

Prosecuting trafficking in persons: known issues, emerging responses

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This paper is the second in a series that examines the different components of the criminal justice response to trafficking in persons. Specifically, this paper seeks to identify some of the practical issues that may affect trafficking prosecutions, such as unclear legal frameworks, the transnational nature of trafficking, and reliance on often traumatised victims as witnesses who may also be unwilling or unable to participate in prosecutions. Proposed strategies to support or improve prosecution practice include legal reform, protection of witnesses and specialist training for prosecution units. There has been limited research on trafficking prosecutions – and given the complexities of transnational cases – it seems important that priority is given to building an evidence base that draws on experience and primary data.

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Background

A review of the literature suggests that internationally, there has been limited research on the practice and experience of trafficking prosecutions. For example, there appear to have been few studies that have sought to systematically examine issues such as:

- who is being prosecuted, and for which types of 'trafficking' crimes
- how these cases are being prosecuted and defended; for example, what charges are laid, what evidence is presented in court, what protections are made available to witnesses, what defences are relied upon, and case outcomes
- the factors that may impact on the conduct or outcome of trafficking prosecutions; for example, jury attitudes, legal complexity or perhaps the type of 'exploitation' alleged
- the experience of participating in a trial, either as a trafficked person giving evidence, a witness, a person accused of 'trafficking', or as a prosecutor or defence lawyer.

This lack of research may reflect the newness of the crime type or perhaps difficulties accessing relevant data. Hopefully in time, research will emerge that analyses these issues, drawing on primary data from, for example, trial observations, interviews with prosecutors and defence lawyers, and trafficked persons who give evidence in court.

In the interim, what information is available about the conduct and experience of trafficking prosecutions? Much has been written about legal and policy frameworks. These studies provide insight into the structural context for trafficking prosecutions and, in some cases, insights into practice. There is also literature on factors that impact on trafficking prosecutions, such as investigative practices and victim support mechanisms. A small amount of information is available from training materials and other documents about how some countries are seeking to structure,

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train or resource their prosecution services to respond to trafficking in persons. In Australia, some information can also be derived from court reports and transcripts from trafficking prosecutions (i.e. trials involving charges laid under Divisions 271 and 272 of the Criminal Code (Cth)).

While the available information is limited, it is nonetheless possible to identify some of the issues that have arisen in prosecutions to date, particularly in the United States and Australia, along with responses to these issues. As there are many issues that might potentially impact on a prosecution process, it is likely that this list will continue to grow and change, particularly as more research is undertaken.

Factors affecting trafficking prosecutions

Legal frameworks

Laws are the basis of any prosecution process. Prosecutors will have great difficulty prosecuting traffickers and securing appropriate penalties if legal frameworks are incomplete, unclear or inadequate. Until recently, many countries either did not have specific criminal offences relating to trafficking in persons (a term defined in the United Nations Trafficking Protocol) or their laws were incomplete; for example, laws focused solely on women and children as victims, and trafficking for the limited purpose of sexual exploitation.

Gallagher and Holmes (forthcoming) argue that a strong legal framework for responding to trafficking involves more than simply criminalising the specific offence of trafficking. They argue that a legal framework needs to:

- criminalise acts 'related' to trafficking, such as forced labour, illegal recruitment, involvement in organised crime and money laundering. This gives prosecutors a range of offences to draw upon, instead of or in addition to the specific offence of trafficking

- prescribe penalties that are proportionate to the gravity of the offence. This allows prosecutors to match offence provisions to the level of alleged complicity in the offence and provide reasonable alternative charges
- allow police, prosecutors and courts to cooperate across borders, including through informal cooperation, mutual assistance and extradition regimes
- include powers to conduct financial investigations and seize proceeds of crime. This allows investigators to obtain evidence of financial transfers and other business dealings, which can strengthen a prosecution case
- ensure trafficked persons are protected from prosecution for crimes committed as a result of trafficking. This is considered vital to ensuring that trafficked persons can come forward without fear of prosecution (ICMPD 2004: 76)
- provide protection for victims of trafficking both as victims of crime and as witnesses inside and outside court
- ensure trafficked persons have access to remedies through civil procedures and criminal injuries compensation (Gallagher & Holmes forthcoming: 3–4; ICMPD 2006).

