

By Frances Simmons

MONEY MATTERS

Material justice for survivors of slavery and human trafficking

Australia's response to human trafficking and slavery has evolved rapidly in the last decade. But despite the growing number of prosecutions, the pathway for victims to claim compensation is unclear and consideration should be given to establishing a federal compensation scheme.



Victims of human trafficking are typically exploited over many months in degrading and abusive conditions. Australia has international obligations to ensure that its legal system provides victims of trafficking with the possibility of obtaining compensation for the harm they have suffered.¹ Since the introduction of federal offences of slavery and people trafficking in 1999 and 2005,² 16 offenders have been convicted of these crimes. In February 2013, the

Federal Parliament passed laws creating specific offences of forced labour, forced marriage, servitude and organ trafficking.³

Yet, despite investing over \$150 million in Australia's response to trafficking and slavery since 2003 and identifying over 190 suspected victims of these crimes, the rights of victims to legal remedies – including for unpaid wages and for the abuse and harm suffered as victims of crime – have been overlooked.⁴ As a result, the pathway to compensation >>

Unlike at state and territory level, there is no compensation scheme for federal victims of crime.

for federal victims is unclear. This has led to growing calls, including from the United Nations Special Rapporteur on Trafficking, to establish a national compensation scheme for victims of trafficking.⁵

The obstacles to claiming compensation for victims of slavery and trafficking are, in part, the product of the fact that the Commonwealth is not used to dealing with crimes that actually cause harm to an individual. Unlike the states and territories, which all have state-funded compensation schemes, the legal architecture to meet the needs of federal victims of crime has not yet been constructed: there is no compensation scheme for federal victims of crime and no official guidance for police, prosecutors or support services about how to make sure trafficking victims understand the different options for claiming compensation.⁶

OFFENDER-BASED COMPENSATION

Since the introduction of the criminal offences of human trafficking and slavery, the Commonwealth has successfully prosecuted 16 offenders for these crimes. The 16 convictions arose from 9 separate transnational trafficking operations and resulted in the exploitation of 34 victims. Of the 16 individual offenders, 10 were convicted of slavery offences, 4 of sexual servitude offences, and 2 for trafficking offences.

Not all investigations into trafficking and slavery will reveal sufficient evidence to support criminal charges, and there is likely to be a significant gap between the number of cases detected by Australian authorities and the number of victims in Australia, due to under-reporting and non-identification of victims and offenders, particularly in non-sex sectors.⁷ However, when a conviction is obtained, the sentencing of the convicted offender presents an ideal opportunity to consider whether the offender should compensate the victim for her loss.

Although the *Crimes Act* enables courts to order convicted offenders to pay reparations to their victims,⁸ none of the 16 people convicted of slavery and people-trafficking offences has been ordered to pay reparations to their victims. It is unclear why none of the 16 offenders has been ordered to pay reparations. In some cases, the offender may not have had the assets to pay such an order, or the issue of seeking reparations orders for economic loss (in the form of unpaid or underpaid wages) may not have been considered.

In the early days of Australia's response to human trafficking, part of the problem may have been that the Commonwealth Director of Public Policy (CDPP) Victims of Crime policy does not require the CDPP to consider making reparations orders on behalf of individual victims of

crime and so, in the absence of legal advice, trafficked people themselves may be unaware that such orders may be made.

The *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2012* (Cth) represents the first tentative attempt to improve the chances of trafficking victims obtaining reparations from convicted offenders. The changes are slight. A neat amendment to ss21B(1)(c) and 21B(1)(d) of the *Crimes Act* means that individual victims of federal offences are now eligible for reparations in the same circumstances as the Commonwealth. This subtly lowers the barrier to obtaining reparations by now requiring the victim to establish that the loss was the result of the criminal conduct, rather than as the *direct* result.

The victims of slavery and human trafficking typically suffer both economic and non-economic loss. A recurring theme in reported Australian cases is that the victims had to work in debt bondage, often for many months, with little or no pay in degrading and abusive conditions. In addition to economic loss, victims may suffer severe psychological harm. However, the provision in the *Crimes Act* that enables courts to order convicted offenders to pay reparations to their victims is typically used in cases where Commonwealth agencies – such as the Australian Tax Office – has suffered economic loss, and not in cases where the victim has suffered psychological or physical injuries as a result of the crime.

