

# OBSTACLES ON THE ROAD TO PROTECTION: ASSESSING THE TREATMENT OF SEX-TRAFFICKING VICTIMS UNDER AUSTRALIA'S MIGRATION AND REFUGEE LAW

ANNA DOREVITCH\* AND MICHELLE FOSTER†

*[In recent years both the international community and the Australian Government have renewed efforts to address the problem of sex-trafficking. This reflects the growing recognition that effectively addressing the issue of trafficking requires more than a criminal law enforcement or immigration compliance approach; it also requires an acknowledgement of the human rights and protection needs of trafficking victims. From this perspective, the article critically examines Australia's response to the protection needs of persons trafficked to the country for the purposes of sexual enslavement in light of Australia's obligations under international law. The article first reviews recent amendments to the Migration Act 1958 (Cth) which provide some respite from mandatory detention and deportation to victims of trafficking who are willing and able to assist in the prosecution of sex-traffickers. While in some respects a positive development, this analysis reveals serious deficiencies in the regime. The article then considers the manner in which Australia has offered protection to trafficking victims pursuant to its existing obligations under the Convention relating to the Status of Refugees. The major part of the article is dedicated to an examination of the way in which Australian courts and tribunals have assessed refugee claims of trafficked women. While foreign jurisprudence and guidance from the United Nations High Commissioner for Refugees demonstrate that the Refugee Convention can clearly encompass trafficking-related claims, it will be argued that, in Australia, art 1A(2) continues to be interpreted and applied in a way that overlooks how gender intersects with social, cultural and economic norms to oppress women and subject them to discriminatory harm.]*

## CONTENTS

I	Introduction.....	2
II	Sex-Trafficking in the Australian Context.....	7
III	Protecting Trafficked Women in Australia pursuant to the <i>Trafficking Protocol</i> ....	9
IV	Protecting Trafficked Women as Refugees .....	15
	A    A Well-Founded Fear of 'Being Persecuted' .....	18
	1    Serious Harm.....	19
	2    Failure of State Protection.....	21
	B    Establishing that an Applicant is a Member of a Particular Social Group in Trafficking-Related Claims .....	28
	1    The Protected Characteristics Approach .....	29
	2    The Social Perception Approach.....	30
	C    The Nexus Requirement.....	36
	1    The Nature of the Causal Link .....	36
	2    The Standard of Causation .....	42
V	Conclusion.....	46

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\* BA, LLB (Hons) (Melbourne).

† BComm (Hons), LLB (UNSW); LLM, SJD (Michigan). Senior Lecturer and Director, Research Programme in International Refugee Law, Institute for International Law and the Humanities, Melbourne Law School. This author would like to thank participants at the Feminism and International Law Workshop, National Centre of Competence in Research on International Trade Regulation, University of Zurich, 23–24 June 2007 for helpful feedback on some of the key ideas in this paper. Both authors would also like to thank the two anonymous referees and the editors of the *Melbourne Journal of International Law* for their helpful suggestions and comments on this article.

Despite the fact that all human beings are born free and equal in human dignity, every day thousands of women and children are sold so that their bodies and their labour can be exploited ... In a perverse commercialization of humanity, they are used like products and then thrown away.<sup>2</sup>

## I INTRODUCTION

Slavery is an atrocity that shocks the conscience of humankind, yet in the form of human trafficking, it is rampant across the globe.<sup>3</sup> While the clandestine nature of this activity makes it impossible to state its magnitude with precision,<sup>4</sup> the United States Department of State conservatively estimates that about 800 000 persons are trafficked across international borders each year; half of these are children and 80 per cent are female.<sup>5</sup> The traffic in women and children for sexual exploitation is the most prevalent manifestation of this crime, accounting for the majority of all trafficking victims.<sup>6</sup> Although estimates of the precise number of women and children trafficked into Australia for the purposes of

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<sup>2</sup> Kofi Annan, Secretary-General of the UN (Address delivered to British Houses of Parliament, London, UK, 8 May 2007).

<sup>3</sup> Sex-trafficking is considered to be the third largest criminal enterprise, after the trade in drugs and arms: Kimberley L Thachuk, 'An Introduction to Transnational Threats' in Kimberley L Thachuk (ed), *Transnational Threats: Smuggling and Trafficking in Arms, Drugs, and Human Life* (2007) 3, 13.

<sup>4</sup> Various figures have been posited over the last decade ranging from half to four million individuals trafficked per annum: UN Educational, Scientific and Cultural Organization Trafficking Project, *Data Comparison Sheet #1: Worldwide Trafficking Estimates by Organizations* (data compiled September 2004) <[http://www.unescobkk.org/fileadmin/user\\_upload/culture/Trafficking/project/Graph\\_Worldwide\\_Sept\\_2004.pdf](http://www.unescobkk.org/fileadmin/user_upload/culture/Trafficking/project/Graph_Worldwide_Sept_2004.pdf)> at 23 May 2008.

<sup>5</sup> If *internal* trafficking is included, the figure is somewhere between two and four million. Although the International Labour Organization ('ILO') estimates that there are 12.3 million people in forced labour, bonded labour, forced child labour and sexual servitude at any given time, this number — according to other sources — could be as high as 27 million: US Department of State, *Trafficking in Persons Report* (Office to Monitor and Combat Trafficking in Persons Report, 12 June 2007) 8 <<http://www.state.gov/g/tip/rls/tiprpt/2007>> at 23 May 2008 ('2007 Report').

<sup>6</sup> *Ibid.* We wish to acknowledge that although boys and some men are also sex-trafficked, especially within South-East Asia, the explicit focus of this article is on women and girls who constitute the vast majority of sex-trafficking victims.

sexual exploitation vary widely,<sup>7</sup> a Parliamentary Joint Committee on the Australian Crime Commission concluded in 2004 that sex-trafficking into Australia is a ‘significant ... problem’ that needs to be taken seriously.<sup>8</sup>

Sex-trafficking is neither a new phenomenon nor an issue on which international law has historically been silent. Indeed, international law has long been concerned with the issue of slavery<sup>9</sup> and the specific phenomenon of sex-trafficking.<sup>10</sup> In addition to a range of relevant ILO conventions,<sup>11</sup> both the 1979 *Convention on the Elimination of All Forms of Discrimination against*

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<sup>7</sup> Australia’s first anti-trafficking non-governmental organisation, Project Respect, estimates that there are up to 1000 trafficked women in Australia working in debt bondage at any one time: Project Respect, *About Trafficking* <<http://www.projectrespect.org.au>> at 23 May 2008. On the other hand, Scarlet Alliance (an Australian sex workers’ association) has presented a much lower estimate, stating ‘that there are less than 400 sex workers entering Australia in any one year on a contract, the majority of whom knowingly consent to the work’: Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the Trafficking of Women for Sexual Servitude* (2004) 21. However, it should be noted that the notion that such women have necessarily provided meaningful consent is a contested one: see below n 31 and accompanying text. It should be noted that there are many difficulties in obtaining accurate figures. As the Parliamentary Joint Committee noted in its report, this is explained by a variety of factors including different and inconsistent definitions of trafficking; its clandestine and criminal nature; the reluctance of victims to report their experiences to authorities or to testify against the perpetrators; and resource and other constraints on the ability of fact-finding in the less developed world: at 19–20. See also Judy Putt, *Human Trafficking to Australia: A Research Challenge* (Trends and Issues in Crime and Criminal Justice No 338, June 2007) 1. Acknowledging these difficulties, the Australian Crime Commission began the People Trafficking for Sexual Exploitation (‘PTSE’) Special Intelligence Operation in December 2003 with the objective to ‘contribute to law enforcement and government understanding of issues relating to PTSE nationally’. The inquiry concluded on 30 September 2006 and is said to have

made important contributions to law enforcement’s understanding of the PTSE environment within Australia, particularly as it related to sources of trafficked persons, entry points for trafficked persons, forms of control over the trafficked person and emerging issues which may impact on persons while working in Australia.

Australian Crime Commission, *Annual Report 2006–07* (2007) 49 <[http://www.crimecommission.gov.au/html/pg\\_annual\\_rep\\_06-07.html](http://www.crimecommission.gov.au/html/pg_annual_rep_06-07.html)> at 23 May 2008.

<sup>8</sup> Parliamentary Joint Committee on the Australian Crime Commission, above n 7, 22.

<sup>9</sup> See, eg, *Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention*, opened for signature 25 September 1926, 60 LNTS 253 (entered into force 9 March 1927); *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, opened for signature 30 April 1956, 226 UNTS 3 (entered into force 30 April 1957).

<sup>10</sup> See, eg, Bernadette McSherry and Susan Kneebone, ‘Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights’ (2008) 12 *International Journal of Human Rights* 67, 69–70 citing the *International Agreement for the Suppression of White Slave Traffic*, signed 18 May 1904, 1 LNTS 83 (entered into force 18 July 1905), replaced by the *International Convention for the Suppression of the Traffic in Women of Full Age*, signed 11 October 1933, 150 LNTS 431 (entered into force 24 August 1934), in turn replaced by the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, opened for signature 21 March 1950, 96 UNTS 316 (entered into force 25 July 1951), with the aim of abolishing prostitution.

<sup>11</sup> See Ryszard Piotrowicz, ‘Victims of People Trafficking and Entitlement to International Protection’ (2005) 24 *Australian Yearbook of International Law* 159, 160.

*Women*<sup>12</sup> and the *Convention on the Rights of the Child*<sup>13</sup> (including its *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*)<sup>14</sup> impose obligations on states to take action against trafficking. Furthermore, the last decade has seen — at the international level — a renewed focus on addressing the causes and consequences of human trafficking conducted for the purposes of sexual exploitation.<sup>15</sup> In part, this is explained on the basis that

despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there [was] no universal instrument that address[ed] all aspects of trafficking in persons.<sup>16</sup>

Hence, in 2000, the United Nations General Assembly adopted the *Trafficking Protocol*, supplementing the *United Nations Convention against Transnational Organized Crime*.<sup>17</sup> Although the *Trafficking Protocol* has been criticised on the basis that it is attached to a convention concerned with crime,<sup>18</sup> and (unlike the

<sup>12</sup> Opened for signature 18 December 1979, 1249 UNTS 455 (entered into force 3 September 1981) (*‘CEDAW’*). Australia is a party to the *CEDAW* which, in art 6, requires ‘States Parties [to] take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women’.

<sup>13</sup> Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (*‘CRC’*). Australia is a party to the *CRC* which, in arts 34–6, requires states to protect children from all forms of sexual exploitation and abuse (art 34); take appropriate measures to prevent the sale of, or traffic in, children (art 35); and to protect children against all forms of exploitation (art 36).

<sup>14</sup> Opened for signature 25 May 2000, [2007] ATS 6 (entered into force 18 January 2002). Australia signed the Protocol on 18 December 2001 and ratified it on 8 January 2007: Office of the UN High Commissioner for Human Rights, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography New York, 25 May 2000* (2002) <[http://www2.ohchr.org/english/bodies/ratification/11\\_c.htm](http://www2.ohchr.org/english/bodies/ratification/11_c.htm)> at 23 May 2008.

<sup>15</sup> For a thought-provoking critique of the international community’s intense focus in this area see James C Hathaway, ‘The Human Rights Quagmire of “Human Trafficking”’ (2008) 49 *Virginia Journal of International Law* (forthcoming).

<sup>16</sup> *United Nations Convention against Transnational Organized Crime*, GA Res 55/25, UN GAOR, 55<sup>th</sup> sess, 62<sup>nd</sup> plen mtg, Annex II (*Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*), Agenda Item 105, preamble, UN Doc A/RES/55/25 (8 January 2001) (*‘Trafficking Protocol’*).

<sup>17</sup> *Ibid.* The *Trafficking Protocol* was opened for signature on 15 November 2000, entered into force on 25 December 2003 and currently has 117 signatories and 118 states parties: see UN Office on Drugs and Crime, *Signatories to the United Nations Convention against Transnational Crime and Its Protocols* (2008) <<http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>> at 23 May 2008.

<sup>18</sup> See Audrey Macklin, ‘At the Border of Rights: Migration, Sex Work, and Trafficking’ in Neve Gordon (ed), *From the Margins of Globalization: Critical Perspectives on Human Rights* (2004) 161, 186. Macklin argues that ‘[t]he Protocol’s status as an annex to a convention about transnational organized crime evinces the primacy of the state as victim of organized criminals’ assault on state sovereignty and security’; thus, the ‘victim status [of trafficked women] is subordinate to the victimization of the state by organized criminals’. She is critical of the fact that

[n]o serious discussion took place about the viability of addressing trafficking as an annex to the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1990), which might have signaled the recognition of trafficking (including for purposes of the sex trade) as a phenomenon associated with the conditions of labor migration under globalization. Nor did the option of addressing trafficking as the discrete subject of a human rights instrument attract widespread support: at 186.

provisions relating to law enforcement) its provisions relating to the protection of trafficking victims are not framed as mandatory obligations,<sup>19</sup> it is nonetheless ‘the single most important international legal instrument on trafficking’ whose ‘reach and influence’ has been said to be ‘astounding’.<sup>20</sup>

In Australia, the need for new strategies to address the problem of sex-trafficking was graphically highlighted in September 2001, when Thai sex-trafficking victim Puongtong Simaplee died as a result of health complications in Sydney’s Villawood Detention Centre 72 hours after being found by Australian immigration officials in a brothel, weighing only 37 kilograms.<sup>21</sup> Fourteen months later, Australia signed the *Trafficking Protocol* and in so doing committed to take specific steps to prevent and combat trafficking in persons, protect and assist victims, and promote international cooperation.<sup>22</sup> Australia has since ratified the *Trafficking Protocol*;<sup>23</sup> introduced a range of criminal offences relating to trafficking and debt bondage in the *Criminal Code Act 1995* (Cth);<sup>24</sup> taken steps to combat trafficking and cooperate with other states in the global initiative against trafficking;<sup>25</sup> and introduced a

<sup>19</sup> See *ibid* 186–7. See also Anne Gallagher, ‘Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments’ (2006) 8 *European Journal of Migration and Law* 163, 165.

<sup>20</sup> Gallagher, above n 19, 165. Furthermore,

[i]n the five short years since its adoption, the Protocol has become a common standard of achievement for all States seeking to deal with the crime and human rights violation that is trafficking. Its entry into force was amazingly rapid — particularly when compared to the pace at which most human rights treaties are ratified: at 165.

In terms of its impact, she notes that

[m]ost, if not all of the many national laws on trafficking developed since 2000 have taken the Protocol as their starting point and framework of reference. Subsequent international and regional agreements and treaties, including the European Convention, have used the Protocol in a similar way: at 165.

<sup>21</sup> Kathleen Maltzahn, ‘Paying for Servitude: Trafficking in Women for Prostitution’ (Speech delivered at the Women’s Electoral Lobby Pamela Denoon Lecture, Canberra, Australia, 4 March 2004). See also Jennifer Burn, Sam Blay and Frances Simmons, ‘Combating Human Trafficking: Australia’s Responses to Modern Day Slavery’ (2005) 79 *Australian Law Journal* 543, 544. The New South Wales Coroner found that Ms Simaplee ‘died from the direct cause of consequences of narcotic withdrawal with an antecedent cause being malnutrition and early acute pneumonia’: Commonwealth, *Parliamentary Debates*, Senate, 16 June 2003, 11 541 (Christopher Ellison, Minister for Justice and Customs).

<sup>22</sup> *Trafficking Protocol*, above n 16, art 2(a).

<sup>23</sup> Australia ratified the *Trafficking Protocol* on 14 September 2005: UN Office on Drugs and Crime, *Signatories to the Convention against Transnational Organized Crime Trafficking Protocol* (2007) <[http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-trafficking\\_protocol.html](http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-trafficking_protocol.html)> at 23 May 2008.

<sup>24</sup> Division 271 (Trafficking in Persons and Debt Bondage). Note that prior to the introduction of these offences, traffickers were tried under div 270 (Slavery, Sexual Servitude and Deceptive Recruiting) of the same Act. For a critical analysis of the Criminal Code provisions, see Bernadette McSherry, ‘Trafficking in Persons: A Critical Analysis of the New Criminal Code Offences’ (2007) 18 *Current Issues in Criminal Justice* 385.

<sup>25</sup> Australia has taken particularly significant steps towards cooperating with countries in the Mekong Delta: Susan Kneebone, (Speech delivered at the Research in Trafficking of Persons Public Lecture, Monash University Law Chambers, Melbourne, Australia, 20 August 2007). See also McSherry and Kneebone, above n 10, 82, where they note that ‘[t]he Australian government gives aid money to different programmes in Southeast Asia to “combat trafficking”’.

range of measures designed to provide protection and support for the victims of trafficking.<sup>26</sup>

While it is acknowledged that addressing the phenomenon of sex-trafficking requires a diverse range of strategies for prevention, investigation and punishment, this article focuses on the protection afforded to trafficking victims under Australia's migration and refugee law in light of its international obligations. The focus on protection reflects increasing international acceptance that sex-trafficking must be understood as a human rights issue, rather than solely as a criminal law or immigration compliance issue.<sup>27</sup> Accordingly, this article explores and critiques the degree to which a human rights approach is being implemented in Australia's protection of sex-trafficking victims.

This article is organised as follows. Part II sets out the definition of trafficking and explains how women and children are trafficked into Australia. Part III examines Australia's implementation of its obligations under the *Trafficking Protocol* through the trafficking witness protection scheme introduced in 2004. It also highlights the shortcomings in the scheme's design and implementation, and illustrates how, in practice, it may paradoxically endanger those most in need of protection. In Part IV, we turn to the major issue of this article, Australia's protection obligations under the *Convention relating to the Status of Refugees*,<sup>28</sup> and examine this as an alternative avenue of protection for victims of sex-trafficking. Although the UN High Commissioner for Refugees ('UNHCR') has encouraged states to ensure their refugee systems are responsive to gender-related claims, in Australia it remains difficult for trafficked women to qualify as refugees. This part focuses on the aspects of the definition of a refugee that have proven most problematic in trafficking-related claims — the requisite link between persecution and the state, the construction of a particular social group, and the vital nexus between an applicant's membership of that group and the persecution she fears. It is our contention that, ultimately, the definition of 'refugee', properly interpreted, is broad enough to encompass many of these claims and that, in lieu of an alternative effective protection scheme for the victims of trafficking, the refugee regime presents a viable method of protection for victims of sex-trafficking in Australia.

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<sup>26</sup> Discussed below in Part III. For an overview of Australia's response to the issue of trafficking, see Burn, Blay and Simmons, above n 21, 543, 545–9.