Trafficking as a transnational crime

The transnational nature of many trafficking offences can complicate and even thwart prosecutions. For example, while a trafficking case might be prosecuted in the country where the exploitation took place, key evidence may be located in the trafficked person's country of origin. At least in the Australian context, if the evidence is required for court it will generally need to be sought from the country in question through formal channels (a process known as mutual assistance). While mutual assistance channels can operate

quickly and smoothly, they can also be slow, inefficient and ineffective (ADB & OECD 2006: 73–105).

The matter is equally complex if the suspect or defendant is located in another jurisdiction. In these cases, investigators and prosecutors must decide whether to seek extradition (a lengthy and complex process) or provide their evidence to the country in question, thereby allowing the authorities in that country to investigate and prosecute. This may involve balancing a number of competing considerations, including the relative likelihood of a criminal justice process progressing in either jurisdiction, the likelihood of an extradition request succeeding and human rights issues.

Trafficked person may be the crucial witness

The trafficked person may be one of only a small number of people who can verify exactly what happened. Accordingly, their evidence may be crucial to the prosecution case (American Cultural Center 2007: 13). This can raise practical challenges for prosecutors.

In many countries, trafficked persons risk deportation or arrest for involvement in illegal activity such as visa fraud or illegal entry. This has the practical result of removing the key witness to the trafficking offence from the jurisdiction or ensuring they are in prison. Some countries have sought to redress this problem, through laws to protect trafficked persons from prosecution and to ensure the immigration status of trafficked persons can be regularised (Carrington & Hearn 2003: 2–13; Costello 2005: 7–11; ICMPD 2004: 53).

While visas and victim support strategies are vital, they also must be managed carefully in the context of a prosecution process. In an adversarial system, it is the defence counsel's role to explore any possible motives the victim and other witnesses may have for fabricating their

story. Experience in the United States, Australia and Italy has confirmed that defence counsel can and will argue that the victim's or other witnesses' testimony has been 'bought' or tainted by 'opportunities' offered by the authorities. This might include immunity from prosecution, access to visas or entitlements under the victim support program (American Cultural Center 2007: 9–10; Costello 2005: 10). For example, in the Australian *Sieders and Yotchomchin* trial, defence counsel drew attention to the fact that the Australian Federal Police had helped key witnesses apply for visas that included work entitlements (see for example, pp. 506 and 630 of the transcript). The implication was that the witnesses should not be believed, as they had ulterior motives for participating in the criminal justice process.

Trafficked persons may not want to participate in prosecutions

Commentators frequently state that trafficked persons do not want to testify in criminal trials. This is likely to be the case for any victim of crime. However, in the trafficking context, it is also stated that trafficked persons fear reprisals, want to avoid the shame that might result from public disclosure at trial of compromising conduct or lack trust in criminal justice officials (American Cultural Center 2007: 4; ICMPD 2004: 82; Segrave 2004: 87). There is little doubt that the experience of giving evidence as a witness can be a traumatic one. While some people find healing in being heard in court, others find participating in a trial process to be deeply traumatic. This trauma is sometimes referred to as secondary victimisation (ICMPD 2006: 49).

The harsh impact of participating in a criminal justice process has been seen in one Australian trafficking prosecution. The alleged victim in *R v Tran, Xu & Qi* was a young Thai woman referred to as Ms K, whom the NSW police initially intercepted after a 000 call. At trial,

Ms K gave evidence that she had been deceptively recruited in Thailand before being forced to have sex with men in Sydney brothels over a 10-day period. As the key witness, Ms K was in the witness box for 11 days. This included six days of cross-examination by three defence counsel (each defendant was represented separately). Ms K was questioned about what she wore on particular days, her prior sexual history, which 'clients' she had sex with in Australia and what this involved. She had to respond to repeated questions that suggested she was a liar, that she just wanted a visa and that she really wanted to marry an Australian man so she could remain in Australia. Defence counsel brought various men, whom they alleged were former clients, into the courtroom and asked her to identify them. Throughout her evidence, she sat in open court with the three co-defendants (transcript of *R v Tran, Xu & Qi*, 2005). After the trial, the jury was unable to reach a verdict on any of the 10 counts (except one, in which they acquitted one of the defendants). Following her evidence, Ms K returned to Thailand. While in theory a retrial might have been possible, she was unwilling to appear as a witness for a retrial, as the experience of giving evidence was too traumatic (CDPP 2005: 105–106).

