



## HUMAN TRAFFICKING WORKING GROUP

Dr Andreas Schloenhardt (Coordinator)

The University of Queensland  
TC Beirne School of Law

[www.law.uq.edu.au/humantrafficking](http://www.law.uq.edu.au/humantrafficking)

## VISAS FOR VICTIMS OF TRAFFICKING; AUSTRALIA

Current as on: November 11, 2009

### Table of Contents

<b>1. Criminal Justice Visas.....</b>	<b>2</b>
1.2 Bridging Visa F (Class WF).....	2
1.3 Criminal Justice Stay Visa (CJSV).....	3
1.4 Permanent Witness Protection (Trafficking) Visa (Class DH) .....	3
<b>2. Protection (Class XA) Visa.....</b>	<b>4</b>
<b>3. Observations.....</b>	<b>6</b>
3.1 The flawed theoretical foundations of Australia's trafficking visa regime .....	6
3.2 Misguided justifications for the visa scheme.....	8
3.3 Failure to acknowledge the vulnerability of victims.....	10
3.4 Unclear Requirements for visa eligibility.....	11
3.5 Removal of trafficking victims .....	12
3.6 Conflict between the visa system and international best practice .....	14
3.7 Failure to implement adequate reforms to the visa system .....	15
<b>4. The Way Ahead .....</b>	<b>16</b>

Once a victim of trafficking has been identified by Australian authorities, his or her ability to remain lawfully in Australia depends on the granting of either a Criminal Justice Visa or a Protection Visa, as outlined in the following Sections.

## 1. Criminal Justice Visas

There are a number of visas available to victims of trafficking that are linked to their participation in the criminal justice system. If a visa is granted it allows the visa holder to remain in Australia and get access to limited social services provided under the Department of Families, Housing, Community Services and Indigenous Affairs' Victims of Trafficking Care Program (VoTCARE).<sup>1</sup>

### 1.2 Bridging Visa F (Class WF)

The Bridging Visa F (BVF) is a visa class designed to offer short-term protection to trafficked persons. Since July 1, 2009, this visa has a duration of 45 days (previously 30 days).<sup>2</sup> This change provides an increased amount of time for victims of trafficking (including persons who are illegal non-citizens) to receive support and to decide about whether they will cooperate with any criminal investigations into the circumstances of their trafficking.<sup>3</sup>

Criticisms of this visa class have centred around the BVF's short duration and the belief that its eligibility is overly dependent on the apparent capabilities of the applicant as a witness, rather than his or her status as a victim of crime. Jennifer Burn and Frances Simmons contend that the 30-day limit for the BVF was flawed as:

international best practice...suggests that trafficked women are less likely to provide evidence under pressure and require time to reflect and recover before deciding whether they wish to provide evidence for criminal investigations and prosecutions. [...] Access to a BVF should not require a trafficking victim to have already made a decision to assist the police.<sup>4</sup>

Furthermore, Fiona David argues that the BVF's duration is often insufficient to remove trafficked women from exploitative situations.<sup>5</sup> Several authors also favour lengthier visa durations because of the fact that trafficked persons often remain under the influence of their former captors, and require a substantial period of re-adjustment in order to make decisions independently of this influence.<sup>6</sup> Ultimately, it seems highly unlikely that these criticisms have been answered by the recent 15-day extension of the BVF's duration.

---

<sup>1</sup> See separate document at [www.law.uq.edu.au/humantrafficking](http://www.law.uq.edu.au/humantrafficking).

<sup>2</sup> DIAC, 'Changes to the People Trafficking Visa Framework', available at [www.immi.gov.au/legislation/amendments/2009/090701/lc01072009-08.htm](http://www.immi.gov.au/legislation/amendments/2009/090701/lc01072009-08.htm) (accessed 24 Oct 2009).

<sup>3</sup> DIAC, 'Changes to the People Trafficking Visa Framework', available at [www.immi.gov.au/legislation/amendments/2009/090701/lc01072009-08.htm](http://www.immi.gov.au/legislation/amendments/2009/090701/lc01072009-08.htm) (accessed 24 Oct 2009).

<sup>4</sup> Jennifer Burn & Frances Simmons, 'Rewarding Witnesses and Ignoring Victims: an evaluation of the new trafficking visa framework' (2005) 387 *Immigration Review* 1 at 8

<sup>5</sup> Fiona David, *Trafficking of Women for Sexual Purposes* (2008) 31.

