

form – trafficking of women for sexual exploitation – the trafficker profits from the rape and sexual assault of the trafficked woman. The US Government estimates that over half of all victims trafficked internationally, and 70 per cent of all trafficked women, are trafficked for sexual exploitation (United States State Department 2004). While adult men are certainly trafficked internationally into various forms of labour (particularly agricultural), 98 per cent of those trafficked into sexual exploitation are women and girls (International Labour Organisation 2005: 15). In order to reflect this fact, we use the terms “women” and “she” when referring to victims of trafficking for sexual exploitation<sup>2</sup>. Also, in line with ACSSA’s focus on the sexual assault of women and girls over fifteen years of age, our emphasis in this paper is on the trafficking of adult women. It should be noted, however, that children are also trafficked in large numbers into sexual exploitation.

In Australia, evidence suggests that trafficking of women into debt-bonded prostitution is the major form of trafficking, accounting for the majority of victims within our borders (Commonwealth Attorney-General’s Department 2005, Project Respect 2004). Debt bondage is recognised as a form of slavery under the Australian Criminal Code and international law (see boxed text “Definitions”). Interview-based and documentary research by Project Respect, an Australian non government organisation (NGO) working to challenge the various dimensions of exploitation and violence against women in the sex industry, shows that currently these “debts” tend to be between \$40,000 to \$50,000:

**“That means they are doing eighteen, twenty jobs of prostitution a day. They are often having to have sex without condoms. They are often exposed to really intense forms of violence. They’re beaten, they’re raped, they’re threatened. If they run away, they are beaten, they’re starved” (Maltzahn 2003).**

Project Respect’s research (2004) estimates the number of women and children in this situation in Australia to be about one thousand at any one time. ACSSA will examine how trafficking works in Australia in further detail, later in the paper. But first we think it is important to establish the international context in which trafficking takes place, and the recent debates surrounding the issue. Theorisations of, and attitudes toward, trafficking for the purpose of sexual exploitation often run parallel to those surrounding sexual assault. Issues of “consent” and false distinctions between “deserving” and “undeserving” victims abound, and those working to end sexual assault will be familiar with such arguments.

### **The “Trafficking Protocol”: Definitions and interpretations**

Before looking at what trafficking *is*, it is important to define what it *isn’t*. A common confusion is between “trafficking” and “smuggling”. Smuggling is the receipt of some form of payment to transfer a person from one country to another illegally. It is not for the purpose of exploiting that person once they arrive in their destination country. Importantly, particularly in the Australian context, the payment made to the smuggler is final. In the case of trafficking, not only is the person transferred to another country illegally, they are then exploited once they arrive, usually through debt-bondage. That is, the payment made to the trafficker(s) is not only inflated relative to the “services” being paid

for, but also ongoing, ill-defined, and able to be increased at any time by the trafficker(s). Debt-bondage is a recognised form of slavery, for which consent is irrelevant, under national and international law. By definition, any “unlawful non-citizen” in Australia who is *in a condition of debt-bondage* has been *trafficked*, not smuggled. As such, the person is not an illegal migrant, but a victim of a human rights violation on Australian soil, to whom Australia therefore has obligations under international law. A recent Parliamentary Briefing paper on the issue noted that “trafficking is confused with smuggling when viewed simply as an illegal immigration issue or threat to national security and not as a human rights violation” (Carrington and Hearn 2003: 3).

“Trafficking” is also frequently conflated with “migration for work” in some contemporary discussions. “Migration” is defined as the movement of a person from one country to another, whether by legal or illegal means. It is often assumed that “migration” is voluntary and “trafficking” involuntary. However, migration can also be involuntary or “without consent”, such as when people are displaced because of war or famine. Trafficking is always involuntary, in that while a trafficked person may have consented to being moved across borders, the UN Trafficking Protocol (examined below) states that the use of coercive means and the subsequent exploitation of that person nullifies the notion of consent. That is, people who voluntarily migrate can end up being trafficked. It is the coercive nature of the means used to get that person across borders, and their exploitation once they arrive, that distinguishes trafficking from migration.

Definitions and interpretations of trafficking are complex and highly-politicised. Prior to 2000, there was no internationally agreed-upon definition of trafficking, making discussion of the issue fraught with misunderstanding and malleable to political agendas. In December 2000 the United Nations adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (known as the “Trafficking Protocol”). The Trafficking Protocol became the international standard and supplied the first-ever agreed upon international definition of trafficking in persons. Misunderstandings have not disappeared, but the definition provides a benchmark to which commentators, legislators and policy makers can refer. The definition is in three parts. According to the first part:

“Trafficking in persons means the recruitment, transportation, transfer, harbouring or receipt of persons, by means of 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 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<sup>3</sup>, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs” (United Nations General Assembly 2000: Article 3(a) ).

Many references to the definition stop at this, ignoring the important second part dealing with the notion of consent:

“The consent of a victim of trafficking in persons to the intended exploitation...shall be irrelevant where any of [these] means are used” (United Nations General Assembly 2000: Article 3b).

