

## An Assessment of New Zealand’s Response to Human Trafficking

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## *I Introduction*

The recent United States Department of State Trafficking in Persons Report (“TIP report”) criticised New Zealand’s human trafficking laws and recommended that the New Zealand government review these to ascertain whether they comply with international

standards.<sup>1</sup> To date, there have been no prosecutions of human trafficking offences in New Zealand although there is anecdotal evidence to suggest human trafficking does take place.<sup>2</sup> It is suggested that the inadequate laws regarding human trafficking hinder the potential prosecution of this offence.<sup>3</sup>

This paper aims to briefly outline international human trafficking law and jurisprudence and comment on specific trends and precedents that have been set by the international community. Then comparatively analyse New Zealand's implementation of human trafficking law drawing on examples of how Canada has amended law and policy to comply with international obligations. Finally, this dissertation will assess whether New Zealand is currently meeting its international obligations by effectively protecting victims of human trafficking, preventing human trafficking from taking place and prosecuting this offence. The paper concludes with recommendations for government regarding what needs to take place in order for New Zealand to meet its international obligations and be world-leading in its strategy addressing human trafficking.

## *II Human trafficking globally*

### *A Overview of human trafficking globally*

The International Labour Organisation in its 2012 Report estimated that 20.9 million people are victims of human trafficking globally and that this figure included the “full realm of human trafficking for labour and sexual exploitation.”<sup>4</sup> The *Global Report on Trafficking in Persons 2013* by the United Nations Office on Drugs and Crime (“UNODC”) states that 79% of people are trafficked for sexual exploitation, 18% of people are trafficked for forced labour and 20% of all people trafficked are children.<sup>5</sup> In 2011, there were 7206 human trafficking prosecutions worldwide and 4239 convictions.<sup>6</sup>

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1 2013 Trafficking in Persons Report (US Department of State, June 2013). [ TIP Report].

2 Reported in the New Zealand media and in case law, as discussed in Section IV A of this paper.

3 2013 TIP Report.

4 ILO global estimate of forced labour: results and methodology / International Labour Office, Special Action Programme to Combat Forced Labour (SAP-FL). – (Geneva: ILO, 1 June 2012 ) [at 13]

5 United Nations Office on Drugs and Crime *Global Report on Trafficking in Persons 2012* United Nations publication Sales No. E.13.IV.1 (2012) [UNODC Global Report]

6 2012 TIP Report [at 44]

## *B Human trafficking legal terminology*

### *1 The definition of slavery*

Slavery and slavery-related practices have achieved the level of customary international law<sup>7</sup> and *jus cogens* status.<sup>8</sup> *Jus cogens* norms are found to be universally accepted standards<sup>9</sup> that “guard[] the most fundamental and highly-valued interests of international society”<sup>10</sup> The practice of slavery has been universally accepted as a crime against humanity<sup>11</sup> and sexual slavery has been outlined as a war crime in the Rome Statute.<sup>12</sup> The right to be free from enslavement is considered so fundamental “that all nations have standing to bring offending states before the Court of justice.”<sup>13</sup>

The prohibition against slavery was first outlined in the International Convention to Suppress the Slave Trade and Slavery 1926 (“Slavery Convention”) and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956 (“Supplementary Convention”). The Slavery convention defined what is now known as “chattel” slavery; “*the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.*”<sup>14</sup> However, the structure of the traditional concept of slavery has evolved from purely chattel based in recent years. The Supplementary Convention acknowledges this by expanding the definition of slavery to criminalise slave-like practices including debt bondage, serfdom, the selling of women by their families for marriage, certain forms

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7 Kelly Askin states that slavery and crimes against humanity are subject to universal jurisdiction and justiciable by any state. Askin K “Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law; Extraordinary advances, enduring obstacles” (2003) 21 Berkeley J. Int’L. 288 at 288.

8 The principle of *jus cogens* is outlined in the Vienna Convention on the Law of Treaties which states at Article 53: [A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 53.

9 Charlesworth H and Chinkin C “The Gender Of *Jus Cogens*” in *Women’s Rights – A Human Rights Quarterly Reader* (The John Hopkins University Press, USA, 2006) at 1.

10 Christenson G “*Jus Cogens: Guarding interests fundamental to international society*”(1988) 28 Ba.K Int’l L. 585 at 607 as cited in Hilary Charlesworth and Christine Chinkin, “The Gender Of *Jus Cogens*” in *Women’s Rights – A Human Rights Quarterly Reader* (The John Hopkins University Press, 2006) at 90

11 The Rome Statute outlines that “enslavement” is a Crime Against Humanity in Article 7(1)(c). Article 7(1)(g) states that rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity constitutes a crime against humanity. Rome Statute of the International Criminal Court 2187 UNTS 90 (opened for signature 17 July 1998, entered into force 1 July 2002) [Rome Statute]

12 Sexual slavery is outlined as a War Crime in Article 8(2)(b)(xxii) of the Rome Statute.

13 Renee Colette Redman, “The League of Nations and the Right to be Free From Enslavement: The First Right” (LexisNexis, Chicago, 1994) [at 780]

14 “chattel” slavery refers to the owners right to treat slaves as possessions

of abuse of women, and the buying and selling of children for labor or prostitution.<sup>15</sup> The supplementary convention also provides criminalization for the term of “servitude” as distinct from slavery.

Slavery indicates that the person concerned is wholly in the legal ownership of another person, while servitude concerns far-reaching forms of restraint and refers, for instance, to the total of labour conditions and/or the obligations to work or to render services from which the person in question cannot escape and which he cannot change.<sup>16</sup>

The definition of slavery has also been discussed in international cases. In *Prosecutor v Dragoljub Junarac Radomir Kovac and Zoran Vukovic* (“Kunarac”) the Appeals Chamber confirmed that slavery has “evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership.”<sup>17</sup> Kevin Bales, a leading academic in the prohibition of slavery comments that the definition of slavery is three-fold and that three elements must be satisfied: loss of free will, the appropriation of labour power and the use or threat of violence.<sup>18</sup> Freedom from slavery is considered a fundamental human right according to the Human Rights Convention and International Covenant on Civil and Political Rights whereby it is explicitly stated in Article four that “no one shall be held in slavery and the slave-trade in all their forms shall be prohibited.”<sup>19</sup> The Office of the High Commissioner for Human Rights (“OHCHR”) in general note five outlines that the measures outlined in article four are an “exceptional and temporary nature” a State Party cannot derogate from even in times of a state emergency.<sup>20</sup> Furthermore, general note five outlines that state parties to the Security Council have an obligation to inform the Security Council and other state parties when there has been a derogation of Article 4.<sup>21</sup>

## 2 *The definition of human trafficking*

The legal definition of human trafficking was codified in 2000 in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (The Trafficking Protocol), supplementing the United Nations Convention against

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<sup>15</sup>The protocol’s purpose was to extend application to practices ‘similar to slavery’ (in title and preamble of supplementary convention.)

<sup>16</sup> Van Dijk P & Van Hoof G.J.H “Theory and Practice of the European Convention on Human Rights 242 (Martinus Nijhoff Publishers 1998) Gallagher, A *The International Law of Human Trafficking* (Cambridge University Press, Cambridge, 2010) at 407.

<sup>17</sup> *Prosecutor v Kunarac* (Judgment) ICTY Appeals Chamber IT-96-23-T, 22 February 2001, at [117]

<sup>18</sup> Bales K and Robbins PT “No One Shall Be Held In Slavery or Servitude: A Critical Analysis of International Slavery” (2006) 2 Hum Rts Q, 565. 568 at 32.

<sup>19</sup> International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 28 March 1979). [ICCPR] at Article 8

<sup>20</sup> Office of the United Nations High Commissioner for Human Rights General Comment No. 05: “Derogation of rights (Art. 4)” (31/07/1981. CCPR General Comment No. 5) (General Comments) at clause 3.

<sup>21</sup> As above.

Transnational Crime (“UNTOC”). Human trafficking law and the development of international human trafficking jurisprudence is thus a relatively new concept.

The Trafficking Protocol of 2002 introduced the offence of “trafficking in persons” which is simultaneously referred to as “modern day slavery.” This protocol provided that there were three main elements to the legal definition of human trafficking that were required to be fulfilled to meet the legal test of human trafficking: A specific action (what is done), a means (how it is done) and purpose (why it is done.)<sup>22</sup>

- a. “Trafficking in persons” shall mean 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, or 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.
- b. The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.
- c. The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;
- d. “Child” shall mean any person under eighteen years of age.<sup>23</sup>

The offence requires that three elements of the crime are met for human trafficking to have considered to have taken place;

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<sup>22</sup> UNODC, Toolkit to Combat Trafficking in Persons, Global Programme Against Trafficking in Human Beings, 2008.

<sup>23</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2237 UNTS 319 (opened for signature 15 November 2000, entered into force 25 December 2003) [Trafficking Protocol].

All three of the listed elements must be present for a situation of “trafficking in persons” to be recognised and for the Trafficking Protocol and Organised Crime Convention to become operational within a fact-given situation.<sup>24</sup>

The purpose element introduces a *mens rea* requirement to the definition whereby the individual or entity committing the offence intended that the action (*actus reus*) would lead to the end result.<sup>25</sup> The *dolus specialis* of trafficking is “the purpose aimed at by the perpetrator when committing the material acts of the offence.”<sup>26</sup>

International law outlines that for persons under 18 years of age, the second element of the offence of human trafficking (“means”) does not have to be established. As such, when ascertaining whether children have been trafficked, the emphasis is on the act of exploitation (purpose). *How* or by which means the child was exploited is not relevant.

The “means” of trafficking in adults – an inherent part of the trafficking definition will operate to nullify consent. As such, means are not required to be established in relation to trafficking in children, consensual trafficking of either adults or children is a legal impossibility.<sup>27</sup>

International law establishes that once it has been established that deception, force or other prohibited means have been used; consent is irrelevant and cannot be used as a defence.<sup>28</sup>

The legal definition of human trafficking has been found to focus explicitly on exploitation and powers of ownership. The European Court of Human Rights (“ECtHR”) in *Rantesev v Cyprus and Russia* discussed this when considering States obligations under Article four of the European Convention of Human Rights (“ECHR”)<sup>29</sup> Here they defined human trafficking as:

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24 Gallagher A.T *The International Law of Human Trafficking* (Cambridge University Press, Cambridge 2010) [The International Law of Human Trafficking] [at 29]

25) *The International Law of Human Trafficking* at 34.

26 United Nations Office for Drugs and Crime, *Anti-Human Trafficking Manual for Criminal Justice Practitioners* (2009), “(Module 1:Definition of Trafficking in Persons and Smuggling of Migrants)” at 4

27 *The International Law of Human Trafficking* at 47

28 U.N Office on Drugs and Crime, *Legislative Guides for the Implementation of United Nations Convention Against Transnational Organised Crime and the Protocols Thereto* at 270. UN. Sales E.05V.2(2004) [Legislative Guide].

29 European Convention on Human Rights ETS 5 (4 November 1950, entered into force 3 September 1953). Please note, this is the same clause as Article 4 UDHR.