<sup>6</sup> Jennifer Burn & Frances Simmons, 'Rewarding Witnesses and Ignoring Victims: an evaluation of the new trafficking visa framework' (2005) 387 *Immigration Review* 1 at 8; Jenna S Demir, *Trafficking of Women for Sexual Exploitation: A Gender-Based Well-Founded Fear? An examination of refugee status determination for trafficked prostituted women from CEE/CIS countries to Western Europe* (2003) 27, available at [www.jha.ac/articles/a115.pdf](http://www.jha.ac/articles/a115.pdf) (accessed 26 Feb 2009); Marianna Leishman, 'Human trafficking and sexual slavery: Australia's response' (2007) 27 *Australian Feminist Law Journal* 193 at 199.

Elaine Pearson notes the fact that the BVF visa (like the other visas in this scheme, discussed below) lacks a victim-driven application process, and claims that this feature could contribute to anxiety and a lack of long-term security for trafficked persons because it 'further disempowers a category of people who have already faced substantial insecurity and abuse at the hands of traffickers and who are in vital need of being put back in control of their lives'.<sup>7</sup> There is thus a perceived failure, within the BVF visa's conditions, to develop the trust needed for victims to feel comfortable enough to give evidence.

### 1.3 Criminal Justice Stay Visa (CJSV)

The Criminal Justice Stay Visa (CJSV) is issued to recipients of the Bridging Visa F who have been determined to be 'of interest' to a prosecution, following the issuing of a Criminal Justice Stay Certificate (CJSC) by the State/Territory or Federal Attorney-General. A federal or state/territory CJSC may be issued where the Commonwealth Attorney-General or an authorised official considers that the non-citizen should remain in Australia for the purposes of the administration of justice.<sup>8</sup> This visa allows the holder to remain in Australia for as long as is necessary to complete judicial proceedings or an investigation. Between January 2004 and April 2009, 72 CJSVs were issued.<sup>9</sup>

A number of commentators regard the link between the access to legal residence in Australia and the participation in the criminal justice system, as required by the CJSV, to be damaging to trafficked persons. This requirement is portrayed as leading to uncertainty for trafficked persons in understanding their immigration status in Australia.<sup>10</sup> The restrictive nature of the application process for the CJSV, and its incompatibility with other visas, is also seen as making the protection of these individuals overly complicated. Accordingly, Burn recommends the implementation of a discretionary power to allow victims to apply for other visas.<sup>11</sup>

### 1.4 Permanent Witness Protection (Trafficking) Visa (Class DH)

Following the reforms of July 1, 2009, the former Witness Protection (Trafficking) (Temporary) Visa,<sup>12</sup> is now combined with the Witness Protection (Trafficking) (Permanent) Visa.<sup>13</sup> This has the effect of making all trafficking victims who qualify for witness protection, eligible for a permanent Australian visa. This offers greater security for these individuals as it removes the requirement for regular renewals of their temporary visas.<sup>14</sup> Additionally, the visa program has been extended to cover the family members of victims, including their

---

<sup>7</sup> Marianna Leishman. 'Human trafficking and sexual slavery: Australia's response' (2007) 27 *Australian Feminist Law Journal* 193 at 199.

<sup>8</sup> Sections 147, 148 *Migration Act 1958* (Cth).

<sup>9</sup> ANAO, *Management of the Australian Government's Action Plan to Eradicate Trafficking in Persons*, ANAO Audit Report No 30, 2008–09 (2009) 48.

<sup>10</sup> Fiona David, *Trafficking of Women for Sexual Purposes* (2008) 60.

<sup>11</sup> Jennifer Burn & Frances, 'Rewarding Witnesses and Ignoring Victims: an evaluation of the new trafficking visa framework' (2005) 387 *Immigration Review* 1 at 11.

<sup>12</sup> Class UM, Subclass 787, under Regulation 2.07 AI *Migration Regulations 1994* (Cth).

<sup>13</sup> Class DH, Subclass 852, under Regulation 2.07AK *Migration Regulations 1994* (Cth); 'DIAC, 'Changes to the People Trafficking Visa Framework', available at [www.immi.gov.au/legislation/amendments/2009/090701/lc01072009-08.htm](http://www.immi.gov.au/legislation/amendments/2009/090701/lc01072009-08.htm) (accessed 24 Oct 2009).

