, and on a systematic

¹⁴⁷ *FWA* pt 5-2.

¹⁴⁸ FWO, *FWO Litigation Policy*, Guidance Note No 1 (2nd ed, 20 July 2011) [4] <<http://www.fairwork.gov.au/fwoguidancenotes/GN-1-FWO-Litigation-Policy.pdf>>. In deciding whether the public interest requires that the proceedings be commenced, the FWO may consider the fact that some workers — including foreign workers — are particularly vulnerable to exploitation in the workplace.

¹⁴⁹ *FWA* s 546(1).

¹⁵⁰ *Ibid* s 546(3)(c). Section 546(4) provides the penalty may be recoverable as a debt owed to the person to whom the penalty is payable.

¹⁵¹ *FWA* s 545(2)(b).

¹⁵² *Ibid* s 708.

¹⁵³ *AGD IDC Report*, above n 5, 17. The AGD also acknowledges that the important role of the Fair Work Ombudsman in protecting vulnerable workers and the general deterrence effect these actions can have on illegal work place arrangements.

¹⁵⁴ *Fryer v Yoga Tandoori House* [2008] FMCA 288.

¹⁵⁵ *Criminal Code 1995* (Cth), s 271.2(1B).

¹⁵⁶ *Ibid* s 270.3(1)(d). The restaurant owner was convicted of the less serious offence of misleading a Commonwealth official in the immigration process: s 135.1 of the *Criminal Code 1995* (Cth).

¹⁵⁷ *Fryer v Yoga Tandoori House* [2008] FMCA 288.

level it is important to improve working conditions in a sector where human trafficking is known to occur.¹⁵⁸ While sex trafficking and labour trafficking are sometimes treated as separate species of harm, the experiences of women who have been trafficked into the Australian sex industry are diverse; in the author's experience, some identify the wrong they have suffered as labour exploitation, others as sexual exploitation, and still others as both. In this context, the victims of sex trafficking should be able to choose the avenue of compensation they pursue. However, although working in the sex industry is legal or decriminalised in many parts of Australia the applicability of the *FWA* to women who are exploited in the sex industry is yet to be tested. The *FWA* provides the strongest protection to employees engaged in full-time, permanent work; there is only limited protection for casual workers, and none for independent contractors.¹⁵⁹ However, it may be possible for sex workers who were subject to debt bondage to recover unpaid wages if they can show the exploitation occurred within an employment relationship (as opposed to one governed by the *Independent Contractors Act 2006* (Cth)).¹⁶⁰

Following widespread concern about the abuse of the 457 visa program, employers who sponsor migrant workers to work in Australia must now employ those workers under terms and conditions that are no less onerous than those of Australian workers doing comparative work.¹⁶¹ If a sponsor fails to satisfy a sponsorship obligation and contravenes civil penalty provision, then the Minister may apply for a pecuniary penalty order made against the offending employer¹⁶² and the Commonwealth, or another person, owed money by a sponsor may recover the amount as a debt.¹⁶³ However, while efforts have been made to reduce the exploitation of migrant workers with temporary work permits, the vulnerability of so-called 'illegal workers'— that is, workers without valid visas or working in breach of their visa conditions — has not been addressed.

The UN Special Rapporteur has emphasised that remedies should be available irrespective of the immigration status of the trafficked person.¹⁶⁴ In principle, the *FWA* should operate to protect the minimum entitlements of unlawful non-citizens and temporary visa holders working in breach of their visa conditions.¹⁶⁵ The ability of the FWO to represent workers who are party to proceedings means that FWO can facilitate the recovery of unpaid wages for

¹⁵⁸ Ibid.

¹⁵⁹ While the rights of independent contractors are set out in the *Independent Contractors Act 2006* (Cth), the *FWA* does prohibit sham contracting (ss 357–9) where a worker is, in reality, an employee. To determine whether a worker is an employee or an independent contractor, the courts apply a 'multiple indicia' common law test to determine the status of the work. The critical element is the control over the worker.