[...] exploitation (*ad sic*) based on the exercise of powers attaching the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere. It implies close surveillance of the activities of victims, whose movements were often circumscribed. It involves the use of violence and threats against victims who live and work under poor conditions.<sup>30</sup>

The terms “slavery” and “human trafficking” are similar because they involve the large-scale movement of individuals for exploitative purposes.<sup>31</sup> However, they differ because the concept of slavery involves the “permanent destruction of an individual’s juridical personality” and autonomy through ownership.<sup>32</sup> Human trafficking relates to “slavery-like” practices that exploit a person’s fundamental freedoms and human rights, but do not necessarily constitute autonomous ownership.<sup>33</sup>

### *3 International conventions relevant to slavery and human trafficking*

While human trafficking is a criminal, immigration and human rights offence. There has recently been a move by the international community to prosecute human trafficking as first and foremost, a human rights offence.<sup>34</sup> Human trafficking violates fundamental human rights, such as the right to life, the right to dignity and security, the right to just and favourable conditions of work, the right to health, the right to equality and the right to be recognised as a person before the law.<sup>35</sup> Human trafficking is considered a human rights violation which “is rooted in poverty, inequality and discrimination.”<sup>36</sup> The OCHR in its Recommended Principles and Guidelines on Human Trafficking Commentary (“OCHR Commentary”) has stated that the Trafficking Protocol should be supplemented by other human rights conventions to ensure greater protection for victims of human trafficking and consistent penalties for perpetrators.<sup>37</sup> The Inter-agency Coordination Group on Trafficking in Persons (“ICAT”) has also confirmed that “taken in isolation, the Trafficking in Persons Protocol is not a particularly strong protection tool” and provided

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30 Rantsev v Russia & Cyprus (Judgment) First Section 25965/04, 10 January 2010 [at 280]

31 Gallagher A *Using International Human Rights Law to Better Protect Victims of Human Trafficking: The Prohibitions on Slavery, Servitude, Forced Labour and Debt Bondage* Theory and Practice of International Criminal Law : Essays in Honor of M. Cherif Bassiouni, Chapter 14 (Martinus Nijhoff Publishers, Leiden, 2008) [at 401]

32 As above [at 411]

33 The European Convention on Trafficking in Human Beings adopted by the Committee of Ministers of the Council of Europe in May 2005 found that “trafficking can lead to slavery.” The Charter of Fundamental Rights of the European Union (preamble) as cited in *The International Law of Human Trafficking* [at 420].

34 As above.

35 As above .

36 Gallagher A *Trafficking and the Global Sex Industry: The need for a human rights framework*, In: *Women’s Rights are Human Rights, Special Issue on Women’s rights* (OCHR Spring 2000 )

37 As above

that the Trafficking Protocol should be supplemented alongside other legal instruments that “offer stronger protection to victims of human trafficking based on rights that are derived from the inherent dignity of the human person.”<sup>38</sup> The ECtHR confirms this approach in *Rantsev v Cyprus and Russia* whereby the judgment states that the Trafficking Protocol should never be considered as the “sole reference for the interpretation of the rights and freedoms enshrined therein.”<sup>39</sup> The international covenants relevant to human trafficking are as follows:

- The Forced Labour Convention (No. 29) of 28 June 1930;
- The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 2 December 1949;
- The Convention relating to the Status of Refugees of 28 July 1951 and its Protocol relating to the Status of Refugees;
- The Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979;
- The Convention on the Rights of the Child of 20 November 1989;
- the International Labour Organisation Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of 17 June 1999;
- The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of 25 May 2000;
- The Protocol against the Smuggling of Migrants by Land, Sea and Air of 28 January 2004
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1 July 2003.

The European Commission’s Experts Group on Trafficking in its 2004 report stated that “the integration of a human rights perspective is fundamental for the analysis of trafficking in human beings and the development of an effective response to it.”<sup>40</sup>

### *III Precedents from the international community regarding the three tiered strategy to eliminate human trafficking*

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38 ICAT International Framework at 2.5]

39 *Rantsev v Russia & Cyprus* (Judgment) First Section 25965/04, 10 January 2010 [at 272]

40 European Commission, Directorate-General Justice, Freedom and Security “Report of the Experts Group on Trafficking in Human Beings” (Brussels, 22 December 2004) [at 60].

The Trafficking Protocol<sup>41</sup> establishes a three-tiered strategy to combat human trafficking: the prevention of human trafficking; the prosecution of traffickers and the protection of victims.<sup>42</sup> For the prosecution of human trafficking to be effective, prevention and protection objectives must be fully functioning. The international standards for each of these measures are briefly outlined below.

### *A Prevention*

Article 9 of the Trafficking Protocol outlines that states have an obligation to prevent and combat human trafficking. It further outlines that states should undertake research into the issue of human trafficking,<sup>43</sup> strengthen legislative, educational, social and cultural measures to discourage the exploitation of people<sup>44</sup> and amend or adopt the necessary legislative measures and establish comprehensive policies and programmes to prevent trafficking in persons<sup>45</sup> Article 10(2) outlines that law enforcement, immigration and other officials should be trained in identifying victims of human trafficking and prosecuting perpetrators of this crime. The UNODC as well as the International Labour Organisation (“ILO”) have created “trafficking indicator tests” to assist with victim identification.<sup>46</sup> The tests clearly show whether a victim is subject to coercive, deceptive or abusive recruitment, coercion or abuse of vulnerability at the destination they are working through a series of questions directed to the victim.<sup>47</sup> The Council of Europe Convention on Action against Trafficking in Human Beings (“Council of Europe”) obligates states to prevent human trafficking within a human rights framework which takes into account a gender and child-sensitive approach<sup>48</sup> The European Union Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims (“EU Directive”) outlines that specific forms of prevention that should take place

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41 The Trafficking Protocol is the international legislative instrument used to define human trafficking and the legislative instrument that is used to prosecute this offence.

42 Trafficking protocol at [article 2] The Trafficking protocol outlines obligations under each of these headings,42 the UNODC codifies these themes in its Framework for Action to Implement the Trafficking in Persons Protocol - United Nations Office for Drugs and Crime “Framework for Action to Implement the Trafficking in Persons Protocol” (UNODC Vienna 2009) at 42 (“the framework”) and the TIP report also uses these standards when evaluating countries compliance and efforts to address human trafficking..

43 Trafficking Protocol Article 9(2)

44 Trafficking Protocol Article 9(5)

45 As above

46 UNODC “Human Trafficking Indicators” <[http://www.unodc.org/pdf/HT\\_indicators\\_E\\_LOWRES.pdf](http://www.unodc.org/pdf/HT_indicators_E_LOWRES.pdf)>

47 International Labour Organisation, “Operational indicators of trafficking in human beings - Results from a Delphi survey implemented by the ILO and the European Commission” (September 2009) [at 4-7].

48 Council of Europe Convention on Action Against Trafficking in Human Beings CETS 148 (open for signature 16 May 2005, entered into force 1 February 2008) at preamble.

by states including discouraging and reducing demand for sexual services and labour,<sup>49</sup> information, raising awareness, research and education,<sup>50</sup> training of officials<sup>51</sup> and the criminalization of services which are the objects of human trafficking.<sup>52</sup> Anne Gallagher recognizes that while states do not currently have a legal obligation prevent human trafficking by addressing demand, this should be considered a key aspect of a comprehensive strategy to eliminate trafficking in persons.<sup>53</sup>

### *B Protection*

The Preamble of the Trafficking Protocol outlines that state parties have an obligation to protect the human rights of victims of human trafficking.<sup>54</sup> Article 6 of the Trafficking Protocol outlines that states should protect victims by providing them with information and services including information regarding court and administrative proceedings,<sup>55</sup> physical, psychological and social recovery services that include medical care, counseling, a safe place to live and employment.<sup>56</sup> The UN Office of Drugs and Crime, International Framework for Action To Implement the Trafficking in Persons Protocol (2009) (“UNDOC Framework”) outlines that states should develop and strengthen victim identification procedures<sup>57</sup> and ensure that these procedures have a human-rights based approach to the protection of victims “regardless of their cooperation with law enforcement.”<sup>58</sup> The framework also outlines that victims should be referred to the asylum system where appropriate.<sup>59</sup>

#### *1 Non-prosecution of victims*

The EU Directive outlines that victims should not be prosecuted, punished or detained even if they were compelled to commit unlawful activities whilst being trafficked.<sup>60</sup> The OHCHR confirms the non-criminalisation of victims:

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49 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims Replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1 [EU Directive] at 18(1)

50 Above at Article 18(2)

51 Above at Article 18(3)

52 Above at Article 18(4)

53 The International Law of Human Trafficking at 443 and 444.

54 Trafficking Protocol at preamble

55 Trafficking Protocol at Article 6(2)(a)

56 Trafficking Protocol Article 6(3)

57 Trafficking Protocol at Article 2(b)

58 Trafficking Protocol at Article 2(e)

59 Trafficking Protocol at Article 2(d)

60 EU Directive Article 8.

The criminalisation of trafficked persons is commonplace, even in situations where it would appear obvious that the victim was an unwilling participant in the illegal act. Such criminalisation is often tied to a related failure to identify the victim correctly. In other words, trafficked persons are detained and subsequently charged, not as victims of trafficking, but as smuggled or irregular migrants, or undocumented migrant workers.<sup>61</sup>

International precedents provide that victims of sex trafficking should be particularly protected when testifying at court<sup>62</sup> whereby no corroboration of testimony is necessary, “consent” is not allowed as a defence<sup>63</sup> and a victims prior sexual conduct is irrelevant.<sup>64</sup> Moreover, a “gender-sensitive” approach is to be applied with special consideration for female judges and other qualified women to hear the testimony of women victims.<sup>65</sup>

## *2 Asylum and complementary protection available to victims of human trafficking*

### *2.1 Victims of human trafficking may be considered refugees*

The Trafficking Protocol outlines states that victims of human trafficking can apply for refugee status under The Convention relating to the Status of Refugees of 28 July 1951 and its Protocol relating to the Status of Refugees (“The Refugee Convention”):

Nothing in this Protocol shall affect the rights, obligations and responsibilities of states and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.<sup>66</sup>

In particular, victims of human trafficking may be eligible for refugee status under the convention reason of “particular social group.”<sup>67</sup> The United Nations High Commission

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61 Office of the United Nations High Commissioner for Human Rights “Recommended Principles and Guidelines on Human Rights and Human Trafficking (United Nations, Geneva, 2010). Principle 7, at 129.

62 Rome Statute of the International Criminal Court 2187 UNTS 90 (opened for signature 17 July 1998, entered into force 1 July 2002) [The Rome Statute] Article 68.1 outlines that the Court will protect the safety, physical and psychological well-being, dignity and privacy of victims of sexual or gender violence.

63As above, when the victim of sexual violence has been subjected to violence, duress, detention or psychological oppression Rule 96(ii)(b) ICTY Rules of Procedure and Evidence, ICTY IT/32/Rev. 47

64 This measure was thought to “adequately protect victims from harassment, embarrassment and humiliation” Rules of Procedure and Evidence, ICTY IT/32/Rev. 47 Rule 96 (iv)

65 Rules of Procedure and Evidence, ICTY IT/32/Rev. 47 at 36(b)

66 Trafficking Protocol at article 14.

67 Article 1 of The Refugee Convention outlines that a refugee is someone who “owing to a 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 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 that country. Arthur Helton states that “membership of a

for Refugees (“UNHCR”) Trafficking Guidelines acknowledge the need for refugee protection in situations where victims have been trafficked abroad; where victims have been trafficked within national territory, have escaped traffickers and have fled in search of international protection; and where individuals fear being trafficked<sup>68</sup> Similarly, the Agenda for Protection, adopted by the Executive Committee of UNHCR in 2003, calls upon States to ensure that their domestic asylum systems are open to receiving claims from individual victims of trafficking.<sup>69</sup> In jurisdictions where comprehensive services for human trafficking victims have not been implemented, refugee protection can be one of the only forms of protection available for victims.<sup>70</sup>

UNHCR has a responsibility to ensure that individuals who have been trafficked and who fear being subjected to persecution upon their return to their country of origin, or individuals who fear being trafficked, whose claim to international protection falls within the definition of a refugee, are recognized as such and afforded international protection.<sup>71</sup>

## 2.2 *Protection from non-refoulement for victims of human trafficking*

The principle of *non-refoulement* and complementary protection also applies to victims of human trafficking in specific circumstances where victims would be subjected to torture or to cruel, inhuman, degrading treatment on return to their country of origin. The Committee against Torture has found that sexual violence and trafficking can sometimes constitute torture.<sup>72</sup> The European Court of Human Rights (“ECtHR”) has also found that returning a person to a state where they may continue to be trafficked may raise *non-refoulement* obligations under the Convention Against Torture.<sup>73</sup>

To engage the principle of *non-refoulement* for the purposes of complementary protection, a claimant must demonstrate that he or she will face a real risk of serious harm upon removal. The very fact of being trafficked or being subjected to, for example, forced labour may not be sufficient to be granted protection. However, a risk of being re-

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particular social group” category is intended to be a safety net which will address any instances of persecution not caught by the other four grounds: Helton A “Persecution on account of membership in a social group as a basis for refugee status “ (1983) *Colombia Human Rights Law Review* at 15.