Many experts, including the UN Special Rapporteur on Trafficking, recommended amending the *Crimes Act* to recognise explicitly that victims of crime may suffer non-economic loss as well as economic loss.⁹ Unfortunately, the recent changes to the *Crimes Act* do not implement this recommendation. The Attorney-General's Department has emphasised that 's21B(1) of the *Crimes Act* deals with reparations, not compensation. As such, it's not intended to cover non-pecuniary damages, such as pain and suffering'.¹⁰

This narrow assessment is at odds with the Australian Law Reform Commission's (ALRC) observation that, while there is no explicit provision for reparations for non-economic loss such as pain and suffering, 'some provisions of Part IB implicitly accept that injury, which may give rise to non-economic loss, may result from the commission of a federal offence'.¹¹ Indeed, in the ALRC's view, there is 'no reason in principle to distinguish between economic and non-economic loss suffered as a result of a federal offence' and it recommended amending the law to clarify 'that a court may order a federal offender to make reparation for any loss suffered by reason of the offence, regardless of whether the loss is economic or non-economic'.¹²

Under existing laws, making a reparations order is discretionary and there is no requirement for a court to consider making an order in certain cases or provision for a victim or a representative to apply for an order. It is apparent that, if orders are to be obtained, then it will be because the CDPP is prepared to work with the victims to present the court with compelling evidence of the loss that they have suffered. In this respect, one potential benefit of recent efforts to improve the availability of reparations orders is that they will encourage CDPP to consider seeking such orders in every case.

Ultimately, even if the process of obtaining a reparations order was reshaped to recognise that trafficking victims typically suffer both economic and non-economic loss, and to require courts to consider making orders against convicted offenders, the reality is that only a small number of trafficking crimes are successfully prosecuted. Even if an offender is convicted, that person may lack the financial means to pay the debt, and then the victim would bear the burden of enforcing a reparation order.

STATE-BASED COMPENSATION SCHEMES

State-funded compensation schemes should provide the most accessible route to compensation for trafficked people. In contrast to the exacting standard of proof demanded by criminal prosecutions, the standard of proof for establishing an entitlement to an award of statutory compensation is the balance of probabilities.¹³ Instead of relying on the offender to pay, the award is publicly funded.

Australia does not have a national compensation scheme for victims of crime. While some victims have been able to seek compensation under state and territory compensation schemes,¹⁴ these schemes all have different eligibility criteria. The amount of compensation a trafficking victim will be able to claim largely depends not on the extent of her injuries, but on where the crime occurred. Some schemes are more generous than others: the maximum amount of compensation available varies from \$30,000 to \$75,000.¹⁵

The state schemes typically pre-date Australia's federal anti-trafficking legislation, and do not specifically acknowledge the crimes of slavery and human trafficking or the injuries victims of these crimes suffer.¹⁶ What this means is that compensation awards may be available to victims of trafficking who can establish that they experienced discrete acts of violence as part of the trafficking process (for example, sexual assault or assault), or who can show they have suffered severe psychological injuries. As a result, victims who were not physically or sexually assaulted or abused as a result of being trafficked may struggle to meet the criteria for compensation under state and territory schemes.¹⁷

State and territory compensation schemes are also inherently ill-equipped to deal with cases of criminal exploitation that can occur over many months in many different states. For example, in *R v Netthip*,¹⁸ 11 Thai women were trafficked into sexual servitude. The abuse continued over many months during which some of the women were moved between brothels in New South Wales (NSW), Victoria and South Australia. However, state schemes offer redress to victims of crime only for injuries sustained within their jurisdiction: compensation cannot be sought in Victoria for what happened in NSW.

To date, most of the claims for compensation by trafficking victims have been made by women who have been victims of slavery or sexual servitude in the sex industry in NSW¹⁹ or Victoria,²⁰ where most of the known cases have been identified.