<sup>27</sup> This is reflected in art 2(b) of the *Trafficking Protocol*, above n 16, which states that one of the Protocol's purposes is '[t]o protect and assist the victims of such trafficking, with full respect for their human rights'. In addition, the UN High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the High Commissioner for Human Rights to the Economic and Social Council*, UN Doc E/2002/68/Add.1 (20 May 2002) states that '[t]he 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': at 3. Even the Parliamentary Joint Committee recognised that '[a] focus on immigration compliance runs the risk that cases of sexual slavery will be missed, with the tragic results that became public in 2003': Parliamentary Joint Committee on the Australian Crime Commission, above n 7, 22. See generally McSherry and Kneebone, above n 10.

<sup>28</sup> Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('*Refugee Convention*'). The *Refugee Convention* has been supplemented by the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1966, 606 UNTS 267 (entered into force 4 October 1967) ('*Refugee Protocol*').

## II SEX-TRAFFICKING IN THE AUSTRALIAN CONTEXT

Before examining Australia's response to the problem of sex-trafficking, it is important to consider the definition of 'trafficking'. The most widely accepted definition is contained in the *Trafficking Protocol*, which defines trafficking as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of 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>29</sup>

This acknowledges that trafficking is an ongoing, exploitative process that can encompass forms of forced labour beyond sexual enslavement.<sup>30</sup> For present purposes, it is important to note that the *Trafficking Protocol* recognises that nobody can 'consent' to being trafficked for exploitation.<sup>31</sup> Article 3(b) stipulates that where a trafficker uses any of the improper means set out in the definition to recruit, transport, transfer, harbour or receive a person, any consent which that person may have expressed is rendered irrelevant.<sup>32</sup> The definition also provides that a child under 18 years of age cannot give valid consent, and that any of those acts done to a child for the purpose of exploitation will constitute trafficking, irrespective of whether improper means are used.<sup>33</sup> This underlines the fact that a woman's knowledge or willingness to participate in some form of sex work in a destination country prior to travel does not necessarily negate her status as a victim of trafficking at international law.<sup>34</sup>

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<sup>29</sup> *Trafficking Protocol*, above n 16, art 3(a).

<sup>30</sup> This article focuses only on sex-trafficking, as it is beyond the scope of this paper to examine other forms of trafficking in Australia. However, it is acknowledged that while there is insufficient research into other forms of trafficking, this 'reflects a lack of research and awareness about the broader issue of human trafficking in Australia' (Burn, Blay and Simmons, above n 21, 543) rather than the absence of a problem.

<sup>31</sup> Hence, this article does not address the question whether consensual paid sex work is, or should be, legitimate. Some feminist scholars argue that the Protocol is wrong to regard the consent of the woman as irrelevant: see, eg, Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (2005) 100. For further background on the controversy surrounding the formulation of this definition, particularly as regards the issue of consent, see McSherry and Kneebone, above n 10, 70–3.

<sup>32</sup> *Trafficking Protocol*, above n 16, art 3(b).

<sup>33</sup> *Ibid* art 3(c).

<sup>34</sup> This definition of trafficking encapsulates the distinction between smuggling and trafficking; the concept of smuggling denotes a finite process whereby the smuggler merely effects entry of a person into a country, and thereafter is not involved with the smuggled migrants. Article 3(a) of the *United Nations Convention against Transnational Organized Crime*, GA Res 55/25, UN GAOR, 55<sup>th</sup> sess, 62<sup>nd</sup> plen mtg, Annex III (*Protocol against the Smuggling of Migrants by Land, Sea and Air*), Agenda Item 105, UN Doc A/RES/55/25 (8 January 2001) (*'Smuggling Protocol'*) defines the 'smuggling of migrants' as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'. This definition implies that smuggling is a consensual process and is not necessarily exploitative. Although, of course, as McSherry and Kneebone point out, '[i]n practice, the lines between smuggling and trafficking are sometimes blurred': above n 10, 68. For a critical analysis of the motivation behind and impact of the *Smuggling Protocol*, see Hathaway, 'The Human Rights Quagmire of "Human Trafficking"', above n 15.

Australia's proximity to Asia has made it a destination country for women trafficked for sexual exploitation from Indonesia, Malaysia, Thailand, Vietnam, China, Hong Kong, Taiwan and the Philippines,<sup>35</sup> as well as South Korea<sup>36</sup> and Burma.<sup>37</sup> While current evidence suggests that most victims are young women, there is also evidence that a number of children are trafficked into Australia for the purposes of debt-bonded prostitution.<sup>38</sup> It is not surprising that the main countries of origin of sex-trafficking victims are developing countries where women and girls are often socially, politically, economically and culturally marginalised. Their subordination and lack of education and employment opportunities make them particularly susceptible to sex-traffickers, who exploit their adverse situations and lure them into sexual servitude. Although victims may be drugged, kidnapped and sold to traffickers, they are more commonly deceived into accepting bogus marriage arrangements or false job contracts promising legitimate and well-paid work.<sup>39</sup> Sometimes, particularly in the case of children, these offers are presented to victims' relatives who 'sell' them to traffickers.<sup>40</sup> While some women and girls who are trafficked into Australia are falsely led to believe they will be working in tourism, hospitality or entertainment, many are aware they will be working in prostitution, but are deceived as to the actual conditions of sexual slavery.<sup>41</sup> Often, these women are told that they will work in karaoke bars with few prostitution clients and the freedom to choose whom they service.<sup>42</sup> In either case, women are likely to be deceived as to the size of the debt incurred for entry and transportation, or the

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<sup>35</sup> UN Office on Drugs and Crime, *Human Trafficking — Regional Profile* (2003) <<http://www.unodc.un.or.th/material/document/RegionalProfile.pdf>> at 23 May 2008.

<sup>36</sup> US Department of State, *2007 Report*, above n 5, 57.

<sup>37</sup> Lara Fergus, *Trafficking in Women for Sexual Exploitation* (Australian Centre for the Study of Sexual Assault Briefing No 5, June 2005) 15. Women have also been trafficked into Australia from Latin America and Eastern and South Eastern Europe: Project Respect, above n 7. The US Department of State notes that Australia is a destination country for some women from Eastern Europe trafficked for the purpose of commercial sexual exploitation: *ibid.* However, it is possible that women from these regions will have been trafficked abroad and then fled to Australia in search of protection: see, eg, Refugee Review Tribunal of Australia ('RRT') *Case No V03/16442* [2004] RRTA 474 (25 June 2004). It should be noted that there are no pinpoint references available for RRT decisions, as they are only published online.

<sup>38</sup> The 2006 report on Australia by End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes ('ECPAT') reports that 'the Australian Centre for the Study of Sexual Assault has noted that a number of children are also trafficked into sexual exploitation for debt-bonded prostitution': ECPAT, *Global Monitoring Report on the Status of Action against Commercial Sexual Exploitation of Children* (ECPAT International Report, 2006) 13 <[http://www.ecpat.net/eng/A4A\\_2005/PDF/EAP/Global\\_Monitoring\\_Report-AUSTRALIA.pdf](http://www.ecpat.net/eng/A4A_2005/PDF/EAP/Global_Monitoring_Report-AUSTRALIA.pdf)> at 23 May 2008. However, there do not appear to be specific programs in Australia 'to identify unaccompanied and separated children at point of entry into the country', nor any programs that 'involve the targeting of brothels or other workplaces where abuse of children is likely to occur': Mary Crock, *Seeking Asylum Alone — Australia: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children* (2006) 45. It is therefore difficult to know the full extent of the problem of the trafficking of children into Australia for the purposes of sexual exploitation.

<sup>39</sup> See, eg, *Case No N02/42226* [2003] RRTA 615 (30 June 2003); *Case No N98/24000* [2000] RRTA 33 (13 January 2000).

<sup>40</sup> See US Department of State, *2007 Report*, above n 5, 8.

<sup>41</sup> *Ibid.*

<sup>42</sup> Maltzahn, above n 21.



number of 'jobs' that will be required to pay it off.<sup>43</sup> It is not unknown for women trafficked into Australia to be forced to repay debts of AU\$40 000.<sup>44</sup>

Trafficked women normally only learn they are in a situation of debt-bondage on arrival, when they are taken to a brothel or apartment, locked in or kept under guard, and deprived of their travel and identification documents.<sup>45</sup> During a brutal 'breaking in' period, their objections may be met with threats against them and their families, and severe forms of violence, such as multiple rapes and beatings that are intended to subjugate them and impress upon them the sexual acts they can expect to perform and endure, including violent and unprotected sex.<sup>46</sup>

By the time sex-trafficking victims come to the attention of the Australian Department of Immigration and Citizenship<sup>47</sup> they are frequently found to be in Australia unlawfully, having either arrived using false passports or documentation, or overstayed valid tourist or student visas arranged for them by their traffickers.<sup>48</sup> Hence, unless the women are able to apply for one of the specific visas discussed in Part III, or for refugee protection, they are likely to be taken into immigration detention and eventually deported to their country of origin without regard for their safety or protection needs.<sup>49</sup>

### III PROTECTING TRAFFICKED WOMEN IN AUSTRALIA PURSUANT TO THE *TRAFFICKING PROTOCOL*

The *Trafficking Protocol* obliges Australia to take steps to protect the privacy and identity of victims in criminal proceedings against traffickers, and to consider implementing measures for their physical, psychological and social recovery, including ensuring the possibility of obtaining compensation for harm suffered.<sup>50</sup> Importantly, all states party to the Protocol must also 'consider adopting legislative or other appropriate measures' to permit trafficking victims to 'remain in [their] territory, temporarily or permanently',<sup>51</sup> having regard to

<sup>43</sup> Project Respect, above n 7.

<sup>44</sup> Parliamentary Joint Committee on the Australian Crime Commission, above n 7, viii.

<sup>45</sup> See, eg, US Department of State, *2007 Report*, above n 5, 9, 14.

<sup>46</sup> Project Respect, above n 7.

<sup>47</sup> The Department administering Australia's migration laws has undergone a number of name changes in recent years. It was named the Department of Immigration and Multicultural and Indigenous Affairs ('DIMIA') from 2001 to 2006; the Department of Immigration and Multicultural Affairs ('DIMA') at the beginning of 2006; and was most recently renamed the Department of Immigration and Citizenship ('DIAC') on 30 January 2007.

<sup>48</sup> It is not uncommon for traffickers to lodge bogus protection visa applications for their victims without their knowledge or consent, taking advantage of the lengthy review process to secure a longer period of exploitation: Project Respect, above n 7. Although it is not within the scope of this article to discuss this problem, it is vital to ensure that these fraudulent applications, which are used by traffickers as an instrument of persecution, are not used by DIAC, or the RRT, to support an adverse credibility finding. To do so would ignore the critical function of deception in the persecution of trafficked women and unfairly prejudice their claims.

<sup>49</sup> This was recognised by the Parliamentary Joint Committee on the Australian Crime Commission, above n 7, 55, where it was noted that, according to a DIMIA submission, 'in 2002–2003, 257 people were detected working illegally in the sex industry, and it is probable that the majority of these were detained, if only briefly, and deported' (citation omitted).

<sup>50</sup> *Trafficking Protocol*, above n 16, art 6.

<sup>51</sup> *Ibid* art 7(1).

'humanitarian and compassionate factors'.<sup>52</sup> Further, art 8 provides that when a state party returns a victim of trafficking to their state of origin, 'such return shall be with due regard for the safety of that person'. However, it should be noted that Australia's obligations in this regard may be compromised by its declaration upon signature (confirmed upon ratification) that 'nothing in the Protocol shall be seen to be imposing obligations on Australia to admit or retain within its borders persons in respect of whom Australia would not otherwise have an obligation to admit or retain within its borders'.<sup>53</sup>

In October 2003, the Australian Government launched a four year AU\$20 million project to address the problem of human trafficking.<sup>54</sup> This project included the introduction of a new visa arrangement to allow persons who assist in the investigation or prosecution of trafficking offenders to remain lawfully in Australia.<sup>55</sup> Whereas the previous policy of detaining and deporting trafficking victims under the mandatory detention provisions of the *Migration Act 1958* (Cth) ('*Migration Act*') had led to the loss of vital evidence for the prosecution of trafficking offences,<sup>56</sup> the new visa package was principally designed to facilitate greater victim cooperation in investigations and prosecutions of alleged offenders. Effective since 1 January 2004, the new framework consists of four types of visa: a new Bridging Visa F (Subclass 060) ('BVF');<sup>57</sup> the existing Criminal Justice Stay Visa ('CJSV');<sup>58</sup> a Temporary Witness Protection (Trafficking) Visa ('TWPTV');<sup>59</sup> and a Permanent Witness Protection (Trafficking) Visa ('PWPTV').<sup>60</sup>

Although the introduction of this visa scheme can be seen as a positive development in that it provides some basis upon which victims of sex-trafficking might remain in Australia, it is still gravely deficient in providing protection to the victims of trafficking because its application is confined to those who are useful to the criminal justice system. Under the current regime, a BVF is granted to 'persons of interest' to the police in relation to an alleged offence involving people trafficking,<sup>61</sup> sexual servitude or deceptive recruiting.<sup>62</sup> This normally

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<sup>52</sup> Ibid art 7(2) (emphasis added).

<sup>53</sup> UN Office on Drugs and Crime, *Signatories to the Trafficking Protocol*, above n 23. This appears to meet the definition of 'reservation' at international law: art 2(d) of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*VCLT*'). However, it could be contentious if the reservation is incompatible with the object and purpose of the treaty: see *VCLT*, art 19.

<sup>54</sup> For a description of the full range of measures, see Burn, Blay and Simmons, above n 21, 545. See also Office for Women, Department of Families, Housing, Community Services and Indigenous Affairs, 'Trafficking Victim Support Contract Awarded', *Women's News* (Canberra, Australia) Winter 2004, available from <<http://ofw.facs.gov.au/publications/womensnews>> at 23 May 2008.

<sup>55</sup> *Migration Amendment Regulations (No 11) 2003* (Cth) sch 8 (Amendments relating to Witness Protection Visas), amending *Migration Regulations 1994* (Cth).

<sup>56</sup> At this time, traffickers could only be prosecuted under the sexual servitude offences of the *Criminal Code Act 1995* (Cth) div 270.

<sup>57</sup> *Migration Regulations 1994* (Cth) sch 2, subclass 060 (Bridging F).

<sup>58</sup> *Migration Act 1958* (Cth) pt 2, div 4 (Criminal Justice Visitors).

<sup>59</sup> Class UM, subclass 787: *Migration Regulations 1994* (Cth) reg 2.07AJ.

<sup>60</sup> Class DH, subclass 852: *Migration Regulations 1994* (Cth) reg 2.07AK. See generally Burn, Blay and Simmons, above n 21, 549.

<sup>61</sup> See *Criminal Code Act 1995* (Cth) div 271 for the various trafficking in persons and debt bondage offences. See *Migration Regulations 1994* (Cth) sch 2, subclass 060 (Bridging F) for the criteria to be satisfied for the granting of a BVF.

occurs after an officer of the DIAC has recognised a woman as a potential trafficking victim and referred her to the Australian Federal Police.<sup>63</sup> The BVF, which is valid for a maximum of 30 days, is designed to give the police time to assess whether the woman could be of assistance in a criminal investigation or prosecution of a trafficking offender and whether she is willing to participate.<sup>64</sup> BVF holders who have been identified as potential trafficking victims have access to victim support administered by Southern Edge Training Pty Ltd, under its contract with the Office for Women.<sup>65</sup> The support includes temporary accommodation, as well as access to Medicare, medical and legal services, training and social support.<sup>66</sup> While this comprehensive package appears to meet Australia's victim assistance obligations under art 6(2) of the *Trafficking Protocol*, it is undermined by the fact that the Minister may terminate a BVF at any stage if advised by the police that the victim is no longer a 'person of interest'.<sup>67</sup>

If a victim's continued presence in Australia is necessary for the administration of criminal justice and she agrees to cooperate with authorities (which, in practice, means making herself available to testify)<sup>68</sup> she will be granted a CJSV.<sup>69</sup> However, CJSV holders may remain in Australia only for the period during which they are 'required for law enforcement purposes'.<sup>70</sup> Further, a CJSV holder who participates in a criminal prosecution has no guarantee of longer-term protection via a TWPTV. In fact, she will not even be given the chance to apply for one; unlike other visas, the TWPTV is not subject to an application process, but is 'offered' to CJSV holders at the government's discretion.<sup>71</sup> Among other criteria, this offer is contingent upon the

<sup>62</sup> For the slavery, sexual servitude and deceptive recruiting offences, see *Criminal Code Act 1995* (Cth) div 270. See *Migration Regulations 1994* (Cth) sch 2, subclass 060 (Bridging F) for the criteria to be satisfied for the granting of a BVF.

<sup>63</sup> This is pursuant to agreed protocols in the Service Agreement between the Australian Federal Police and the Department. 'If the [Australian Federal Police] advise that a matter would be dealt with more effectively under State or Territory legislation', the Department must refer the information to the relevant State or Territory police: DIMA, *Migration Series Instruction 391: People Trafficking* (13 February 2004) [391.2.3.5], [391.2.3.6].

<sup>64</sup> See generally *Migration Regulations 1994* (Cth) sch 2, subclass 060 (Bridging F).

<sup>65</sup> Office for Women, above n 54.

<sup>66</sup> Although BVF holders are not eligible for social security payments, 'hotel accommodation is provided as well as a \$500 emergency allowance, a food allowance of \$80 per week and a living allowance of \$80 per week': Commonwealth, *Parliamentary Debates*, House of Representatives, 14 March 2005, 16 (Malcolm Turnbull).

<sup>67</sup> *Migration Regulations 1994* (Cth) sch 2, cl 060.511(3).

<sup>68</sup> US Department of State, *Trafficking in Persons Report* (Office to Monitor and Combat Trafficking in Persons Report, 5 June 2006) 63 <<http://www.state.gov/g/tip/rls/tiprpt/2006>> at 23 May 2008.

<sup>69</sup> A woman will first be issued a criminal justice stay certificate by the Attorney-General (or an authorised official for a state), which will lead to the DIAC granting her a CJSV: *Migration Act 1958* (Cth) ss 147–8.

<sup>70</sup> Jennifer Burn and Frances Simmons, 'Trafficking and Slavery in Australia: An Evaluation of Victim Support Strategies' (2006) 15 *Asian and Pacific Migration Journal* 553, 561.

<sup>71</sup> Schedule 1, item 1224AA (Witness Protection (Trafficking) (Temporary) (Class UM)) of the *Migration Regulations 1994* (Cth) stipulates that there is no application form for this class of visa. Under reg 2.07AJ(3), the requirements for eligibility include: '(g) an offer of temporary stay in Australia is made to the person by an authorised officer'; and that '(h) the person indicates, in writing, to an officer that he or she accepts the Australian Government's offer of a temporary stay in Australia'.