68 United Nations High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* E/2002/68/Add.1 (20 May 2002). [UNHCR Trafficking Guidelines], n. 3, para. 13.

69 UNHCR Agenda for Protection, A/AC.96/965/Add.1, 2002, Goal 2, Objective 2. (October 2003)

70 Jayasinghe U & Baglay S “Protecting Victims of Human Trafficking Within a ‘Non-Refoulement’ Framework: is Complementary Protection an Effective Alternative in Canada and Australia?” *International Journal of Refugee Law* Vol. 23 No. 3 (Oxford University Press, 2011) [at 489].

71 United Nations Office on Drugs and Crime [UNODC] *Toolkit to Combat Trafficking in Persons* (UNODC, Vienna, 2008) at [7.9]

72 UN Committee Against Torture (CAT), *Concluding observations of the Committee against Torture: Russian Federation* (CAT/C/RUS/CO/1 February 2011) and *Austria* (CAT/C/AUT/CO/3) [para 4]

73 ECtHR, *Ould Barar v Sweden*, Application No. 42367/98, 19 January 1999.

trafficked on the basis of the inability or unwillingness of the claimant's state to protect him or her is likely to engage the *non-refoulement* protection of the ICCPR.<sup>74</sup>

Applying the Refugee Convention and Convention Against Torture to human trafficking cases reinforces the premise that the Trafficking Protocol is strengthened through consultation of other relevant human right treaties. This collaborative approach is consistent with the rules of interpretation in the Vienna Convention which provides that when interpreting provisions of a treaty, other treaties can be consulted if they are relevant to the interpretation of the human right.<sup>75</sup>

### *C Prosecution*

#### *1 Strengthening domestic legislation*

Article 5(1) of the Trafficking Protocol states that state parties should adopt legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in the definition of human trafficking.<sup>76</sup> The ECtHR states that “the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of human trafficking.”<sup>77</sup> The UNTOC framework encourages states to strengthen legislation in compliance with the Trafficking Protocol<sup>78</sup> and criminalise crimes related to trafficking in persons, such as corruption, money laundering, obstruction of justice and participation in an organized criminal group.<sup>79</sup> Section V of the Trafficking Protocol states that law enforcement entities should develop intelligence led investigations that do not necessarily rely on the testimony of victims.<sup>80</sup>

Anne Gallagher comments that no state has yet established a comprehensive human trafficking statute that adequately prosecutes perpetrators and protects victims.<sup>81</sup> Some scholars attribute this to the poor drafting of the Trafficking Protocol.<sup>82</sup> Many States that have implemented and ratified the Trafficking Protocol have subsequently had to amend

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74 Above at 72 p at 514

75 Vienna Convention Section 3

76 Trafficking Protocol Article 3

77 *Rantsev v Russia & Cyprus (Judgment)* First Section 25965/04, 10 January 2010 [at 283]

78 Trafficking Protocol Article 3(a)(i)

79 Trafficking Protocol 3(a)(ii)

80 Trafficking Protocol 3(v)

81 Gallagher A “Prosecuting and adjudicating trafficking in persons cases in Australia: obstacles and opportunities” (paper presented at the National Judicial College of Australia twilight seminar on human trafficking, Canberra, 15 June 2009) at 8.

82 ICAT states that the Trafficking in Persons Protocol is not a strong protection tool. ICAT International Framework at 2.4 and 2.5.

domestic legislation to further expand and define the definition of human trafficking in a domestic context.<sup>83</sup>

ICAT recently commented that the extremely low number of global convictions reinforces the perception that human trafficking is a crime that is committed with impunity.<sup>84</sup> ICAT as well as numerous other sources have further stated that the prosecution of human trafficking is essential in combating this egregious crime.<sup>85</sup>

## *2 Criminalising human trafficking that takes place domestically*

Although the language “trafficking” implies movement from one international border to another, the Trafficking Protocol and UNTOC mandate that state parties should criminalise both transnational trafficking in persons and trafficking in persons that occurs solely within the borders of a country.<sup>86</sup> The UNODC Legislative Guide for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto states that “the element of transnationality is one of the criteria for applying the Convention and the Protocols but transnationality must not be required as a proof in a domestic prosecution.”<sup>87</sup> Ben Perrin, states that “human trafficking does not require an international border to be crossed, nor does it necessarily involve movement or transfer of the victim.”<sup>88</sup> The EctHR further upholds that the UNTOC explicitly requires each State Party to establish jurisdiction over human trafficking offences that take place domestically in the territory of the state party.<sup>89</sup>

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83 Above at 83..

84 ICAT International Framework at 2.1

85 The Executive Director of UNODC, Antonio Maria Costa said with the launch of the 2013 UNODC Trafficking in Persons report that “many governments are still in denial. There is even neglect when it comes to either reporting on, or prosecuting cases of human trafficking. United Nations Office on Drugs and Crime “UNODC report on human trafficking exposes modern form of slavery” (UNDOC February 2009)

86 Article 34(2) United Nations Convention against Transnational Organised Crime (“UNTOC”) 2225 UNTS 209 (opened for signature 15 November 2000, entered into force 29 September 2003). [UNTOC]

87 Legislative Guide [at 275-76].

88 Invisible Chains [at 8].

89 Rantsev v Russia & Cyprus (Judgment) First Section 25965/04, 10 January 2010 at [288].

## *IV New Zealand's strategy to eliminate human trafficking*

### *A Human trafficking in New Zealand*

#### *1 Conflicting dialogue regarding the extent of human trafficking in New Zealand*

There is conflicting dialogue regarding the extent of human trafficking in New Zealand due to a lack of reporting of human trafficking activity or trafficking-related activity in New Zealand.<sup>90</sup>

One of the only publications that comments on human trafficking in New Zealand is the United States Department of State Trafficking in Persons report ("TIP Report") with its country narrative for New Zealand.<sup>91</sup> The data for the TIP report is collected from government press reports, NGO's, anti-human trafficking organisations based in New Zealand and the New Zealand media<sup>92</sup> and then compiled by the United States Embassy in New Zealand<sup>93</sup> It is important to note that the TIP Report is not the "sole or primary resource" for human trafficking.<sup>94</sup> It is also important to note that there are criticisms regarding the way the data is collected for the TIP report,<sup>95</sup> how the TIP report has a strong focus on sex trafficking and forced prostitution<sup>96</sup> and the way that states are measured and assessed largely on their law-enforcement response to human trafficking while root causes of human trafficking such as poverty and human rights violations are largely ignored.<sup>97</sup>

The New Zealand government has consistently refuted allegations contained in the TIP report regarding children trafficked into New Zealand's sex industry.<sup>98</sup> In response to the 2013 TIP Report, Hon Nathan Guy has again stated that allegations that children were trafficked in New Zealand "were based on media reports in New Zealand newspapers,

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90 This is further discussed in section 2 below.

91 New Zealand was first mentioned in the TIP report in 2004.

92 Harre, T "Human Trafficking for Forced Labour at Sea: An Assessment of New Zealand's Response" (LLM thesis, University of Canterbury, 2013) at 50 and 51.

93 Above at 50

94 Gallagher, Anne T "Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Reports" (September 2011) *Human Rights Review* 12.3 381-400. at 396

95 Above at 396

96 As above.

97 Gallagher A, *Trafficking in Persons Report* (review) (2002) *Human Rights Quarterly*, Volume 23, Number 4, at, pp 1139.

98 In 2004, Phil Goff stated the TIP report was "misleading" and denied that children were trafficked into New Zealand. *US State Dept Human Trafficking Report Misleading* Scoop.co.nz (online ed, 17 June 2004); "NZ Rebuffs Child Trafficking, Prostitution Claims in US Report" *New Zealand Herald* (online ed, 9 March 2007).

which did not match police reports.”<sup>99</sup> However, the New Zealand government has not published information or data to adequately quash allegations made in the TIP report nor undertaken any other research into human trafficking issues that are profiled as issues of concern. As such, there is no concise or evidenced based research that counteracts the TIP reports assertions, and the TIP report remains one of the only authorities commenting on the extent of human trafficking in New Zealand.

## 2 *The (actual?) extent of human trafficking in New Zealand*

The 2012 Trafficking in Person’s report (“TIP Report”) stated that New Zealand was a source, transit and destination country for human trafficking. It further outlined that domestic human trafficking was taking place in New Zealand whereby girls and boys, often of Maori or Pacific Island descent were trafficked to engage in street prostitution.<sup>100</sup> New Zealand was also named a destination country for foreign men and women subjected to forced labour including debt bondage aboard foreign-flagged fishing vessels in New Zealand waters, women trafficked to work in New Zealand’s sex industry and Asian and Pacific Islanders who migrate voluntarily to New Zealand to work in the agriculture sector, but who are forced to work in different conditions than stipulated in their contracts.<sup>101</sup> The 2013 TIP report was more conservative, but still alleged that New Zealand was a “destination country for foreign men and women subjected to forced labor and to an extent, a source country for underage girls subjected to sex trafficking within the country.”<sup>102</sup> It highlighted again that fisher-men in New Zealand waters were subjected to forced labour, that a small number of Maori and Pacific Island children engage in forced prostitution controlled by criminal gangs.<sup>103</sup> The TIP Report emphasised that there were indications that human trafficking was taking place in New Zealand’s horticulture and viticulture sectors evidenced by excessive and escalating recruitment fees, confiscation of passports and contracts and working conditions being altered without permission of the worker.<sup>104</sup> Anecdotal evidence reported in New Zealand’s media confirms that trafficking related offences such as labour exploitation in the horticulture industry,<sup>105</sup> underage prostitution in Auckland<sup>106</sup> and forced marriage<sup>107</sup> could warrant specific research.

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99 Isaac Davidson “Trafficking report said to be from NZ media” New Zealand Herald (online ed 21 June 2013)

100 Dave Crampton “Laws needed to clean up underage prostitution” (3 April 2013) New Zealand Herald <<http://www.nzherald.co.nz>>, Abby Gillies “MP finds 13-year-old prostitutes taking \$600 a night” (27 March 2013) New Zealand Herald <<http://www.nzherald.co.nz>>

101 As above.

102 TIP report 2013.

103 TIP Report 2013.

104 TIP Report 2013.

105 Nelson Mail “Contractor exploited migrant workers” (31 January 2013) [www.stuff.co.nz](http://www.stuff.co.nz), One News “Illegal wages in New Zealand a ‘widespread’ problem” (16 August 2012) <<http://tvnz.co.nz>>, Joseph Aldridge “Boss pays exploited

In 2011, The New Zealand Asia Institute released a report regarding labour and human rights abuses aboard foreign fishing vessels in New Zealand.<sup>108</sup> The report found slavery-like practice taking place on Foreign Charter Vessels (“FCV”) in New Zealand. The report subsequently led to the New Zealand government instigating a ministerial inquiry into the use and operation of Foreign Charter Vessels.<sup>109</sup> Following the ministerial inquiry, the New Zealand government made efforts to strengthen employment conditions and for workers on New Zealand Fishing Charter Vessels.<sup>110</sup>

The Prostitutes Collective with funding from the government recently published a report on research into migrant sex workers in New Zealand.<sup>111</sup> Key findings of the report indicated that most migrant sex workers were female students and there was no indication that sex workers were working against their will or for the profit of someone else.<sup>112</sup>

In response to the criticisms in the 2012 Trafficking in Persons’ Report regarding New Zealand’s human trafficking law, the New Zealand government undertook a legislative review into New Zealand’s laws on human trafficking- however, they have not yet published the report or the recommendations contained in the report and it is unclear whether they will do so.<sup>113</sup>

The Immigration department of the Ministry of Business, Innovation and Employment (“MBIE”)<sup>114</sup> is responsible for the monitoring of human trafficking in New Zealand.<sup>115</sup>

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workers \$8 an hour” (29 August 2012) <http://www.nzherald.co.nz>, Ongoongo Faka Tonga “Government must lift its game on migrant worker abuse” (18 March 2013) <<http://www.nzkanivapacific.co.nz>>

106 At footnote 102.

107 Immigration New Zealand “INZ supports victims of forced marriage” (21 December 2012) <<http://www.immigration.govt.nz>>

108 Stringer, C, Simmons, G, and Coulston, D “Not in New Zealand’s Waters, Surely? Labour and Human Rights Abuses Aboard Foreign Fishing Vessels” 2011 New Zealand Asia Institute Working Paper 11-01

109 Ministry of Agriculture and Forestry Report of the Ministerial Inquiry into the Use and Operation of Foreign Charter Vessels (February 2012).