Prior inconsistent statements and credibility

In several Australian trafficking cases, a key issue has been that the alleged victim had given statements to investigators that differed in substantial ways, resulting in 'prior inconsistent statements'. For example, in the *Tran, Xu & Qi* case, one of the defence lawyers noted that Ms K had signed a statement in her first interview with police at the Villawood Detention Centre. This was followed by a subsequent interview and as many as six further signed statements (transcript of *R v Tran, Xu & Qi*, 6 April 2005).

There can be many reasons why a person's story may change between when they were first brought to the attention of authorities and later interviews. In at least two Australian trafficking prosecutions (*R v Tran, Xu & Qi*; *R v Sieders & Yotchomchin*), alleged victims have indicated that they did not initially tell the police the whole story, as they were trying to protect family members in Australia or overseas. Research also suggests that trauma can impact significantly on the memory and behaviour of some trafficked persons (Zimmerman et al. 2006). This can lead to hostility, patchy memory, confusion over chronology or even complete inability to recall key events (American Cultural Center 2007: 11; ICMPD 2006: 27–29).

In the *Tran, Xu & Qi* case, defence counsel drew attention to Ms K having mixed up the names of several of the co-accused in her initial interview with police. On this basis, the defence counsel accused her of having fabricated her story (transcript of *R v Tran, Xu & Qi*, 7 April 2005). The prosecutor elicited further evidence from Ms K to explain the inconsistency. In re-examination, she noted that:

When I was at the Villawood Detention Centre, I was totally exhausted and confused, and the time lapse between the event and time when I was at that detention centre has been a long lapse. I remember the events happening but I may have made some mistakes in the chronological order. Usually, it's common for people to forget details as time passes, especially at that time I was particularly exhausted and confused (transcript of *R v Tran, Xu & Qi*, 8 April 2005).

There can be many other bases upon which defence counsel might seek to undermine the credibility of a key witness in court. However, it is arguable that the credibility of some trafficked persons

may be vulnerable to attack if they come from the more stigmatised groups in society; for example, sex workers and illegal migrants. There is research that suggests, for example, that 'rape myths' and juror biases have a profound impact on outcomes in sexual assault trials (Taylor 2007). It remains to be seen whether recourse to stereotypical notions about who is and who is not believable is an effective tactic in this context.

In the *Tran, Xu & Qi* case, defence counsel suggested that Ms K had fabricated her story so she would not be deported from Australia, and that she had collected telephone numbers from her clients in the hope they would marry her so she could remain in Australia. In this case, the prosecutor was able to lead evidence from Ms K that she had actively sought to return home after being detected by the police, even though she was told she might be eligible for a visa to remain in Australia (transcript of *R v Tran, Xu & Qi*, 8 April 2005). The likely need to rebut attacks on the alleged victim's credibility underscores the important role of corroborative evidence.

Difficulties in proving slavery without evidence of locks and chains

The issue of whether a situation can amount to trafficking or slavery, in situations where there is limited evidence of physical restraint but evidence of more subtle forms of coercion and control, has been key in several prosecutions in Australia. For example, in *R v Tang* [2006] VCC 637, Justice McInerney accepted there was no evidence that the alleged victims had been held under lock and key. However, Justice McInerney found that due to a combination of circumstances, each alleged victim, while not locked in the premises, was 'effectively restrained by the insidious nature of their contract'. Justice McInerney suggested that to comprehend their circumstances, it was relevant to ask the rhetorical question:

How could they run away when they had no money, they had no passport or ticket, they entered on an illegally obtained visa, albeit legal on its face, they had limited English language, they had no friends, they were told to avoid Immigration, they had come to Australia consensually to earn income and were aware of the need to work particularly hard in order to pay off a debt of approximately \$45,000 before they were able to earn income for themselves? (at p. 637)

Ms Tang successfully appealed this decision. The Court of Appeal of the Supreme Court of Victoria found the judge's directions to the jury on the issue of intention or knowledge were not adequate to allow them to decide. The conviction was quashed and the sentence set aside (*R v Wei Tang* [2007] VSCA 134, 144). The Commonwealth Director of Public Prosecutions (CDPP) was granted leave to appeal the decision to the High Court, and the appeal was heard in May 2008 (*The Queen v Tang* [2008] HCATrans 180, 181). One of the key issues before the High Court was the meaning of 'slavery' in the Criminal Code.

