

Trafficking: The Need for a Human Rights Based Approach

**Speech by the Sex Discrimination Commissioner and
Commissioner responsible for Age Discrimination
Elizabeth Broderick**

Human Rights and Equal Opportunity Commission

INAUGURAL ANTI-TRAFFICKING FORUM

**University of Technology Sydney
24 July 2008**

I would like to begin by acknowledging the Gadigal people of the Eora nation, the Indigenous peoples on whose land we are gathered today and pay my respects to their elders.

A month ago I attended the National Roundtable on People Trafficking.

At the Roundtable anti-people trafficking NGOs, victims of crime support organisations and employer and union advocates and representatives of the Commonwealth Government came together for the first time to talk about people trafficking.

At the start of the day there was some trepidation.

Trafficking raises complex legal and ethical issues. There is a lack of data about the nature and extent of the problem of trafficking in Australia and, pending the judgment of the High Court in *The Queen v Wei Tang*, legal uncertainty about what constitutes slavery in the 21st century.

At the end of the day there was a sense of accomplishment and enthusiasm for further action.

The reason was that the Roundtable tapped into a rich – and previously unexploited – vein of knowledge that exists within NGOs who work with trafficked persons.

NGOs talked about how trauma impacts on the ability of trafficking victims to decide whether to participate in the investigation and prosecution of trafficking offences.

They spoke from first-hand experience about the importance of developing culturally appropriate information for trafficked persons and the need for training for judges and lawyers about the cross-cultural issues that can arise in trafficking cases.

As I sat at the Roundtable listening to these dedicated individuals I was struck by two things.

The first thing was how many topics we agreed on.

We agreed we need to know more about trafficking for labour exploitation.

We agreed the involvement of unions, employer representatives and the Workplace Ombudsman is vital to respond to the emerging issue of labor trafficking.

We agreed that NGOs need guidelines for working with trafficked persons and we set up a Working Group to produce them.

HREOC and NGOs agreed that visa framework for trafficked people needs to be reformed so access to victim support and legal advice is not conditional on a person's ability to assist police investigations and prosecutions.

The second thing I was struck by is how NGOs who work with people who may be trafficked instinctively took a human rights approach to trafficking.

This approach is about recognizing the trafficking is first and foremost a human rights issue and that ‘the human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims’.¹

A human rights approach also acknowledges the responsibility of government and – through the course of their work - NGOs to assist and protect trafficked persons and to make sure that their actions do not breach the human rights of trafficking victims, migrant workers or asylum seekers.

This approach needs to be applied to what are often called the three Ps: Prevention, Protection and Prosecution.

While a human rights approach to trafficking involves paying more attention to the issues of prevention and protection, Australia’s international human rights obligations also play a key role in the legislative drafting and judicial interpretation of laws which criminalise trafficking and exploitative practices such as slavery.

In 2005 Parliament sought to implement Australia’s international obligations by introducing offences of trafficking and debt bondage

¹ United Nations High Commissioner For Human Rights Principles and Guidelines on Human Rights and Trafficking, E/2002/68/Add.1 (2002).

into the Criminal Code. This followed the introduction of slavery, sexual servitude and deceptive recruiting offences in 1999.

The UN Trafficking Protocol says trafficking involves the movement of people through deceptive, coercive or abusive means for the purpose of exploitation. This exploitation can include sexual servitude, forced labour or services, slavery or practices similar to slavery, servitude and the removal of organs.

Some of the offences introduced by the 1999 and 2005 reforms do not criminalise trafficking but exploitative practices that may continue long after the trafficker is out of the picture. Indeed, a person may be subject to slavery without actually being trafficked.