<sup>14</sup> HREOC, 'For trafficked people, Government changes put human rights first' (17 June 2009) available at [www.hreoc.gov.au/about/media/media\\_releases/2009/50\\_09.html](http://www.hreoc.gov.au/about/media/media_releases/2009/50_09.html) (accessed 14 Oct 2009).

immediate family overseas, who were previously not able to access this visa.<sup>15</sup> As with the BVF amendments, the changes apply only to visas made on or after July 1, 2009, or for visas that have been applied for but were yet to be determined at that date.<sup>16</sup>

If the victim can demonstrate that he or she would be in danger if returned to his or her home country, and that he or she has contributed to, and cooperated closely with, a prosecution or investigation related to trafficking,<sup>17</sup> that individual will be able to apply for this permanent visa. This standard is a modification of the original requirement of the witness protection visa. The issuing of a Witness Protection (Trafficking) Certificate by the Attorney-General acts as the prerequisite for the Permanent Witness Protection (Trafficking) Visa, and previously required victims to have made a 'significant contribution' to a trafficking investigation — an obligation which was subject to severe criticism.<sup>18</sup> This standard has been lowered to the provision of 'a contribution' to either an investigation or prosecution, whether or not the matter proceeded to trial.<sup>19</sup> Additionally, this visa will now be available before the conclusion of a relevant prosecution, after the activation of an 'independent trigger'; however, it has not been publicly specified what must occur for this trigger to be activated.<sup>20</sup> This ends the practice of forcing victims to await the conclusion of criminal trials before being able to access a permanent visa. These changes can be seen as an acknowledgement that the previous divisions between Temporary and Permanent Witness Protection (Trafficking) visas were ineffective, particularly as no permanent visas were issued from their creation in 2004 to 2009.<sup>21</sup>

However, access to this visa class remains limited, given its requirement for the criminal justice involvement of the visa holder. This criminal justice emphasis is one of the most criticised aspects of the Australian trafficking visa program, and is explored further below.

## 2. Protection (Class XA) Visa

Some victims of trafficking are unable to receive any of the criminal justice visas mentioned above, because they are traumatised or otherwise unable to cooperate with law enforcement authorities, or because they have no useful information to offer. In these circumstances the only option that allows non-citizens to remain in Australia is for them to apply for a Protection

---

<sup>15</sup> DIAC, 'Changes to the People Trafficking Visa Framework', available at [www.immi.gov.au/legislation/amendments/2009/090701/lc01072009-08.htm](http://www.immi.gov.au/legislation/amendments/2009/090701/lc01072009-08.htm) (accessed 24 Oct 2009).

<sup>16</sup> 'DIAC, 'Changes to the People Trafficking Visa Framework', available at [www.immi.gov.au/legislation/amendments/2009/090701/lc01072009-08.htm](http://www.immi.gov.au/legislation/amendments/2009/090701/lc01072009-08.htm) (accessed 24 Oct 2009).

<sup>17</sup> Australia, Government, Department of Families, Housing, Community Services and Indigenous Affairs, *Australian Government Anti-People Trafficking Strategy* (2009), available at [www.fahcsia.gov.au/sa/women/progserv/violence/Pages/AntiPeopleTraffickingStrategy.aspx](http://www.fahcsia.gov.au/sa/women/progserv/violence/Pages/AntiPeopleTraffickingStrategy.aspx) (accessed 24 Oct 2009).

<sup>18</sup> See for example, Jennifer Burn & Frances Simmons, 'Rewarding Witnesses and Ignoring Victims: an evaluation of the new trafficking visa framework' (2005) 387 *Immigration Review* 1 at 9, 10, 11; Lara Fergus, *Trafficking in women for sexual exploitation*, Briefing 5, Australian Centre for the Study of Sexual Assault (2005) 27.

<sup>19</sup> DIAC, 'Changes to the People Trafficking Visa Framework', available at [www.immi.gov.au/legislation/amendments/2009/090701/lc01072009-08.htm](http://www.immi.gov.au/legislation/amendments/2009/090701/lc01072009-08.htm) (accessed 24 Oct 2009).