Similar issues arose in *Sieders & Yotchomchin*, in which the defendants were convicted of conducting a business involving the sexual servitude of others, namely four Thai women who had debt contracts of around \$45,000 each. The Crown case was that the women were not free to cease providing sexual services because they feared harm against themselves and their families in Thailand, and deportation. The defence claimed the situation was nothing more than a commercial arrangement between the defendants and the alleged victims, who would be free to start earning money for themselves once they had paid their debts. However, the judge rejected this argument, noting that it failed to take account of the facts that the women were at any point in time liable to deportation and could only discharge

their debt if they remained hidden (*R v Sieders & Yotchomchin* [2006] NSWDC 184).

Strategies to support prosecution processes

Legal reform

Many countries have sought to reform their laws as the first step in responding to trafficking in persons. In Australia, law reform began in 1999 with the introduction of laws relating to slavery and sexual servitude. This was followed more recently with the introduction of various laws designed to give effect to the obligations in the United Nations Trafficking Protocol (for commentary on this issue, see McSherry 2007). Following amendments in 2005, the Criminal Code now includes offences such as slavery (25 years imprisonment), sexual servitude (15 years), deceptive recruiting for sexual servitude (seven years), trafficking (12 years), trafficking in children (25 years), domestic trafficking in persons (12 years) and debt bondage (12 months).

As at 30 January 2008, seven people have been convicted for offences under Divisions 270 and/or 271 of the Criminal Code:

- Joseph Sieders and Somsri Yotchomchin were convicted in 2006 of 'conducting a business involving the sexual servitude of another', with four and five years imprisonment respectively. As at 30 January 2008, an appeal against their conviction and sentence was pending.
- 'DS' pleaded guilty in 2006 to three counts of possessing a slave and two counts of engaging in slave trading. DS was initially sentenced to nine years imprisonment, which was reduced to six years on appeal.
- Kanakporn Tanuchit and Trevor McIvor were each convicted in 2007 of five counts of possessing a slave and five counts of using a slave. As at 30 January 2008, the defendants were awaiting sentencing.

- Zoltan and Melita Kovacs were each convicted in 2007 of possessing and using a slave and organising a sham marriage. They were sentenced to four and eight years imprisonment respectively. As at 30 January 2008, an appeal against their conviction and sentence was pending.

In addition, Ms Wei Tang was convicted in June 2006 of slavery offences following a jury trial. Her conviction was quashed on appeal and a retrial ordered. This decision raises legal issues, including the meaning of slavery in the Criminal Code. These issues are being considered by the High Court.

Australian laws concerning telecommunication interceptions, money laundering, proceeds of crime, mutual assistance and extradition can also be applied in various ways, to support trafficking investigations and prosecutions. For example, the trafficking offences in the Criminal Code are designated as 'serious crimes' under the *Telecommunications (Interception and Access) Act 1979* (Cth). This means designated law enforcement authorities, including the Australian Federal Police, can seek permission to intercept relevant telephone calls and emails to investigate trafficking offences. This information can then be used as evidence in court. Information obtained through telephone interception has been important evidence in at least one trafficking prosecution (see, for example, transcript of *Sieders & Yotchomchin*, District Court of NSW, 12 July 2006, p. 642). The *Proceeds of Crime Act 2002* (Cth) has been used to restrain the alleged proceeds of trafficking in persons in at least one Australian prosecution (see, for example, *Commonwealth DPP v Xu* [2005] NSWSC 191).

Protecting witnesses in court

Trafficked persons need protection in court when giving evidence (ICMPD 2006: 57–63). Trafficking crimes will not always involve a sexual element.