Attorney-General's certification that the victim 'made a significant contribution to, and cooperated closely with', the prosecution or investigation of an alleged trafficking offender *and* upon the Immigration Minister's satisfaction that she would be in danger if she returned to her home country.<sup>72</sup> Although the regulations specify that the Attorney-General may certify that a person has made a significant contribution to a prosecution irrespective of whether the alleged offender was convicted, women have reportedly been removed from the CJSV program with very little notice because the evidence they gave was deemed insufficient for a successful prosecution.<sup>73</sup> Indeed, in the absence of a transparent application process, it is impossible to know what information, if any, guides the evaluation of a 'significant contribution' and 'close cooperation' or what informs the Minister's assessment of a victim's danger. These matters are entirely discretionary. Moreover, as Burn and Simmons point out, the requirements are also 'unduly onerous' since '[a]ny trafficking victim who undertakes to assist police in [any way] ... is undertaking a psychologically difficult and potentially dangerous task'.<sup>74</sup> This is especially so given the threats of violence and reprisals to which victims may be subjected during the trafficking ordeal.<sup>75</sup> If a victim's traffickers belong to an organised criminal network, these threats may be very real and her cooperation may seriously endanger her life and the lives of her relatives.<sup>76</sup>

On the available evidence, it is questionable whether this Ministerial discretion has to date been exercised with a sufficient degree of concern for the long-term safety of trafficked women or with compassion for their predicament. Since the inception of the new visa scheme, 85 suspected victims have been granted BVFs and 52 people have been granted CJSVs.<sup>77</sup> The fact that only 15 victims have been issued with TWPTVs<sup>78</sup> suggests that a considerable number may well have been returned to their countries despite having risked their lives to assist with the enforcement of Australian law.<sup>79</sup> Moreover, since there is no application process for a TWPTV, the removal of such persons under s 198 of the *Migration Act* after their CJSV has been cancelled is not subject to

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<sup>72</sup> *Migration Regulations 1994* (Cth) reg 2.07AJ(3)(c), (f).

<sup>73</sup> Natalie O'Brien and Elisabeth Wynhausen, 'Use and Abuse', *The Australian* (Sydney, Australia) 12 January 2005, 11. See also Burn and Simmons, above n 70, 564.

<sup>74</sup> Burn and Simmons, above n 70, 564, 565.

<sup>75</sup> For example, in May 2004, a couple who had trafficked Korean sex workers into Sydney had their charges dropped because the rescued women refused to testify after their families received death threats: O'Brien and Wynhausen, above n 73.

<sup>76</sup> See Office of the UNHCR, *Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, Doc HCR/GIP/06/07 (7 April 2006) [18] ('UNHCR Trafficking Guidelines').

<sup>77</sup> Personal communication with DIAC, 20 May 2008 (section responsible for trafficking in persons issues, including the visa framework, policy development and training).

<sup>78</sup> Sharon Watts, DIAC (Speech delivered at Human Trafficking Discussion Forum: The Reality in Australia, Monash University Law Chambers, Melbourne, Australia, 12 December 2007). This public conference was hosted by the Castan Centre for Human Rights Law and the Young Lawyer's Section of the Law Institute of Victoria. This figure was subsequently verified: *ibid*.

<sup>79</sup> The authors concede that there may be a reasonable basis for some discrepancy in the number of CJSV holders and the number of victims ultimately granted a TWPTV. For example, some CJSV holders may not wish to remain in Australia at the completion of the relevant criminal proceedings. However, such a large discrepancy is cause for concern.

administrative or judicial review.<sup>80</sup> The entire arrangement as it currently stands is therefore fraught with insecurity for trafficking victims. Rather than protecting victims and allaying their fears of reprisal, the Australian Government is paradoxically emulating a tactic of traffickers by enticing women to cooperate, using the women for their own ends and abandoning them once their services are spent. It is unacceptable that women who pursue this path of protection on the encouragement of the DIAC may then be returned to their countries of origin, potentially in greater danger than before.<sup>81</sup>

This analysis suggests that while the new visa regime has provided protection to some victims of sex-trafficking in Australia, there are serious deficiencies with the scheme. These deficiencies call into question the extent to which Australia is fulfilling the purpose of the *Trafficking Protocol* to 'protect and assist the victims of such trafficking, with full respect for their human rights'.<sup>82</sup> In addition, as Burn, Blay and Simmons highlight, Australia's approach to this issue 'lags behind international best practice'.<sup>83</sup> They also point out that it is contrary to 'soft law' in this area; notably the UN *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, which state that 'protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings'.<sup>84</sup>

In the context of the very limited specific protection options currently available for trafficking victims in Australian law, the international refugee regime presents a compelling alternative avenue for victim protection, particularly for women who are abandoned by the witness protection scheme or

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<sup>80</sup> For a compelling report on how this aspect of the visa regime is failing victims, see Burn and Simmons, above n 70.

<sup>81</sup> See *UNHCR Trafficking Guidelines*, above n 76, [17]. Indeed, it is such concerns that led the Parliamentary Joint Committee on the Australian Crime Commission, above n 7, 57, to recommend that 'all trafficked women accepted onto the victim support program or receiving the Criminal Justice Stay Visa [should] be exempt from compulsory return to their country of origin': Recommendation 8. The Committee explained that this recommendation was based on the concern that there is a group of women 'who, once they have assisted Australian prosecutions, are in danger of retribution from traffickers should they be returned home'. The Committee therefore 'strongly believes that once a trafficked woman has agreed to assist Australian authorities, she should not be returned to her home country against her will'. For a detailed discussion of how the operation and administration of this visa package ought to be reformed to ensure trafficking victims are afforded meaningful protection, see Burn and Simmons, above n 70, 563–7.

<sup>82</sup> Article 2(b). It is difficult to argue that Australia is in violation of direct legal obligations under the Protocol because it could be argued that the Protocol does not impose sufficiently specific obligations on states. See, eg, Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975, 990–3. Moreover, as noted above, Australia issued a Declaration which has the likely effect of limiting its obligations with respect to the deportation of trafficking victims: see UN Office on Drugs and Crime, *Signatories to the Trafficking Protocol*, above n 53, and accompanying text.

<sup>83</sup> Burn, Blay and Simmons, above n 21, 551, discussing the US and Italy. It is also interesting to note that the *Council of Europe Convention on Action against Trafficking in Human Beings*, opened for signature 16 May 2005, CETS 197 (entered into force 1 February 2008) ('*Council of Europe Trafficking Convention*') requires states parties to provide a 'recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim': art 13(1). In addition, art 14(1) requires each state party to 'issue a renewable residence permit to victims' where (inter alia) 'the competent authority considers that their stay is necessary owing to their personal situation'.

<sup>84</sup> UN High Commissioner for Human Rights, above n 27, 3. See Burn, Blay and Simmons, above n 21, 551.

who are not able or are too frightened to use this insecure system.<sup>85</sup> Not only does the *Refugee Convention* offer the most immediate and essential remedy for many trafficking victims — the right not to be returned to their home state — it also provides a regime of rights and entitlements, particularly vital socio-economic rights, for refugees within the jurisdiction of a state party to the Convention.<sup>86</sup> The appropriateness of reliance on the *Refugee Convention* in this context is anticipated by art 14 of the *Trafficking Protocol*, which states that

[n]othing in [this] Protocol shall affect the rights, obligations and responsibilities of States and individuals under ... international human rights law and, in particular, where applicable, the [Refugee Convention] and the principles of non-refoulement as contained therein.<sup>87</sup>

Indeed, the relevance of international refugee law in the trafficking context has been explicitly recognised by the UNHCR in the 2006 *UNHCR Trafficking Guidelines*<sup>88</sup> as well as in the 2007 *Executive Committee Conclusion on Children at Risk*, which calls on all state parties to ‘consider an age and gender-sensitive application of the 1951 Convention through the recognition of child-specific manifestations and forms of persecution, including ... trafficking’.<sup>89</sup> It is worth noting that, as a member of the UNHCR Executive Committee, Australia joined the consensus of the Committee in passing this Conclusion.

Finally, other international human rights treaty bodies have recognised the importance of international refugee law in this area. The Committee on the Rights of the Child has noted that

[s]ome trafficked children may be eligible for refugee status under the 1951 Convention, and States should ensure that separated and unaccompanied trafficked children who wish to seek asylum ... have access to asylum procedures.<sup>90</sup>

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<sup>85</sup> The only other option for women who are not protected under the criminal justice stay visas is application to the Minister to exercise discretion for them to remain on humanitarian grounds pursuant to s 417 of the *Migration Act 1958* (Cth); however, this is a non-compellable and non-reviewable discretion.

<sup>86</sup> See, eg, *Refugee Convention*, above n 28, arts 17–19, 21, 22, 24.

<sup>87</sup> (Emphasis added). In light of this and other recommendations — see, eg, UNHCR, *Agenda for Protection*, UN Doc A/AC.96/965/Add.1 (26 June 2002) 48 — Australia’s declaration upon signing the *Trafficking Protocol* that nothing in it shall be seen to be imposing obligations on Australia to admit or retain within its borders persons in respect of whom it would not otherwise have an obligation to admit or retain, does not in any way limit the ability of victims to invoke Australia’s protection obligations under the *Refugee Convention*. We note that the *Council of Europe Trafficking Convention*, above n 83, has a similar saving clause: see art 14(5).

<sup>88</sup> Above n 76.

<sup>89</sup> Executive Committee of the High Commissioner’s Programme, *Report of the Fifty-Eighth Session of the Executive Committee of the High Commissioner’s Programme*, UN Doc A/AC.96/1048 (10 October 2007) pt III(A)(g)(viii). It is fascinating also to note that in 2007 there was a proposal to pass an Executive Committee Conclusion on Trafficking: UNHCR Division of International Protection Services, *Proposals for an Executive Committee Conclusion on the Protection of Victims of Trafficking Seeking Asylum* (Informal Consultative Meeting, 16 January 2007) (copy on file with authors). It is not clear why this attempt failed.

<sup>90</sup> Committee on the Rights of the Child, *General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, UN Doc CRC/GC/2005/6 (1 September 2005) [53].

In addition, in its most recent concluding comments on Australia's compliance with the *CEDAW*, the Committee on the Elimination of Discrimination against Women urged Australia 'to consider the extension of temporary protection visas and reintegration and support services to all victims of trafficking, including those who are unable or unwilling to cooperate in the investigation and prosecution of traffickers'.<sup>91</sup> Applying refugee law to trafficked women would enable such an extension. Therefore, the remainder of this article explores the question of whether the victims of sex-trafficking may qualify for refugee status by critically examining the way in which Australian courts and tribunals have dealt, thus far, with the claims for refugee status of trafficked women.

#### IV PROTECTING TRAFFICKED WOMEN AS REFUGEES

Australia's obligations under the *Refugee Convention* have been incorporated into domestic law by s 36(2)(a) of the *Migration Act*, which provides that an applicant for a protection visa must be 'a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol'. Article 1A(2) of the *Refugee Convention* defines a refugee as any person who,

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it.<sup>92</sup>

Before analysing whether trafficking victims can satisfy this definition, a preliminary issue exists in Australia as to whether trafficked women and children are even aware of this option for protection. DIAC officers are not statutorily required to inform unlawful non-citizens of their right to apply for refugee protection,<sup>93</sup> and the *Migration Series Instruction 391: People Trafficking* makes no mention whatsoever of this legal option.<sup>94</sup> Considering DIAC officers have (at least) constructive knowledge of the possible danger faced by sex-trafficking victims upon return to their countries of origin,<sup>95</sup> 'screening out' such women from refugee determination could entail a breach by Australia of its cardinal obligation under art 33 of the *Refugee Convention* to ensure that nobody is expelled or forcibly returned to a country where his or her life and freedom

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<sup>91</sup> *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Australia*, UN Doc CEDAW/C/AUL/CO/5 (3 February 2006) [21].

<sup>92</sup> The temporal limitations of art 1A(1) and (2) have been intentionally excluded from the definition to reflect the application of the *Refugee Protocol*, above n 28, which relevantly omitted the words '[a]s a result of events occurring before 1 January 1951'.

<sup>93</sup> See, in particular, *Migration Act 1958* (Cth) s 193 (Application of Law to Certain Non-Citizens while They Remain in Immigration Detention) and s 256 (Person in Immigration Detention May Have Access to Certain Advice, Facilities, Etc). For a concise discussion of the problems with the 'screening in' process, see Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (2006) 63–4.

<sup>94</sup> DIMA, above n 63.

<sup>95</sup> This danger is clearly alluded to in the *Migration Series Instruction 391: People Trafficking*: *ibid* [391.4.1].

would be at risk. It is not clear whether trafficked women on BVFs are being informed of the option to apply for refugee protection in the legal advice they receive from Southern Edge under its government contract, even though the provision of such information is arguably also required by art 6(3)(b) of the *Trafficking Protocol*. Ensuring sex-trafficking victims are aware of their full legal rights to access this avenue of protection therefore presents a practical hurdle for advocates in this area.

Even where a trafficking victim is able to submit an application for a protection visa, it is vital that specialised legal advice be available. In a UK study of trafficked women who were assisted in their refugee applications by a specialist organisation it was found that, while 26 of the 32 claims submitted to the Home Office were refused at the initial decision stage, 80 per cent of cases that had their appeal determined at the Adjudicator level were overturned and refugee status was granted.<sup>96</sup> The study concluded that trafficked women supported by the specialist anti-trafficking organisation were six times as likely as other asylum seekers to succeed at appeal.<sup>97</sup>

Turning to the substantive aspects of a refugee claim, to fall within the scope of the definition in art 1A(2) of the *Refugee Convention*, an applicant for a protection visa must establish that she is outside her country of nationality owing to a well-founded fear of being persecuted for a Convention reason; *and* that she is unable or, owing to such fear, is unwilling to avail herself of the protection of that country.<sup>98</sup> Although an applicant must be ‘outside her country of nationality owing to her well-founded fear’, it is not necessary that the applicant fled her country on account of her fear. This is significant because, unlike many other refugees who experience persecution in their home state but are safe once they leave their country of persecution, a trafficking victim’s fear of future persecution often arises *after* she has left her country to take up ‘well paid’ and ‘legal’ employment abroad. In such situations, a trafficked woman may be recognised as a refugee *sur place*<sup>99</sup> as long as her fears, triggered after departure, relate to persecution in her home country. It is also important to note that even if her initial departure was ‘voluntary’ and/or for ‘economic’ reasons, this does not preclude a refugee claim where a woman is at risk of future harm as a result of having been trafficked. For example, in granting refugee status to a woman from Uzbekistan, the Refugee Review Tribunal (‘RRT’) recognised that the applicant left her country ‘to improve her economic situation in the context of a declining economy and consequent limited employment opportunities in Uzbekistan, especially for women’.<sup>100</sup> Nonetheless, the RRT ‘considered whether her

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<sup>96</sup> Sarah Richards, Mel Steel and Debora Singer, *Hope Betrayed: An Analysis of Women Victims of Trafficking and Their Claims for Asylum* (POPPY Project Report, February 2006) 9–10 <[http://www.eaves4women.co.uk/POPPY\\_Project/Documents/Recent\\_Reports/Hope%20Betrayed.pdf](http://www.eaves4women.co.uk/POPPY_Project/Documents/Recent_Reports/Hope%20Betrayed.pdf)> at 23 May 2008.

<sup>97</sup> *Ibid* 11.

<sup>98</sup> Stateless asylum seekers must establish that, owing to a fear of Convention-related persecution, they are outside their country of former habitual residence, and are unable or, owing to such fear, are unwilling to return to it.

<sup>99</sup> Office of the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/IP/4/Eng/REV.1 (January 1992) [94], [96]. See also *UNHCR Trafficking Guidelines*, above n 76, [25].

<sup>100</sup> *Case No N02/42226* [2003] RRTA 615 (30 June 2003).



subsequent experience of being trafficked and the risk of harm that followed from that experience constituted persecution'.<sup>101</sup> This is clearly in line with the *Refugee Convention*, which always requires a prospective assessment of risk.<sup>102</sup>

For the purpose of this article, the critical components of the definition are that the applicant has a well-founded fear of persecution and that the applicant fears persecution for a Convention reason. Importantly, although gender is not explicitly mentioned in the *Refugee Convention* definition, the UNHCR has stressed that the Convention, properly interpreted, covers gender-related claims,<sup>103</sup> including those brought by victims,<sup>104</sup> and potential victims,<sup>105</sup> of trafficking. Claims of this kind are commonly based on an applicant's membership of a particular social group ('PSG'). However, in some cases the other Convention grounds of religion, race, nationality and political opinion may be alternatively or additionally applicable.<sup>106</sup> As the UNHCR points out, 'although a successful claim need only establish a causal link with one ground, a full analysis of trafficking cases may frequently reveal a number of interlinked, cumulative grounds'.<sup>107</sup> This is particularly relevant in the case of armed conflicts, in which trafficking for prostitution is a deliberate form of targeted victimisation of certain ethnic or racial groups.<sup>108</sup> It is also likely where sex-trafficking is 'serving' market demands for women of a particular race or nationality.<sup>109</sup> This article focuses on the issues that arise with respect to membership of a PSG because it is both the most popular and most fraught ground in the present context.

We submit that international refugee law has the potential to reach and protect more trafficking victims than the current witness protection regime. Specifically, Australia's protection obligations under the *Refugee Convention* may be invoked by: a woman who has been trafficked into Australia; a woman who has been

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<sup>101</sup> Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007) 246. For contrary approaches, see 243–7.

<sup>102</sup> See, eg, Piotrowicz, above n 11, 165.

<sup>103</sup> The first suggestion that the refugee definition could encompass gender-specific claims was by the Executive Committee of the UNHCR in 1985: Executive Committee, UNHCR, *Refugee Women and International Protection*, Doc No 39 (XXXVI) (18 October 1985) <<http://www.unhcr.org/excom/EXCOM/3ae68c43a8.html>> at 23 May 2008. See also Office of the UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the Context of Art 1A(2) of the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/GIP/02/01 (7 May 2002) [6] ('*UNHCR Gender Guidelines*').

<sup>104</sup> *UNHCR Trafficking Guidelines*, above n 76, [15].

<sup>105</sup> *Ibid* [16].

<sup>106</sup> For this reason, the UNHCR has also mainstreamed gender considerations into their guidelines for claims of trafficking-related persecution feared for reasons of race, religion, nationality or political opinion: see *ibid* [34]–[36], [40].