110 On 15 February the Foreign Chartered Vessels Bill passed its first reading in Parliament. The bill provides more scrutinized monitoring of employment and safety issues when registering foreign fishing vessels by the Ministry of Primary Industries (“MPI”), the ability to suspend or cancel the registration of non-compliant vessels and measures to ensure that foreign-owned vessels operating in New Zealand waters operate under New Zealand legal jurisdiction. Nathan Guy “Foreign Chartered Vessels bill passes first reading” (NZ Beehive, 15 February 2013)

111 Lincoln Tan “Money, not traffickers, lures migrant sex staff” NZ Herald (NZ Herald, 12 April 2013)

112 The report has not yet been published. However, a presentation of the research was given by Catherine Healy at the Prevent People Trafficking Conference Aotearoa on 11 April 2013. Chris Frazer “Prevent People Trafficking Conference Report” (April 11-12 2013) at [ 27 to 31]

< <http://www.salvationarmy.org.nz/uploads/file/PPT%20Conference%20Report%202013.pdf>>

113 This has not yet been published.

114 Formally the Department of Labour.

However, there is no specific “human trafficking” unit within MBIE nor a focal person to contact within immigration.<sup>116</sup> Moreover, it is unclear what the New Zealand government is actively doing with regard to prevention, protection or prosecution of human trafficking in New Zealand as the New Zealand government is relatively silent on this issue.

Hon Michael Woodhouse recently outlined that amendments will be made to the Immigration Act to criminalise people that exploit migrants who hold temporary work visas.<sup>117</sup> The amendments will also allow migrants who have obtained residence status in New Zealand to be deported if they are found to be exploitative employers.<sup>118</sup> The new law proposes harsh penalties for exploitation including imprisonment for up to seven years and/or a NZD 10,000 fine.<sup>119</sup> Immigration New Zealand staff were recently briefed regarding how to report instances of exploitation and special visa waivers for people who have been exploited.<sup>120</sup>

There have been no human trafficking prosecutions in New Zealand and to date, and no victims of human trafficking have been identified according to New Zealand law.<sup>121</sup> The 2013 TIP Report harshly criticized the New Zealand governments efforts to investigate trafficking cases:

The Government of New Zealand demonstrated modest efforts to investigate suspected trafficking offences—an increase from six reported last year to eight this year—but failed to convict and punish any trafficking offenders for a ninth consecutive year. New Zealand does not have a comprehensive anti-trafficking law that prohibits all forms of trafficking and the government’s recommendations from its review of the scope of these laws are still pending with the Cabinet.<sup>122</sup>

### *3 Case law examples of trafficking-related cases*

While there have been no human trafficking prosecutions in New Zealand, a number of “trafficking-related” cases have been prosecuted as outlined below. Some of these cases would arguably meet the definition of human trafficking provided in the Trafficking

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115 Minister Woodhouse, New Zealand’s Minister of Immigration attended the Bali Process in April and also presented the opening speech at the New Zealand Prevent People Trafficking Conference. Hon Michael Woodhouse “Speech: Woodhouse - Prevent People Trafficking Conference” (NZ Beehive 11 April 2013)

116 Michael Woodhouse “New measures to combat migrant exploitation” (Beehive 23 June 2013)

117 As above.

118 As above

119 As above.

120 As above.

121 TIP report 2012 and 2013.

122 As above

Protocol. They are briefly outlined below to highlight that human trafficking and trafficking-related activity do take place and have been prosecuted in New Zealand courts.

In *The Queen v Prasert Decha-Iamsakun*<sup>123</sup> a Thai national was found guilty of selling Somwang Sokharat (“Sokharat”), a 26 year old Thai national to Shamus Duncan, a New Zealander. The accused had allegedly bought Sokharat for NZD 7000<sup>124</sup> which meant he had permission from Sokharat’s family “to do whatever he liked with her.” He on sold Sokharat for NZD 3000 in New Zealand<sup>125</sup> and it was clear when the case was heard in court that the accused “carried on the business of bringing Thai girls to New Zealand and living off their earnings” implying that there were possibly other Thai women who had entered New Zealand in this way. The accused was sentenced to imprisonment for five years in New Zealand and then ordered to be deported. In this case, the meaning of slave was found to be “one who is submissive under domination.” Domination was further explained as “control and authority that brooks no opposition or disobedience.”<sup>126</sup>

In *R v Chechelnitski*, Mr Chechelnitski was prosecuted under s 98C(1) of the Crimes Act for organising three Ukrainian nationals to enter New Zealand.<sup>127</sup> Mr Chechelnitski organised false passports and facilitated the travel and entry of the Ukrainian nationals to New Zealand.<sup>128</sup> In this case, the procedural history of s 98D was discussed<sup>129</sup> and it was noted that deterrence of those who circumvent New Zealand’s immigration laws was a key factor in the consideration of sentencing.<sup>130</sup> In 2009, a similar case took place whereby two Ukrainian girls entered New Zealand on false passports.<sup>131</sup> In this case, lawyer, Jeremy Bioletti stated that they were victims of human trafficking even though they had entered New Zealand on false passports, however, this was not recognised by New Zealand courts due to insufficient evidence.<sup>132</sup>

Similarly, in *R v Setiadi*, Mr Setiadi was found guilty of aiding and abetting Indonesian nationals to remain unlawfully in New Zealand for material benefit.<sup>133</sup> Seven Indonesian

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123 *R v Decha-Iamsakun*, [1993] 1 NZLR 141 (CA).

124 Above at p4

125 Above at p2

126 As above.

127 *R v Chechelnitski* CA160/04, 1 September 2004.

128 As above at [14].

129 *R v Chechelnitski* at [3] to [12]

130 *R v Chechelnitski* at [20].

131 Stacey Wood, *Victims of human trafficking need to seek help*( Stuff, 7 September 2009)

132 *R v Chechelnitski* CA160/04, 1 September 2004

133 *R v Setiadi* [2006] NZHC 619

nationals paid Mr Setiadi to organise their flights, travel, employment and accommodation in New Zealand.<sup>134</sup> The judgment referenced that they had come to New Zealand under the illusion that they would be lawfully employed but in fact, they worked illegally, lived in a three bedroom house with 11 other migrant workers at times<sup>135</sup> and had to pay Mr Setiadi for their accommodation and transport.<sup>136</sup> All of the Indonesian workers were sentenced to prison for working unlawfully in New Zealand.<sup>137</sup> It is possible that the victims in this case could have been subjected to human trafficking even though they paid to enter New Zealand.<sup>138</sup> Using the ILO's Indicators of trafficking of adults for labour exploitation, it is clear that the Indonesian migrant workers may have been deceptively recruited to work in New Zealand and exploited once they were in New Zealand according to the Trafficking Protocol.<sup>139</sup>

In *R v Hastie*, Mr Hastie “lured” a 15 year old school girl from Wellington to New Plymouth to live with him under the pretense that he was a 22 year old surfer. When the plaintiff arrived, she found Hastie was 61 years old. She had consensual sex with Hastie two weeks later and began working as a prostitute from Mr Hastie's house, giving him a share of her earnings. The plaintiff implied that she could not leave Hastie because “she had no choice but to work for him because she owed him”<sup>140</sup>

Interestingly, an analogous case with similar material facts to *Hastie* was prosecuted as human trafficking in Canada. *R v Nakpangi*<sup>141</sup> involved two minors, 15 and 16 years of age who were lured into a romantic relationship with Mr Nakpangi who subsequently arranged for the girls to work for him as prostitutes though he was aware of their age. When the girls tried to leave Nakpangi, he outlined that an exit fee of CAD 100,000 was required meaning the girls could not leave him. Nakpangi was convicted of human trafficking under s 279.01(1) of the *Criminal Code of Canada* for exercising control or direction over the movements of a person for the purpose of exploiting or facilitating exploitation.<sup>142</sup>

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134 *R v Setiadi* [2006] NZHC 619 at [7]

135 *R v Setiadi* [2006] NZHC 619 at [9]

136 As above.

137 *R v Setiadi* [2006] NZHC 619 at [10]

138 Harre, T “Human Trafficking for Forced Labour at Sea: An Assessment of New Zealand's Response” (LLM thesis, University of Canterbury, 2013) at 59.

139 ILO Trafficking indicators p 5.

140 *R v Hastie* CA153/2011 30 September 2011 At [8].

141 *R v Nakpangi* (2008) CarswellOnt 9334 at [1] [Nakpangi]

142 As above.

In New Zealand, in a case with similar facts to the above, Hastie was sentenced to five charges under the PRA including:

- Sexual connection with a girl between 12 and 16 years
- Assisting a person under the age of 18 to provide commercial sexual services
- Receiving earnings from commercial and sexual services provided by a person under the age of 18;
- Entering into contracts under a person under the age 18 who was to provide cannabis to a person under the age of 18; and
- Supplying cannabis to a person under the age of 18.

Significantly, the fact that Hastie had “tricked” or “lured” C to New Plymouth was not addressed in the judgment and as New Zealand law does not recognize trafficking that takes place domestically, there was no discussion regarding whether *Hastie's* conduct came into the realms of trafficking-related activity at all. It is arguable that *Hastie* would meet the definition of human trafficking according to the trafficking protocol because C was lured and tricked into meeting Mr Hastie who she believed was a 22 year old surfer (Act) for the purpose of sexual exploitation. As C was a minor, under international law, establishing the second element of the offence (means) was not required because whether C consented to the exploitation is irrelevant.<sup>143</sup>

### *R v Kongsaijan*

In *R v Kongsaijan*,<sup>144</sup> three Thai nationals paid a substantial fee to Ms Kongsaijan who assisted them in coming to New Zealand. Her assistance included applying for visas, passports and identity cards.<sup>145</sup> This case was prosecuted under human smuggling law,<sup>146</sup> however, human trafficking law was discussed and reference was made to the fact that extra-territorial jurisdiction outlined in s 7A of the Crimes Act could apply to human trafficking cases with the consent of the Attorney-General.<sup>147</sup>

## *B Prevention*

### *1 Prevention as outlined in New Zealand's plan of action to prevent people trafficking*

As mentioned above, there is no human trafficking unit within MBIE and this can sometimes cause confusion regarding how the New Zealand government is addressing

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<sup>143</sup> See footnote 32.

<sup>144</sup> *R v Kongsaijan* [2012] NZHC 2293.

<sup>145</sup> As above at [5]

<sup>146</sup> S 98C Crimes Act 1961

<sup>147</sup> *R v Kongsaijan* [2012] NZHC 2293 at [26]

human trafficking in New Zealand. Other jurisdictions such as Canada, Australia, the USA have created offices or networks within government to coordinate a government response to human trafficking. For example, in Canada, the Royal Canadian Mounted Police (“RCMP”) established a Human Trafficking National Coordination Centre (“HTNCC”) within the RCMP Immigration and Passport division in 2005<sup>148</sup> for the purpose of developing tools and guidelines to facilitate human trafficking investigation, coordinating national awareness and anti-trafficking initiatives, being a first port of call for victims who need assistance, coordinating intelligence and developing and maintaining international partnerships.<sup>149</sup> New Zealand has no equivalent office or network and shows a lack of leadership with regard to coordinating a government response to human trafficking.