¹⁶⁰ For further discussion, see Frances Simmons and Fiona David, (2012) 1 *Anti-Trafficking Review* 60.

¹⁶¹ For a critical appraisal of these changes see Joanna Howe, 'The Migration Legislation Amendment (Worker Protection) Act 2008: Long Overdue Reform, But Have Migrant Workers been Sold Short?' (2010) 23 *Australian Journal of Labour Law* 251.

¹⁶² *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth) s 140Q.

¹⁶³ *Migration Act 1958* (Cth) s 140S. Section 140SC provides for an informal small claims procedure in a magistrate's court for amounts not above \$5000.

¹⁶⁴ Ezeilo, above n 59, [53].

¹⁶⁵ See Michael Campbell, above n 144.

foreign workers who have already returned to their country of origin.¹⁶⁶ However, this will only be possible if the FWO has the opportunity to make necessary inquiries of the worker before they leave Australia. In the normal course of events, s 198 of the *Migration Act 1958* (Cth) requires that unlawful non-citizens be removed from Australia ‘as soon as reasonably practicable’. In the case of workers without a valid visa, it appears the ability of an exploited worker to remain in Australia temporarily to assist FWO investigators is entirely dependent upon the discretion of the officials from the Department of Immigration and Citizenship. As the FWO is obliged to report unlawful non-citizens to the Department, the threat of removal may also deter exploited workers from reporting abuse to authorities. The immigration status of a trafficked person may also prove to be a roadblock to remedies under workers compensation schemes. For example, in *Australian Meat Holdings Pty Ltd v Kazi*¹⁶⁷ the Queensland Court of Appeal held that workers compensation protections do not operate to protect a claimant who is an unlawful non-citizen because, by virtue of s 235 of the *Migration Act*, the workers’ contract was void for illegality.¹⁶⁸

D Other Pathways to Compensation

While there have been no reported cases of trafficking victims in Australia bringing civil claims against their traffickers, such claims may offer a greater level of financial redress than statutory compensation schemes.¹⁶⁹ Such actions could potentially be based on a breach of contract or a claim that a tort of negligence, trespass, battery, false imprisonment, or deceit has been committed.¹⁷⁰ The basic function of an award of damages would be to compensate the plaintiff for the loss suffered as a result of the tort and put the plaintiff in the position that they would have been in had the tort not been committed.¹⁷¹ However, the spectre of a costs order and the need to identify a defendant with identifiable means may mean that, in practice, torts claims are likely to be an illusory option for most trafficked people.

Survivors of trafficking may also have been the victims of discrimination. Four federal anti-discrimination acts prohibit discrimination in employment on the

¹⁶⁶ FWA s 682(f). See, eg, *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 2)* [2010] FCA 1156, where the FWO recovered \$242 000 in unpaid wages plus interest of about \$65 000, for migrant Chinese workers who travelled to Australia on 457 visas to build a Chinese Garden of Remembrance in Kalgoorlie, and who were paid less than \$3 an hour for between nine and 14 months’ work .

¹⁶⁷ [2004] QCA 147.

¹⁶⁸ The situation will be different depending on the relevant jurisdiction. See, eg, *Singh v TAJ (Sydney) Pty Ltd* [2006] NSWCA 330.

¹⁶⁹ See, eg, *At v Dulghieru* [2009] EWHC 225 where the English High Court awarded four victims of sex trafficking between £82 000 and £125 000 respectively, after they sued their traffickers in tort for an unlawful conspiracy. In the United States, victims can sue traffickers for compensatory and punitive damages: US Department of State, *United States Trafficking in Persons Report* (9th ed, 2009); see further, Dan Werner and Kathleen Kim, *Civil Litigation on Behalf of Victims of Trafficking* (Immigrant Justice Project, 3rd ed, 2008) .

¹⁷⁰ See further Pam Stewart, ‘Tortious Remedies for Deliberate Wrongdoing to Victims of Human Trafficking and Slavery in Australia’ (2011) 34 *University of New South Wales Law Journal* 898.