<sup>107</sup> *Ibid* [33]. In a decision of a refugee appeal body in France (Decision No 423904, Commission des Recours des Réfugiés, 17 October 2003), refugee status was granted to a woman from the Dominican Republic who had been trafficked to Haiti and forced into prostitution because of 'the lack of State protection on account of her ethnicity, and the stance she was seen to have taken in seeking to refuse forced prostitution amounted to a (political) battle for human rights and dignity': Evaluation and Policy Analysis Unit, UNHCR, *Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe*, Doc EPAU/2004/05 (May 2004) 48, available from <<http://www.unhcr.org/research/3b850c744.html>> at 23 May 2008.

<sup>108</sup> *UNHCR Trafficking Guidelines*, above n 76, [34].

<sup>109</sup> *Ibid*.

trafficked within her home state or to another country and subsequently fled to Australia; a woman from either of these categories who escaped before repaying her 'debt'; a woman who has been trafficked into Australia and subsequently participated in a criminal investigation; as well as a woman who has not been trafficked, but legitimately fears that she will become a victim of trafficking upon return to her country of origin. While we do not suggest that every woman who fits one of the above descriptions necessarily qualifies as a refugee, it is our contention that since sex-trafficking involves sustained sexual and gender-based harm which causes lasting physical and psychological damage, and very often gives rise to the risk of future harm,<sup>110</sup> a woman who has been the victim of sex-trafficking or legitimately anticipates this occurring, *prima facie* has strong grounds to apply for refugee protection in this country.

Despite the theoretical scope of art 1A(2), refugee determination for victims and potential victims of trafficking is, in practice, no more secure than the witness protection scheme previously discussed. In the following sections we critically analyse the interpretive challenges that have arisen in this context in relation to the elements of persecution, membership of a PSG and the *Refugee Convention* nexus.

#### A *A Well-Founded Fear of 'Being Persecuted'*

Article 1A(2) does not define persecution but it is widely understood to mean 'the sustained or systemic violation of basic human rights demonstrative of a failure of state protection'.<sup>111</sup> In Australia, 'persecution' is qualified by s 91R of the *Migration Act* which provides that it must involve 'serious harm' and 'systematic and discriminatory conduct'.<sup>112</sup> Although the paradigm case of persecution is that committed by the state,<sup>113</sup> privately inflicted abuse will constitute persecution where it is condoned, tolerated or present because the state refuses or is unable to offer effective protection.<sup>114</sup> Since harm associated with sex-trafficking is ordinarily inflicted by non-state agents, the most contentious issue in this context is whether it has the requisite 'official quality' to constitute persecution.<sup>115</sup> This turns on whether protection *inside* the applicant's home

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<sup>110</sup> See below Part IV(A)(1).

<sup>111</sup> James C Hathaway, *The Law of Refugee Status* (1991) 104–5. For extensive discussion of subsequent authority accepting this position, see Foster, above n 101, ch 2.

<sup>112</sup> The term 'systematic' has been held to mean no more than 'non-random' or not 'non-selective' and does not require an applicant to show organised or coordinated violence: *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1, 32 (McHugh J). Since traffickers target vulnerable women and girls and are liable to punish them if they try to escape or betray them, both the crime and its related harm are systematic and discriminatory.

<sup>113</sup> *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, 11 (Gleeson CJ) ('*Khawar*').

<sup>114</sup> See, eg, *ibid*; *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 495 (Lord Hope) ('*Horvath*'). See also Roz Germov and Francesco Motta, *Refugee Law in Australia* (2003) 362; Hathaway, *The Law of Refugee Status*, above n 111, 125.

<sup>115</sup> *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 233 (Brennan CJ) ('*Applicant A*'), cited with approval in *Minister for Immigration and Multicultural Affairs v S152/2003* (2004) 222 CLR 1, 8 (Gleeson CJ, Hayne and Heydon JJ) ('*S152*').

country is sufficiently lacking.<sup>116</sup> The issues of serious harm and sufficiency of protection are considered in turn.

### 1 *Serious Harm*

Sex-trafficking involves human rights abuses of the gravest kind which, separately or cumulatively, may constitute acts of persecution. Trafficked women are typically incarcerated or otherwise deprived of their liberty, forced to perform dangerous and debasing labour and subjected to physical, sexual and psychological violence.<sup>117</sup> Other forms of harm exacted upon victims include exposure to HIV/AIDS and venereal diseases, starvation, induced drug-dependencies and denial of medical treatment.<sup>118</sup> These acts clearly fall within the types of ‘serious harm’ contemplated by s 91R(2) of the *Migration Act*,<sup>119</sup> as they are flagrant violations of international human rights.<sup>120</sup>

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<sup>116</sup> It should be noted that there is a debate as to whether the reference to ‘protection’ in the definition relates exclusively to the availability of *external* (consular or diplomatic) protection offered by the applicant’s country. This has mainly been an issue with which Australian courts have been concerned: see *Khawar* (2002) 210 CLR 1, 10–11. Cf James C Hathaway and Michelle Foster, ‘Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination’ in Erika Feller, Volker Türk and Frances Nicholson, *Refugee Protection in International Law* (2003) 357, 373–81. However, even in Australia, the High Court has accepted that it is the element of *internal* protection implicit in art 1A(2) which requires close attention. Australian courts have recognised, albeit slowly, that internal state protection is relevant to the assessment of whether (a) an applicant fears persecution; (b) the fear is well-founded; and (c) the applicant is justified in her unwillingness to avail herself of her country’s consular protection (assuming it is available): see, eg, *S152* (2004) 222 CLR 1, 8–11 (Gleeson CJ, Hayne and Heydon JJ).

<sup>117</sup> See generally, Project Respect, above n 7. See also *UNHCR Trafficking Guidelines*, above n 76, where it is noted that ‘[i]nherent in the trafficking experience are such forms of severe exploitation as abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation ... [and] the deprivation of medical treatment’: at [15].

<sup>118</sup> For a description of how these harms are inflicted, see April Rieger, ‘Missing the Mark: Why the *Trafficking Victims Protection Act* Fails to Protect Sex Trafficking Victims in the United States’ (2007) 30 *Harvard Journal of Law and Gender* 231, 241–3.

<sup>119</sup> That subsection reads:

Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of serious harm for the purposes of that paragraph:

- (a) a threat to the person’s life or liberty;
- (b) significant physical harassment of the person;
- (c) significant physical ill-treatment of the person;
- (d) significant economic hardship that threatens the person’s capacity to subsist;
- (e) denial of access to basic services, where the denial threatens the person’s capacity to subsist;
- (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person’s capacity to subsist.

Importantly, DIAC acknowledges that rape and other forms of sexual assault inflict severe pain and suffering (physical and mental) and obviously constitute cruel, inhuman and degrading treatment as well as torture.<sup>121</sup> Although the RRT has accepted that the severity of abuse endured by trafficked women is tantamount to persecution,<sup>122</sup> to succeed in a claim for refugee status, women who have been trafficked must link this past experience to their fears of future harm.

A woman's individual trafficking experience bears directly on the forms of persecution she fears. For example, a woman who has escaped or been rescued before repaying her debt, and/or cooperated with authorities, may face extortion, reprisals and possible re-trafficking from the persons to whom she was debt-bonded and whom she possibly incriminated. Where her traffickers were part of a transnational racket, her fears are likely to be based on a real chance of this occurring.<sup>123</sup> A woman who has been trafficked may also fear severe ostracism, discrimination and punishment by her family, the community or the authorities of her country for having engaged in prostitution.<sup>124</sup> The *UNHCR Trafficking Guidelines* point out that such repercussions may amount to persecution, particularly if aggravated by trauma suffered as a result of being trafficked.<sup>125</sup> Alternatively, a trafficked woman may face isolation from traditional support networks, leading to destitution, which may itself constitute persecution.<sup>126</sup> This was recognised by the Tribunal in *Case No V0618399*. After accepting that the harm which the applicant would face included 'harm from

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<sup>120</sup> These include rights enshrined in the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/RES/217A (III) (10 December 1948); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *International Labour Organization Convention (No 29) Concerning Forced or Compulsory Labour*, opened for signature 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932); *International Labour Organization Convention (No 105) Concerning the Abolition of Forced Labour*, opened for signature 25 June 1957, 320 UNTS 291 (entered into force 17 January 1959); and more recent treaties such as the *CEDAW*, above n 12; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); and where applicable the *CRC*, above n 13; *International Labour Organization Convention (No 138) Concerning Minimum Age for Admission to Employment*, opened for signature 26 June 1973, 1015 UNTS 297 (entered into force 19 June 1976); *ILO Convention (No 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, opened for signature 17 June 1999, 38 ILM 1207 (entered into force 19 November 2000).

<sup>121</sup> Refugee and Humanitarian Division, DIMIA, 'Gender-Related Persecution (Article 1A(2)): An Australian Perspective' in DIMIA, *Interpreting the Refugees Convention: An Australian Contribution* (2002) 83, 92–3.

<sup>122</sup> See, eg, *Case No V01/13868* [2002] RRTA 799 (6 September 2002); *Case No N03/45573* [2003] RRTA 160 (24 February 2003); *Case No N03/47757* [2004] RRTA 355 (11 May 2004).

<sup>123</sup> See, eg, *Case No N98/24000* [2000] RRTA 33 (13 January 2000), in which the Tribunal accepted that there was a 'real chance that on return to Colombia the Applicant might face harm by the criminals who have attempted to exploit her because of her lack of cooperation, her refusal to continue to pay and her contact with the Australian authorities'.

<sup>124</sup> *UNHCR Trafficking Guidelines*, above n 76, [18].

<sup>125</sup> *Ibid.*

<sup>126</sup> For authority for the proposition that social ostracism and resulting destitution constitutes persecution, see Foster, above n 101, 228–30.

society at large including stigmatisation and the denial of social and economic resources', the Tribunal acknowledged that '[i]n a context where the applicant would be unable to rely on family support ... such treatment would amount to serious harm'.<sup>127</sup> Importantly, the Federal Magistrate's Court has indicated that, in light of the *UNHCR Trafficking Guidelines*, the RRT ought to consider such possibilities before concluding that a sex-trafficking victim would not be discriminated against, or otherwise seriously harmed, to a degree constituting persecution.<sup>128</sup>

## 2 *Failure of State Protection*

In order to engage Australia's protection obligations, a trafficked woman must establish that the persecution she fears is official, officially tolerated, or uncontrollable by the authorities of her country.<sup>129</sup> This requirement stems from the underlying rationale of refugee law as offering a system of surrogate protection actuated upon a state's failure to safeguard the human rights of its citizens.<sup>130</sup> In most trafficking-related refugee claims the issue has not been whether the state is condoning or tolerating sex-trafficking and related harm,<sup>131</sup> but whether it is unable to protect the applicant from this occurring. It is therefore necessary to consider how inadequate state protection must be before the international community may be relied upon. Conversely, what standard of internal protection will negate a claim of persecution? In Australia, as in the UK, the test for standard of protection is one of reasonableness.<sup>132</sup> Adjudicators, however, tend to resolve this test upon satisfaction of a state's ability *or* its willingness to protect, rather than ensuring that *both* requirements are met. This has led to contradictory conclusions that applicants do not fear 'persecution', notwithstanding that, in the absence of effective protection, their fears of serious harm are well-founded. This approach and its problematic application are analysed below.

In *Horvath*, the House of Lords proposed that the standard to be applied is not that which would eliminate all risk and thus amount to a guarantee of protection, but rather, a practical standard — one which takes proper account of the duty that the state owes to its nationals.<sup>133</sup> Applying the principle of surrogacy, Lord Hope suggested that 'the criterion must be whether the alleged lack of protection

<sup>127</sup> *Case No V0618399* [2006] RRTA 95 (22 June 2006).

<sup>128</sup> *VXAJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 198 FLR 455, 467 ('*VXAJ*').

<sup>129</sup> *Applicant A* (1997) 190 CLR 225, 233 (Brennan CJ) cited with approval in *S152* (2004) 222 CLR 1, 8 (Gleeson CJ, Hayne and Heydon JJ).

<sup>130</sup> Hathaway, *The Law of Refugee Status*, above n 111, 104–5.

<sup>131</sup> This may be attributable to the fact that the home states of many applicants have signed and ratified the *Trafficking Protocol*: see UN Office on Drugs and Crime, *Signatories to the Trafficking Protocol*, above n 23. However, more ought to be required than symbolic concern to prevent and combat trafficking in women and children before it can be concluded that a state is not tolerating or condoning trafficking.

<sup>132</sup> *S152* (2004) 222 CLR 1, 11–12 (Gleeson CJ, Hayne and Heydon JJ) explores the Australian approach, citing *Osman v United Kingdom* (2000) 29 EHRR 245 as to what constitutes appropriate steps to safeguard those within its jurisdiction.

<sup>133</sup> *Horvath* [2001] 1 AC 489, 500 (Lord Hope). The Federal Court of Australia approved the proposition that 'absolute protection of an individual is not required before it could be concluded that adequate protection is available' in *Verma v Minister for Immigration and Multicultural Affairs* [2002] FCA 324, [12] (Finkelstein J).

is such as to indicate that the home state is unable or unwilling to discharge *its* duty to establish and operate a system for the protection against persecution of its own nationals'.<sup>134</sup> Lord Clyde, in that case, fleshed out this requirement, agreeing with Stuart-Smith LJ in the Court of Appeal, that in order to discharge this duty

there must be in force ... a criminal law which makes the violent attacks by the persecutors punishable by sentences commensurate with the gravity of the crimes. The victims as a class must not be exempt from the protection of the law. There must be reasonable willingness by the law enforcement agencies, that is to say the police and courts, to detect, prosecute and punish offenders.<sup>135</sup>

The judgment indicates that a state must be both able *and* reasonably willing to afford protection if it is to be regarded as adequately discharging its sovereign responsibility.<sup>136</sup> The criterion of 'reasonableness' has been adopted in the Australian test for standard of protection, with the majority of the High Court in *S152* affirming that a state's obligation is 'to take *reasonable measures* to protect the lives and safety of its citizens, and those measures would include an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system'.<sup>137</sup> The problem with this precedent is that, by directing attention to 'reasonable measures', it has led adjudicators to resolve the issue by reference to a state's notional willingness to combat trafficking rather than by examining its present ability to do so, often without due attention to the actual measures in place for victim protection and assistance.

The RRT's approach to the requisite standard of protection is particularly problematic in its treatment of country information — especially information from the US Department of State Trafficking Reports<sup>138</sup> — as evidence of adequate state protection. The US Department of State annually ranks countries into four tiers according to their level of compliance with the minimum standards for the elimination of trafficking prescribed by the *Victims of Trafficking and Violence Protection Act of 2000*.<sup>139</sup> These standards require states to prohibit

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<sup>134</sup> *Horvath* [2001] 1 AC 489, 495 (Lord Hope) (emphasis in original).

<sup>135</sup> *Ibid* 511.

<sup>136</sup> Lord Clyde insists that '[t]here must be in place a system of domestic protection and machinery for the detection, prosecution and punishment [of persecutory acts]. More importantly there must be *an ability and a readiness to operate that machinery*': *ibid* 510 (emphasis added).

<sup>137</sup> (2004) 222 CLR 1, 11 (Gleeson CJ, Hayne and Heydon JJ) (emphasis added). A Tribunal which fails to consider this test, and confines its enquiry in relation to state protection to the narrow issue of whether or not the state condoned or tolerated the relevant harm, may fall into error: *M93 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FMCA 252 (Unreported, McInnis FM, 24 February 2006) [80]. See also the earlier decision of *Prathapan v Minister for Immigration and Multicultural Affairs* (1997) 47 ALD 41, 48, where Madgwick J held that what is required is a 'reasonable level of efficiency of police, judicial and allied services and functions, together with an appropriate respect on the part of those administering the relevant state organs for civil law and order, and human rights'.

<sup>138</sup> See, eg, US Department of State, *2007 Report*, above n 5.

<sup>139</sup> 22 USC § 7108 (2000) ('*US Trafficking Act*').

severe forms of trafficking<sup>140</sup> (imposing penalties commensurate with the gravity of the crime and stringent enough to deter future offenders) and make serious and sustained efforts to eliminate it. The standards include ten indicia of serious and sustained efforts which cover prosecution, conviction and sentencing of offenders, vigorous investigation and prosecution of public officials who participate in or facilitate sex-trafficking, as well as awareness-raising and the provision of legal assistance to victims.<sup>141</sup> Omitted from the indicia, however, are specific measures for the protection and rehabilitation of victims who are nationals of that country.<sup>142</sup> In this respect, the US minimum standards are still less onerous than the measures for victim protection contemplated by Part II of the *Trafficking Protocol*, which, according to the UNHCR, also provides guidance for resolving this issue.<sup>143</sup>

Quite remarkably, notwithstanding this drawback, the RRT has been prepared to accept that countries which do not fully comply with the *US Trafficking Act's* minimum standards (classified in the US Department of State reports as 'Tier 2' countries) are able and willing to protect the individual concerned because 'they are making significant efforts to bring themselves into compliance'.<sup>144</sup> For

<sup>140</sup> 'Severe forms of trafficking in persons' is defined as (1) sex-trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act is under 18; or (2) the recruitment, harbouring, transportation, provision, or obtaining of a person for labour or services, through the use of force, fraud, or coercion, for the purpose of subjecting that person to involuntary servitude, peonage, debt bondage, or slavery: *US Trafficking Act*, 22 USC § 7103(8) (2000).

<sup>141</sup> *US Trafficking Act*, 22 USC § 7106(b) (2000).

<sup>142</sup> The only provision in the *US Trafficking Act* which relates to victim protection is in § 7108(b)(2) which lists one of the relevant indicia as follows:

Whether the government of the country protects victims of severe forms of trafficking in persons and encourages their assistance in the investigation and prosecution of such trafficking, including provisions for legal alternatives to their removal to countries in which they would face retribution or hardship, and ensures that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked.

However, this is directed to a state's protection of foreign nationals trafficked into its borders, rather than protection of its citizens trafficked abroad; and is thus not relevant to the question of state protection in the present context.

<sup>143</sup> *UNHCR Trafficking Guidelines*, above n 76, [22]. See especially art 6 of the *Trafficking Protocol*, above n 16, which obliges states to consider implementing measures to provide — in a gender and age sensitive manner — for the 'physical, psychological and social recovery of victims', including through the provision of housing, counselling, legal aid, 'medical, psychological and material assistance', and 'employment, educational and training opportunities', as well as provisions for their physical safety and the possibility of obtaining compensation for the damage suffered. It is also interesting to note that reference to the Protocol is also arguably appropriate in Australian law in light of the High Court's suggestion in *S152* (2004) 222 CLR 1, 12 that '[t]he only other basis upon which the applicant's unwillingness to seek the protection of Ukrainian government could be justified ... would be that Ukraine did not provide its citizens with the level of State protection required by international standards' (emphasis added).