<sup>20</sup> Australia, Government, Department of Families, Housing, Community Services and Indigenous Affairs, *Australian Government Anti-People Trafficking Strategy* (2009), available at [www.fahcsia.gov.au/sa/women/progserv/violence/Pages/AntiPeopleTraffickingStrategy.aspx](http://www.fahcsia.gov.au/sa/women/progserv/violence/Pages/AntiPeopleTraffickingStrategy.aspx) (accessed 24 Oct 2009).

<sup>21</sup> ANAO, *Management of the Australian Government's Action Plan to Eradicate Trafficking in Persons*, ANAO Audit Report No 30, 2008–09 (2009) 48.

Visa.<sup>22</sup> To be granted this visa, the trafficking victim must prove that he or she satisfies Australia's protection obligations under the *Convention and Protocol relating to the Status of Refugees*.<sup>23</sup> Accordingly, an applicant must prove that he or she:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>24</sup>

Victims of trafficking are only rarely regarded as refugees by the Australian Government, or by Australian courts and tribunals,<sup>25</sup> largely because trafficking is not a state-sponsored crime,<sup>26</sup> and few asylum applications are accepted by Australia's Refugee Review Tribunal on the basis of gender persecution.<sup>27</sup> Thus, Protection Visas have previously only been granted to a small number of trafficked persons.<sup>28</sup> Pearson speculates that the limited ability of victims of trafficking to consult with legal advisors under the Australian Government's victim support scheme (where only three legal consultations are allowed) could also contribute to this lack of applications.<sup>29</sup> The absence of a statutory onus on Department of Immigration and Citizenship (DIAC) officers to inform unlawful non-citizens, such as trafficked persons, of their ability to access refugee status is also noted in an article by Anna Dorevitch and Michelle Foster. They remark that:

considering DIAC officers have (at least) constructive knowledge of the possible danger faced by sex-trafficking victims upon return to their countries of origin, 'screening out' such women from refugee determination could entail a breach by Australia of its cardinal obligation under

<sup>22</sup> Section 36 *Migration Act 1958* (Cth).

<sup>23</sup> Section 36(2) *Migration Act 1958* (Cth).

<sup>24</sup> Article 1(a)(2) *Convention Relating to the Status of Refugees* 1951, 189 UNTS 150.

<sup>25</sup> See, for example *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 233 per Brennan CJ; cited with approval in *Minister for Immigration and Multicultural Affairs v S15212003* (2004) 222 CLR 1 at 8 per Gleeson CJ, Hayne, Heydon JJ. See also *VXAJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 198 FLR 455 at 467; Bernadette McSherry & Susan Kneebone, 'Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights' (2008) 12(1) *International Journal of Human Rights* 67 at 79.

<sup>26</sup> Anna Dorevitch & Michelle Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law' (2008) 9 *Melbourne Journal of International Law* 1 at 38-39. See also Case No V03/I6442 [2004] RRTA 474 (25 June 2004); Bernadette McSherry & Susan Kneebone, 'Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights' (2008) 12(1) *International Journal of Human Rights* 67 at 78.

<sup>27</sup> Marianna Leishman, 'Human trafficking and sexual slavery: Australia's response' (2007) 27 *Australian Feminist Law Journal* 193 at 202, citing Jenna Demir, *Trafficking of Women for Sexual Exploitation: A Gender-Based Well-Founded Fear?* (2003). In a related matter, the fact that women in a particular country could constitute a 'social group' for the purposes of the definition was accepted in Australia in *MIMA v Khawar* [2000] 67 ALD 577, in granting a refugee status to a female victim of domestic violence carried out through non-state agents, and where there was a lack of conduct on behalf of the state. See also; Susan Kneebone, 'Women within the refugee construct: "Exclusionary Inclusion" in policy and practice – the Australian experience' (2005) 17 *International Journal of Refugee Law* 7 at 29, 38, 40 who notes the restriction of the *Khawar* principle in recent legislative amendments to the *Migration Act 1958* (Cth).

<sup>28</sup> See, for example, Refugee Review Tribunal Reference N04/40551.

<sup>29</sup> Elaine Pearson, 'Australia' in, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007) 28 at 41; Anna Dorevitch & Michelle Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law' (2008) 9 *Melbourne Journal of International Law* 1 at 6, 16.

art 33 of the *Refugee Convention* to ensure that nobody is expelled or forcibly returned to a country where his or her life and freedom would be at risk.<sup>30</sup>

The *UNHCR Guidelines* in relation to trafficking of persons note that trafficking and refugee status will frequently coincide, given the incidence of severe exploitation and human rights violations associated with trafficking will often amount to persecution.