In NSW, the Director of Anti-Slavery Australia, Associate Professor Burn, reports that Anti-Slavery Australia has now assisted over 20 victims of trafficking to obtain over

\$1,000,000 in compensation, with other cases still awaiting determination under NSW's backlogged compensation scheme. The claimants in such cases, who so far have all been women, have been able to claim compensation for the 'compensable injury' of category 3 sexual assault, which involves a pattern of abuse.²¹

At the time this article went to print, the NSW government had just introduced the *Victims and Support Bill* (NSW) 2013, and it is apparent that if this Bill is enacted the compensation available to women who are victims of these crimes in NSW will be dramatically reduced. The Bill does not consider or acknowledge the specific crimes of slavery, human trafficking, forced labour and forced marriage. This, in turn, underscores the need for the Commonwealth government to take action to recognise and protect the rights of victims of human trafficking and slavery.

The existing NSW scheme was not designed to compensate victims of human trafficking and slavery and, as a result, the claims made for compensation by victims of these crimes have been for the compensable injury of category 3 sexual assault. This means an adult victim of sexual servitude will first need to establish that the sexual intercourse that occurred while she was in servitude was non-consensual.²² If it is not possible to establish that specific sexual acts were non-consensual, it may be possible to argue that the injury of 'sexual servitude' is similar to the injury of category 3 sexual assault, and therefore covered by clause 8 of the schedule, which permits awards of >>

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compensation for injuries that are 'similar' to those set out in schedule 1.²³

The process of claiming compensation as a victim of category 3 sexual assault or a similar injury is unnecessarily burdensome and can re-traumatise the victim. In particular, requiring the victim to provide medical proof that they have suffered psychological or psychiatric harm as a result of the crime (even in cases where the trafficker has been convicted) can result in re-traumatisation.²⁴

The first report of a trafficking victim who obtained compensation under the NSW scheme involved a young woman who was trafficked to Australia in 1997 when she was 13 years old and exploited in the sex industry. Ten years later, she successfully claimed compensation for category 3 sexual assault and received the maximum award of \$50,000.²⁵ Consent was not an issue; she was a child when she was exploited.²⁶

In the last decade, most of the cases of trafficking into the sex industry that have been reported have involved adults, most of whom travelled to Australia intending to work in the sex industry, and then found themselves working in exploitative and abusive conditions. The issue of consent can be complex and victims may also suffer economic loss from working with no pay for many months. For example, in *Sieders v The Queen*,²⁷ four Thai women were exploited in a condition of 'sexual servitude' in a Sydney brothel. After observing it was possible that all but one of the women made a deliberate choice in Thailand to undertake a debt bondage arrangement to work in the brothel to pay off \$45,000,²⁸ the court noted: '[a] person can be free to do a multitude of different things, but if she is not free to cease providing sexual services, or not free to leave the place or area where she provides sexual services, she will, if the other condition of the section is met, be in sexual servitude'.²⁹

Although Australia's early response to people-trafficking focused upon criminal exploitation in the sex industry, the Australian Federal Police (AFP) is now uncovering more cases of trafficking outside the sex industry.³⁰ This trend is likely to continue, particularly following the recent introduction of new offences of forced labour and forced marriage. But under the current NSW scheme victims of trafficking, slavery and forced labour who do not experience sexual or physical assault may not be eligible for compensation, as the scheme only compensates victims who have specific types of injuries.³¹

TOWARDS A NATIONAL COMPENSATION SCHEME

As the number of human trafficking and slavery prosecutions grows, so do the arguments in favour of a national framework to protect and compensate the victims of these crimes. The issue of a national compensation scheme has been on the government's radar for years, but no action has yet been taken.³² The limitations of reparations orders are obvious and the problems of relying on state and territory schemes are clear.

Australia's response to human trafficking has many admirable features. But the rights of trafficked people to seek remedies for the harm they have suffered have not yet

been properly recognised at a federal level and, as a result, the pathway for victims to seek compensation remains unclear. As a recent Senate Committee Inquiry concluded, the establishment of a federal compensation scheme should be further investigated.³³ On a practical level, it is imperative that these investigations identify ways of improving the confiscation of the proceeds of trafficking and slavery crimes and how the proceeds of crime could help to fund a federal compensation scheme.

The Director of Anti-Slavery Australia, Associate Professor Burn, believes that the recent introduction of new offences of forced labour, forced marriage and organ-trafficking strengthen the case for a national compensation scheme.³⁴ She hopes the question of how such a scheme could work in practice will be considered by the Joint Standing Committee on Foreign Affairs, Defence and Trade, which is due to report on its inquiry into slavery, slave-like practices and people-trafficking in Australia later this year.