New Zealand is a signatory to the Bali process on People Smuggling, Trafficking in Persons and Related Transnational Crime (“Bali Process”) which is an intelligence sharing initiative focused on the prevention of human trafficking and human smuggling in Asia South Pacific.<sup>150</sup>

The New Zealand government published a *Plan of Action to Prevent People Trafficking* (“Plan of Action”) in July 2009 which aimed to coordinate government agencies in their response to human trafficking. The Inter-agency Working Group (Working Group) on People Trafficking, established in 2006 was tasked with coordinating the work set out in the Plan of Action.<sup>151</sup> The Plan of Action stated that the New Zealand government was committed to the prevention of human trafficking, the protection of human trafficking victims and the prosecution of human trafficking offences.<sup>152</sup> The Plan of Action also outlined assistance and protection victims of human trafficking would receive from the New Zealand government<sup>153</sup> and stated that research and training would take place into the scope of the issue of human trafficking and training for police and immigration staff.<sup>154</sup> However, six years later, there has been no review of the report, any amendments to the report or any analysis regarding whether the report objectives outlined in the Plan

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148 Royal Canadian Mounted Police, “Human Trafficking in Canada” (2010), at 4

149 As above

150 “About the Bali Process” The Bali Process <[www.baliprocess.net](http://www.baliprocess.net)>.

151 Immigration New Zealand “What is the government doing - People Trafficking”, (26 November 2012)

152 Plan of Action to Prevent People Trafficking (Department of Labour, Wellington, 2009) [NZ Plan of Action] at 22 states that “New Zealand has comprehensive laws and enforcement measures in place to prosecute people traffickers. People traffickers will be prosecuted to the fullest extent in law.”

153 Such as assistance for repatriation, health services, housing, special visas and other social services NZ Plan of Action [at 16-21].

154 NZ Plan of Action at 10

of Action have been met.<sup>155</sup> Moreover, the objectives are considered descriptive in nature because there is little evidence that any of the objectives outlined below have followed through. As part of New Zealand's prevention strategy, the Plan of Action outlines the New Zealand government will carry out the following actions:

- Training to identify trafficking activity<sup>156</sup>
- Targeted awareness- raising<sup>157</sup>
- Research on people trafficking<sup>158</sup>
- Intelligence gathering<sup>159</sup>
- International engagement on people trafficking issues<sup>160</sup>
- International development assistance to combat the causes of people trafficking<sup>161</sup>
- Enhancing border security to prevent traffickers targeting New Zealand.<sup>162</sup>

## 2 *Research and awareness*

As outlined above, there has been very little research on people trafficking in New Zealand. This obviously impacts on New Zealand's ability to identify victims of human trafficking and prevent human trafficking from taking place, protect victims and obviously prosecute perpetrators.<sup>163</sup>

The TIP report is not the only international report that has identified the lack of research into human trafficking in New Zealand; the concluding observations of the Committee on the Elimination of Discrimination against Women ("CEDAW") stated in its 2012 report that while it appreciated New Zealand's Plan of Action, it regretted "the absence of comprehensive information and data on trafficking in women and girls." The report further noted:

The Committee notes that there have been no prosecutions or convictions for trafficking in women and girls and is concerned that this may be linked to insufficient knowledge and awareness of the threat of

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155 One of the recommendations of the 2013 TIP Report outlined that the New Zealand government should update and fully implement the 2009 national plan of action to reflect the current trafficking in persons situation in the country.

156 NZ Plan of Action at 8

157 NZ Plan of Action at 9

158 NZ Plan of Action At 10

159 NZ Plan of Action At 11

160 NZ Plan of Action At 12

161 NZ Plan of Action At 13

162 NZ Plan of Action At 14

163 The Executive Director of UNODC commented that human trafficking research allows action on the guiding framework of the three Ps (prevention, prosecution and protection) based on solid information. UNODC The United Nations Global Initiative to Fight Human Trafficking (UN.GIFT) The Vienna Forum Report – a way forward to combat human trafficking (2008).\

trafficking and exploitation, particularly given reports on trafficking of migrant women and girls, including “mail-order” and “Internet” brides.<sup>164</sup>

Anne Gallagher recently commented that New Zealand researchers and advocates secured a “rare and important victory” through researching the FCV issue that led to the New Zealand government acknowledging the existence of slavery-like practices in New Zealand waters<sup>165</sup> and changing law and policy to provide greater protections for employees on FCV’s.<sup>166</sup>

These (research) developments are significant and deserve to be applauded. They provide a rare and welcome example of strong research creating the basis for effective advocacy that in turn leads to real changes in laws and policies.<sup>167</sup>

It is interesting to note that one of the only comprehensive research assignments into slavery in New Zealand resulted in a finding that there was slavery taking place in New Zealand waters. By way of comparison, the Canadian government conducted Canada’s first “Human Trafficking Threat Assessment” (“Assessment”) to determine the extent of human trafficking in Canada between 2005 and 2009.<sup>168</sup> The research confirmed that “vulnerable, economically challenged and socially dislocated sectors of the Canadian population represented a potential pool of trafficking victims.”<sup>169</sup> The assessment also identified vulnerable communities and ethnic groups and the fact that a large number of aboriginal Canadians were trafficked internally.<sup>170</sup> Moreover, the research identified industry sectors and particular provinces that required monitoring.<sup>171</sup> Since the publishing of the Assessment, numerous other research projects have been conducted into areas of sexual exploitation, the trafficking of aboriginal girls, localized human trafficking within provinces and Canadian’s involvement in child sex tourism.<sup>172</sup> New Zealand would

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164 Committee on the Elimination of Discrimination against Women Concluding observations of the Committee on the Elimination of Discrimination against Women New Zealand (Fifty-second session 9 – 27 July 2012)

165 Anne Gallagher commented that the New Zealand government had previously “denied the existence” of slavery in New Zealand’s seas - Anne T. Gallagher Exploitation in the Global Fishing Industry: New Zealand Researchers and Advocates Secure a Rare and Important Victory Interdisciplinary Project on Human Trafficking, 4 May 2013, <[www.traffickingroundtable.org](http://www.traffickingroundtable.org)>

166 Anne T. Gallagher “Exploitation in the Global Fishing Industry: New Zealand Researchers and Advocates Secure a Rare and Important Victory” Interdisciplinary Project on Human Trafficking, 4 May 2013, <[www.traffickingroundtable.org](http://www.traffickingroundtable.org)>

167 Anne T. Gallagher Exploitation in the Global Fishing Industry: New Zealand Researchers and Advocates Secure a Rare and Important Victory Interdisciplinary Project on Human Trafficking, 4 May 2013, <[www.traffickingroundtable.org](http://www.traffickingroundtable.org)>

168 Government of Canada National Action Plan to Combat Human Trafficking (2012) at 6 [Canada’s National Plan]

169 Canada’s National Plan at 6

170 Canada’s National Plan at 12

171 Canada’s National Plan at 7

172 Canadian Council for Refugees, Trafficking Resources <<http://ccrweb.ca/en/trafficking-resources>>

benefit from a similar scoping research assessment carried out identify vulnerable people, sectors and industries.

### *3 Victim identification*

At New Zealand's Prevent People Trafficking Conference in April 2013, Minister Woodhouse outlined that the New Zealand government has provided training regarding victim identification to border staff and other NGO's.<sup>173</sup> The TIP report stated that INZ has trained police, customs and border officers as well as frontline immigration staff regarding identifying victims of human trafficking.<sup>174</sup> However, it is unclear in New Zealand who is training law enforcement officers, what they are being trained and how many people have received training as this information has not been publicised. In Canada, between 2008 and 2012, The Royal Canadian Mounted Police's Human Trafficking National Coordination Centre provided awareness raising sessions to over 39,000 law enforcement officials, government and non-government organisations.<sup>175</sup> The Canadian government also regularly evaluates their criminal investigation processes in order to improve these.<sup>176</sup> A consistent theme throughout this paper is the lack of reporting from the New Zealand government regarding the initiatives they *are* carrying out to prevent human trafficking. It would be helpful to know, for example, how many people have received training, in which sectors and what criteria is used to identify victims of human trafficking. However, unlike Canada, this information is not reported by the New Zealand government.

### *C Protection*

#### *1 Protection outlined in New Zealand's Action Plan against Human Trafficking*

The Plan of Action outlines the protection that the New Zealand government affords to human trafficking victims. However, again, this is descriptive because there have been no victims of human trafficking identified according to New Zealand law and thus the New Zealand policy regarding protection for victims of human trafficking outlined in the Plan of Action has been unable to be assessed.<sup>177</sup> According to the Plan of Action, victims of human trafficking would be formally identified as a human trafficking victims by the New Zealand police according to the legal definition of a trafficked person defined in s98

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173 Minister Woodhouse, New Zealand's Minister of Immigration attended the Bali Process in April and also presented the opening speech at the New Zealand Prevent People Trafficking Conference. Hon Michael Woodhouse "Speech: Woodhouse - Prevent People Trafficking Conference" (11 April 2013)

174 TIP report 2012.

175 Canada's National Plan at 17.

176 Canada Border Services Agency Criminal Investigations Program (IRPA) - Evaluation Study (December 2010) at

177 As outlined above, there have been no victims of human trafficking identified according to New Zealand law.

of the Crimes Act.<sup>178</sup> However, to correctly identify a victim of human trafficking, it is essential that the law that defines a trafficked person is easy to understand. It is also essential that police officers who identify victims have been trained in how to accurately do this. For example, in 2001, the New Zealand police failed to thoroughly investigate a group of Thai nationals who were forced to work as sex workers in New Zealand.<sup>179</sup> The women did not have access to their own passports, money or air tickets and they entered New Zealand after securing a loan of NZD 10,000 each with interest at 36 per cent that they were required to repay to the people smuggler.<sup>180</sup> In 2001, New Zealand police stated that the women were not trafficked people because they were able to freely leave the brothel where they were working.<sup>181</sup> However, Justice Glazebrook has stated that the police were wrong to not to prosecute or recognize that psychological restraints can operate in place of physical restraints to prevent people leaving their place of employment.<sup>182</sup> The failure to prosecute in 2001 highlights a lack of understanding from police investigating this case at the time. It reinforces that the victim-identification under s98 needs to be practical, effective and easy to understand.

According to the Plan of Action, once human trafficking victims have been identified, they will be granted visas while their cases were being investigated and permanent immigration options will be possible in cases where it is “too dangerous” for the victim to return to their country of origin.<sup>183</sup> This approach is similar to Canada. However, there is a special visa category especially for victims of human trafficking in Canada.<sup>184</sup> Temporary resident permits (“TRP”) are issued to victims of human trafficking in Canada and can lead to permanent residence after an evaluation regarding whether the country of origin is a significant source country for human trafficking victims.<sup>185</sup> Significantly, the TRP’s issued to victims of human trafficking are not subject to victims testifying against their trafficker in court.<sup>186</sup>

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178 NZ Plan of Action at 16

179 S Glazebrook J “Human Trafficking and New Zealand” (keynote address to the AGM of the New Zealand Women Judges Association, 13 August 2010) at 9

180 As above.

181 As above.

182 Justice Glazebrook also stated that while the human trafficking provisions of the Crimes Act were not enacted, the police could have prosecuted under fraud, obtaining by deception, kidnapping and perhaps even theft of the victim’s earnings.

183 NZ Plan of Action at 17

184 178 TRP’s were issued between May 2006 to December 2011, Canada’s Plan of Action at 14.