A key challenge for the Courts is how to interpret these offences. It is a well settled principle of statutory construction that legislation should be interpreted, as far as possible, to be consistent with Australia's international obligations, including in relation to human rights.²

For example, in the recent case of the *Queen v Wei Tang* the High Court heard submissions about the scope of Australia's international obligation to prohibit all forms of slavery.³

² See, eg, *Dietrich v R* (1992) 177 CLR 292 at 321 (Brennan J), 360 (Toohey J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-7 (Mason CJ and Deane J)

³ *The Queen v Wei Tang M5 of 2008* was an appeal against the decision of the Victorian Court of Appeal to overturn the Ms Tang's conviction on the ground that the trial judge has incorrectly directed the jury on the mental element of the offence of slavery.

HREOC was granted leave to intervene in this case to make submissions on a point of legal principle – the meaning of slavery under the *Criminal Code*.⁴ HREOC didn't comment on whether Ms Tang should have convicted.

The question the High Court had to grapple with is what does slavery mean today?

In the 21st century what is often called the modern day slave-trade does not resemble the 19th century trade in chattel slaves. Instead, we see new and cruel demonstrations of how one person can deny another's freedom.

In 2008, migrant workers may find themselves in debt bondage arrangement with little or no control over their conditions of work. Their passports may be withheld and they may be subjected to physical or psychological abuse.

In *Wei Tang* HREOC said that the definition of slavery in the Criminal Code should be interpreted consistently with international law on the meaning of slavery.

HREOC argued the international prohibition on all forms of slavery includes contemporary forms of slavery which are based on the exercise of **any or all** of the powers attaching to the right of ownership.

⁴ *The Queen v Wei Tang*, High Court Proceeding No M5 of 2008. See further [2008] HCATrans 180 (13 May 2008); [2008] HCATrans 181 (14 May 2008).

Our submissions drew on the international case law about contemporary forms of slavery where the Courts have focused **on the degree** of control that one person exercised over another.

These cases have identified the indicia of contemporary forms of slavery – including the restriction of freedom of movement, the denial of personal autonomy and the erosion of free choice through psychological control and abuse, deception and threats.

While successful prosecutions are important, the cycle of trafficking can not be broken without protecting the rights of trafficked persons and introducing effective strategies to prevent trafficking.

The Australian Government's National Action Plan to Eradicate Trafficking in Persons has four main elements: prevention; detection and investigation; criminal prosecution; and victim support and rehabilitation.

However, until recently victims rights and prevention strategies have taken a back seat to law enforcement. Trafficked persons have been treated as potential witnesses, instead of victims of human rights abuses.

To prevent trafficking we need to know more about why people might make migration decisions that result in their exploitation. We need to consider policies that assist people to make informed and

safe choices about migration; choices that do not result in exploitation.

To date, the vast majority of Australian trafficking cases have involved trafficking of women for exploitation in the sex industry. However, we know that cases of labour trafficking do exist and we need to broaden the singular – and often sensationalised - focus on trafficking for sexual servitude to look at all forms of trafficking.

We need to develop a better understanding of the gendered dimensions of trafficking and the extent to which **men** and women are vulnerable to being trafficked into a range of different industries.

This work is already underway. In 2007 the Australian Institute of Criminology was funded to conduct a four year research program into trends in human trafficking in the Asia Pacific. Researchers at the Monash University are also investigating these issues.

While more research is vital in order to understand and effectively prevent trafficking, there are some things we know already.

We know from NGOs that persons who have been trafficked **and** people who are vulnerable to exploitation need culturally appropriate information about their rights.

We know that some elements of Australia's current counter-trafficking framework need to be reformed.

The existing framework for providing visas and victim support to trafficking victims does not comply with the principle that the care and protection of trafficked persons must 'not be made conditional on the capacity or willingness of trafficked persons to cooperate in legal proceedings'.⁵

At the National Roundtable HREOC and NGOs signed a statement calling on the Government to reform the People Trafficking Visa Framework.

Currently, if a person is identified as a suspected victim of trafficking **and** that person is willing and able to assist police prosecution that person will be eligible for a Bridging Visa F for a maximum of 30 days.

This Bridging Visa is that person's access card to the intensive stage of the Victim Support Program administered by the Office for Women.