¹⁷¹ *Livingstone v Rawyards Coal Co* (1880) LR 5 App Cas 25, 39.

basis of race, colour, descent or national or ethnic origin; sex; marital status; pregnancy or potential pregnancy; family responsibilities; disability; and age.¹⁷² For example, in the United States, the Equal Opportunity Commission is suing a California-based labour contractor and farms in Washington and Hawaii, claiming they discriminated against more than 200 Thai workers on the grounds of national origin and race after they confiscated the workers' passports and threatened to deport them if they complained about their conditions.¹⁷³ In Australia, little consideration has been given to the convergences between the right to non-discrimination and financial redress for victims of labour trafficking, although scholars have observed '[t]he potential for exploitation and discrimination of temporary migrant labour has been high and is reflected in complaints of racial discrimination.'¹⁷⁴

IV Overcoming Obstacles to Obtaining Compensation

A Strengthening Strategies to Identify Trafficked Persons

Only trafficked victims who are identified by authorities and provided with access to support, information, and independent legal advice have a chance of claiming compensation. To date most victims of trafficking have been identified as a result of immigration raids on brothels.¹⁷⁵ Labour trafficking is under-reported and greater efforts must be made to identify trafficking victims outside the sex industry. As the UN Special Rapporteur has observed, the challenge of identification is complicated by the problem of 'imperfect' victims, who may have committed crimes in the process of becoming a trafficking victim.¹⁷⁶ For example, in the Australian context, the UN Special Rapporteur has suggested that some of the Indonesian men and boys charged with people smuggling offences may have been deceptively recruited to work on ships and therefore may themselves have been victims of trafficking.¹⁷⁷

In theory at least, all migrant workers who experience serious exploitation at work should be able to seek legal remedies. However, migrant workers whose immigration status is either temporary or unlawful are unlikely to report

¹⁷² *Sex Discrimination Act 1984* (Cth); *Racial Discrimination Act 1975* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth). The *Sex Discrimination Act 1984* (Cth) also makes sexual harassment in the workplace unlawful, while the *Racial Discrimination Act 1975* (Cth) prohibits offensive behaviour based on racial hatred and the *Disability Discrimination Act 1992* (Cth) prohibits harassment of people with disabilities.

¹⁷³ The Equal Employment Opportunity Commission ('EEOC') filed its lawsuit in the US District Court for the District of Hawaii: *US Equal Employment Opportunity Commission v Global Horizons, Inc d/b/a Global Horizons Manpower, Inc, Captain Cook Coffee Company, Ltd et al* (D Hawaii Civ no CV-11-00257-DAE-RLP, 19 April 2011) and the US District Court for the Eastern District of Washington (*US Equal Employment Opportunity Commission v Global Horizons, Inc d/b/a Global Horizons Manpower, Inc, Green Acre Farms, Inc et al* (ED Washington Civ no 2:11-CV-03045-EFS). The alleged conduct is argued to breach Title VII of the *Civil Rights Act of 1964*.

¹⁷⁴ Margaret Thornton and Trish Luker, 'The New Racism in the Global Economy' (2010) 32 *Sydney Law Review* 1.

¹⁷⁵ Ezeilo, above n 59, [44].

¹⁷⁶ *Ibid* [43].

¹⁷⁷ *Ibid* [18].

exploitation to authorities because of fears of deportation, recrimination from agents in their country of origin, and the spectre of criminal punishment for breaching Australian immigration laws.¹⁷⁸ While a special visa framework can protect trafficking victims, this framework only protects suspected victims who are identified by the police and, after an initial 45-day reflection period, agree to assist police. Victims who are unable or unwilling to assist police are left unprotected even if they are entitled to pursue civil remedies. In this context, it may be helpful to consider creating a temporary visa that is available for trafficking victims who are entitled to pursue civil remedies.