185 As above.

186 As above.

In New Zealand, police-certified victims of human trafficking would receive access to publically funded health services,<sup>187</sup> temporary housing and access to women's refuges and other shelters.<sup>188</sup> Victims would also be able to access appropriate benefits and employment.<sup>189</sup> Repatriation assistance would be available for victims of human trafficking<sup>190</sup> and victims of human trafficking would be given culturally appropriate assistance when participating in criminal procedures to ensure they were fully aware of their rights as victims.<sup>191</sup> Victims could also be compensated according to New Zealand law.<sup>192</sup>

On paper, it is considered that victims of human trafficking would be adequately protected and that New Zealand's policy objectives satisfy international obligations for protection.<sup>193</sup>

## *2 Asylum, complementary protection and humanitarian*

In accordance with New Zealand law, victims of human trafficking are able to apply for refugee status in New Zealand where their claim would be assessed according to the Refugee Convention. Refugee and Protection Officers can also make assessments regarding whether a person should be recognized as a "protected person" according to the Immigration Act 2009.<sup>194</sup> The Immigration Act outlines that a person must be recognized as a protected person if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand in accordance with the Convention Against Torture<sup>195</sup> or that there are substantial grounds for believing a person may be subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand according to the International Covenant on Civil and Political Rights. However, protection status cannot be granted if a person can access domestic protection in their country of origin<sup>196</sup> and the protected people status must be made after considering human rights violations in the country of origin.<sup>197</sup> Victims of human trafficking may also be granted residence in a humanitarian appeal against deportation.

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187 NZ Plan of Action at 18

188 NZ Plan of Action At 19

189 A NZ Plan of Action t 19

190 NZ Plan of Action At 17.

191 NZ Plan of Action At 23

192 NZ Plan of Action At 24.

193 Outlined in Section IIIB of this paper.

194 S 125 Immigration Act. Refugee and Protection claims can also be appealed at the Immigration and Protection Tribunal ("IPT").

195 Immigration Act S130(1)

196 Immigration Act S130(2)

197 Immigration Act S130(3)

S207(1) of the Immigration Act outlines that the Immigration and Protection Tribunal (“The Tribunal”) will allow an appeal against liability for deportation on humanitarian grounds where it is satisfied that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand<sup>198</sup> and where it would not be contrary to the public interest to allow the appellant to stay in New Zealand.<sup>199</sup>

The Tribunal recently allowed a humanitarian appeal for a former human trafficking victim who was sold to a brothel at age 14.<sup>200</sup> The appellants “historical experiences” in her country of origin contributed to satisfying the “exceptional circumstance” criteria of the Immigration Act.<sup>201</sup>

#### *D Prosecution*

##### *1 Protection outlined in New Zealand’s Action Plan Against Human Trafficking*

New Zealand is a state party to the UNTOC, the Trafficking Protocol and the Protocol against the Smuggling of Migrants by Land Sea and Air. New Zealand ratified the conventions in 2002.<sup>202</sup> New Zealand also adopted the optional protocol regarding the sale of children in 2011. New Zealand is a state party to the following international conventions that are relevant to the prevention, protection or prosecution of human trafficking:

- Forced Labour Convention (ratified 1938)
- Labour Inspection Convention (ratified 1959)
- Migration for Employment (ratified 1950)
- Abolition of Forced Labour Convention (ratified 1968).
- Convention Against Torture (ratified 10 December 1989)
- International Covenant on Civil and Political Rights (ratified 28 December 1978)
- Refugee Convention (ratified 1960)
- United Nations Convention on the Rights of the Child (ratified 6 April 1993)

New Zealand is not a State Party to the Convention on Enforced Disappearance or the Convention on Migrant Workers.

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198 Immigration Act 270(1)(a)

199 Immigration Act 279(a)(b)

200 [2013] NZIPT 500768 (14 June 2013) [at 6] The Tribunal recognized that the appellant was a victim of human trafficking, but against a forward-looking assessment, decided that the appellant would not be coerced to return to sex work on return to her country of origin [43] and thus she was not recognized as a refugee or protected person.

201 [2013] NZIPT 800282 (14 June 2013)

202 NZ signed the Trafficking Protocol on 14 December 2000 and ratified this on 19 July 2002.

The Plan of Action states that “New Zealand has comprehensive laws and enforcement measures in place to prosecute people traffickers. People traffickers will be prosecuted to the fullest extent of the law.” However, the prosecution section of the Plan of Action acts on a presumption that New Zealand has a strong legislative framework to enable prosecution.<sup>203</sup> The prosecution section of the Plan of Action does not comment on police responsibilities and powers or comment in detail regarding special procedures for victims of human trafficking testifying in court. The Plan of Action outlines that suspected trafficking activity will be investigated by the New Zealand police, the MBIE and Customs.<sup>204</sup>

## *V An analysis of New Zealand’s human trafficking law*

### *A Overview*

New Zealand does not have a comprehensive human-trafficking statute. As such, New Zealand criminalises human trafficking through the Crimes Act (“CA”) Prostitution Reform Act (“PRA”) and Immigration Act (“IA”). Section 98 of the CA criminalises slave-dealing and section 98AA specifically criminalises dealing in people under 18 for sexual exploitation, removal of body parts, or engagement in forced labour. Sections 98B, D, E and F specifically criminalise “trafficking in people.” These provisions were added to the Crimes Act in June 2002 in order for New Zealand to meet international obligations after ratifying the UNTOC signed in December 2000.<sup>205</sup> The Transnational Organised Crime Bill recognized that New Zealand had no legislative provisions criminalizing migrant smuggling or trafficking in persons and thus needed to enact law to criminalise this.<sup>206</sup>

New Zealand’s human trafficking law does not encompass all elements of the crime of human trafficking according to the Trafficking Protocol. As such, separate sections of the Crimes Act are required to be consulted to form a human trafficking offence. The law is difficult to understand<sup>207</sup> and all of the trafficking-related laws have to be read together in order to reach a definition that somewhat complies with the Trafficking Protocol.<sup>208</sup>

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203 Until the ministerial review currently before cabinet, there has been no analysis by government into the current legal framework concerning human trafficking.

204 NZ Plan of Action at 22

205 Transnational Organised Crime Bill 2002 (201-1) [Transnational Organised Crime Bill].

206 As above.

207 Justice French comments that aspects of the legislation have “not been well drafted” in *Anna-Anastazia Horlor v District Court at Christchurch and Anor* HC CHCH CIV-2009-409-002499 [12 March 2010] at [9].

208 Department of State Analysis of NZ’s Anti-Trafficking Laws (2012)

An argument from the government with regard to New Zealand's current human trafficking law is that while there is not a concise statute that addresses "trafficking in persons", elements of the human trafficking offence are adequately covered through separate offences outlined in the CA, IA and PRA. In his opening speech at the Prevent People Trafficking Conference in April 2013, Hon Nathan Guy confirmed this approach:

I am well aware that there has been some criticism in certain quarters about the lack of prosecutions of people traffickers and New Zealand's trafficking definition, which includes a requirement for cross-border movement which is different to some international jurisdictions.

[...]

We have in place comprehensive legislation that covers offences associated with people trafficking crimes. These include measures to punish abduction, assault, kidnapping, rape, engaging underage prostitutes, coercing prostitutes, and exploiting workers.<sup>209</sup>

Following on from Hon Nathan Guy's statement above, it is clear that the New Zealand judiciary is more likely to prosecute separate offences contained in the Trafficking Protocol definition of human trafficking;

New Zealand is more likely to deal with the forcible movement of persons within New Zealand (whether for sex work or other purposes) as kidnapping, slavery, or other related forms of offending. The PRA specifically prohibits the use of persons under 18 years in prostitution, whether or not they have been transported internally or internationally. In addition, section 16 of the PRA makes it an offence to compel (via threat or any other means) a person to provide commercial sexual services, or earnings from prostitution.<sup>210</sup>

The table below outlines offences in the CA, IA and PRA that relate to the international definition of human trafficking. It is evident from this table that New Zealand's specific human trafficking law, section 98 of the Crimes Act, addresses most elements of the human trafficking definition in the Trafficking Protocol. However, it is also evident from the table that three different statutes and multiple legal provisions apply to each element of the definition of human trafficking according to international law. This is extremely messy and confusing when it comes to the prosecution of this offence. Moreover, as outlined above, three elements have to be satisfied under international law to meet the definition of human trafficking (act, means and purpose.) Under New Zealand's law, the

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209 Hon Nathan Guy "Opening address to the Prevent People Trafficking Conference" 11 April 2013 <http://www.national.org.nz/Article.aspx?ArticleId=40712>

210 Ministry of Justice "Policy Development- Trafficking" < <http://www.justice.govt.nz>>

three elements of the crime of human trafficking are found in separate sections of the law, not in a concise and robust definition.

Action (actus reas)		Means		Purpose (mens rea)	
Act	NZ law	Act	NZ law	Act	NZ law
Recruitment	S 98 CA S98B CA	Threat or use of force	S128A(2)(b) CA S129A CA S98B(d) CA S 306 CA S 307A CA	Exploitation	S98E(2)(a) CA S351 IA
Transport	S98(1)(c) CA S98AA(1)(e) CA S144C (1)(b)	Coercion	S 98D CA	Sexual exploitation	S98 AA CA S 98E (2)(a) CA S138 CA S3(a) PRA S 20 to 22 PRA
Transfer	S98(1)(a) CA S98(1)(f) CA S98(1)(g) CA S98AA(1)(a) CA S98AA(1)(h) CA	Abduction and kidnapping	S 208 CA S 209A CA S 210 CA	Forced labour	S98AA CA
Harbouring	S98(1)(b) CA S98D(3)(b)	Fraud	S98B CA	Slavery or similar practices	S98 CA
Receipt of persons	S 98 CA S 210(s) CA	Deception	S 98D CA	Removal of organs	S98AA S98E(2)(a)

For example, when considering the prosecution of the 2001 Thai sex workers mentioned above who had their passports confiscated on arrival to New Zealand and were forced to work as sex workers (which implies they believed they were coming to New Zealand to work in other sectors), the following laws would have to be consulted in the prosecution of this offence:

**s98D (Crimes Act) Trafficking in people by means of coercion or deception**

- (1) Every one is liable to the penalty stated in subsection (2) who—
- (a) arranges the entry of a person into New Zealand or any other State by 1 or more acts of coercion against the person, 1 or more acts of **deception** of the person, or both;

**s98B (Crimes Act) Terms used in sections 98C to 98F**

**act of deception** includes fraudulent action

**s16 (Prostitution Reform Act) Inducing or compelling persons to provide commercial sexual services or earnings from prostitution**

- (1) No person may do anything described in subsection (2) with the intent of inducing or compelling another person (**person A**) to—
- (a) provide, or to continue to provide, commercial sexual services to any person;
- or
- (b) provide, or to continue to provide, to any person any payment or other reward derived from commercial sexual services provided by person A.

**s351 (Immigration Act) Exploitation of persons not legally entitled to work**

- (1) Every employer commits an offence against this Act who,—
- (a) while allowing an unlawful employee to work in the employer's service,—
- (i) is responsible for a serious failure to pay to the employee money payable under the Holidays Act 2003; or
- (ii) is in serious default under the Minimum Wage Act 1983 in respect of the employee; or
- (iii) is responsible for a serious contravention of the Wages Protection Act 1983 in respect of the employee; or
- (b) while allowing an unlawful employee to work in the employer's service, takes an action with the intention of preventing or hindering the employee from—**
- (i) leaving the employer's service; or
- (ii) leaving New Zealand; or**
- (iii) ascertaining or seeking his or her entitlements under the law of New Zealand; or
- (iv) disclosing to any person the circumstances of his or her work for the employer.

