



Australian  
Human Rights  
Commission

# A human rights approach to trafficking in persons

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE UN  
SPECIAL RAPPORTEUR ON TRAFFICKING IN PERSONS ESPECIALLY  
WOMEN AND CHILDREN, AUSTRALIAN MISSION, 17-29 NOVEMBER 2011**

14 November 2011

ABN 47 996 232 602  
Level 3, 175 Pitt Street, Sydney NSW 2000  
GPO Box 5218, Sydney NSW 2001  
General enquiries 1300 369 711  
Complaints info line 1300 656 419  
TTY 1800 620 241

Australian Human Rights Commission  
[www.humanrights.gov.au](http://www.humanrights.gov.au)

## Table of Contents

***Australian Human Rights Commission Submission to the UN Special Rapporteur on Trafficking in Persons especially women and children, Australian Mission, 17-29 November 2011* ..... 1**

**1 Introduction..... 3**

**2 Summary ..... 3**

**3 Recommendations..... 3**

**4 A human rights approach to trafficking ..... 4**

**5 Current protections ..... 6**

**6 Guidelines for NGOs working with trafficked people..... 7**

**7 Gaps in protection ..... 7**

**8 Children’s rights ..... 9**

## 1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the *United Nations Special Rapporteur on Trafficking in Persons, especially women and children* for her formal mission to Australia, 17-29 November 2011.

## 2 Summary

2. The Commission welcomes the opportunity to report to the UN Special Rapporteur on Trafficking in Persons, especially women and children on the human rights issues arising from trafficking in persons in Australia.
3. This submission is framed within a human rights approach to trafficking in persons. This includes identifying the human rights protections available in Australia to trafficked persons and their dependents; as well as the gaps in human rights protections.

## 3 Recommendations

4. The Australian Government should:

***Recommendation 1:*** adopt a human rights based approach to preventing, protecting and redressing trafficking in persons.

***Recommendation 2:*** *In relation to trafficking in persons:*

- improve coordination among government agencies involved in anti-trafficking responses
- review the return and reintegration of trafficking victims procedures and develop repatriation guidelines for police and other relevant personnel.
- Develop a federal victims' compensation scheme
- Provide improved access for trafficked people to information and legal services for assistance with making compensation claims.
- Improve provision of settlement services, including access to housing, for trafficked women and their dependent children who obtain permanent residence in Australia.

***Recommendation 3:*** *In relation to trafficking in children:*

- undertake comprehensive data collection and research on the prevalence of child trafficking and sexual exploitation
- implement measures for providing specialist child specific services for child victims of trafficking, non-citizen minors and unaccompanied minors, in accordance with the best interests of the child principle and the UNICEF 'Guidelines on the Protection for Child Victims of Trafficking' (2006)
- ensure that where trafficked people and their dependent children obtain permanent residence in Australia, these families receive access to adequate settlement services

- amend the visa framework for victims of trafficking to ensure every person who is identified as a victim of child trafficking and who would face danger if returned to their country of origin is eligible for a permanent visa, regardless of whether they participate in law enforcement processes
- develop clear guidelines for agencies on how to deal with child victims of trafficking on issues including guardianship, housing, access to education, confidentiality and privacy, access to independent lawyers and protecting the best interests of child.

#### **4 A human rights approach to trafficking**

5 Australia has ratified the United Nations *Convention against Transnational Organized Crime* (UNTOC). In addition in 2005 Australia ratified the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the Convention on Transnational Crime* (The Trafficking Protocol).

6 The Trafficking Protocol defines trafficking in persons as:

...the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>1</sup>

7 Under the Trafficking Protocol the consent of the victim is irrelevant where it is obtained by any of the coercive, deceptive or abusive means described in the definition of trafficking. Children can never consent to be exploited.

8 The UNTOC and related Trafficking Protocol, outline an international framework for combating trafficking assisting victims of trafficking.

UNTOC Article 25(2)

Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.