Despite these problems with access to Protection Visas, commentators have affirmed that many trafficking survivors should be entitled to be classed as refugees, and accordingly afforded protection.<sup>31</sup> Jenna Demir, for instance, proposes that the recognition of refugee status for trafficked persons should be based on cases where: 'a well-founded fear of persecution exists, as members of a particular social group trafficking victims should be entitled to enjoy the protection afforded to other persecuted groups through existing refugee mechanisms.'<sup>32</sup> She looks to 'gender-based persecution' as the criteria for refugee status, based on an acknowledgement of the fear of persecution faced by trafficked women who return to their homeland.<sup>33</sup> A similar approach is taken in Article 18 of the *UNHCR Guidelines for Trafficked Persons*, which notes that victims of trafficking should be granted refugee status if their countries of origin are unwilling or unable to protect them.<sup>34</sup> Australia has also previously recognised women from a particular society may be part of a 'particular social group' and so qualify for protection under the *Refugee Convention*.<sup>35</sup>

### 3. Observations

#### 3.1 The flawed theoretical foundations of Australia's trafficking visa regime

Despite the limited changes to the visa system for trafficked persons in 2009, the Australian Government's approach to trafficking in persons can still be seen as resting on a 'criminalisation' system which prioritises the use of criminal justice mechanisms as the means to combat the problem of trafficking.<sup>36</sup>

---

<sup>30</sup> Anna Dorevitch & Michelle Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law' (2008) 9 *Melbourne Journal of International Law* 1 at 15-16.

<sup>31</sup> See, for example, Elaine Pearson, 'Australia' in, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007) 28 at 41-42.

<sup>32</sup> Jenna Demir, *Trafficking of Women for Sexual Exploitation: A Gender-Based Well-Founded Fear?* (2003) ii.

<sup>33</sup> Jenna Demir, *Trafficking of Women for Sexual Exploitation: A Gender-Based Well-Founded Fear?* (2003) 7.

<sup>34</sup> Cited in Bernadette McSherry & Susan Kneebone, 'Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights' (2008) 12(1) *International Journal of Human Rights* 67 at 80.

<sup>35</sup> Anna Dorevitch & Michelle Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law' (2008) 9 *Melbourne Journal of International Law* 1 at 28. See also *MIMA v Khawar* (2002) 210 CLR 1.

<sup>36</sup> Jennifer Burn & Frances Simmons, 'Rewarding Witnesses and Ignoring Victims: an evaluation of the new trafficking visa framework' (2005) 387 *Immigration Review* 1 at 8; Marianna Leishman, 'Human trafficking and sexual slavery: Australia's response' (2007) 27 *Australian Feminist Law Journal* 193 at 193; Sam Blay et al, 'Combating human trafficking: Australia's responses to modern day slavery' (2005) 79(9) *Australian Law Journal* 543 at 551; Anna Dorevitch & Michelle Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law' (2008) 9 *Melbourne Journal of International Law* 1 at 1; Lara Fergus, *Trafficking in women for sexual exploitation*, Briefing 5, Australian Centre for the Study of Sexual Assault (2005) 27; Marie Segrave, 'Surely Something is Better than Nothing' (2004) 16(1) *Current Issues in Criminal Justice* 85 at 89.

This emphasis strongly influences the visa system in Australia, as the issuing of visas to trafficked persons depends on the applicant's ability to cooperate with criminal investigations into trafficking. This criminalisation perspective is evident in the comment by DIMIA's Executive Coordinator (Border Control and Compliance Division) (now part of DIAC) that the system 'has an emphasis on cooperation with an investigation or a prosecution [...] we did not want a situation where the people could simply assert they have been trafficked, and thus provide a basis for remaining in Australia.'<sup>37</sup>

The majority of commentators have strongly criticised this approach,<sup>38</sup> suggesting that it neglects the requirements of trafficked persons in their position as victims of crime, whose right to protection should be innate, rather than tied to their ability to testify against their captors. Many authors favour an approach grounded in the protection and restoration of the human rights of victims, rather than seeking to use them as tools for prosecution.<sup>39</sup> The criminalisation approach is also seen as ineffective, as it ignores the driving economic and social factors behind trafficking.<sup>40</sup>