<sup>144</sup> *US Trafficking Act*, 22 USC § 7107(1) (2000). The Tier Placement works as follows: governments of Tier 1 countries fully comply with the minimum standards; governments of Tier 2 countries do not fully with the *US Trafficking Act's* minimum standards but are making significant efforts to bring themselves into compliance; and governments of Tier 3 countries do not fully comply with minimum standards and are not making significant efforts to do so. It should be noted that the *US Trafficking Act* also created a special 'watch list' of Tier 2 countries that should receive special scrutiny: see US Department of State, *2007 Report*, above n 5, 12–14, 27, 42–8.

example, in *Case No V02/13868*,<sup>145</sup> the Tribunal found that the Albanian government was willing and able to protect young women from being kidnapped and trafficked based on developments that included the creation of an Anti-Trafficking Unit with increased staff (an improvement on the previous year, where reports indicated they had been largely ineffectual due to lack of staffing and police involvement in trafficking), as well as several government and NGO programs to assist trafficked women.<sup>146</sup> The Tribunal proceeded to use the promotion of Albania from a Tier 3 to Tier 2 country to signify that the government of Albania ‘has demonstrated a willingness to end trafficking, even if it has some distance to go’.<sup>147</sup> Two years later, in *Case No V03/16442*, the Tribunal again found the Albanian government to be willing and able to protect women from being kidnapped and trafficked in light of further developments,<sup>148</sup> despite the observation that ‘[s]ome aspects of [the country’s] anti-trafficking strategy [have] not been as effectively implemented as they could have been, in particular, there have been insufficient prosecutions of police and government officials involved in trafficking’.<sup>149</sup> Although the country was still not in compliance with the *US Trafficking Act*’s minimum standards, Albania’s Tier 2 ‘promotion’ from three years earlier was cited as evidence of ‘the success achieved so far by the Albanian government’.<sup>150</sup> The fact that in 2007, five years after the first-mentioned decision, the government of Albania was *still* not complying with these minimum standards illuminates the danger in relying on Tier 2 placements as evidence that adequate protection will be forthcoming.<sup>151</sup> This approach can be contrasted with a 2003 decision of the UK Immigration and Asylum Tribunal (‘UKIAT’) which found that ‘while there may be some improvement’ in Albania’s action against trafficking, including its promotion from a Tier 3 to Tier 2 country in the 2002 US Department of State Trafficking Report, it ‘does not yet fully comply with the minimum standards for the elimination of trafficking’ and thus does not provide a ‘sufficiency of protection’ for the purposes of refugee law.<sup>152</sup>

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<sup>145</sup> [2002] RRTA 799 (6 September 2002).

<sup>146</sup> It should be noted that for Convention purposes, any protection and assistance offered exclusively by NGOs cannot count as evidence that *the state* is discharging its duties. This is notwithstanding that art 6 of the *Trafficking Protocol*, above n 16, suggests certain services may, where appropriate, be provided in cooperation with NGOs and other elements of civil society.

<sup>147</sup> *Case No V01/13868* [2002] RRTA 799 (6 September 2002).

<sup>148</sup> Those developments included bilateral agreements with neighbouring countries to combat trafficking, the introduction of education programs to warn children about traffickers and the provision of victim support.

<sup>149</sup> *Case No V03/16442* [2004] RRTA 474 (25 June 2004).

<sup>150</sup> *Ibid.* See also *Case No N05/50773* [2005] RRTA 103 (28 June 2005), in which the Tribunal found that it could not conclude that Moldova was unwilling or unable to protect the applicant in relation to her abduction by traffickers, although it admitted that the authorities had not been very successful in prosecuting traffickers. This finding was reached despite acknowledgment that Moldova was not fully complying with the minimum standards for the elimination of trafficking; that despite continued allegations of trafficking-related corruption among some law enforcement officials, the government took no action against these officials; and that its efforts to assist and protect trafficking victims remained inadequate.

<sup>151</sup> See, eg, US Department of State, *2007 Report*, above n 5, 56. A similar point is made by Stephen Knight, ‘Asylum from Trafficking’ (2007) 7 *Immigration Briefings* 1, 10.

<sup>152</sup> *SK Albania* [2003] UKIAT 00023 (12 June 2003) [12]. However, this can be contrasted with the findings in *VD Albania CG* [2004] UKIAT 00115 (4 May 2004).



By focusing on ‘reasonable willingness’, RRT decisions, such as those described above, disclose a disturbing tendency to overlook the debilitating effect of corruption on a state’s ability to provide protection. This is a critical problem in the trafficking context since applicants often fear persecution by rich and powerful criminal organisations that can and do bribe members of the police and judiciary.<sup>153</sup> In *Horvath*, Lord Clyde took the view that ‘the corruption, sympathy or weakness of some individuals in the system of justice does not mean that the state is unwilling to afford protection’.<sup>154</sup> With respect, this dismissal of corruption is untenable on two levels. First, as the *UNHCR Trafficking Guidelines* make clear, where state officials are acting corruptly on the basis of the positions of authority they occupy within governmental structures, a situation of de facto toleration or condonation arises, such that the persecution can be seen to emanate from the state itself.<sup>155</sup> Although the UNHCR distinguishes this from circumstances in which officials are acting in their *personal capacity* outside the framework of government authority, it is hard to conceive of a scenario where the acceptance of bribes by immigration, police or judicial officers to ignore fraudulent papers, tip-off brothel owners, drop charges or acquit trafficking offenders could be seen not to stem from their positions of power. Second, even if adjudicators do not accept the agency of the state in cases of unchecked corruption, they should at least acknowledge the debilitating effect it has on a state’s ability to afford protection. A good example is provided by *Case No N03/47757*, in which the Tribunal, after referring to country information on police corruption and complicity in Thailand’s sex industry, rightfully accepted that ‘effective protection was not available to the applicant’.<sup>156</sup>

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<sup>153</sup> For example, in *VXAJ* (2006) 198 FLR 455, 467, the Federal Magistrate noted that

[t]he country information before the [RRT] supported the claim that Thai authorities were unwilling or unable to protect the applicant from being harmed by persons within the trafficking network, who were rich and powerful and had the means to pay off police and government officials. ... Further the report clearly noted that there was credible evidence of some corrupt military government officials involved directly in trafficking and taking bribes to ignore it.

<sup>154</sup> *Horvath* [2001] 1 AC 489, 511 (Lord Clyde, citing Stuart-Smith LJ in the Court of Appeal with approval).

<sup>155</sup> *UNHCR Trafficking Guidelines*, above n 76, [24]: ‘In these circumstances the agent of persecution may well be the State itself, which becomes responsible, whether directly or as a result of inaction, for a failure to protect those within its jurisdiction’. See also discussion of *VXAJ* (2006) 198 FLR 455, below n 156.

<sup>156</sup> *Case No N03/47757* [2004] RRTA 355 (11 May 2004). See also *Case No 060779039* [2006] RRTA 187 (21 November 2006), in which the Tribunal accepted that Nepal was a patriarchal society where women are vulnerable to violence and exploitation and that police and government authorities were ‘generally less than adequately responsive to protecting vulnerable women in the situation of the applicant’ (emphasis added). See also *VXAJ* (2006) 198 FLR 455, in which the Federal Magistrate found that an RRT decision was infected with jurisdictional error on the basis (inter alia) that it failed to consider ‘country information supporting the claim that some local officials, immigration officers, and police reportedly either were involved in trafficking directly or took bribes to ignore it’: at 466. The Federal Magistrate also found that this evidence was relevant to ‘both the question of whether the harm feared by the applicant had an official quality and whether the authorities were willing and able to provide adequate protection to trafficking victims’: at 468. For similarly positive, overseas authority, see *Celaj v Gonzales* 468 F 3d 1094 (8<sup>th</sup> Cir, 2006).

That example aside, however, most RRT decisions in this area tend to obscure the real issue of a state's ability to protect with a narrow assessment of its 'reasonable willingness' to take measures to do so. The decisions referred to in this section illustrate that the net result of such measures is normally insufficient to mitigate the risk of serious harm to a remote chance. This lax approach is contrary to the standard recommended by the UNHCR which

depend[s] on whether legislative and administrative mechanisms have been put in place to prevent and combat trafficking, as well as to protect and assist victims and on whether these mechanisms are effectively implemented in practice.<sup>157</sup>

Since effective implementation is contingent on both the practical ability to establish protection mechanisms and a *demonstrated* willingness to operate them, this ought to be the yardstick for standard of protection.<sup>158</sup> Unfortunately, this logical construction, which embraces the *Refugee Convention's* purpose, was explicitly rejected by the majority of the High Court in *S152*. In that case, Gleeson CJ, Hayne and Heydon JJ held that '[t]he fact that the authorities, including the police, and the courts, may not be able to provide an assurance of safety, so as to remove any reasonable basis for fear, does not justify unwillingness to seek their protection'.<sup>159</sup> Consequently, the position in Australia, as in the UK, is that a woman can be returned to her country of origin notwithstanding the fact that she has a well-founded fear of persecution for a Convention reason.<sup>160</sup> Rightly finding this interpretation to be 'at odds with the fundamental obligation of non-refoulement', the New Zealand Refugee Status Appeals Authority has rejected it, preferring a standard of protection which reduces the risk of serious harm to below that which renders the fear well-founded.<sup>161</sup>

Recent attempts to challenge the illogical outcomes produced as a result of the Australian approach have failed to establish jurisdictional error.<sup>162</sup> In *VXAJ*,

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<sup>157</sup> *UNHCR Trafficking Guidelines*, above n 76, [22] (emphasis added).

<sup>158</sup> This seems to be the effect of paragraph 23 of the *UNHCR Trafficking Guidelines*, *ibid*, which states that '[w]here a State fails to take reasonable steps as are within its competence to prevent trafficking and provide effective protection and assistance to victims, the fear of persecution is likely to be well-founded'. The *UNHCR Trafficking Guidelines* proceed to explain that if laws exist but are not effectively implemented or if administrative mechanisms for protection and assistance are in place but are not accessible to the victim, the state may be deemed unable to extend protection to that victim or potential victim of trafficking.

<sup>159</sup> *S152* (2004) 222 CLR 1, 12 (Gleeson CJ, Hayne and Heydon JJ) (emphasis added).

<sup>160</sup> *Refugee Appeal No 71427/99* (New Zealand Refugee Status Appeals Authority ('NZRSAA'), Haines and Tremewan, 16 August 2000) [62].

<sup>161</sup> *Ibid* [63].

<sup>162</sup> In Australia, the possible bases on which administrative decisions could be challenged in the federal courts was (attempted to be) limited in 2001 by the introduction of a 'privative clause': see *Migration Act 1958* (Cth) s 474 (Decisions under Act are Final). Section 474(1) provides that a 'privative clause decision' is 'final and conclusive', and 'must not be challenged ... in any court'. However, in *S157/2002* (2003) 211 CLR 476, the High Court held that the privative clause does not apply to a decision infected by 'jurisdictional error' (see generally *Craig v South Australia* (1994) 184 CLR 163, 179). Hence, while it is still possible to challenge decisions in the federal courts, the grounds are now much more limited.

counsel for the applicant argued that, taken together, the RRT's findings that (i) there was a real chance the applicant would be seriously harmed by the traffickers on her return to Thailand and that (ii) Thailand had the will and resources to protect trafficking victims from reprisal for breaking their bondage, were nonsensical and demonstrated that the RRT had misunderstood its task.<sup>163</sup> The court rejected this argument on the basis that '[a]t common law, want of logic is not synonymous with error of law'.<sup>164</sup> Similarly, in *SXPB v Minister for Immigration and Multicultural and Indigenous Affairs*, the full Federal Court concurred that 'the Tribunal's acceptance that Albania had not fully complied with minimum standards for the elimination of trafficking was not inconsistent with a finding that it was in a position to offer an acceptable form of protection'.<sup>165</sup> Notwithstanding the difficulty in establishing sufficient error to challenge these decisions as a matter of domestic law, it is arguable that Australia's acceptance of a level of protection which does not comply with minimum standards, nor remove the reasonable basis for an applicant's fear of serious harm, is in violation of Australia's international obligations under the *Refugee Convention*.<sup>166</sup> Until Australian refugee decision-makers embrace an approach that complies with the cardinal protection objectives of the Convention, victims and potential victims of trafficking are likely to continue to face significant difficulties at this stage of the inquiry.

Even if an applicant is successful in establishing that the harm feared is 'persecution' attributable in some way to her state of origin or former habitual residence, she will not qualify as a refugee unless the Tribunal is satisfied that the persecution feared is for a Convention reason. As previously mentioned, most trafficking-related claims are brought under the membership of a PSG category, with the applicant alleging membership in a PSG defined by her gender, qualified as it may be by other attributes.<sup>167</sup> In such instances, the Tribunal must determine whether the claimed group exists, whether the applicant is in fact a member of that group and whether the applicant fears persecution because of that membership.

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<sup>163</sup> *VXAJ* (2006) 198 FLR 455, 471.

<sup>164</sup> *Ibid* 472 (Pascoe CFM). However, the application for judicial review was successful on other grounds: see discussion in above n 156.

<sup>165</sup> *SXPB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 11 (Unreported, Keifel, Kenny and Graham JJ, 20 February 2006) [6].

<sup>166</sup> Article 27 of the *VCLT*, above n 53, provides that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

<sup>167</sup> A woman/girl's gender is distinct from her sex because, rather than being biologically determined, it is constructed by the society and/or culture in which she lives. It encompasses the identities, statuses, roles and responsibilities that are assigned to her as a woman/girl and bears directly on her treatment in a given society.

B *Establishing that an Applicant is a Member of a Particular Social Group in Trafficking-Related Claims*

In Australia, as in other jurisdictions, it has been established that women in a society may constitute a PSG for the purposes of the *Refugee Convention*.<sup>168</sup> It has also been accepted that children can constitute a PSG, although there have been few refugee claims by child victims of sex-trafficking in Australia.<sup>169</sup> It is well settled in principle that the size of the professed group does not preclude it being considered a PSG.<sup>170</sup> Indeed, just as members of a particular race, religion or nationality may be numerous, the wide membership of a PSG comprising ‘women in a society’ is no objection to its existence.<sup>171</sup> Nor is it necessary for the purpose of establishing a PSG to confine the putative group to persons who are likely to be persecuted. In the recent House of Lords decision in *K v Secretary of State for the Home Department* (‘*Fornah*’),<sup>172</sup> for example, Lord Hope was comfortable with widely defining the applicant’s PSG as ‘females in Sierra Leone’, holding that ‘[i]t is enough that [the PSG] should identify the shared characteristic — the common denominator — within the wider group that reflects the reason why membership of it gives rise to the well-founded fear’.<sup>173</sup>

Despite these significant developments, assessment of whether a female claimant belongs to a PSG defined by her gender (alone or qualified by other attributes) continues to present challenges to trafficking-related claims in Australia. Whereas the US, Canada, the UK and New Zealand construe membership of a PSG *ejusdem generis* with the other Convention grounds to refer to groups of persons who share an innate or immutable characteristic,<sup>174</sup>

<sup>168</sup> In Australia, see *Khawar* (2002) 210 CLR 1; in the UK, see *R v Immigration Appeals Tribunal; Ex parte Shah* [1999] 2 AC 629, 645 (Steyn L), 654 (Hoffmann L), 658 (Hope L) (‘*Shah*’); and in New Zealand, see *Refugee Appeal No 71427/99* (NZRSAA, Haines and Tremewan, 16 August 2000). See also the UK, US, Canadian and Australian Gender Guidelines: UK Home Office, *Asylum Policy Instruction: Gender Issues in the Asylum Claim* (2006); Phyllis Coven, US Immigration and Naturalization Service, *Considerations for Asylum Officers Adjudicating Asylum Claims From Women* (1995); Immigration and Refugee Board of Canada (‘IRBC’), *Guideline 4 — Women Refugee Claimants Fearing Gender-Related Persecution: Update* (Compendium of Decisions, February 2003); DIMA, Commonwealth of Australia, *Refugee and Humanitarian Visa Applicants Guidelines on Gender Issues for Decision Makers* (1996).

<sup>169</sup> For discussion of the issue of children as a PSG, see Foster, above n 101, 329–39.

<sup>170</sup> *Khawar* (2002) 210 CLR 1, 13 (Gleeson CJ), 28 (Gummow and McHugh JJ), 43 (Kirby J). This view is supported by the Office of the UNHCR, *Guidelines on International Protection on ‘Membership of a Particular Social Group’ within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/GIP/02/02 (7 May 2002) [18].

<sup>171</sup> *Khawar* (2002) 210 CLR 1, 28 (Gummow and McHugh JJ).

<sup>172</sup> [2007] 1 AC 412.

<sup>173</sup> *Ibid* 450.

<sup>174</sup> For further discussion of the acceptance of this approach in these jurisdictions, see James C Hathaway and Michelle Foster, ‘Membership of a Particular Social Group’ (2003) 15 *International Journal of Refugee Law* 477, 480–2. However, it should be noted that in the recent decision of the House of Lords in *Fornah* [2007] 1 AC 412, some of the Lords accepted an approach which imports some elements of the social perception test into the *ejusdem generis* approach: 431 (Lord Bingham), 468 (Lord Brown). In part this is explained by the San Remo Expert Roundtable, ‘Summary Conclusions: Membership of a Particular Social Group’ in Erika Feller, Volker Türk and Frances Nicholson, *Refugee Protection in International Law* (2003) 312, 312–13 and the Council Directive, 2004/83/EC [2004] OJ L 304/12, art 10(1)(d), the latter of which requires satisfaction of both tests.

Australian courts have opted for an objective ‘social perception’ test, premised on the assumption that adjudicators can ascertain the existence of a PSG in any particular society. While there is no reason in principle or logic why the latter cannot be straightforwardly applied to establish PSGs of women (or a narrower subset of women) in a society, the RRT’s determination of this issue has been ad hoc and inconsistent. This section sets out both the *ejusdem generis* and ‘social perception’ approaches, focusing on the way the latter has been construed and applied in the trafficking context. Ultimately, we argue that although the Australian approach has the theoretical capacity to encompass more claims, it has not lent itself to principled application.