HREOC and NGOs agree that the Bridging Visa F and the Victim Support should be available for three months and should not be conditional on a person being willing and/or able to assist police investigations of prosecutions.

We also want to see reform to the Witness Protection visas that are currently available to trafficked persons who are assisting police investigations and prosecutions.

⁵ United Nations High Commissioner For Human Rights Principles and Guidelines on Human Rights and Trafficking, E/2002/68/Add.1 (2002), Principle 8.

At the moment there are two types of witness protection visas: temporary and permanent visas. The only difference between the two visas is that to be eligible for a permanent witness protection visa you must have held a temporary protection visa for at least two years.

Having done away with temporary protection visas, we believe we should do the same thing with the temporary witness protection visa. Instead, trafficking victims who have assisted police investigations and who would be in danger if they returned to their country of origin should be eligible for a permanent witness protection early in the investigation and prosecution process.

Law enforcement agencies have spoken about the challenges in gaining the trust of trafficking victims. By ensuring trafficked persons feel supported and secure about their long-term residence status we can help create an environment that engenders trust.

These reforms are about recognizing that we are dealing with victims of human rights abuses and that victim support should be available on the basis of need, not contingent on the ability to assist police.

I am delighted that Tanya Plibersek has indicated the Office for Women will investigate how we can better protect trafficked people who are unwilling or unable to assist police.

One of the many reasons access to the victim support program is so important is that it ensures trafficked persons can receive legal advice. One of the issues this legal advice should cover is compensation.

While criminal justice remedies for trafficking victims in Australia have improved, the possibility of obtaining **material** justice remains out of reach for many trafficking victims. Although 107 people have accessed the Victim Support Program, to my knowledge only one trafficking victim has received compensation and this was awarded under a state scheme on the basis of her status as a victim of sexual assault, not as a victim of trafficking.

The UN Trafficking Protocol requires Australia to ensure trafficking victims are offered the possibility for obtaining compensation. To make the possibility of obtaining compensation a reality trafficked persons must receive legal advice about the availability of compensation.

We also need to consider the need for new avenues for trafficked persons to obtain compensation. There is no federal victims of crime compensation fund and trafficking victims may face significant obstacles in seeking to access to state and territory compensation schemes. To date, prosecutors have not sought orders for reparations from convicted offenders.

There is a clear need for Australia's response to trafficking to pay more attention to the needs, experiences and rights of those who have been trafficked.

Things are changing. Like many others in this room, I left the National Roundtable with an extraordinary sense of optimism about the research that is occurring and the reforms – including the Minister Debus’ plans to introduce a charter of victims’ rights– that have been proposed to support and empower the victims of Commonwealth crime.

There is a great synergy between the reforms proposed by Minister Debus and the work NGOs are already doing.

Yesterday, I chaired the first meeting of a Working Group established by the National Roundtable to produce guidelines for NGOs working with trafficked persons.

These guidelines will deal with practical and ethical issues facing NGOs. The sorts of issues we are looking are:

- identifying appropriate referrals for trafficked person,
- providing guidance to NGOs who are served with a subpoena for information about their clients,
- protecting the confidentiality, safety and privacy of trafficked persons; and
- obtaining informed consent from trafficked persons to participate in media interviews.

The members of the Working Group include anti-trafficking NGOs and representatives from the Commonwealth Government.

The Working Group is, I believe, symbolic of a new collaborative approach to human trafficking; an approach where NGOs and

Government agencies pool their knowledge to create better outcomes for trafficked persons.

Finally I want to say what an enormous privilege to speak to an audience full of people who have devoted long (and often under funded) hours to putting the principles of a human rights approach to trafficking into practice. In particular, I would like congratulate Jennifer Burn and the Anti-Slavery Project for bringing everyone together to share their knowledge.

As Sex Discrimination Commissioner I am constantly reminded that while we can do our work alone, we are never as effective as when we work together. In that spirit, I hope you leave today with a clearer sense of the work that needs to be done **and** – most importantly - how we can support each other in doing it.