Section 235 of the *Migration Act* creates a civil penalty offence for unlawful non-citizens working without a valid visa or in breach of their visa conditions. Employers who employ non-citizens without a valid visa or in breach of the work conditions on their visa are also subject to criminal sanctions under the *Migration Amendment (Employer Sanctions) Act 2007* (Cth). Stiffer penalties apply to employers who either know, or are reckless to the fact, that workers are being exploited in forced labour, sexual servitude, or slavery.¹⁷⁹ However, a 2011 review of the migration sanction offences found that there have been no successfully contested prosecutions of these offences. This failure was attributed to the fact that while ‘the “best evidence” of breach would almost always come from the workers themselves ... their evidence is affected by their complicity or independent culpability under section 235 of the *Migration Act 1958*’.¹⁸⁰ It would seem sensible to clarify that a person who has been exploited in forced labour, debt bondage, slavery, or servitude will not be prosecuted under this provision.¹⁸¹

B Securing Support, Protection and Residency Rights

The right to effective remedies will only be meaningful if trafficked people have access to protection, support, and independent legal advice. Victims of trafficking are typically unfamiliar with Australian law and require interpreters to understand their rights and to communicate with lawyers, support workers and counsellors. Concepts like ‘compensation’, ‘counselling’ and ‘psychologist’ may be either unfamiliar or stigmatised. Despite the cultural and linguistic barriers trafficking victims face in obtaining information about their legal rights and accessing appropriate medical services, there have been no specific official efforts to inform trafficked people about opportunities to obtain reparations orders or compensation as victims of crime (although the FWO has made considerable efforts to inform vulnerable migrant workers and international students of their rights under the *FWA*).

Compensation for trafficked people who have been exploited in Australia is, at best, an afterthought. Unlike its state counterparts, the Commonwealth AGD

¹⁷⁸ David, above n 67, 59.

¹⁷⁹ *Migration Act 1958* (Cth), ss 245AA–AK.

¹⁸⁰ Stephen Howells, ‘Report of the 2010 Review of the *Migration Amendment (Employer Sanctions) Act 2007*’ (Report, Department of Immigration and Citizenship, 2011) [10].

¹⁸¹ This is accordance with Australia’s international obligations not to penalise trafficking victims for status offences.

does not have a victim services division dedicated to meeting the needs of victims of crime. Where a prosecution leads to the conviction, the CDPP *Victim Support Policy* does not require the CDPP to consider whether reparation orders should be sought.¹⁸² Neither the AFP nor the CDPP provide information to trafficked persons on the right to claim compensation, although the AFP may refer labour trafficking matters to the FWO.¹⁸³ There has been no official investment in developing multilingual resources that inform trafficked people about their rights as victims of crime. To remedy this situation, the issue of effective remedies for trafficked people should be mainstreamed into the National Anti-Trafficking Strategy. The CDPP should develop protocol around obtaining reparations orders if a conviction is obtained in a trafficking matter and both the AFP and the CDPP should give trafficked people basic information about claiming compensation in a language they can understand.

The Support Program and visa framework for trafficked people create a hierarchy of victims, where those who can assist police can expect a greater level of protection and support than those who cannot. The Support Program, currently delivered by the Australian Red Cross, is only available to people who are identified by the AFP as ‘suspected victims of trafficking’ — the Program cannot accept referrals from NGOs or medical professionals. Suspected victims of trafficking referred to the program by the AFP will then receive 45 days of victim support (in rare cases support may be extended for another 45 days). Beyond this time, victim support is contingent on cooperation with the AFP. In some cases the AFP investigation will result in criminal charges; in other cases the evidence may not be sufficient to warrant pressing charges. Each trafficked person on the program has a limited budget to cover legal costs. While Red Cross caseworkers endeavour to ensure trafficked people obtain independent legal advice about obtaining compensation, there is no contractual obligation to do so. When the criminal justice process ends and a person is either repatriated or granted a witness protection trafficking permanent visa, the trafficked person can expect to be exited from the victim support program following a 20-day transition period.