Trafficking Protocol Article 6(6)

Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.<sup>2</sup>

9 Australia has also ratified other conventions that prohibit different forms of exploitation that may occur in a trafficking situation including slavery, debt

bondage, forced labour, child labour and forced marriage. These include the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention on the Rights of Elimination of All forms of Discrimination Against Women* (CEDAW). Australia is also a signatory to the *Convention Against Slavery* (1926). As a state party to these conventions the Australian Government has an obligation to prevent trafficking and protect the rights of trafficked persons, particularly women and children.<sup>3</sup>

5. The CEDAW Committee in its review of Australia in 2010 commended Australia for:
  - implementing a national plan to eradicate trafficking in persons mirroring the objectives of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which supplements the Palermo Convention against Transnational Organized Crime.
  - Introducing the Support for Victims of People Trafficking Programme and the People Trafficking Visa Framework since 1 July 2009.<sup>4</sup>
6. However the Committee recommended Australia adopt a human rights framework in its revised action plan and consider complementary approaches to the current criminal justice approach. In particular the Committee recommended the Australian Government:
  - improve coordination among government agencies involved in anti-trafficking responses
  - review the return and reintegration of trafficking victims procedures and develop guidelines for repatriation for police and other relevant personnel.
  - review the accommodation available for women trafficked into Australia with a view to offering more options and reducing stress on the victims
  - undertake an impact assessment of the Bali Process in order to ensure the sustainability of its networking among the countries under this project
  - evaluate and monitor the Asia Regional Trafficking in Persons Project (ARTIP)
  - continue providing assistance to member States of the Association of Southeast Asian Nations (ASEAN) for improving investigation and judicial process in cases of trafficking in human beings.<sup>5</sup>
7. The Australian Government was also requested to provide information in its next periodic report on civil proceedings related to compensation for victims (including the number of cases and the amount of compensation awarded).<sup>6</sup>
8. The Human Rights Committee in its review of Australia in 2009 noted that, despite the positive measures adopted by the State party, trafficking in human beings, especially women, persists on the territory of Australia. The Committee recommended the Australian Government strengthen its measures to prevent and eradicate trafficking in human beings, including by adopting a comprehensive strategy, and providing equal assistance and protection to all victims identified regardless of their participation or otherwise in criminal proceedings against perpetrators.<sup>7</sup>

9. Australia has also ratified the Convention on the Rights of the Child and its Optional protocol on the Sale of children, Child Prostitution and Child Pornography.<sup>8</sup>
10. The United Nations High Commissioner for Human Rights' *Recommended Principles and Guidelines on Human Rights and Human Trafficking* recommend that the promotion and protection of human rights should be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.<sup>9</sup>
11. **Recommendation 1:** The Australian Human Rights Commission recommends that the Australian Government should adopt a human rights based approach to preventing, protecting and redressing trafficking in persons.

## 5 Current protections

- 10 In Australia, slavery, sexual servitude, deceptive recruiting for sexual services, trafficking and debt bondage are all criminal offences. Victims of these offences may be able to receive victim support under a program administered by the Australian Government Office for Women. There are also special visa arrangements for trafficking victims who assist police investigations and prosecutions.
- 11 The Australian Government has taken a range of positive measures to prevent and punish trafficking of persons and ensure effective remedies to victims of trafficking including:
  - Introducing criminal offences for slavery, sexual servitude and deceptive recruitment for sexual services, sale of a child, debt bondage and people trafficking under the Criminal Code
  - Introducing changes to the people trafficking visa framework to provide permanent witness protection visas to trafficked people who would face danger if returned to their country of origin, who have contributed to a criminal investigation, as well as their immediate family members.
  - Operating a victim support program for victims returning to Australia to provide evidence<sup>10</sup>
  - Implementing a communication awareness strategy for victims of trafficking – including the issuing of 'Guidelines for NGOs working with trafficked people' and an accompanying 'Know Your Rights' fact sheet, which were developed in conjunction with the Commission and non-government organisations
  - Undertaking consultation with non-government organisations and the Commission through the annual National Roundtable on People Trafficking, and other roundtables including the 2011 roundtable on housing needs of victims of human trafficking
  - Funding of \$1.4m to support the work of key NGOs in combating people trafficking.