Victims of trafficking and slavery typically work for a long time for little or no money in grossly degrading conditions. The injury to their psychological health and well-being is profound and the process of recovery can take many years. It is critical that, in ensuring that Australia's response to human trafficking and slavery reflects international best practice, the earnest commitment to bring traffickers to justice is accompanied by meaningful efforts to ensure that their victims can seek material justice. ■

Anti-Slavery Australia provides a specialist legal service for victims of human trafficking (02) 9514 9662 or email antislavery@uts.edu.au.

Notes: **1** For a comprehensive overview, see Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press: 2010), at 355-69. **2** The *Criminal Code Amendment (Slavery and Sexual Servitude) Offences Act 1999* (Cth) introduced the offences of slavery (s270.3), sexual servitude (s270.6) and deceptive recruiting for sexual services (s270.7) into the *Criminal Code Act 1995* (Cth) Sch 1. The *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth) added the offences of trafficking in persons (s271.2); trafficking in children (s271.4); domestic trafficking in persons (s271.5) and debt bondage arrangements (s271.8). See *R v Tang* (2008) 237 CLR 1, 16 [21]–[23] (Gleeson CJ) (explaining the legal meaning of slavery); *R v Sieders* (2008) 72 NSWLR 417 (explaining the meaning of sexual servitude). **3** *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013* (Cth) (Slavery Act 2013), amending the *Criminal Code Act 1995* (Cth), received royal assent on 7 March 2013 and came into effect the following day. **4** United Nations Human Rights Council, *Report of the Special Rapporteur on trafficking in persons, especially women and children* on her mission to Australia (17-30 November 2011), 18 May 2012 www.ohchr.org/EN/Issues/Trafficking/Pages/Visits.aspx. **5** *Ibid.* **6** Commonwealth Director of Public Prosecutions (CDPP), *Victims of Crime Policy* <http://www.cdpp.gov.au/Publications/Victims-of-Crime-Policy/>. The policy states that '[i]n the context of this policy, a victim of crime is an identified individual who has suffered harm as a direct result of an offence or offences committed, or apparently committed, against Commonwealth law or prosecuted by Commonwealth authorities. "Harm" includes physical or mental injury, pregnancy, emotional suffering or economic loss.' **7** Fiona David, *Labour Trafficking* (Report No. 108, Australian Institute of Criminology, 2010) xii. **8** The operation of s21B of the *Crimes Act 1914* (Cth) is triggered by the conviction of a federal offender and a reparation order made on s21B is treated as a civil

debt. **9** See note 7 above. **10** Attorney-General's Department (Cth), Answers to Questions on Notice to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012*, 4 September 2012, 15. **11** Australian Law Reform Commission, *Same Crime, Same Time: sentencing of federal offenders*, Report No. 103, 13 September 2006, [8.41] (noting 'Section 16A(e) provides that the court is to take into account any "injury, loss or damage" resulting from the offence when sentencing a federal offender, and s16A(f) provides that the court is to take into account the degree to which a person has shown contrition for an offence by taking action to make reparation for any injury, loss or damage resulting from the offence'). **12** *Ibid* [8.46], Recommendation [8.2]. **13** See *Criminal Injuries Compensation Act 2003 (WA)* s12; *Victims of Crime Assistance Act 1996 (Vic)* s31; *Victims of Crime Act 2001 (SA)* s22; *Victims of Crime Assistance Act 2009 (Qld)* s78, *Victim Support and Rehabilitation Act 1996 (NSW)* s29; *Victims of Crime (Financial Assistance) Act 1983 (ACT)* s29; *Victims of Crime Assistance Act 1976 (Tas)* s5. **14** For an overview of the emergence of criminal injuries compensation schemes, see Christine Forster, 'Good Law or Bad Lore? The Efficacy of Criminal Injuries Compensation Schemes for Victims of Sexual Abuse: A New Model of Sexual Assault Provisions' (2005) 32 *University of Western Australia Law Review* 264, 272-3. **15** A maximum award of \$30,000 is available under the *Victims of Crime Regulations 2000 (Tas)* while in Western Australia (*Criminal Injuries Compensation Act 2003 (WA)* s31) and Queensland (*Victims of Crime Assistance Act (Qld)* s38) victims can claim up to \$75,000. **16** For example, NSW includes sexual assault but not sexual servitude in the list of compensable injuries. In contrast, the ACT explicitly includes sexual servitude offences in the definition of 'violent crime': *Victims of Crime (Financial Assistance) Act (1983) ACT*, s3. **17** See Frances Simmons, 'Making possibilities realities: compensation for trafficked people', (2012) 34(3) *Sydney Law Review* 114. **18** [2010] NSWDC 159. **19** Under the NSW scheme, victims of acts of violence that occurred in the commission of an offence in NSW can apply for compensation. The *Victims Support and Rehabilitation Act 1996 (NSW)* s5 (*VSRA*) **20** In Victoria, victims of trafficking crimes may claim financial assistance under the *Victims of Crime Assistance Act 1996 (Vic)* (*VOCA Act*), if they suffered an injury as a direct result of a criminal act that occurred in Victoria. For example, in 2010, a magistrate awarded a woman who had been forced into sexual servitude almost \$30,000 of financial assistance for two separate acts of violence under the *Victims of Crime Assistance Act 1996 (Vic)* (*VOCA Act*): forced deprivation of liberty for the purposes of sexual penetration and threats of death. **21** The schedule of compensable injuries establishes three categories of sexual assault. The most severe category is category 3, which involves 'a pattern of abuse' or 'unlawful sexual intercourse in which two or more offenders are involved or the offender uses an offensive weapon': *Victims Support and Rehabilitation Act 1996 (NSW)* (*VSRA*) sch 1, cl 6. **22** The *VSRA* defines 'sexual assault' as including sexual intercourse (within the