The special visa framework for trafficking victims does not provide temporary visa options for trafficked people who are unable or unwilling to assist police but who wish to pursue civil remedies.¹⁸⁴ Instead, the framework is designed to protect witnesses in police investigation into human trafficking. First, a person identified by the AFP as a ‘suspected victim of trafficking’ is granted a Bridging Visa F for 45 days. During this time, the person will receive victim support. After the 45 days expires, the AFP may request a Criminal Justice Stay Certificate if they believe the continued presence of the trafficking victim in Australia is necessary to assist the police with their investigations. The final stage occurs when the AFP requests a Witness Protection Trafficking Certificate and the trafficked person is

¹⁸² CDPP, *Victims of Crime Policy*, above n 9.

¹⁸³ Simmons and David, above n 160.

¹⁸⁴ In some circumstances victims of trafficking may be able to apply for protection visas (class XA). See, eg, *VXAJ v Minister for Immigration* [2006] FMCA 234. See generally Anna Dorevitch and Michelle Foster, ‘Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia’s Migration and Refugee Law’ (2008) 9 *Melbourne Journal of International Law* 1.

invited to apply for a Witness Protection Trafficking Permanent Visa. In order for the visa to be granted, the applicant must meet two criteria: first, the applicant must have contributed to a police investigation or prosecution into people trafficking and second, the Minister of Immigration must be satisfied that the person would be in danger if returned to his or her country of origin.¹⁸⁵ While it is possible that certain remedies may be sought on behalf of trafficked people who have been repatriated, practical problems may arise obtaining the necessary evidence.¹⁸⁶

After visiting Australia, the UN Special Rapporteur recommended extending the existing 45 day reflection and recovery period to 90 days.¹⁸⁷ Implementing this recommendation would provide trafficked people with additional time to seek legal advice about their prospects of claiming compensation and recovering unpaid wages. However, while trafficked people who cooperate with law enforcement may be granted criminal justice stay visas, there is no temporary resident permit for trafficked persons who are entitled to pursue civil remedies. While not all civil action will necessarily require a trafficked person's presence in Australia over an extended period of time, the UN Special Rapporteur has recommended that 'States should provide trafficked persons with temporary residence permits during the duration of any legal proceedings on an unconditional basis'.¹⁸⁸

C *Towards a National Compensation Scheme*

After assessing Australia's response to trafficking, the UN Special Rapporteur recommended establishing a federal compensation scheme for trafficked persons.¹⁸⁹ In 1980, the ALRC's endorsed establishing a federal victims' compensation scheme but the proposal failed to gain traction.¹⁹⁰ However, now there are now a growing number of federal crimes that result in individual victims suffering economic and non-economic loss.¹⁹¹ It is necessary to hold an inquiry into whether current legal and policy arrangements adequately meet the needs of victims of federal crime. While this inquiry should examine the availability of compensation for trafficking victims, consideration must also be given to the rights of victims of child sexual exploitation, terrorism, and other federal crimes. Particular attention should be paid to the issues of compensation and counselling, protection for vulnerable witnesses, and the articulation of a Federal Charter of Victims' Rights.

¹⁸⁵ *Migration Regulations 1994* (Cth) reg 2.07AK(3)(c). See generally, Burn and Simmons, above n 54.

¹⁸⁶ For example, the *Victim Support and Rehabilitation Act 2006* (NSW) enables a victim's compensation application to be brought on behalf of victim of an act of violence that occurred in NSW, irrespective of whether the victim has since left the jurisdiction.

¹⁸⁷ Ezeilo, above n 59, [54].

¹⁸⁸ Ezeilo, above n 28, 14.

¹⁸⁹ Ezeilo, above n 59, [66].

¹⁹⁰ ALRC, *Sentencing of Federal Offenders (Interim report)*, (Report No 15, 1980) [462]–[466].

¹⁹¹ The possibility of establishing a federal victim's compensation scheme was reportedly mooted by the then Minister for Home Affairs, the Hon Bob Debus but never mentioned again, see Jonathan Pearlman, 'Rights Charter to Vindicate Victims', *Sydney Morning Herald*, 7 February 2008, 4.