**98E (Crimes Act) Aggravating factors**

When determining the sentence to be imposed on, or other way of dealing with, a person convicted of an offence against section 98D, a court must also take into account—

- (a) whether a person in respect of whom the offence was committed was subjected to exploitation (for example, sexual exploitation, a requirement to undertake forced labour, or the removal of organs) as a result of the commission of the offence

**98F (Crimes Act) Attorney-General's consent to prosecutions required**

- (1) Proceedings for an offence against section 98C or section 98D cannot be brought in a New Zealand court without the Attorney-General's consent.

Using this example, it is clear that three different statutes have to be consulted, the Attorney-General has to consent to the prosecution going forward and there are some elements to the crime committed that are not properly covered by law. For example, There are no statutory provisions that criminalise sexual exploitation for persons over 18 years. Exploitation and sexual exploitation is referred to in the sentencing requirements, however, exploitation does not form a critical part of the offence of human trafficking and there is no relative law that criminalises the holding or harbouring of passports and restricting the movement of persons who are being exploited.<sup>211</sup> New Zealand law does not criminalise “abuse of power or vulnerability” or “giving payments or benefits” which are outlined in the “means” section of the international definition.

### *B The definition of slavery in New Zealand law*

Section 98 of the Crimes Act criminalises the selling and purchase of slaves,<sup>212</sup> the employment of slaves,<sup>213</sup> inducing a person into slavery<sup>214</sup> and giving a person to debt-bondage and serfdom.<sup>215</sup>

New Zealand law defines a slave as “a person who is subject to debt-bondage or serfdom.”<sup>216</sup> In New Zealand case law, “slave” has been defined as “a person held as property” and “one who is submissive under domination.”<sup>217</sup> S98(2) provides a “partial” definition of “slave” according to Adams because it only recognizes two forms of “slavery” which are debt-bondage and serfdom.<sup>218</sup> New Zealand law uses the language “slavery” which has been found to constitute full ownership according to international law, not “human trafficking” which takes into account slavery like practice based on exploitation. The New Zealand definition of slavery does not take into account or criminalise other slavery related acts in the trafficking protocol such as forced labour or services, forms of sexual exploitation, practices similar to slavery or the removal of organs.<sup>219</sup> As such, the New Zealand definition provides a narrow scope to prosecute human trafficking under old-fashioned terms which are not consistent with how the

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211 Section 279.03 of Canada’s Criminal Code outlines 279.03 criminalises any person who “conceals, removes, withholds or destroys any travel document that belongs to another person or any document that establishes or purports to establish another person’s identity or immigration status.” However, New Zealand does not criminalise any similar provision in New Zealand law.

212 S98(1)(a)

213 S98(1)(b)

214 S 98(1)(d)

215 S98(1)(e)

216 S98(2)

217 R v Decha-Iamsakun [1993] 1 NZLR 141; (1992) 8 CRNZ 470 (CA).

218 Adams CA98.04 Definition of slave.

219 Trafficking Protocol Article 3

definition of slavery has evolved to encompass more modern types of slavery and “slavery-like” offences.<sup>220</sup>

*C The definition of human trafficking in New Zealand law*

S 98D provides New Zealand’s most robust trafficking in persons law. It criminalises trafficking in persons by means of coercion or deception.

- (1) Every one is liable to the penalty stated in subsection (2) who—
- (a) arranges the entry of a person into New Zealand or any other State by 1 or more acts of coercion against the person, 1 or more acts of deception of the person, or both; or
  - (b) arranges, organises, or procures the reception, concealment, or harbouring in New Zealand or any other State of a person, knowing that the person's entry into New Zealand or that State was arranged by 1 or more acts of coercion against the person, 1 or more acts of deception of the person, or both.

Justice Glazebrook summarises the definition of New Zealand’s human trafficking law in *R v Chechelnitski*:

Trafficking conversely is concerned with the situation where the migrant’s entry into New Zealand has been procured by acts of coercion or deception. Both offences are punishable by imprisonment for a term not exceeding 20 years, a fine not exceeding \$500,000 , or both. Section 98E provides that, when sentencing a person for an offence against either ss98C or 98D, the court must take into account certain factors, including the number of migrants involved, whether the migrants were subjected to inhuman or degrading treatment, whether bodily harm or death occurred and whether the offence was part of the activities of an organized criminal group as defined in s98A.<sup>221</sup>

There are a number of issues with this particular section of law and Justice Glazebrook’s summary above. Firstly, New Zealand’s trafficking in persons law only criminalises “arranging the entry of a person into New Zealand” and does not criminalise human trafficking that takes place within New Zealand with no border crossed. Secondly, New Zealand law only explicitly recognises two “means” of trafficking a person in to New Zealand; coercion and deception. It does not expressly outline other ways people could be trafficked in accordance with the Trafficking Protocol including threat or use of force, fraud, abduction abuse of power or vulnerability or giving benefits. Finally, the wording “exploitation” is not included in the wording of the provisions that criminalise human trafficking at all. As “exploitation” is considered the whole purpose of human trafficking in the Trafficking Protocol and in international precedents, this does not make exploitation the overarching purpose of New Zealand’s human trafficking law. These issues are discussed in more detail below.

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220 As outlined on page 6 of this paper.

221 R V Chechelnitski CA 160/04, 1 September 2004 at [3].

*1 The New Zealand definition of human trafficking does not criminalise human trafficking that takes place within New Zealand*

New Zealand does not recognize human trafficking that takes place domestically. Article 98D provides criminal liability for someone who “arranges the entry of a person into New Zealand or any other State.” As such, New Zealand only recognizes human trafficking taking place across international borders, not within New Zealand. This is inconsistent with international human trafficking law that states that movement or transnationality is not required for human trafficking to take place.<sup>222</sup> Adams on Criminal law states that “New Zealand Courts have jurisdiction over conduct entirely performed outside of New Zealand conferred by 7A, although the consent of the Attorney-General<sup>223</sup> to prosecutions for such conduct is required.”<sup>224</sup> However, there are no legal provisions regarding human trafficking that takes place *within* New Zealand. The legislative guide to the implementation of the Trafficking in Persons Protocol outlines:

The central and mandatory obligation of all State Parties to the Trafficking Protocol is to criminalise trafficking in their domestic legal systems. The Protocols parent instrument, the Organised Crime Convention requires the offence of trafficking to be established in the domestic law of every State Party independently of its transnational nature or the involvement of an organised criminal group.<sup>225</sup>

Through New Zealand not recognizing that human trafficking that occurs domestically and only recognizing human trafficking as a transnational offence, New Zealand may not be meeting the mandatory obligation of state parties to the Trafficking Protocol.

*2 New Zealand law outlines very limited “acts” and “means” according to the Trafficking Protocol*

Article 98D provides criminal liability for someone who “*arranges the entry* of a person into New Zealand or any other State” through coercion or deception or who “*organises, or procures the reception, concealment, or harbouring* in New Zealand or any other State of a person, knowing that the person’s entry into New Zealand or that State was arranged by” *coercion or deception*.<sup>226</sup> Article 98(1)(a) provides criminal liability for someone who “*sells, purchases, transfers, barter, lets, hires*” (a slave) and Article 98(1)(c)

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222 As outlined in IV(D)(3.1) of this paper.

223 Crimes Act 98F

224 Adams note 98F.

225 Law of International Human Trafficking Law at 374

226 Crimes Act Article 98D

provides criminal liability for someone who “*detains, confines, imprisons, carries away, removes, receives, transports, imports or brings to any place.*”

The above law outlines some of the acts that are outlined in the Trafficking Protocol such as harbouring, and concealing<sup>227</sup>, however, the Trafficking Protocol provides two other acts which are not included in New Zealand law; recruitment and “receipt of persons.” Considering human trafficking usually involves form of payment,<sup>228</sup> it is surprising this is not included in New Zealand’s domestic law. Furthermore, New Zealand legislation provides only two ways a human trafficking victim can be trafficked as outlined in Article 98D; through coercion and deception.

Before Canada amended its criminal code, it also prosecuted human trafficking-related offences under specific domestic law.

Previously, the *Criminal Code* contained no provisions to specifically prohibit trafficking in persons, although a number of offences – including kidnapping, uttering threats, and extortion – played a role in targeting this crime<sup>229</sup>

The Canadian definition of human trafficking initially focused on the actus reus (act) and mens reus (purpose) outlined in the Trafficking Protocol but did not criminalise the “means” element of the offence which meant that a recognition of coercion, fraud, deception or the abuse of power or the giving or receiving of payments and benefits to achieve the consent of a person was not required to constitute human trafficking.<sup>230</sup>

However, S 279.01(1) extended the Act element of the human trafficking offence to include the criminalization of “exercising control, direction or influence over the movements of a person.”<sup>231</sup> S 279.01(a) criminalized the “means” of kidnap<sup>232</sup> and added two crimes not included in the Trafficking Protocol which were aggravated assault and sexual assault.<sup>233</sup> The basis for codifying and criminalizing kidnap and other “means”

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227 The required mental state for the offence of concealment is that the accused must have concealed knowing that the person’s entry “was arranged” by acts of coercion or deception. Thus, New Zealand law links the acts and means together, however, they do not provide “for the purpose of...exploitation” as the third element of the offence. (See Adams note CA98D.02. and R v Chehelnitki 1/9/04, CA160/04 where it is discussed that this accords with the policy aims of the UNCTOC).

228 Trafficking in persons is estimated to be the second most profitable trade in the world after drugs

229 Laura Barnett BILL C-49: AN ACT TO AMEND THE CRIMINAL CODE (TRAFFICKING IN PERSONS) Parliament of Canada 12 January 2006.

230 though the court *may* consider means in ascertaining exploitation outlined in s 279.04(2)

231 Criminalising every person who recruits, transports, transfers, receives, holds, conceals or harbours a person”

232 The Trafficking Protocol provided in the “means” abduction which is similar to kidnap.

233 s 279.01(a) Canadian Criminal Code

was to ensure Canada's domestic law reflected a "similar definition of trafficking in persons to that found in the 2000 Protocol."<sup>234</sup>

### *3 Exploitation is not the over-arching purpose of New Zealand's human trafficking law*

Article 3(a) of the PRA states that the one of the overarching purposes of the PRA is to safeguard the human rights of sex workers and protect them from exploitation.<sup>235</sup> There is also specific law that criminalises dealing in people under 18 years through selling, buying, transferring, bartering, renting, hiring<sup>236</sup> and also detaining, confining or imprisoning<sup>237</sup> for the purpose of sexual exploitation.<sup>238</sup> Moreover, "sexual exploitation" is explicitly defined in s 98AA(3).

However, the law is specific to the criminalisation of sexual exploitation for persons under 18 years old. There are no strong or robust provisions contained in the Crimes Act regarding the criminalisation of persons over 18 years of age. Section 98E(2) states that when determining a sentence to be imposed on a person convicted of an offence under s 98D, the court must take into account "whether a person in respect of whom the offence was committed was subjected to exploitation (for example, sexual exploitation, a requirement to undertake forced labour, or the removal of organs) as a result of the commission of the offence." However, this provision seems to be more of an add-on or after-thought because it is not outlined as part of the trafficking in person's offence. As such, New Zealand law fails to make exploitation the centre of the trafficking in persons offence in a way that is consistent with international law.

The Immigration Act criminalises the exploitation of persons not legally entitled to work under S 351 of the Immigration Act, however, no definition of exploitation is specified and no case law has been found under this section which implies no prosecution has taken place. Furthermore, criminalizing the exploitation of people "not legally entitled to work" is an immigration offence related to the employment of people who have no legal status in New Zealand (ie- no work visa). As such, this section does not allow for people who are exploited in the work place who may be New Zealand citizens, residents or on visas. S 98AA criminalises "dealing in people under 18 for sexual exploitation, removal of body parts, or engagement in forced labour." Again, this statute only outlines three

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234 Laura Barnett BILL C-49: AN ACT TO AMEND THE CRIMINAL CODE (TRAFFICKING IN PERSONS)  
Parliament of Canada 12 January 2006.