### 1 *The Protected Characteristics Approach*

The *ejusdem generis* approach was formulated by the US Board of Immigration Appeals in the *Matter of Acosta*<sup>175</sup> and expounded by the Supreme Court of Canada in *Ward v Canada*.<sup>176</sup> It is premised on the idea that, consistent with the categories of race, religion, nationality and political opinion, the Convention ground of membership of a PSG must also protect characteristics which persons cannot change (because they are ‘innate’ or historically permanent), or should not be required to change (because they are fundamental to their individual identities or consciences).<sup>177</sup> The determination as to what is a protected ground under this approach is directly linked to the evolution of anti-discrimination in matters affecting fundamental human rights.<sup>178</sup> Applying this methodology, women have been described as a clear example of a PSG defined by the ‘innate’ and ‘unchangeable’ characteristics of their sex and gender.<sup>179</sup> Importantly, although gender is not a biological attribute, its immutability has been recognised by courts of high authority. For example, in

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<sup>175</sup> 19 US Board of Immigration Appeals (‘BIA’) 211 (1 March 1985).

<sup>176</sup> *Ward v Canada* [1993] 2 SCR 689 (‘*Ward*’).

<sup>177</sup> Specifically, in *Ward*, the Supreme Court classified PSGs into 3 categories:

(1) groups defined by an innate, unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence: *ibid* 692.

<sup>178</sup> See, eg, *Shah* [1999] 2 AC 629, 651: Lord Hoffman expressed the opinion that

[i]n choosing to use the general term ‘particular social group’ rather than an enumeration of specific social groups, the framers of the Convention were ... intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention.

<sup>179</sup> *Ward* [1993] 2 SCR 689, 692. See also the *UNHCR Gender Guidelines*, above n 103, [30]: ‘It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men’. As Baroness Hale of Richmond noted in the recent decision of *Fornah* [2007] 1 AC 412,

[i]n other words, the world has woken up to the fact that women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted because of the inferior status accorded to their gender in their home society: at 459.

the recent House of Lords decision in *Fornah*, Lord Bingham held:

I think it clear that women in Sierra Leone are a group of persons sharing a common characteristic which, without a fundamental change in social mores is unchangeable, namely a position of social inferiority as compared with men. ... That is true of all women, those who accept or willingly embrace their inferior position and those who do not.<sup>180</sup>

Women who fear being trafficked or have been trafficked and fear related harm have tended to rely on the innate characteristic of their sex and/or immutability of their gender.<sup>181</sup> Trafficked women have additionally claimed to belong to PSGs defined by a former association or status such as ‘sex worker’, ‘bonded sex slave’ or trafficking victim, which is unalterable due to historical permanence.<sup>182</sup> For a woman who has suffered sexual servitude, the experience of slavery has a physical and psychological permanence. Her escape or cooperation with authorities are actions which cannot be undone. Since these are immutable realities, acknowledged by the international community as requiring a special kind of protection, it is entirely consistent with the anti-discrimination and human rights objectives of the *Refugee Convention* to recognise groups defined by this former status and/or activity as PSGs.

## 2 *The Social Perception Approach*

In contrast to the approach adopted in other jurisdictions, establishing a PSG in Australia requires an applicant to demonstrate that the group is identifiable by a characteristic or attribute that is common to all members of the group; that the relevant characteristic or attribute is not the shared fear of persecution; and that the possession of that characteristic or attribute distinguishes the group from society at large.<sup>183</sup> This three step test, established in *Applicant A*<sup>184</sup> and refined in *Applicant S*,<sup>185</sup> requires the group to be objectively cognisable within society.

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<sup>180</sup> *Fornah* [2007] 1 AC 412, 441 (Lord Bingham). See also Baroness Hale at 466:

Nor can it be seriously doubted that the persecution is visited upon its victims because they are members of a particular social group. It is only done to them because they are female members of the tribes within Sierra Leone which practise [female genital mutilation]. They share the immutable characteristics of being female, Sierra Leonean and members of the particular tribe to which they belong. They would share these characteristics even if [female genital mutilation] were not practised within their communities. Their social group exists completely independently of the initiation rites it chooses to practise.

<sup>181</sup> It should be noted however that not all claims by trafficked women have been successful in the jurisdictions that adopt the *ejusdem generis* approach, and in some cases this is due to the failure of the adjudicator to view the victims as belonging to a PSG: see, eg, Knight, above n 151, 8–9.

<sup>182</sup> In a recent decision of the UKIAT, the Tribunal found that a previous decision which had held that ‘former victims of trafficking’ could not constitute a PSG was ‘wrongly decided’. The UKIAT rather found that “‘former victims of trafficking’ and “‘former victims of trafficking for sexual exploitation’ are capable of being members of a particular social group ... because of their shared common background or past experience of having been trafficked’: *SB Moldova CG* [2008] UKIAT 00002 (25–6 April 2007) [112]. See also Piotrowicz, above n 11, 169–70.

<sup>183</sup> *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387, 400 (*‘Applicant S’*).

<sup>184</sup> (1997) 190 CLR 225, 264–6.

<sup>185</sup> (2004) 217 CLR 387, 400.

Although the group of individuals need not be subjectively perceived as socially distinct,<sup>186</sup> such social perception will ordinarily point to a PSG's existence. By way of example, McHugh J in *Applicant A* illustrates how the actions of persecutors in targeting individuals who share the attribute of being left-handed would create public perception that 'left-handed men' comprise a PSG.<sup>187</sup> Building on this illustration, Gleeson CJ, Gummow and Kirby JJ explained in *Applicant S* that 'over time the discriminatory treatment of this group might be absorbed into the social consciousness of the community' and that

[i]n these circumstances, it might be correct to conclude that the combination of legal and social factors ... prevalent in the community indicate that left-handed men form a particular social group distinguishable from the rest of the community.<sup>188</sup>

Properly applied, this approach should direct attention to the social and legal position that women occupy as a result of ingrained discrimination, rather than their risk of persecution per se. In this respect, the approach can eschew impermissibly circular definitions of PSGs, whereby a group is defined by a shared fear of persecution. Thus, in *Khawar*, McHugh and Gummow JJ suggested membership of the group 'women in Pakistan' was not dictated by the finding of persecution; rather, it reflected 'the operation of cultural, social, religious and legal factors bearing upon the position of women in Pakistani society'.<sup>189</sup>

Since membership of the PSG must reflect the reason for the well-founded fear of persecution, whether a woman has been or anticipates being trafficked will shape the definition of her putative group. In the trafficking context, applicants have claimed that they belong to a PSG defined as women in their country, and/or narrower subsets of women qualified by any combination of gender, age, appearance, marital or family status, socio-economic class and geographic location. Those who have been trafficked may additionally claim membership in groups along the lines of 'sex-workers', or 'trafficked women'.<sup>190</sup> After defining the professed social group, the inquiry turns on whether social, cultural, legal and religious norms prevalent in the country of reference operate to distinguish it from society at large.<sup>191</sup> The High Court has found 'no reason in principle why these norms cannot be ascertained objectively from a third-party

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<sup>186</sup> Ibid 397, 400 (Gleeson CJ, Gummow and Kirby JJ), 408 (McHugh J).

<sup>187</sup> *Applicant A* (1997) 190 CLR 225, 264. This was endorsed in *Shah* [1999] 2 AC 629, 645 (Lord Steyn).

<sup>188</sup> *Applicant S* (2004) 217 CLR 387, 399 (Gleeson CJ, Gummow and Kirby JJ).

<sup>189</sup> *Khawar* (2002) 210 CLR 1, 28.

<sup>190</sup> One applicant, who was trafficked and cooperated with Australian authorities, claimed in the alternative that she belonged to a PSG of 'trafficked women who have given evidence'. In that case (*VXAJ* (2006) 198 FLR 455) the Federal Magistrates Court made it clear that the facts of the case must be considered not merely as providing the context for what occurred but as the means to identify whether a PSG existed: at 464. In *VXAJ*, the Federal Magistrates Court found the Tribunal had erred in not accepting that trafficked women who give evidence can be considered members of a PSG, considering the Draft Witness Protection Bill then under way in Thailand was evidence that the Government recognised witnesses who have been trafficked for prostitution as witnesses in need of protection.

<sup>191</sup> See, eg, *Applicant S* (2004) 217 CLR 387, 399–400 (Gleeson CJ, Gummow and Kirby JJ).

perspective’;<sup>192</sup> however, adjudicators have struggled with this task in practice. Despite occasional straightforward acceptance by the Tribunal that women (or a broad subgroup of women) can comprise a PSG because they *clearly* share readily identifiable characteristics,<sup>193</sup> the Tribunal has generally been reluctant — if not averse — to recognising that a PSG as broadly defined as ‘women in a country’ could exist.<sup>194</sup> The latter often manifests in an arbitrary finding that being a woman, even in a society where gender-based discrimination persists, is not ‘sufficiently distinguishing’.<sup>195</sup> Worryingly, this reluctance may be attributable to implicit floodgates concerns, which are premised on the mistaken view that if a broad PSG is accepted, *all* of its members will be eligible for protection.<sup>196</sup> The resulting inconsistencies are illustrated below.

<sup>192</sup> *Applicant S* (2004) 217 CLR 387 (Gleeson CJ, Gummow and Kirby JJ). Their Honours went on to emphasise the importance of country information gathered by international bodies and nations other than that of the applicants ‘from [which] it is permissible for the decision-maker to draw conclusions as to whether the group is cognisable within the community’: at 400.

<sup>193</sup> See, eg, *Case No V01/13868* [2002] RRTA 799 (6 September 2002). See also *SVTB v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 104 (Unreported, Marshall, Mansfield and Stone JJ, 3 June 2005) in which the RRT had accepted that the appellant was a member of the PSG ‘a single woman in Albania without the protection of male relatives’: at [5].

<sup>194</sup> In *SZBFQ v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FMCA 197 (Unreported, Driver FM, 10 June 2005), the Court granted relief to the applicant (a young, Orthodox Christian, ethnic Russian woman in Azerbaijan), having found that the RRT had made a jurisdictional error by saying as a statement of principle (rather than a finding of fact) that being a woman in itself is not a PSG as meant by the *Refugee Convention*. The statement of principle was wrong in excluding the possibility that such a PSG existed, especially given the RRT Member’s earlier comment (when dismissing an alternative PSG defined as youth ethnic Russian women) ‘that *prostitution and people trafficking* was not an issue exclusively for any subset of women but it was a problem facing women in Azerbaijan generally’: at [28] (emphasis added).

<sup>195</sup> See, eg, *Case No N98/24000* [2000] RRTA 33 (13 January 2000), in which the Tribunal was ‘not satisfied on the evidence before it that the characteristics of vulnerability, youth and gender, whether considered together or separately, distinguish “vulnerable young Colombian women” or “young women” from the rest of the community’. See also *Case No V00/11003* [2000] RRTA 929 (29 September 2000), in which the RRT found:

In distinction from the circumstances of ‘women in Pakistan’ identified in *Islam*, the information concerning the circumstances of women in Bosnia and Herzegovina does not reveal that the nature and scale of any discrimination in that society is such that women or young, single women could be said to constitute a particular social group within that society.

This conclusion was reached notwithstanding information from the US Department of State which indicated that ‘a male-dominated society prevails in both entities, particularly in rural areas, with few women in positions of real economic power or political power’.

<sup>196</sup> This concern has also been explicit in some recent decisions of US immigration judges. See, eg, *Rreshpja v Gonzales*, 420 F 3d 551 (6<sup>th</sup> Cir, 2005) in which the 6<sup>th</sup> Circuit, after noting at 555 that that ‘almost all of the pertinent decisions have rejected generalized, sweeping classifications for purposes of asylum’, held that

[i]f the group with which [the applicant] is associated is defined noncircularly — ie, simply as young, attractive Albanian women — then virtually any young Albanian woman who possesses the subjective criterion of being ‘attractive’ would be eligible for asylum in the United States: at 556.

See also *Papapano v Gonzales*, 188 Fed App 447 (6<sup>th</sup> Cir, 2006). Such decisions are entirely misinformed. Since refugee status is granted upon satisfaction of all elements in art 1A(2), mere recognition of a PSG does not mean that all of its members are automatically refugees.



In *Case No V06/18399* (a claim by an Albanian woman who was trafficked into Italy by her abusive husband of an arranged marriage), the RRT accepted that women in northern Albania constitute a PSG, identifiable and set apart by their gender.<sup>197</sup> It reached this conclusion after considering independent country information indicating that women, particularly in the masculine and patriarchal society of northern Albania, occupy a subordinate role to men and are regarded as mere chattels under the Kanun.<sup>198</sup> Although the applicant had claimed she belonged to the broader group ‘women in Albania’, the RRT geographically confined the PSG to the women in the north.<sup>199</sup> This was despite an earlier decision in which the RRT (considering substantially similar country information) had accepted without question that, in line with the principles in *Applicant S*, ‘women in Albania’ could be considered a PSG.<sup>200</sup> In another decision, the RRT did not accept that ‘Thai women’, ‘young Thai women’ or ‘Thai women without male protection’ constituted PSGs because their gender, age or marital status were not found to sufficiently link them, nor did they constitute sufficiently defining characteristics.<sup>201</sup> This was due to ‘the stronger forces (such as socio-economic status [and] geographic location) that separate those women’.<sup>202</sup>

While such decisions encourage applicants to narrow the alleged PSG by importing additional factors applicable to their situation, pursuit of this tactic has also set applicants up for failure.<sup>203</sup> For example, many adjudicators have dismissed PSGs comprising subsets of women described as ‘vulnerable’, ‘abandoned’, or ‘lacking in protection’ as impermissible on the ground that these

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<sup>197</sup> *Case No V0618399* [2006] RRTA 95 (22 June 2006).

<sup>198</sup> Kanun is customary law which still has wide application in the north of Albania: US Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices — 2006: Albania* (2007) <<http://www.state.gov/g/drl/rls/hrrpt/2006/78797.htm>> at 23 May 2008.

<sup>199</sup> Following a similar method of reasoning, the Tribunal in *Case No 060779039* [2006] RRTA 187 (21 November 2006) found ‘unmarried women in Nepal’ to be a PSG after accepting that Nepal was a ‘patriarchal’ and ‘traditional society where family ties, caste and traditions remain particularly important for social recognition’.

<sup>200</sup> *Case No V03/16442* [2004] RRTA 474 (25 June 2004).

<sup>201</sup> This unpublished RRT decision was overturned in *VXAJ* (2006) 198 FLR 455, 460.

<sup>202</sup> *Ibid.* Adopting a similar line of reasoning in *Case No V02/13996* [2003] RRTA 56 (22 January 2003) (an application brought by two abandoned young Filipina girls) the RRT rejected that ‘girls in the Philippines’ constituted a PSG because ‘the lives of girls in the Philippines, are determined far more by factors other than their gender, factors such as social class, wealth, or whether they live in cities or in less populated areas’.

<sup>203</sup> See, eg, *Shah* [1999] 2 AC 629, 652 where Lord Hoffman criticised the appellant’s tactic of producing a more restricted and complicated definition of PSG when ‘the parts of the definition which restricted the group to anything narrower than the entire sex were essentially circular and incapable of defining the group for the purposes of the Convention’.

PSGs cannot exist independently of the persecution feared.<sup>204</sup> However, while the fear of persecution must be driven by the Convention ground and not vice versa,<sup>205</sup> it is inaccurate to equate visible and distinguishing ‘vulnerability factors’ — such as being single, homeless, poor, jobless or uneducated — with the persecution feared.<sup>206</sup> First, the persecution feared is not vulnerability per se (whether poverty, homelessness, unemployment, etc) but rather it is the harm which is intrinsic to and/or stems from situations of debt-bondage and sexual servitude. Second, such vulnerability factors are often identifiable not only to the alleged persecutors but also to governments and any elements of civil society, including NGOs, which acknowledge and attempt to respond to their defencelessness. Thus, in a decision where country information indicated that sex-trafficking was a serious problem in Thailand, and that NGOs and government agencies were working to assist victims of this crime, the Tribunal erred in concluding that ‘Thai women trafficking victims’ were merely ‘individual victims of the same crime; [and] ... not socially distinct’.<sup>207</sup> It was equally erroneous to conclude that ‘[t]he fact that they [gave] evidence [was] of significance in the criminal justice system but it does not link them in and set them apart in wider society: it is not a social attribute’,<sup>208</sup> given the evidence in that case of the risks of reprisal faced by women who testify and reports of a Draft Witness Protection Bill. In light of such information, the Federal Magistrate’s Court found that the RRT erred in concluding that women who share the common activity of testifying against former traffickers are not identifiable or distinct as a social unit, and thus not capable of constituting a PSG.<sup>209</sup>

While adducing evidence of governmental and non-governmental programs directed at the putative group clearly establishes social perception of its existence, the success of setting up a PSG in this way may be undermined by a finding, on the same evidence, that state protection is available. For example, in *Case No V02/13868*,<sup>210</sup> the Tribunal concluded that ‘young women in Albania’ could be considered a particular social group because

[t]he measures which have been introduced by the government to combat the problem of trafficking in women ... and the plethora of agencies which have been

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<sup>204</sup> For example, in the abovementioned Filipina case (*Case No V02/13996* [2003] RRTA 56 (22 January 2003)), the Tribunal went on to say that the more specific formulations of PSG (such as girls who were homeless, single, orphaned, abandoned, without male protection, unemployed, or any combination of these features) ‘are not recognisable or cognisable social groups’ because ‘without ... [the group members’ vulnerability and the harm they may encounter as a result], the collections of individuals do not in my view share a common characteristic or element which unites them and renders them a cognisable group within their society’. See also *VXAJ* (2006) 198 FLR 455, 460, where Pascoe CFM referred to the RRT’s decision to not accept that ‘vulnerable’ women of any age group could be a PSG because this would be defining the group in a circular way by reference to the persecution feared.

<sup>205</sup> *Applicant A* (1997) 190 CLR 225, 242 (Dawson J).

<sup>206</sup> However, applicants should be cautious not to introduce into their PSG characterisation factors which are more relevant to other aspects of refugee determination, such as whether their fear is well-founded and whether adequate protection is available.

<sup>207</sup> *VXAJ* (2006) 198 FLR 455, 460, 463–4.

<sup>208</sup> *Ibid* 460.

<sup>209</sup> *Ibid* 464.

<sup>210</sup> [2002] RRTA 799 (6 September 2002).

established to assist women who have been harmed in this way constitutes recognition by society of their separateness and links them as a group.<sup>211</sup>

However, this was immediately followed by a conclusion that those developments indicated Albania was willing and able to protect the applicant.<sup>212</sup> The unpredictable adjudication in this area leaves advocates with little guidance as to how best to frame a PSG that will neither be improperly dismissed for being too wide, nor disqualified for circularity.