meaning of s61H of the *Crimes Act 1900 (NSW)*) with a person without their consent or with consent obtained by means of threat. When sexual intercourse occurs without consent, it is an unlawful sexual assault for the purposes of s61I of the *Crimes Act 1900 (NSW)*. The *VSRA* refers to former ss61R and 65A of the *Crimes Act 1900 (NSW)* in relation to consent. These provisions have now been repealed and s61HA(2) provides that 'a person "consents" to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse'. **23** Clause 8 of Schedule 1 provides that a compensation assessor may determine an injury not specifically mentioned in Sch 1 to be a compensable injury, if in the opinion of the Tribunal or compensation assessor dealing with the application for statutory compensation: '(a) The injury is similar to an injury specifically mentioned in the table [of compensable injuries], and (b) The injury has caused symptoms or disability lasting for at least 6 weeks.' The standard amount of compensation for the injury is the standard amount for that similar injury. **24** *Victims' Compensation Fund Corporation v GM (2004)* 60 NSWLR 310, 331 [125]. In this case, the NSW Court of Appeal held that sexual assault victims are required to establish proof of 'injury'. Five children who were sexually abused by an identified offender were not entitled to compensation because they had failed to provide medical evidence of their injuries. **25** Natalie Craig, 'Avenging Angels', *The Age* (Melbourne), 4 September 2011, 19. **26** *Ibid*. **27** (2008) 72 NSWLR 417. **28** *Ibid*, 439 [142]. **29** *Ibid*, 425 [95]. **30** *Ibid*. **31** The schedule of compensable injuries provide for a category of chronic or psychological or psychiatric harm (category 2): *VSRA* sch 1, cl 5. Claims for compensation for 'moderately' disabling psychological or psychiatric disorders can only be made if the act of violence occurred during an armed robbery, abduction or kidnapping. **32** Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012 [Provisions]* (2012) 27 citing Mr Anthony Coles, Attorney-General's Department. **33** Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012 [Provisions]* (2012) 34. **34** Email from Associate Professor Jennifer Burn to Frances Simmons, 28 March 2013 (on file with the author); see also Anti-Slavery Australia, Submission No. 28 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People-Trafficking) Bill 2012*, 6 August 2012 (considering different models for a compensation scheme).

Frances Simmons has previously worked as a lawyer representing people who have been trafficked at Anti-Slavery Australia and as a research consultant on human trafficking. She is a PhD candidate at Monash University Law Faculty. The views expressed in this article are her own.

EXPERT OPINION SERVICE

Dr Andrew Korda

Royal Prince Alfred Medical Centre 100 Carillon Ave Newtown NSW 2042

Phone: 02 9557 2450 Fax: 02 9550 6257 Email: akorda@bigpond.net.au

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