In formulating a national framework to compensate victims of trafficking, care should be taken to avoid unnecessarily re-traumatising victims of egregious human rights violations. Victims of sexual servitude under the New South Wales and Victorian schemes are required to provide evidence that the crime has resulted in psychological injury. In the experience of the author, the prospect of recounting the details of abuse to a stranger through an interpreter is enough to deter some victims from claiming compensation. The problem could be resolved through statutory acknowledgment that sexual servitude, forced labour and slavery are crimes that are inherently injurious to human dignity and freedom. Thus, if a decision-maker was satisfied on the balance of probabilities that a person has been a victim of such a serious crime, then a base level of compensation could be made available without requiring the person to provide medical evidence that their slavery or sexual servitude had resulted in psychological injury.

For the proposal for a federal victims' compensation scheme to gain traction, a sustainable source of funding must be identified. The UN Special Rapporteur has suggested that '[e]xplicit provision should also be made for seized proceeds of trafficking and confiscated assets of traffickers to be used in the first instance to compensate trafficked persons and in the second instance for general provision of remedies to trafficked persons'.¹⁹² The known cases of trafficking in Australia suggest offenders are motivated by profit, however the question of how to link the operation of the *Proceeds of Crime Act 2002* (Cth),¹⁹³ which can be used to confiscate the proceeds of trafficking crimes,¹⁹⁴ with the compensation of trafficking victims, has not yet been explored.

The case for a national compensation scheme for federal victims of crime would be assisted by research examining the experience of federal victims of crime claiming compensation under the various state schemes. This review could identify how the differences between the eight schemes affect the availability of compensation for federal victims of crime, develop a clearer picture of how many federal victims of crime are seeking compensation under state schemes, and identify the nature of the claims. The capacity of state services for victims of crime to respond to the needs of federal victims of trafficking could also be addressed and training programs developed to assist tribunal members and compensation assessors dealing with claims by trafficking victims.

V Conclusion

The failure to place the right to effective remedies at the core of Australia's anti-trafficking strategy reflects a broader failure to locate anti-trafficking efforts firmly in a human rights framework that treats trafficked people as rights-bearing individuals rather than potential witnesses in criminal justice proceedings. It is

¹⁹² Ezeilo, above n 28.

¹⁹³ The *Proceeds of Crime Act 2002* (Cth) came into force on 1 January 2003 and includes civil forfeiture at a federal level, unlike its predecessor *Proceeds of Crime Act 1987* (Cth). The CDPP uses the older Act in conviction-based confiscation proceedings that commenced prior to 1 January 2003.

¹⁹⁴ See eg, *Commonwealth Director of Public Prosecutions v Xu* [2005] NSWSC 191, where Sally Xu was charged with sexual servitude and slavery offences, and s 17 of the *Proceeds of Crime Act 1987* (Cth) was relied upon to place a restraining order over Ms Xu's property.

clearly desirable that prosecutors seek reparation orders when a trafficking offender is convicted but the reality is offenders are rarely convicted. Instead of viewing trafficked people through the narrow lens of law enforcement, Australia's national anti-trafficking plan should promote the capacity of civil schemes to compensate victims of crime and the role of the FWO in recovering unpaid wages and penalising abusive employers.

There is growing awareness of the issue of compensation for trafficked people among Australian anti-trafficking advocates. Compensation claims by victims of sex trafficking under statutory schemes in Victoria and New South Wales are proving successful. However, these schemes are not designed to compensate the many different manifestations of trafficking. Variations between the schemes mean access to compensation will vary significantly depending on where the crime occurred. In the long-term, a comprehensive national scheme to compensate victims of federal crime should be established.

In the immediate future, greater efforts must be made to ensure that trafficked people have meaningful access to existing remedies. To this end, the Australian government should monitor the number of compensation claims made by trafficked persons, design and publicise multilingual information about claiming compensation, and strengthen the accessibility of labour law protections for temporary and unauthorised migrant workers. This approach positions the specific issue of compensating individual trafficking victims within the broader context of strengthening the labour rights of vulnerable migrant workers and reducing the demand for cheap, exploitable labour. Such a move requires stepping outside the crime control paradigm that has characterised Australia's initial response to people trafficking and empowering exploited people to seek redress for the harm they have suffered in Australia.