Although the social perception test set out in *Applicant S* confers greater judicial discretion and is therefore theoretically expansive, the above analysis has highlighted the inability of decision-makers to consistently discern that women constitute a PSG. Rather than providing clear guidance, jurisprudence in this area has complicated what ought to be a straightforward determination in gender-related claims, especially considering the acknowledgment by Gleeson CJ that '[w]omen in any society are a distinct and recognisable group'.<sup>213</sup> Women's innate physiological and physical characteristics undeniably make them an identifiable and distinct social unit. Furthermore, since most societies are patriarchal, there are few places in the world where women are not 'treated differently from and unequally to men' in public and private spheres of life.<sup>214</sup> As Germov and Motta observe,

[t]his is evident even in countries like Australia where there is a raft of anti-discrimination laws, equal opportunity laws ... and the like that attempt to rectify traditional, societal discrimination which is directed against women for no other reason than their gender.<sup>215</sup>

Importantly, women are not defined by the violence or discrimination they face nor the laws or policy that seek to redress this. As Gleeson CJ acknowledges, 'their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments'.<sup>216</sup> Although this illustrates that the social perception test could, in theory, be used to consistently recognise PSGs comprised of women (or for that matter, sex-workers or trafficked women), this article illustrates the observation that 'in practice [it] amounts to little more than a license for subjective assessment of merit'.<sup>217</sup> In light of this uncertainty, we submit that a far more satisfactory approach is that

<sup>211</sup> Reflecting the line of reasoning espoused by McHugh J in *Applicant A*, the Tribunal was satisfied that '[i]n the context of a society in which trafficking ... has been brought to the top of the political agenda ... the activities of the traffickers have led to a situation in which there is a recognition that young women are a group set apart from the rest of the community': *ibid*.

<sup>212</sup> *Ibid*. It should be stressed that, while NGO assistance may point to the visibility of a PSG, it is actually irrelevant to the evaluation of *state* protection. This problematic aspect of the RRT's assessment of state protection is explored in Part IV(C).

<sup>213</sup> *Khawar* (2002) 210 CLR 1, 14.

<sup>214</sup> Germov and Motta, above n 114. For an excellent example of a gender-sensitive application of the principles pertaining to membership in a PSG, see the extracts of *Case No N93/00656* [1994] RRTA 1580 (3 August 1994) cited in the Committee on Immigration and Nationality Law of Association of the Bar of the City of New York, *Gender-Related Asylum Claims and the Social Group Calculus: Recognizing Women as a 'Particular Social Group' Per Se* (2003) 11–13.

<sup>215</sup> Germov and Motta, above n 114.

<sup>216</sup> *Khawar* (2002) 210 CLR 1, 14.

<sup>217</sup> Hathaway and Foster, 'Membership of a Particular Social Group', above n 174, 484.

put forward by Lord Steyn of the House of Lords: that women as a PSG is ‘neither novel nor heterodox’, but rather is ‘simply a logical application of the seminal reasoning in *Acosta*’ (the protected characteristic approach).<sup>218</sup>

### C The Nexus Requirement

The final definitional issue to be explored is also the most problematic aspect of refugee determination in the sex-trafficking context, namely, the inquiry into whether the applicant fears being persecuted *for a Convention reason*.<sup>219</sup> It is well accepted that the ‘for reasons of’ clause requires a causal link between the risk of being persecuted and one or more Convention grounds. However, there continues to be much confusion and controversy surrounding both the nature of the causal link, specifically whether intention is necessary, and the degree of connection required.

#### 1 The Nature of the Causal Link

In addition to requiring a causal link between the risk of being persecuted and a Convention ground, Australian courts have gone further in interpreting the phrase ‘for reasons of’ as importing ‘an element of motivation (however twisted) for the infliction of harm’.<sup>220</sup> Although the persecutor’s motivation need not be hostile or malign, the victim must be persecuted for something perceived about her or attributed to her, which falls under one of the Convention’s protected grounds.<sup>221</sup> This approach has been said to focus on the *intention of the persecutor* in harming or withholding protection from the applicant, rather than on the reasons underlying the applicant’s risk of being harmed. Considering that the rules of treaty interpretation give primacy to the text in light of the treaty’s context, object and purpose,<sup>222</sup> it is striking that the text of art 1A uses the passive voice (‘fear of being persecuted’). This suggests that it is the cause of the applicant’s predicament which should be assessed, rather than the intention of the persecutor.<sup>223</sup> Reference to the *Refugee Convention*’s humanitarian and protection-oriented object and purpose merely reinforces the inappropriateness of focusing on the persecutor’s intention.<sup>224</sup>

Not only is the intention approach arguably incorrect as a matter of treaty interpretation, but its importation has been highly problematic for victims and

<sup>218</sup> *Shah* [1999] 2 AC 629, 644 (Lord Steyn).

<sup>219</sup> See generally, DIMIA, *Gender-Related Persecution*, above n 121, 97.

<sup>220</sup> *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565, 568 (Burchett J).

<sup>221</sup> *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293, 304–5 (Gleeson CJ, Gaudron, Gummow and Hayne JJ), 311–12 (Kirby J).

<sup>222</sup> Article 31(1) of the *VCLT*, above n 53, provides that ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.

<sup>223</sup> Judicial support for this interpretation is evident in the observation by the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Kord* (2002) 125 FCR 68, 69 (Heerey J) that ‘the use of the passive voice conveys a compound notion, concerned both with the conduct of the persecutor and the effect that conduct has on the person being persecuted’. See also *Refugee Appeal No 72635/01* (NZRSAA, Haines and Plunkett, 16–17 July 2001); *Refugee Appeal No 74665/03* (NZRSAA, Roche, Haines and Murphy, 22 July 2003).

<sup>224</sup> For a more detailed analysis of the different approaches to causation in the refugee context, see Foster, above n 101, 272–81.

potential victims of trafficking who typically fear persecution by criminals and/or members of their family and community whose motivations are found to fall outside the scope of art 1A(2). While the courts in *Shah* and *Khawar*<sup>225</sup> were praised for recognising that when persecution consists of privately inflicted harm and a failure of state protection, then the *Refugee Convention* nexus can be attached to either limb,<sup>226</sup> these precedents have provided only limited support to female claimants in the trafficking context. This is because a state's culpability for the criminal acts of private citizens will only be Convention-based if its conduct in withholding protection is selective and discriminatory.<sup>227</sup> In other words, its usefulness is confined to factual settings analogous to *Khawar* and *Shah*, where '[t]he distinguishing feature ... is the evidence of institutionalised discrimination against women by the police, the courts and the legal system'.<sup>228</sup> In both cases, the feared persecution consisted of severe domestic abuse against women, which was widely tolerated and sanctioned by Pakistani police. Importantly, the majority judgments in *Khawar* touched upon the critical distinction between states that condone and tolerate non-Convention harm against women and states that are simply unable to protect against it. The suggestion made was that a Convention nexus cannot be established where the failure of protective law enforcement stems from a shortage of resources,<sup>229</sup> maladministration or ineptitude by the police.<sup>230</sup> Considering the Tribunal's tendency in trafficking-related claims to focus on the symbolic willingness of a state to eradicate trafficking rather than its practical ability to do so, as well as its failure to view rampant corruption (including police participation in trafficking) as de facto toleration,<sup>231</sup> the Tribunal is likely to reject *Khawar*-style nexus arguments, even where state complicity of this kind exists.

The other limitation of the *Khawar* and *Shah* judgments is their underlying assumption that there was nothing inherently questionable about the Tribunals'

<sup>225</sup> *Shah* [1999] 2 AC 629; *Khawar* (2002) 210 CLR 1.

<sup>226</sup> See, eg, Udara Jayasinghe, 'Women as "Members of a Particular Social Group": Some Flexible Judicial Developments' (2006) 31 *Alternative Law Journal* 79, 81.

<sup>227</sup> See, eg, *Khawar* (2002) 210 CLR 1, 29 (McHugh and Gummow JJ). This is also emphasised in the chapter entitled 'Persecution' in RRT, Legal Services Section, *The Guide to Refugee Law in Australia* (2007) ch 4, available from <<http://www.mrt-rrt.gov.au/guideRefLaw.asp>> at 23 May 2008.

<sup>228</sup> *Shah* [1999] 2 AC 629, 655 (Lord Hoffman). A good illustration of this is provided in *Case No V0618399* [2006] RRTA 95 (22 June 2006), where the Tribunal, after considering an Amnesty International report which documented how 'violence against women is widely tolerated, justified and excused by reference to tradition, or a specific Albanian "mentality", even at the highest levels of the government, police and judiciary', concluded that the applicant would be discriminatorily denied protection for reasons of her membership of the PSG 'women in northern Albania': Amnesty International, *Albania: Violence against Women in the Family: It's Not Her Shame* (Amnesty International Report, 30 March 2006). See also *Case No 060779039* [2006] RRTA 187 (21 November 2006), where the RRT concluded that there was a real chance that

assistance would be denied [to the applicant] by government authorities, such as the police, on a selective and discriminatory basis for a Convention reason, viz her being a member of the particular social group of women in Nepal, and in particular, unmarried unskilled women with a dependent child lacking in family support, and that this would be the essential and significant motivation for that lack of protection.

<sup>229</sup> *Khawar* (2002) 210 CLR 1, 28–9 (Kirby J).

<sup>230</sup> *Ibid* 12 (Gleeson CJ).

<sup>231</sup> See above Part IV(A)(2).

conclusion that domestic violence is not Convention-based because it is 'privately motivated'.<sup>232</sup> This has lent weight to the common misconception that violence against women cannot be for *Refugee Convention* reasons because it stems from personal relationships between women and their persecutors.<sup>233</sup> This construction is neither warranted by the Convention nor logically sound, as '[e]ssentially, all violence involves a "personal relationship" between the inflictor of harm and the victim — even if it is merely the violence that constitutes the relationship'.<sup>234</sup> The tendency to view personally motivated violence as automatically outside the scope of art 1A(2) is particularly visible in trafficking cases, where adjudicators routinely focus on the 'criminal' and 'profit-making' motives of sex-traffickers without considering the additional operation of *Refugee Convention* grounds.<sup>235</sup> This is epitomised in a decision of the RRT which concerned a young Colombian woman, whom the Tribunal accepted had been forced into prostitution after being tricked into coming to Australia under the pretence of travel and lawful work, and who would face a real chance of harm upon return to Colombia because of her lack of cooperation with traffickers and her contact with Australian authorities.<sup>236</sup> Rejecting the applicant's submission that she feared persecution for reasons of her membership of the PSG 'vulnerable Colombian women', the Tribunal found:

The Applicant's own personal circumstances in Colombia (including her expressed desire to travel overseas), together with the fact that she is a young woman, presented the opportunity for certain criminals to identify her as a suitable victim but does not of itself necessarily provide the motivation for the harm she suffered or feared. The Tribunal is satisfied that the motivation in first luring the Applicant into prostitution and then demanding regular payments from her was opportunistic self-interested criminality to make money ... Further, the ... harm the Applicant fears on return to Colombia arises out of her particular circumstances and is essentially a harm directed at her as an individual and not for any Convention reason ...<sup>237</sup>

The conclusion that sex-trafficking is not Convention-based harm because it is a criminal activity motivated by personal self-interest has been reached in a

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<sup>232</sup> *Khawar* (2002) 210 CLR 1, 13 (Gleeson CJ), 29 (McHugh and Gummow JJ), 41 (Kirby J).

<sup>233</sup> For example, in *Case No N02/43293* [2002] RRTA 944 (24 October 2002), the RRT concluded that a young Thai woman who had been sold into prostitution by her family in order to repay a loan shark was not targeted for persecution because she belonged to a PSG of poor and uneducated people. Rather, because 'she was essentially the victim of criminal activity ... she was subjected to a form of "private persecution" unrelated to a Convention reason'.

<sup>234</sup> Germov and Motta, above n 114, 312.

<sup>235</sup> This tendency on the part of refugee tribunal decision-makers to focus on the criminal or economic motives of traffickers has been noted in other jurisdictions as well: see generally Foster, above n 101, 266–8. See also Knight, above n 151, 6–8.

<sup>236</sup> *Case No N98/24000* [2000] RRTA 33 (13 January 2000).

<sup>237</sup> *Ibid.*

number of decisions by the RRT.<sup>238</sup> Such cursory and insular assessment of motivation is objectionable for a number of reasons. First, it overlooks the fact that a finding that sex-traffickers are personally motivated to make money does not preclude a finding that they are *also* motivated for a Convention reason. It is, therefore, inconsistent with the well-established mixed motive doctrine.<sup>239</sup> The relevance of this doctrine in the present context was recently emphasised by the Federal Magistrates Court in reviewing a Tribunal decision which had denied protection to a young Thai girl who had been abandoned by drug-addicted relatives in rural Thailand.<sup>240</sup> McInnis FM held that the Tribunal had erred when it concluded that ‘any harm or threat of harm [such as being sold/lured into prostitution or being sexually assaulted] that would emanate from the applicant’s relatives or others would be motivated by financial reasons or personal gratification’, without considering (as was required) whether the applicant was also being persecuted for reasons of the PSG identified.<sup>241</sup> The point is reiterated in the *UNHCR Trafficking Guidelines* which stipulate that although

[t]rafficking in persons is a commercial enterprise, the prime motivation of which is likely to be profit ... [t]his overriding economic motive does not ... exclude the possibility of Convention-related grounds in the targeting and selection of victims of trafficking.<sup>242</sup>

This guideline highlights a second major flaw in the Tribunal’s method of gauging motivation in trafficking cases — namely, its failure to address what motivates the persecutor’s ‘selection’ of the applicant. In light of the mixed motive doctrine, it is untenable to reject the requisite nexus because an applicant was merely targeted as a ‘suitable victim’ of criminal activity without inquiring as to *why* she was suitable for *that* activity. The way in which the inquiry should be taken to this next level was articulated in *Rajaratnam v Minister for Immigration and Multicultural Affairs*,<sup>243</sup> a case which turned on whether the crime of extortion had been committed for reasons of race. As an extortion case, it is highly applicable to the present context, since the use of threats and force to

<sup>238</sup> See, eg, *Case No V03/16442* [2004] RRTA 474 (25 June 2004), in which the Tribunal expressed ‘doubts as to whether the criminals who kidnap and sell Albanian women do so because they are members of a particular social group. The women may just as likely be kidnapped by the criminals because as individuals they are suitable victims’. See also, the discussion of *Case No N02/43293* [2002] RRTA 944 (24 October 2002); *Case No V00/11003* [2000] RRTA 929 (29 September 2000) which concerned a young Bosnian woman who the RRT accepted had been gang raped by a group of men, one of whom was a police officer, after she had refused to cooperate in a sex-trafficking operation. The Tribunal did not accept that she was threatened and raped for reasons of her membership in the group ‘young women in Bosnia and Herzegovina’, finding that ‘the threats and violence perpetrated against her were criminal acts that were aimed at her as an individual’.

<sup>239</sup> See, eg, *Minister for Immigration and Multicultural Affairs v Sarrazola* (1999) 95 FCR 517, 521–2. See also *Kanagasabai v Minister for Immigration and Multicultural Affairs* [1999] FCA 205 (Unreported, Branson J, 10 March 1999) [20]. For a detailed discussion of the mixed motive issue, particularly in the context of an economic element in refugee claims, see Foster, above n 101, 247–53.

<sup>240</sup> *M93 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FMCA 252 (Unreported, McInnis FM, 24 February 2006).

<sup>241</sup> *Ibid* [70].

<sup>242</sup> *UNHCR Trafficking Guidelines*, above n 76, [31].

<sup>243</sup> [2000] FCA 1111 (Unreported, Moore, Finn and Dowsett JJ, 10 August 2000) (*‘Rajaratnam’*).

exact payment of a debt or other advantage is both an intrinsic part of the trafficking process *and* a separate harm that flows from it. In other words, not only is sex-trafficking a form of extortion itself, but extortion is commonly inflicted on former trafficking victims who have either escaped before paying their debt or who, despite having paid their debt, are perceived as a threat to their traffickers because they hold incriminating information and can deter others from being duped.<sup>244</sup> Although the criminal activities of sex-trafficking and any subsequent extortion are obviously motivated by a personal interest to make money or gain an advantage (for example, being able to continue lucrative illegal operations with impunity), the relevant question is why the applicant was targeted to realise this interest and whether or not that reason is found in the *Refugee Convention*. As Finn and Dowsett JJ<sup>245</sup> explained in *Rajaratnam*:

The extorted party may have been chosen specifically as the target of extortion for a Convention reason, or may have become the subject of extortion because of the known susceptibility of a vulnerable social group to which he or she belongs, that social group being identified by a Convention criterion. Or, conversely, the person may have been selected simply because of his or her perceived personal capacity to provide the particular advantage sought and for no other reason or purpose.<sup>246</sup>

It is the failure of adjudicators to embark on this necessary investigation that renders the motivation approach to causation problematic for victims of sex-trafficking. The primary task for the adjudicator is to ascertain whether an applicant fears being persecuted for reasons in the *Refugee Convention*. Since it is established that gender constitutes a Convention criterion, the question will be whether, in selecting the applicant for persecution, the persecutor was motivated by the applicant's gender (qualified as it may be by other relevant attributes). Unlike other crimes, such as robbery, for which victims are chosen indiscriminately, or for a non-Convention reason, such as wealth, sex-trafficking disproportionately victimises women and girls. The perpetrators of this crime inevitably perceive women as inferior and unworthy of being accorded human rights. Moreover, their conduct demonstrates that they view women as chattels — capable of being bought, sold, used and discarded.

The final problem with the intention approach is its inherent inappropriateness in the context of a treaty which focuses on providing protection rather than punishing the perpetrators of crime. While this insight can be applied in refugee claims generally, it is particularly pertinent to the trafficking context. The nature and scope of sex-trafficking are such that harm is inflicted by multiple actors across a temporal and geographical continuum. Unlike human smuggling, which is a finite process that ends when the smuggled person reaches his or her

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<sup>244</sup> For example, in *Case No N05/50773* [2005] RRTA 103 (28 June 2005), which concerned a Moldovan woman who had been abducted in an attempted trafficking operation but escaped, the Tribunal acknowledged that the applicant's abductors 'may well have wanted to ascertain that the applicant was no longer around — not because they still wanted to traffic her, but because they did not want her telling her story — either to the authorities ... or to other potential victims'.

<sup>245</sup> Moore J, in dissent, agreed with Finn and Dowsett JJ on this point: *Rajaratnam* [2000] FCA 1111 (Unreported, Moore, Finn and Dowsett JJ, 10 August 2000) [10] (Moore J).