235 Prostitution Reform Act

236 S98AA(1)(a)

237 S98AA(d)

238 S98AA Crimes Act

specific forms of exploitation in relation to children, not adults. New Zealand's specific trafficking in persons law seems to miss the main purpose of the crime of human trafficking by not defining exploitation. Further, New Zealand's trafficking in persons allows for only some forms of exploitation to be prosecuted.

Again, drawing upon examples from Canada, A further amendment was made to Canada's human trafficking law in June 2012 whereby exploitation was made the central focus of Canada's human trafficking law and again, attempts were made to ensure that Canada's human trafficking law reflected the Trafficking Protocol.<sup>239</sup>

The Nakpangi case reveals that Parliament has inadequately defined human trafficking and deviated from the internationally agreed definition after having committed to criminalizing the practice.<sup>240</sup>

The definition of exploitation was included in Canada's trafficking in persons law in 2005:

A person exploits another person if they cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service.

However, in 2012, the criminal code was again amended. Section 279.04(2) outlined:

- (2) In determining whether an accused exploits another person under subsection (1), the Court may consider, among other factors, whether the accused
- (a) used or threatened to use force or another form of coercion;
  - (b) used deception; or
  - (c) abused a position of trust, power or authority.

The "means" element of the offence of human trafficking which was excluded in Canada's initial human trafficking law was added. It provided that the Court *may* consider whether the accused has used or threatened to use force or another form of coercion,<sup>241</sup> deception,<sup>242</sup> or abused a position of trust, power or authority<sup>243</sup> when assessing exploitation. MP Joy Smith who introduced the bill reinforced the premise that exploitation was required to be the core of the offence for human trafficking in Canadian law.

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239 Parliament of Canada *Bill C-452* (1st session, 41st Parliament 60-61 Elizabeth II, 2011-2012. at Private Members Speech, MP Joy Smith (Kildonan St Paul) at 1725.

240 *Invisible Chains* at 124.

241 Canada Criminal Code s 279.04(2)(a)

242 Canada Criminal Code s 279.04(2)(b)

243 Canada Criminal Code s 279.04(2)(c)

This amendment stems from consultations with law enforcement, lawyers and prosecutors who have faced challenges demonstrating exploitation and trafficking in persons under the current definition. They feel that the current definition of “exploitation” is worded in such a way that it has caused courts to interpret “exploitation” too narrowly. The current definition hinges on an assumption that victims feared for their own safety or for the safety of someone known to them so much that they were compelled to provide a labour or a service. This has often been interpreted as a concern for one’s physical safety.<sup>244</sup>

It is interesting to observe that all of the amendments made to Canada’s human trafficking law have attempted to that it reflects the Trafficking Protocol.<sup>245</sup> Where New Zealand is considering and reviewing domestic trafficking in persons law, it is important that this observation is duly noted.

#### *4 The attorney-general’s consent*

In *R v Konsaijan*,<sup>246</sup> Justice Allan stated that the requirement of consent for the offence of human smuggling and human trafficking in New Zealand “suggests that Parliament saw an alleged offence under the section as falling into a particularly grave or important category requiring a degree of oversight by the country’s senior legal officer.”<sup>247</sup> Justice Alan also referred to human trafficking as a “high end” offence when and if s 98E (aggravating factors) were taken into consideration.<sup>248</sup> The requirement of the Attorney-General’s consent elevates the crime of human trafficking to a potentially higher crime than it needs to be (especially considering how human trafficking is widely taking place throughout the whole world.) Furthermore, the Attorney-General’s consent provides a greater procedural hurdle for the prosecution of human trafficking in New Zealand and access to justice for victims.

### *VI Whether New Zealand trafficking in persons law meets international standards and international obligations*

New Zealand is given tier one status in the TIP report which signifies that it meets minimum international standards.<sup>249</sup> From the analysis above, it is clear that New Zealand

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244 Parliament of Canada *Bill C-452* (1st session, 41st Parliament 60-61 Elizabeth II, 2011-2012. at Private Members Speech, MP Joy Smith (Kildonan St Paul) at 1725.

245 Canada has also amended the law to provide harsher sentences for the trafficking of children and to criminalise extra-territorial trafficking committed by Canadian nationals outside of Canada.

246 *R v Konsaijan* [2012] NZHC 2293.

247 S7A of the Crimes Act outlines that s 98D *R v Konsaijan* [2012] NZHC 2293 at [26]

248 *R v Konsaijan* [2012] NZHC 2293 at [28]

249 This is the criteria the TIP reports use to monitor human trafficking. Tier one status means that a government prohibits and punishes human trafficking and makes efforts to eliminate trafficking in persons according to the

law as it stands is capable of enabling human trafficking prosecutions to take place. However, the law as it currently stands is disorganized, confusing and does not make prosecution easy or straight-forward.

The latest TIP report commented that NGO's and government officials believe that the lack of anti-human trafficking prosecutions and identification of victims in New Zealand is due to "the high evidentiary bar of the current law."<sup>250</sup> I would argue that the lack of prosecutions in New Zealand is due first and foremost to a lack of understanding of the crime of human trafficking according to New Zealand law. The confusing law impacts on the New Zealand governments ability to provide the necessary structures required to prevent human trafficking from taking place, protect victims of human trafficking and prosecute this offence;

[..] it could be argued that States failing to fully and effectively criminalise trafficking are not meeting their obligations to protect victims of human trafficking and to prevent future trafficking. In addition, they may also be failing to provide the necessary structures within which State agencies can investigate, prosecute, and adjudicate cases of trafficking in persons to the required standard of due diligence. Failure to criminalise in accordance with the international legal definition could also impact on the ability of States to effectively discharge their obligations with respect to legal and other forms of cooperation.<sup>251</sup>

Anne Gallagher also notes that where states consistently deny responsibility for human trafficking or do not acknowledge that human trafficking takes place, "an understanding of the principles of international legal responsibility as they apply in the trafficking context is an essential prerequisite for examining and, if justified, rejecting claims of this kind."<sup>252</sup> A central proposition under human rights treaties is that when they are incorporated into domestic law, they must be practical and effective. As outlined above, The ECtHR has commented that national legislation reflecting the Trafficking Protocol "must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of human trafficking."<sup>253</sup> This approach has also been confirmed by courts in New Zealand:

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Trafficking Victims Protection Act 2000 (USA) 22 USC § 7101 [TVPA]. *2011 Trafficking in Persons Report* (U.S Department of State, June 2011).

250 TIP Report 2013.

251 *The International Law of Human Trafficking* at 370.

252 Above at 219.

253 *Rantsev v Russia & Cyprus (Judgment)* First Section 25965/04, 10 January 2010 [at 283]

A failure to give practical effect to international instruments to which New Zealand is a part may attract criticism.<sup>254</sup>

[...]

When an Act is silent as to relevant considerations, international obligations are required to be taken into account<sup>255</sup>

It is considered that New Zealand trafficking in persons law is impractical and ineffective for the following reasons:

- 1) The definition of human trafficking is very difficult to understand. Three different statutes and numerous legal provisions have to be consulted in order to satisfy the three elements outlined in the human trafficking definition outlined in the Trafficking Protocol.
- 2) To add to this confusion, the New Zealand definition of human trafficking does not recognize human trafficking that takes place domestically and thus does not adequately reflect international standards or meet international obligations under UNTOC. As outlined earlier, section 34(2) of UNTOC outlines:

The offences established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1.<sup>256</sup>

Tavita v Minister of Immigration [1994] 2 NZLR 257 (“Tavita”) states that New Zealand is required to give practical effect to international instruments to which New Zealand is part. New Zealand has already been criticized by the Department of State for not recognizing human trafficking that takes place in New Zealand. It is considered that in line with international requirements and standards, New Zealand law should recognize human trafficking that takes place domestically in New Zealand.

- 3) New Zealand law does not make exploitation the central focus of human trafficking law. This again contributes to the offence of human trafficking being difficult to understand by New Zealanders and the judiciary and contributes to New Zealand trafficking in persons law not being in conformance with

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254 Tavita v Minister of Immigration [1994] 2 NZLR 257; [1994] NZFLR 97; (1993) 1 HRNZ 30; (1993) 11 FRNZ 508; [1994] NZAR 116

255 As above. This has recently been confirmed in Hamed v R - [2012] 2 NZLR 305 at [35].

256 Article 34(2) United Nations Convention against Transnational Organised Crime (“UNTOC”) 2225.

international precedents. Having “exploitation” considered as an “aggravating factor” in the sentencing of human trafficking is not adequate when exploitation is at the core of the definition of human trafficking according to international law.

- 4) New Zealand law only recognises human trafficking by coercion and deception and does not recognize other ways people can be trafficked through threat or use of force, fraud, abduction abuse of power or vulnerability or giving benefits. Again, New Zealand has failed to adequately reflect the international law and obligations as state parties to the Trafficking Protocol and UNTOC.

## *VII Conclusion and Recommendations*

This dissertation has attempted to evaluate New Zealand’s law and policy and practice regarding the prevention, protection and prosecution of human trafficking in New Zealand. There are some clear recommendations that have been easily identified, however, it is considered a lot more research is warranted with regard to this issue. The obvious recommendations are that New Zealand’s human trafficking law should be amended to reflect the international definition of human trafficking, the New Zealand government should show more leadership in coordinating a three-tiered response to prevent human trafficking taking place, protecting victims and prosecuting this crime. Moreover, specific scoping research should take place led by the New Zealand government to ascertain the extent of human trafficking taking place in New Zealand. Finally, the government should collect data and publish reports regarding human trafficking initiatives that are taking place in the interests of communicating how they are or are not meeting their international obligations in addressing the issue of human trafficking in New Zealand.

### *A Amendments to the Crimes Act Trafficking in Persons Law*

The government should amend New Zealand’s human trafficking law so that it reads in a concise and straight-forward manner, is contained in one statute and reflects the international definition of human trafficking. Canada and other states have made several amendments to human trafficking law to allow for prosecution of this offence and ensure that domestic law reflects international obligations under the Trafficking Protocol and UNTOC. New Zealand law as it currently stands breaches international obligations because it is not practical, effective and easy to understand. Any amendments that are made to New Zealand’s trafficking in persons law should be made with regard to human rights obligations taking into consideration human rights treaties New Zealand is currently party to.

*B The government should show leadership in coordinating a three-tiered response to human trafficking in accordance with the trafficking protocol*

The New Zealand government should create a specific office or small branch within the Refugee and Protection Unit (the current human rights arm of MBIE) to coordinate the government's response to human trafficking. The Refugee and Protection Unit already consider asylum and protection claims under international law and are aware of protection obligations under human rights treaties so are a relevant unit to be considered to head this. At the moment, there is a lack of leadership from government regarding this issue including no focal person to contact and no spokesperson liaising with NGO's and the New Zealand public. Similarly to Canada, a New Zealand human trafficking unit could coordinate the government's response to human trafficking including investigation of potential human trafficking cases, research into this issue, response to victims of human trafficking and enquiries from the New Zealand public.

*C Scoping research*

Once New Zealand's human trafficking law is adequately defined, there is a real need for scoping research similar to Canada's threat assessment to take place where the full extent of human trafficking in New Zealand is documented and/or assessed. Case law and stories reported in the media indicate that trafficking-related activity is taking place in New Zealand in the horticulture industry and sex industry. Furthermore, the issue of forced marriage and migrant exploitation could warrant specific research. It is important that vulnerable communities and industries are identified to ensure that victims of human trafficking are protected in New Zealand.

*D Reports and data collection*

It is clear that the New Zealand government is undertaking some initiatives to address human trafficking in New Zealand, for example, training border staff regarding victim-identification, amending the migrant exploitation law in the Immigration Act and turning around sex-workers at the border to permit them entering New Zealand. However, the government rarely publishes this activity and there is a degree of frustration regarding what the government is actually doing to address human trafficking in New Zealand. A specific office would assist in communicating to the public what the government is doing, but until then, the government should be more active in sharing information regarding initiatives they are undertaking. The government should also set up a database whereby information regarding human trafficking activity is collated.

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