- Two public consultations on reforms to address the practices of forced and servile marriage and the criminal justice response to people trafficking, reparation and vulnerable witnesses<sup>11</sup>

12 The focus of many of the measures has been on preventing trafficking and prosecuting trafficking-related crimes. In addition attention is also needed on addressing the human rights violations suffered by victims of trafficking by providing access to effective remedies as required under Australia's international human rights obligations.

## **6 Guidelines for NGOs working with trafficked people**

13 In 2008, the Australian Human Rights Commission, as part of the Working Group of the National Roundtable on People Trafficking to assist Non-Government Organisations working with trafficked people<sup>12</sup>, developed the *2008 Guidelines for Working with Trafficked People*.<sup>13</sup>

14 They represent a comprehensive resource, both for well-established NGOs and organisations supporting trafficked persons for the first time. The guidelines promote the best interests of victims of trafficking including the importance of informed consent, privacy protection and culturally appropriate services. They provide practical advice to NGOs dealing with victims of all forms of trafficking, including sexual servitude and labour exploitation.

15 NGOs have a vital role in supporting trafficked people and improving public understanding of trafficking. NGOs might come into contact with trafficked people through the services they provide to migrant workers or because they offer specialised services to trafficking victims. Trafficked people have short-term and long-term needs including the need for interpreters, housing, food and clothing, medical care, health education, health care, legal and immigration services, safety planning, English language classes, assistance in finding employment and education and information about the Australian legal system, their human rights and legal entitlements including compensation and financial assistance. These needs must be met in a professional and culturally appropriate manner. These Guidelines aim to help NGOs provide services for trafficked people in a way that is safe, ethical and respects the human rights of trafficked people.

16 In addition to the Guidelines, the Government prepared an accompanying two-page *Know Your Rights* fact sheet which gives trafficked people information about how they can get advice about their visa status, contact police and access support services. It has been translated into Thai, Vietnamese, Korean, Chinese and Tagalog. The Guidelines were also subsequently updated and re-released in 2010.

## **7 Gaps in protection**

17 The Commission remains concerned however that in relation to prevent and punish trafficking of persons and ensure effective remedies for victims of

trafficking there are still some ongoing gaps in human rights protections as follows:

- The reported case law on trafficking in Australia is still very limited and a considerable number of cases have been dismissed due to lack of evidence or have been appealed to higher courts. It is widely accepted that in Australia the known cases of human trafficking for sexual purposes have not been straight forward and do not necessarily conform to traditional stereotypes.<sup>14</sup> The Commission intervened in the High Court case of *The Queen v Tang* to assist the court in interpreting the meaning of 'slavery' in the Criminal Code to reflect the reality of trafficking in contemporary Australia.<sup>15</sup> In its intervention, the Commission submitted that the definition of 'slavery' in the Criminal Code should be read with reference to the relevant international covenants, namely the 1926 Slavery Convention and the Supplementary Convention.<sup>16</sup>
- The Australian trafficking laws have been in place for over five years and there is a need to review these to ensure they comprehensively reflect the full suite of Australia's international legal obligations in this area. For example, consideration should be given to including a separate offence of 'forced labour' in the Criminal Code.
- The trafficking in persons offences in the Criminal Code should comprehensively cover all aspects of the definition of 'trafficking' in the Trafficking Protocol.<sup>17</sup> This is because definitional differences in the Criminal Code may pose obstacles in prosecuting and judging cases that fall within the definition of 'trafficking' in the Trafficking Protocol, and may have the potential to limit international cooperation critical to gathering evidence to prosecute trafficking cases.<sup>18</sup>
- There is a need for a federal victims' compensation scheme

There are significant practical obstacles that may prevent a trafficked person from making compensation claims, including obstacles to obtaining legal advice about claiming compensation, a lack of visa options to stay in Australia to pursue compensation claims, and the limited legal avenues to pursue compensation claims.