Finally, the third part of the definition limits the requirements with regards to children:

**“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 [these] means” (United Nations General Assembly 2000: Article 3c).**

The clear suggestion here is that, for children, the trafficking does not necessarily involve threat, coercion, or use of force. The recruitment, transport, harbouring or receipt of children for the purpose of exploiting them is automatically “trafficking”.

Commentators have often interpreted this definition as being composed of three “core elements” (Gallagher 2004; Anderson and Rogaly 2005):

- 1) movement of a person;
- 2) with deception or coercion;
- 3) into a situation of forced labour, servitude or slavery-like practices.

However, reference to this interpretation of the definition has tended to limit rather than clarify the dimensions of trafficking that are acknowledged in the Protocol itself. Most importantly, in terms of reparation to victims and effective criminal justice responses, this interpretation ignores the part of the definition dealing with consent. It is also arbitrary and selective in its interpretation of the first part of the definition. “Movement” is by no means essential to the definition, which gives equal emphasis to “recruitment”, “transfer”, “harbouring” and “receipt”, as it does to “transportation”. Furthermore, reducing the list of “means”, by which trafficking is said to take place, to “deception and coercion”, loses the important notions of “abuse of power or a position of vulnerability”, essential to understandings of trafficking as an issue of sex, race and class. Finally, citing only “forced labour, servitude or slavery-like practices” in the third “core element”, overlooks what the drafters of the Protocol saw fit to place first on the list of exploitative practices: “the exploitation of the prostitution of others”.

The Protocol acknowledges that much trafficking is for the purpose of prostitution, and that the exploitation of prostitution and trafficking cannot be separated. It was internationally agreed that the exploitation of the prostitution of others was not the same thing as “forced labour” because the harms to the victim were of a different nature. One reason for not specifying the exploitation of prostitution as a “core element” could be that whilst “forced labour, slavery and servitude” are defined in international law, the phrase “exploitation of the prostitution of others or other forms of sexual exploitation” is not<sup>4</sup>. As a result, there is much debate as to the interpretation of this last phrase (centring on the issue of which elements of prostitution constitute exploitation).

Other interpretations of the definition suggest that “the key element in the trafficking process is its exploitative purpose, rather than the movement across a border” (Raymond 2001: 5). In its most recent Trafficking in Persons Report, the United States State Department notes that: “Many nations misunderstand [the Trafficking Protocol] definition, overlooking internal trafficking or characterizing any irregular migration as trafficking” (United States State Department 2004: 9). With regards to the interpretation of “movement” as a core part of the definition, the United States Trafficking Victims Protection Act does not “require that a

trafficking victim be physically transported from one location to another. [The definitions used in the Act] plainly apply to the recruitment, harbouring, provision, or obtaining of a person for the enumerated purposes" (2004: 9).

The second part of the definition, dealing with consent, is important because prior to the establishment of the Trafficking Protocol, there was much debate on the issue of whether or not women trafficked into prostitution were "witting" or "unwitting" about the type of "work" they would do. Under the legal systems of most modern liberal democracies, however, it has never made a difference "whether or not the victim initially knew or agreed to perform the labour voluntarily. A person cannot consent to enslavement or forced labour of any kind" (O'Neil 1999: vi). A person cannot, therefore, consent to debt-bondage, the most common modern form of slavery. This part of the Protocol definition simply confirms what has been legal practice since the abolition (in law) of slavery. Nevertheless, many commentators and legislators continue to misunderstand the fact that abusive practices such as trafficking make the notion of consent irrelevant, a misunderstanding that seems particularly widespread in discussions of trafficking for sexual exploitation.

The notion of "deception" is another frequently misunderstood aspect of the definition. The drafters of the Protocol made clear that "deception", according to this definition, is not only with regard to the *type* of work the victim will be doing, but can also be deception with regard to the *conditions* of that work. That is, a woman may understand that she is being "recruited" into prostitution, but not that she will be denied freedom of movement, have her passport confiscated and be debt-bonded. This deception is enough to constitute trafficking under the Protocol.

In this light, it seems the recent Parliamentary Joint Committee report shows a limited understanding of these particular aspects of the Trafficking Protocol definition - "consent" and "deception" - when it states that:

**"Many of the trafficked women who are detected by DIMIA [Department of Immigration, Multicultural and Indigenous Affairs] or Police, have voluntarily come to Australia with the intention of working in the sex industry, and cannot be considered victims of sexual servitude" (Parliamentary Joint Committee on the Australian Crime Commission 2004).**

This illustrates the kind of confusion that currently exists surrounding definitions of trafficking and servitude, in this case leading to a clear contradiction in terms. If a woman is *trafficked* into the sex industry, then, according to the above UN definition, she is in a condition of sexual servitude, no matter what her "intention" may have been. Either the Parliamentary Joint Committee is conflating "trafficked" with "smuggled", or they are assuming that if a woman knew she would be prostituted then she cannot be in servitude (which is contrary to international law and the Australian Criminal Code – "Definitions" on p.xx). In their Briefing Paper, Carrington and Hearn note that:

**"The Commonwealth offence of sexual servitude may be committed regardless of whether women who migrate to work [sic] in the sex industry consent to do so. Yet it appears that those who do consent have been pre-judged and automatically disqualified as legitimate victims of these offences" (Carrington and Hearn 2003: 7).**

According to Carrington and Hearn, then, misreadings serve both to cloud understandings of what trafficking is, and to underestimate its incidence. They suggest, for example, that the "consent" of trafficked women is often used in

***Trafficking in persons:***

“The recruitment, transportation, transfer, harbouring or receipt of persons, by means of 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 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. The consent of a victim of trafficking in persons to the intended exploitation . . . shall be irrelevant where any of [these] means are used” (United Nations General Assembly 2000).

***Smuggling in migrants:***

“The procurement, in order to obtain directly or indirectly a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident” (UN Protocol Against the Smuggling of Migrants by Land, Sea and Air).

***Debt bondage:***

“The status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined” (United Nations General Assembly 1957: Article 1).

***“Contract girl/worker”:***

Euphemism used by some organisations (including Scarlet Alliance and the Network of Sex Work Projects) for women trafficked into debt-bonded prostitution or sexual servitude (see Scarlet Alliance 2003, 2004). The “contracts” referred to are not only illegal, but constitute slavery under national and international law (Criminal Code section 270(1), United Nations General Assembly 1957: Article 1).

***Slavery:***

“[T]he status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised “ (League of Nations 1927: Article 1)

“The condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person” (Criminal Code section 270(1)).

***Person of servile status:***

“A person in the condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention” [including debt-bonded] (United Nations General Assembly 1957: Article 3).

***Sexual servitude:***

“The condition of a person who provides sexual services and who, because of the use of force or threats is not free to cease providing sexual services; or is not free to leave the place or area where the person provides sexual services”, Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999, adding to the offences set out in Division 270 of the Code.

defence of Australia's poor prosecutions record of traffickers, and has led to a situation where trafficked women are sometimes being treated as criminals or illegal immigrants (instead of victims of a human rights abuse).

Similarly, some organisations have been reluctant to acknowledge debt-bonded women in prostitution as being trafficked. Scarlet Alliance, for example, the national "peak body for Sex Worker Organisations / Projects / Groups / Networks", prefers the term "contract-worker" or "migrant sex worker", and uses a definition of trafficking much narrower than that provided by the Trafficking Protocol. In its *Submission to the Parliamentary Joint Committee on the Australian Crime Commission, Inquiry into Trafficking in Women for Sexual Servitude*, the organisation implies that women who have consented to come to Australia to do prostitution cannot be trafficked or in sexual servitude, regardless of their debt-bonded status (Scarlet Alliance 2003). This position appears to derive from concerns that any attempts to end trafficking will result in an over-policing of women in prostitution generally and the deportation of trafficked women, as articulated in the organisation's objections to the introduction of new anti-trafficking legislation (Scarlet Alliance 2004). While these concerns are certainly legitimate, the problem here lies in the adequacy and fairness (or otherwise) of criminal justice and immigration responses. A failure to recognise the extent to which trafficking exists does nothing to improve such responses<sup>5</sup>, and clouds the distinction between trafficking and migration.

## The causes of trafficking

Different theorists attribute different factors to the causes of trafficking depending on their theoretical approach to the issue of trafficking itself. A migration-based approach, for example, will focus on such issues as policies on migration and migrant labour, availability of work opportunities in various countries, globalisation of the economy and development strategies. A criminal-justice based approach focuses on legislation and its implementation, policing strategies, impediments to prosecution, and the involvement of organised crime. A human-rights based approach acknowledges the importance of criminal justice, but will situate the causes of trafficking in issues such as the abuse of power, corruption of authorities, discrimination, and state failure to protect civil, political, economic and social rights. Most feminist analyses encompass elements of all these approaches but situate inequalities of sex, race and class, and the power this gives some to abuse others, as central to any detailed analysis of the causes of trafficking. In this analysis trafficking is viewed in terms of exploitation of women and the harm it causes them. Feminist theorists in particular tend to situate male demand as the primary cause of trafficking (Raymond, Hughes and Gomez 2001, Leidholdt 2003, Jeffreys 2003).

The United States State Department has carried out some of the most extensive research into the efforts of governments to combat severe forms of trafficking in persons. In their view, trafficking in persons is a global market:

**"Victims constitute the supply, and abusive employers or sexual exploiters represent the demand. The supply of victims is encouraged by many factors including poverty, the attraction of a perceived higher standard of living elsewhere, weak social and economic structures, a lack of employment opportunities, organized crime, violence against women and children, discrimi-**