However, where they do, it is arguable that trafficked persons need protections that are broadly comparable with the protections made available to witnesses in sexual assault matters. This might include measures to:

- protect the witness's privacy (name suppression orders, use of pseudonyms and non-publication orders, closing the court)
- protect the witness from further trauma associated with having to confront the person accused of abusing them (use of screens or closed-circuit television)
- avoid unnecessary repetition of testimony
- protect the witness from harsh or unfair cross-examination, particularly about their private or sexual life (ICMPD 2004: 128–129; ICMPD 2006: 55–63).

In Australia, the main law criminalising trafficking, the Criminal Code, is silent on the issue of protection for witnesses. While trafficking offences are found in Commonwealth law, prosecutions are conducted in state and territory courts. Presently, the relevant state or territory law and court rules determine the witness protections available in trafficking cases. Consequently, the protections available to such witnesses differ between jurisdictions and courts.

Witnesses may also need protection where disclosure of their identity would endanger them. This situation has already arisen in Australia, where a defendant acted as a witness for the Crown in several other prosecutions. As Commonwealth legislation does not cover protection of witnesses, the decision about whether the court could suppress the defendant's name was decided by reference to common law. In the DS case, prosecutors successfully argued that the defendant's name should be suppressed on public policy grounds (transcript of *The Queen v DS*, County Court of Victoria, 30 December 2004).

Vital role of corroboration

Because the trafficked person's evidence is likely to be crucial to the prosecution, experienced prosecutors have noted the importance of seeking corroborative evidence to support every possible aspect of the trafficked person's story (American Cultural Center 2007: 13; Moskowitz 2007: 5). Corroborative evidence helps redress arguments that the witness is either not believable, or their version is incorrect or false. In Australia, a review of case transcripts shows that prosecutors have elicited corroborative evidence from a range of sources, including:

- clients of brothels who could confirm the alleged victim had asked for help to escape their situation
- mobile telephone records to confirm that a victim's movements were as they claimed
- transcripts of intercepted telephone calls, which confirmed the existence of relationships between offenders (who claimed they did not know each other)
- financial records confirming money transfers
- photographs and videotapes of premises.

Avoiding or minimising prior inconsistent statements

To minimise the risk of prior inconsistent statements, experienced prosecutors suggest it is important to avoid taking full and highly detailed statements until the victim has been given an opportunity to physically and emotionally recover, and to develop a degree of confidence in law enforcement (Moskowitz 2007: 3). This maximises the likelihood that the victim will give a full and truthful account, and reduces the risk of prior inconsistent statements, which can be used to undermine the victim's credibility as a witness in court. Nonetheless, there may also be situations where law enforcement officers have little choice but to take a

statement from the victim early in an investigation. For example, investigators may need to know if there are other people in danger, or they may need a signed statement to obtain a search warrant. This suggests that, to the extent statements do need to be taken at an early stage, investigators should be sensitive to the level of detail required.

Specialisation and training

Given the apparent complexity and priority of trafficking prosecutions, several countries have established specialist prosecution units to focus on such cases. For example, the Human Trafficking Unit within the US Department of Justice focuses on complex trafficking cases, particularly those involving a transnational element and complex financial crimes (US Department of Justice 2006: 1). Specialist prosecutorial teams have also been established in Italy, Thailand and the Philippines (David 2007: 53; Gallagher & Holmes forthcoming: 8).

Several countries and some regions have also developed training courses for judges and prosecutors who may be exposed to human trafficking cases. For example, standard training materials have been developed for judges and prosecutors in all European Union Member States (ICMPD 2006: 8). In Australia, the CDPP has identified training as an important issue that it is actively seeking to address. In June 2007, the CDPP held an information sharing conference for prosecutors working on trafficking matters and a similar event is planned for 2008. The CDPP has also

sourced local and international expertise for training events scheduled for 2008.

Conclusion

Internationally, information about the conduct and experience of trafficking prosecutions is limited. This suggests the need for further research that draws on a broad range of primary data. From the limited information available, it is reasonable to assert that legal frameworks – including laws that ensure trafficked persons and other witnesses are protected inside and outside of court – corroboration, credibility and training are all important considerations. As experience and research grows, it is likely that other features will be identified as having an impact on the prosecution of trafficking offences.

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