<sup>246</sup> *Ibid* [46].



destination,<sup>247</sup> trafficking entails the prolonged exploitation of a person and has rightfully been conceived by the UNHCR as ‘a process comprising a number of interrelated actions rather than a single act at a given point in time’.<sup>248</sup> These actions are committed by various actors, which can include members of the victim’s own family and community, especially in the case of young women and girls ‘sold’ to traffickers. The complex and multifarious nature of this ordeal is entirely incompatible with a test that examines the reason for the persecutor’s desire to harm the victim. Exactly whose motive is the adjudicator to assess? The person who recruited the applicant or those who transported, harboured or received her? What of the countless men who rape her because she is forced to have sex with them against her will, and who are clearly not motivated by money?<sup>249</sup>

The above extract from *Rajaratnam* alludes to an alternative way to satisfy the *Refugee Convention* nexus in these cases: asking whether the applicant is at risk of persecution because she belongs to a particularly susceptible or vulnerable Convention-protected group. This has been described as the ‘predicament approach’ to causation, which turns on whether a Convention ground is what places the applicant at risk of being persecuted.<sup>250</sup> It is particularly useful in the present context because it redirects adjudicators’ attention to the wider context of poverty and discrimination in which trafficking occurs. As the UNHCR observes, ‘[s]cenarios in which trafficking can flourish frequently coincide with situations where potential victims may be vulnerable to trafficking precisely as a result of characteristics [protected in the refugee definition]’.<sup>251</sup> In most, if not all, trafficking source countries, the poverty and disadvantage that render women susceptible to being lured or sold into sexual slavery are inextricably linked to the protected attribute of their gender and are usually heightened by other factors such as economic and civil status, ethnicity, location and age.<sup>252</sup> For example, in many of these societies, women and children are discriminatorily denied the education and employment opportunities that are afforded to men and the resulting feminisation of poverty is a major contributor to trafficking.<sup>253</sup>

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<sup>247</sup> Office to Monitor and Combat Trafficking in Persons, *Distinctions between Human Smuggling and Human Trafficking* (Fact Sheet, US Department of State, 1 January 2005) <<http://www.state.gov/g/tip/rls/fs/2005/57345.htm>> at 23 May 2008.

<sup>248</sup> *UNHCR Trafficking Guidelines*, above n 76, [10].

<sup>249</sup> Since art 3(b) of the *Trafficking Protocol*, above n 16, renders expressed consent to any of the acts of trafficking immaterial where deceptive measures have been used in doing those acts, potentially all sexual encounters a woman has during her ordeal amount to rape. See also Joan Smith, ‘Sex with a Trafficked Woman is Rape’, *The Independent* (London, UK) 29 September 2005, 33.

<sup>250</sup> See generally, ‘The Michigan Guidelines on Nexus to a Convention Ground’ (2002) 23 *Michigan Journal of International Law* 211 (‘*Michigan Guidelines*’).

<sup>251</sup> *UNHCR Trafficking Guidelines*, above n 76, [31].

<sup>252</sup> See, eg, *Case No N03/45573* [2003] RRTA 160 (24 February 2003) in which the Tribunal was satisfied that the applicant — an ethnic Shan woman in Burma who had been trafficked within Burma and into Thailand — feared severe persecution for reasons of her membership in the PSGs postulated, as well as her ethnicity.

<sup>253</sup> Jenna Shearer Demir, ‘The Trafficking of Women for Sexual Exploitation: A Gender-Based and Well-Founded Fear of Persecution?’ (UNHCR Working Paper No 80, 2003) 4–5.

The predicament approach to causation, which is espoused by the UNHCR<sup>254</sup> and the *Michigan Guidelines*<sup>255</sup> (and arguably represents the correct approach to interpretation pursuant to the *VCLT*),<sup>256</sup> has been liberally applied by the Immigration and Refugee Board of Canada ('IRBC').<sup>257</sup> In one case involving a Thai woman who had been sex-trafficked to France, the IRBC stated that 'it is enough if the prospective harm [of continued debt-bondage or serious physical reprisals] is in some respect related to an innate characteristic of the claimant. The fact the claimant is a woman is a major cause of her predicament'.<sup>258</sup> In other decisions the predicament approach has not been explicit, however, the analysis clearly treats the vulnerable status or profile of an applicant as pivotal to the assessment of her risk of being persecuted.<sup>259</sup> For example, in a decision concerning an Ethiopian woman who was trafficked into domestic servitude in Lebanon as a 14 year old, the IRBC was persuaded that, considering the claimant's gender, age, educational level and the fact that she had no family or ties to any persons in Ethiopia to assist and guide her, she faced a serious possibility of persecution based on her profile.<sup>260</sup> In Australia, a methodology akin to the 'predicament' approach, which examines the discriminatory effect rather than the intent of the persecutor, has had some acceptance in the Federal Court<sup>261</sup> — particularly where the *Refugee Convention* ground indirectly motivates the harm feared. However, the prevailing approach is clearly that which 'makes motive critical'.<sup>262</sup>

## 2 The Standard of Causation

The previous section has illustrated how, as a form of gender-based persecution, sex-trafficking and its related harm are discernibly gender-motivated (either directly under the intention approach or indirectly under the predicament approach). However, the Australian Government has

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<sup>254</sup> The *UNHCR Trafficking Guidelines*, above n 76, specify that '[t]o qualify for refugee status, an individual's *well-founded fear of persecution* must be *related* to one or more of the Convention grounds': at [29] (emphases added).

<sup>255</sup> *Michigan Guidelines*, above n 250, 215.

<sup>256</sup> For a detailed analysis of how the *VCLT* requires this approach, see James C Hathaway and Michelle Foster, 'The Causal Connection ("Nexus") to a Convention Ground' (2003) 15 *International Journal of Refugee Law* 461.

<sup>257</sup> For a detailed summary of these decisions and similarly positive examples from other jurisdictions, see Foster, above n 101, 282–5.

<sup>258</sup> *X (Re)* [1999] IRBC Docket No T98–06186 (2 November 1999) 5.

<sup>259</sup> In a recent decision of the UK's Asylum and Immigration Tribunal, the Tribunal took a very straightforward approach to satisfaction of the causation test in the context of trafficking, which is reminiscent of a predicament approach: see *SB Moldova CG* [2008] UKIAT 00002 (25–6 April 2007); see especially at [79], [111].

<sup>260</sup> *X (Re)* [2005] IRBC Docket No TA4–16915 (16 March 2006) 7.

<sup>261</sup> *Okere v Minister for Immigration and Multicultural Affairs* (1998) 87 FCR 112 ('*Okere*'). See also *NACM of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 134 FCR 550, 561, 563–4, 565.

<sup>262</sup> *Immigration and Naturalization Service v Elias-Zacarias*, 502 US 478, 483 (1992).

imposed a further definitional hurdle by way of s 91R(1)(a) of the *Migration Act*, which requires the Convention ground to be ‘the essential and significant reason’ for the persecution feared. This provision was part of a raft of legislative amendments enacted post-*Khawar* to impose tighter parameters on the scope of art 1A(2).<sup>263</sup> Although the provision refers to the *reason* for persecution, and, therefore, leaves the possibility of a construction consistent with the predicament approach, the RRT directs itself that ‘persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant *motivation* for the persecution feared’.<sup>264</sup> While the RRT acknowledges that the motivation for persecution need not be solely attributable to the Convention reason, its interpretation of s 91R(1)(a) could potentially reintroduce the false dichotomy between ‘personal’ and ‘Convention’ motivations discussed above.<sup>265</sup> It also imposes an unduly high standard of causation, which has been rightly criticised for being at odds with the humanitarian purpose of the *Refugee Convention*.<sup>266</sup> The UNHCR therefore recommends that Australia use the phrase ‘relevant contributing factor’ instead of ‘essential and significant reason’<sup>267</sup> — a recommendation that, if followed, would bring Australia one step closer to adhering to the *Michigan Guidelines*.<sup>268</sup> The Guidelines suggest that only if the Convention ground is ‘remote to the point of irrelevance’, should refugee status not be recognised.<sup>269</sup>

Although s 91R(1)(a) of the *Migration Act* ostensibly makes Australia’s causation test even less adaptable to the nature and scope of trafficking-related persecution, it appears to have had only a minimal impact on judicial interpretation of the ‘for reasons of’ phrase.<sup>270</sup> This, as de Costa contends, might

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<sup>263</sup> *Migration Legislation Amendment Act (No 6) 2001* (Cth). In the second reading speech, then Minister Phillip Ruddock disclosed this intention, stating that

[i]n the absence of clear legislative guidance, the domestic interpretation of [Australia’s] obligations has broadened out under cumulative court decisions so that Australia now provides protection visas in cases lying well beyond the bounds originally envisaged by the convention.

Commonwealth, *Parliamentary Debates*, House of Representatives, 28 August 2001, 30 420 (Phillip Ruddock, Minister for Immigration and Multicultural Affairs).

<sup>264</sup> This is contained in the summary definition of a refugee which is found in the introduction to all RRT decisions (emphasis added).

<sup>265</sup> See, eg, *Okere* (1998) 87 FCR 112, 118 (Branson J).

<sup>266</sup> See, eg, Edwards’ criticism of s 91R(1)(a) that ‘fear of persecution [for a Convention reason] should be enough in itself, without interrogation into other, corollary reasons for flight’: Alice Edwards, ‘Tampering with Refugee Protection: The Case of Australia’ (2003) 15 *International Journal of Refugee Law* 192, 203.

<sup>267</sup> Evidence to Senate Legal and Constitutional References Committee, *Reference: Migration Legislation Amendment Bill [No 6] 2001*, Parliament of Australia, Canberra, 21 September 2001, 19 (Tham Meechubot, UNHCR).

<sup>268</sup> Above n 250, 217.

<sup>269</sup> *Ibid.*

<sup>270</sup> See, eg, Jayasinghe, ‘Women as “Members of a Particular Social Group”’, above n 226, 81, noting how the s 91 amendments ‘play a somewhat limited role in the interpretation of sexual and gender based persecution’.

be because s 91R can be applied in a manner consistent with pre-existing case law,<sup>271</sup> which establishes that

where persecution arises by virtue of cumulative causal factors, an intuitive [common-sense] approach informed by policy considerations will dictate whether a particular factor is, or is not, causally linked to the persecution for the purpose of art 1A(2)'s satisfaction.<sup>272</sup>

Importantly, such policy considerations should primarily derive from international human rights jurisprudence.<sup>273</sup>

A common-sense approach to s 91R(1)(a) is apparent in Pascoe CFM's judgment in *VXAJ*.<sup>274</sup> In that case the applicant was a Thai woman who was trafficked into sexual servitude in Australia, detained in immigration detention (following a raid on the illegal brothel where she was held), and ultimately released and granted a CJSV after assisting police with the prosecution of those involved.<sup>275</sup> The applicant feared that persons within the trafficking network would kill, re-traffic or otherwise harm her because she had information about the network, had provided this information to the Australian police, and had escaped before paying her debt. Although the RRT accepted that the applicant belonged to a PSG defined as 'sex workers in Thailand', it found that the fact that the applicant was or had been a sex worker 'was not the essential and significant reason for the harm she [feared]'.<sup>276</sup> It provided the context (she was in that situation because she had been a sex worker) but 'the motivation was her so called debt and betrayal of the traffickers'.<sup>277</sup> Adopting a common-sense approach and adhering to the mixed motive doctrine, Pascoe CFM held that

the Tribunal's construction of s 91R(1)(a) appears to have treated specific factors as precluding the characterisation of the reason for the applicant's fear of persecution at a more general level. The Tribunal has assumed that the applicant's debt and betrayal of the traffickers were factors exclusive of any motivation arising from the fact that the applicant was a sex worker. ... I am thus not satisfied that the Tribunal properly considered s 91R given that the applicant was

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<sup>271</sup> Of particular significance in the pre-existing case law is the decision in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 that although China's persecution of 'black children' born in breach of the one child policy was intended to punish the *parents* and discourage others from breaking the law, *because it was done by discriminating against the children*, it was 'for reasons of' their membership of the PSG of 'black children': at 315–16 (Kirby J), 303–4 (Gleeson CJ, Gummow, Gaudron and Hayne JJ).

<sup>272</sup> Alex de Costa, 'Assessing the Cause and Effect of Persecution in Australian Refugee Law: *Sarrazola, Khawar and the Migration Legislation Amendment Act (No 6) 2001 (Cth)*' (2002) 30 *Federal Law Review* 535, 537.

<sup>273</sup> *Ibid.*

<sup>274</sup> (2006) 198 FLR 455, 465.

<sup>275</sup> After the applicant's release from detention on 6 June 2003, she cooperated with police and assisted with the prosecution of those of her traffickers who were resident in Australia. It is evident that by the time the delegate for the Minister rejected her application on 13 May 2004, she had not been awarded a TWPTV, despite her cooperation and assistance in the prosecutions: *ibid* 459. Arguably, it was the failure of the temporary witness protection regime which prompted her to apply for protection under the *Refugee Convention*.

<sup>276</sup> *Ibid* 460.

<sup>277</sup> *Ibid.*

a sex worker and *there appears to be a fundamental connection between being a sex worker, the debt and her giving evidence against the traffickers.*<sup>278</sup>

This decision demonstrates that, properly constructed, s 91R(1)(a) is consistent with a predicament approach to causation. It also suggests that persecutory motivation cannot be assessed in a vacuum, without considering the claimed Convention ground where there is a fundamental connection between that ground and the more direct factors leading to the persecution. In this instance, for example, the applicant's membership in a Convention-protected group ('sex workers in Thailand') was inextricably linked to the forms of persecution she feared. It was, therefore, erroneous for the Tribunal to dismiss it as providing merely the context for the harm.<sup>279</sup> The decision also suggests that a direct or obvious motivation is not necessarily the same as the 'essential and significant reason' for persecution. Importantly, the *Migration Act* only requires the latter to be linked to the *Refugee Convention*.

Applying this to trafficking cases more generally, it is possible to argue that while the direct and obvious motivation to engage in criminal activity may be financial, the *Refugee Convention* is not concerned with that criminal activity per se. Rather, it is concerned with protecting the woman who, as the targeted victim of this crime, fears the violence and cruelty meted out to her throughout its execution. That violence is essentially and significantly motivated by a desire to break her will, instil fear and exert control over her, and make her compliant. These motives are inextricably linked to the perceptions her persecutors hold of her gender, qualified as it may be by other attributes (such as race, class, age and marital status, among others). Equally, entrenched discrimination against women generally (or against narrower subsets), including discrimination by law enforcement agencies in that country, may be an essential and significant reason for her particular susceptibility and heightened risk of such harm. Properly and sensitively examined, either approach should point to the same conclusion that sex-trafficking is a form of gender-based persecution, which happens to women *because they are women.*<sup>280</sup>

<sup>278</sup> Ibid 465 (emphasis added). See also Udara Jayasinghe, 'Administrative Decision-Making in the Sexual and Gender-Based Persecution Context' (2007) 14 *Australian Journal of Administrative Law* 102, 108–10.

<sup>279</sup> The RRT reached a similar, if not *more* absurd conclusion in *Case No V0618483* [2006] RRTA 79 (6 June 2006). The applicant was the brother of a trafficked Albanian woman who had later testified and helped put her traffickers in prison. After being released, they sought revenge against her and her family. Since the Minister had intervened in the applicant's sister's case, the RRT had to consider afresh whether the sister belonged to a PSG, such that the brother could claim he feared harm as a result of his membership in her family. The Tribunal found that, although she belonged to the PSG of 'women who have escaped traffickers and given information to the police', her persecution was not for this reason. It concluded that the sister had been '*targeted individually and directly by her purported assailants for the role she played in their arrest and jailing ... [and not] in any way as a member of any particular social group*' (emphasis added). In examining the persecutors' vengeful motive in a vacuum, the Tribunal failed to grasp the essential and seemingly obvious link between her predicament and the professed PSG.

<sup>280</sup> Rodger Haines QC, 'Gender-Related Persecution and Refugees: The Importance of Mainstreaming Refugee Claims by Women' (UNHCR Discussion Paper No 1/2005, January 2005) 8, available from <<http://www.unhcr.org.au/nletter.shtml>> at 23 May 2008.

## V CONCLUSION

It is a cause of great concern that there is no clear means of protection for women who are trafficked to Australia for the purposes of sexual exploitation. The government's witness protection visa scheme is severely limited in scope and security, as it not only excludes victims who are unable or unwilling to cooperate in criminal proceedings, but also fails to provide meaningful long-term security to those who choose to embark on this path. Under this highly discretionary scheme,<sup>281</sup> the critical health and safety needs of victims are subordinate to the Australian Government's interests. Against this background, we have presented refugee law as a legitimate and appropriate alternative avenue of protection for those victims who are excluded from and/or abandoned by the witness protection program.

This article has demonstrated that, properly construed, art 1A(2) of the *Refugee Convention* can accommodate claims brought by victims of sex-trafficking. We have illustrated that sex-trafficking is a widespread form of persecution which has reached unacceptable levels in recent times, largely because it is officially tolerated, condoned or uncontrollable in many parts of the world. We have also argued that it is a form of gender-based persecution, motivated by prevailing attitudes towards women as inferior, and as products capable of being bought, sold, used and abused. However, while foreign jurisprudence and guidance from the UNHCR demonstrate that the *Refugee Convention* can clearly encompass trafficking-related claims, our analysis reveals that Australian decision-makers continue to interpret and apply art 1A(2) of the Convention in a way that overlooks how gender intersects with social, cultural and economic norms to oppress women and subject them to discriminatory harm.

This suggests that reforms are urgently needed both in terms of the specific visa regime currently in place for those victims of sex-trafficking, but also in the way in which the *Refugee Convention* is applied to sex-trafficking victims. Recognising that this human rights atrocity is inextricably and fundamentally linked to gender discrimination is the first step in working toward a safer and more certain future for victims of this heinous crime. Indeed, as Burmese leader and prisoner of conscience Aung San Suu Kyi has urged,

[a]s we take practical steps to prevent trafficking in women ... we also have to work to eradicate deeply rooted customs and prejudices that undermine their position in society. Women have to be so valued that the price of treating them as disposable goods would be so high in emotional, spiritual, and economic terms that any perceived benefits would be greatly offset by a very real loss to family and society.<sup>282</sup>

It is hoped that future refugee claims by trafficked women will be adjudicated in a way that gives full effect to Australia's obligations under the *Refugee Convention*, thus ensuring that the recognition that sex-trafficking is a human rights issue as much as a criminal law enforcement problem is translated into positive outcomes for the victims of trafficking.

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<sup>281</sup> See above Part III.

<sup>282</sup> Aung San Suu Kyi, 'A Message from Aung San Suu Kyi' in Karen Beeks and Delila Amir (eds), *Trafficking and the Global Sex Industry* (2006) ix, ix.