- There is also a need to improve access for trafficked people to information and legal services for assistance with making compensation claims. The Commission considers that more work could also be done to set out the rights of trafficking victims during court proceedings. For example, it would be useful to develop a comprehensive code on possible witness protection measures suitable for use in trafficking trials. This code could then be referred to judges hearing trafficking trials so they can be guided in the exercise of their discretion to control court proceedings. This code should have an emphasis on the special needs of children. There could also be benefit in investing in mental health professionals providing counselling support services for victims making claims.



- There is a need for better adequate settlement services, including access to housing, to be provided to trafficked women and their dependent children who obtain permanent residence in Australia.

**18 Recommendation 2: The Australian Government should**

- ***improve coordination among government agencies involved in anti-trafficking responses***
- ***review the return and reintegration of trafficking victims procedures and develop repatriation guidelines for police and other relevant personnel.***
- ***Develop a federal victims' compensation scheme***
- ***Provide improved access for trafficked people to information and legal services for assistance with making compensation claims.***
- ***Improve provision of settlement services for trafficked women and their dependent children who obtain permanent residence in Australia.***

**8 Children's rights**

19 The *Criminal Code 1995* (Cth) contains Australia's trafficking in persons offences.<sup>19</sup>

20 Consistent with the definition of 'trafficking' in Article 3 of the Trafficking Protocol, the movement of persons under the age of 18 for the purpose of exploitation is considered 'trafficking' even if the traffickers do not use force, coercion, or other means to achieve the consent of the child to go with the traffickers.

21 Child trafficking victims who come to the attention of the Australian Federal Police may be supported by the Victim Support Program until the child can be transferred to the care of the relevant state or territory authority. It is also likely that a guardian would be appointed.<sup>20</sup>

22 A child trafficking victim who has been identified as an unaccompanied minor will generally have access to the same range of government services as all Australians – including education or language classes.<sup>21</sup>

23 The Commission remains concerned that:

- There continues to be a lack of data and research on the prevalence of child trafficking and sexual exploitation in Australia.
- Where a child trafficking victim is not officially identified as an unaccompanied minor, he or she may not have access to the same level of government services.

- There is a need for specific policy guidelines to be developed on protecting the rights of child victims of trafficking in Australia, especially during police investigations and prosecutions.
- Ongoing support services should be available to child victims of trafficking even where they are unwilling or unable to assist police investigations or prosecutions.
- The victim support program could benefit from further funding to be able to provide specific services and support that respond to (a) the specific needs of child victims of trafficking and (b) the needs of adult victims of trafficking with dependent children either in Australia or offshore.
- The process of reunifying adult victims of trafficking with dependent children offshore often takes years. This is distressing for families and can leave the children of trafficking victims exposed to dangers in the country of origin. When trafficked people are reunited with their children (under the people trafficking visa framework) it is essential that appropriate settlement services are made available to help trafficked people and their families build a new life in the Australian community.
- There are also concerns that state and territory child protection and other agencies need to be better resourced and skilled in meeting the needs of child trafficking victims who remain in Australia.

24 ***Recommendation 3: The Australian Government should***

- ***undertake comprehensive data collection and research on the prevalence of child trafficking and sexual exploitation***
- ***implement measures for providing specialist child specific services for child victims of trafficking, non-citizen minors and unaccompanied minors, in accordance with the best interests of the child principle and the UNICEF 'Guidelines on the Protection for Child Victims of Trafficking' (2006)***
- ***ensure that where trafficked people and their dependent children obtain permanent residence in Australia, these families receive access to adequate settlement services***
- ***amend the visa framework for victims of trafficking to ensure every person who is identified as a victim of child trafficking and who would face danger if returned to their country of origin is eligible for a permanent visa, regardless of whether they participate in law enforcement processes***
- ***develop clear guidelines for agencies on how to deal with child victims of trafficking on issues including guardianship, housing, access to education, confidentiality and privacy, access to independent lawyers and protecting the best interests of child.***

<sup>1</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, General Assembly resolution 55/25 (2003) at Article 3.

<sup>2</sup> *United Nations Convention and Transnational Organized Crime*, General Assembly resolution 55/25 (2000); *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, General Assembly resolution 55/25 (2003).

<sup>3</sup> Article 6, *Convention on the Elimination of Discrimination against Women*, opened for signature 18 December 1979, (entered into force 3 August 1981); Article 8, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976).

<sup>4</sup> CEDAW Committee *Concluding Observations Australia*, UN Doc CEDAW/C/AUL/CO/7, at 30 and 31 (2010).

<sup>5</sup> CEDAW Committee *Concluding Observations Australia*, UN Doc CEDAW/C/AUL/CO/7, at 30 and 31 (2010).

<sup>6</sup> CEDAW Committee *Concluding Observations Australia*, UN Doc CEDAW/C/AUL/CO/7, at 30 and 31 (2010).

<sup>7</sup> Human Rights Committee *Concluding Observations Australia* UN Doc CCPR/C/AUS/CO/5, at 22 (2009).

<sup>8</sup> Article 35, *Convention on the Rights of the Child*, opened for signature 20 November 1989 (entered into force 2 September 1990).

<sup>9</sup> Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, presented to the Economic and Social Council as an addendum to the report of the United Nations High Commissioner for Human Rights (E/2002/68/Add. 1)

<sup>10</sup> As of July 2009, all victims of trafficking identified by the Australian Federal Police have access to the Australian Government's Victim Support Program for up to 90 days, regardless of whether they have contributed to the investigation and prosecution of a criminal offence (see <http://www.fahcsia.gov.au/sa/women/progserv/violence/Pages/AntiPeopleTraffickingStrategy.aspx> (viewed 19 April 2010)). The types of support services provided by the government through this program (via non-government contractors) to identified trafficking victims include:

- accommodation
- a living allowance
- a food allowance
- an amount of money for the purchase of essentials such as clothing and toiletries
- access to health care, including counselling
- access to interpreters
- access to legal services
- an individual case manager responsible for ensuring the appropriate delivery of support services to meet clients' individual needs. ( For further information, see <http://www.fahcsia.gov.au/sa/women/progserv/violence/Pages/peopletrafficking.aspx#3> (viewed 19 April 2010).)

<sup>11</sup> Australian Human Rights Commission, *Protection of the rights of the child in the context of migration* (2010). At

[http://www.humanrights.gov.au/legal/submissions/2010/201004\\_OHCHR\\_child\\_migration.pdf](http://www.humanrights.gov.au/legal/submissions/2010/201004_OHCHR_child_migration.pdf) (viewed 15 July 2011)

<sup>12</sup> The National Roundtable on People Trafficking Working Group comprises Commonwealth Government agencies and nine NGOs, and was chaired by the Australian Human Rights Commission. The members included:

- Anti-Slavery Project, University of Technology, Sydney
- Australian Catholic Religious Against Trafficking in Humans
- Scarlet Alliance
- Project Respect
- Salvation Army
- Victim Support Australasia
- NSW Rape Crisis Centre
- Josephite Counter Trafficking Project
- Attorney-General's Department
- Australian Government Office for Women
- Department of Immigration and Citizenship
- Workplace Ombudsman
- Australian Human Rights Commission.

<sup>13</sup> 2008 Guidelines for Working with Trafficked People(2008). At [http://www.hreoc.gov.au/sex\\_discrimination/publication/traffic\\_NGO/index.html](http://www.hreoc.gov.au/sex_discrimination/publication/traffic_NGO/index.html) (viewed 9 November 2011).

<sup>14</sup> See Department of Families, Housing, Community Services and Indigenous Affairs, 'Trafficking of women for sexual purposes: Research and Public Policy Series - No. 95' (8 April 2009) at [http://www.fahcsia.gov.au/sa/women/pubs/violence/traffic\\_women/Pages/default.aspx](http://www.fahcsia.gov.au/sa/women/pubs/violence/traffic_women/Pages/default.aspx) (viewed 28 October 2009). See also Anne Gallagher, *Prosecuting and Adjudicating Trafficking in Persons Cases in Australia: Obstacles and Opportunities* (Speech delivered at the National Judicial College of Australia Twilight Seminar on Human Trafficking, Sydney, 15 June 2009); Fiona David, 'Trafficking for Sexual Purposes', Australian Institute of Criminology, *Research and Public Policy Series*, no 95, 39; Fiona David, 'Prosecuting trafficking in persons: known issues, emerging response', Australian Institute for Criminology, *Trends and Issues in Criminal Justice*, no.358, June 2008.

<sup>15</sup> *Queen v Tang* (2008) 237 CLR 1.

<sup>16</sup> See Australian Human Rights Commission, *Submissions in support of the Application for Leave to Intervene and Submissions on the Appeal - Commonwealth Director of Public Prosecutions v Wei Tang*, 5 May 2008. At [http://www.humanrights.gov.au/legal/submissions\\_court/intervention/tang.html](http://www.humanrights.gov.au/legal/submissions_court/intervention/tang.html) (viewed 24 November 2009).

<sup>17</sup> E Broderick and B Byrnes, *Beyond Wei Tang: Do Australia's human trafficking laws fully reflect Australia's international human rights obligations?* (Speech delivered at Workshop on Legal and Criminal Justice Responses to Trafficking in Persons in Australia: Obstacles, Opportunities and Best Practice, Monash University, 9 November 2009), 74.

<sup>18</sup> E Broderick and B Byrnes, *Beyond Wei Tang: Do Australia's human trafficking laws fully reflect Australia's international human rights obligations?* (Speech delivered at Workshop on Legal and Criminal Justice Responses to Trafficking in Persons in Australia: Obstacles, Opportunities and Best Practice, Monash University, 9 November 2009).

<sup>19</sup> Section 271.4 Offence of trafficking in children

- (1) A person (the first person) commits an offence of trafficking in children if:
- a. the first person organises or facilitates the entry or proposed entry into Australia, or the receipt in Australia, of another person; and
  - b. the other person is under the age of 18; and
  - c. in organising or facilitating that entry or proposed entry, or that receipt, the first person:
    - i. intends that the other person will be used to provide sexual services or will be otherwise exploited, either by the first person or another, after that entry or receipt; or
    - ii. is reckless as to whether the other person will be used to provide sexual services or will be otherwise exploited, either by the first person or another, after that entry or receipt.

Penalty: Imprisonment for 25 years.

- (2) A person (the first person) commits an offence of trafficking in children if:
- a. the first person organises or facilitates the exit or proposed exit from Australia of another person; and
  - b. the other person is under the age of 18; and
  - c. in organising or facilitating that exit or proposed exit, the first person:

- i. intends that the other person will be used to provide sexual services or will be otherwise exploited, either by the first person or another, after that exit; or
- ii. is reckless as to whether the other person will be used to provide sexual services or will be otherwise exploited, either by the first person or another, after that exit.

Penalty: Imprisonment for 25 years.

(3) In this section:

"*sexual service*" means the use or display of the body of the person providing the service for the sexual gratification of others.

<sup>20</sup> See *Guidelines for NGOs working with trafficked people*, Chapter 10. At [http://www.hreoc.gov.au/sex\\_discrimination/publication/traffic\\_NGO/index.html](http://www.hreoc.gov.au/sex_discrimination/publication/traffic_NGO/index.html), (viewed 19 April 2010).

<sup>21</sup> For further information about services available to unaccompanied minors, see Department of Immigration and Citizenship, 'Fact Sheet 69 - Caring for Unaccompanied Minors', <http://www.immi.gov.au/media/fact-sheets/69unaccompanied.htm> (viewed 19 April 2010).