The theoretical foundations of Australia's visa system thus prioritise criminal justice frameworks, rather than the human rights of trafficked persons. Burn et al suggest that:

the danger of conceiving trafficking as a law enforcement problem instead of a human rights violation is that the status of the victim becomes less important than the ability of the victim to act as a witness in a criminal investigation or prosecution. This is precisely the problem with the new trafficking visa framework.<sup>41</sup>

Further, this criminalisation approach fails to consider that the ability of victims to cooperate will often be limited by their fear of reprisals if they are returned to their country of origin.<sup>42</sup> This perspective is also cited by Australia's Human Rights and Equal Opportunities Commission (now the Australian Human Rights Commission) in arguing that the visa framework for victims should not be based on the individual's ability to aid the criminal investigation and prosecution of traffickers.<sup>43</sup> Marie Segrave also notes that this framework

<sup>37</sup> Official Committee Hansard 2005, 12, cited in Elaine Pearson, 'Australia' in, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007) 28 at 40

<sup>38</sup> Georgina Costello, *Donald Mackay Winston Churchill Fellowship to study people trafficking law and policy in Italy and the USA*. Winston Memorial Trust of Australia (2005) [copy held by author]; Marie Segrave, 'Surely Something is Better than Nothing' (2004) 16(1) *Current Issues in Criminal Justice* 85 at 88; Lara Fergus, *Trafficking in women for sexual exploitation*, Briefing 5, Australian Centre for the Study of Sexual Assault (2005) 27.

<sup>39</sup> Lara Fergus, *Trafficking in women for sexual exploitation*, Briefing 5, Australian Centre for the Study of Sexual Assault (2005) 81; HREOC, 'For trafficked people, Government changes put human rights first' (17 June 2009) available at [www.hreoc.gov.au/about/media/media\\_releases/2009/50\\_09.html](http://www.hreoc.gov.au/about/media/media_releases/2009/50_09.html) (accessed 14 Oct 2009); Amnesty International, 'New permanent visas still do not fully protect trafficking victims' (19 June 2009), available at [www.amnesty.org.au/news/comments/21207/](http://www.amnesty.org.au/news/comments/21207/) (accessed 24 Oct 2009).

<sup>40</sup> Marie Segrave, 'Surely Something is Better than Nothing' (2004) 16(1) *Current Issues in Criminal Justice* 85 at 89; Bernadette McSherry & Susan Kneebone, 'Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights' (2008) 12(1) *International Journal of Human Rights* 67 at 79, 81.

<sup>41</sup> Sam Blay et al, 'Combating human trafficking: Australia's responses to modern day slavery' (2005) 79(9) *Australian Law Journal* 543 at ???. See also, HREOC, 'For trafficked people, Government changes put human rights first' (17 June 2009) available at [www.hreoc.gov.au/about/media/media\\_releases/2009/50\\_09.html](http://www.hreoc.gov.au/about/media/media_releases/2009/50_09.html) (accessed 14 Oct 2009).

<sup>42</sup> Jenna Demir, *Trafficking of Women for Sexual Exploitation: A Gender-Based Well-Founded Fear?* (2003) 23.

<sup>43</sup> Elizabeth Broderick, 'Trafficking: The Need for a Human Rights Based Approach', speech to the *Inaugural Anti-Trafficking Forum* (2008) 3, 9, 20, available at [www.antislavery.org.au/pdf/ElizBroderickKeynoteAddress.pdf](http://www.antislavery.org.au/pdf/ElizBroderickKeynoteAddress.pdf) (accessed 24 Oct 2009).

calls on women to self-identify as victims, but ignores the factors which often contribute to trafficked persons' fear of authorities.<sup>44</sup>

This negative assessment of the visa scheme is only challenged by a small number of commentators who offer guarded praise in suggesting that the initial development of the visa scheme in 2004 was a significant improvement on the Federal Government's previous response to trafficked persons, which relied on deporting victims in the absence of protective visa classes.<sup>45</sup> Burn et al note that:

the Australian Government's response to trafficking has improved. The new *Criminal Code Amendment (Trafficking in Persons Offences) Act* will strengthen the country's capacity to prosecute traffickers [...]. Importantly, the Act also provides us with the opportunity to broaden the debate about trafficking in Australia from the trafficking of women into sexual servitude to the broader issue of human trafficking and forced labour.<sup>46</sup>

Anna Dorevitch and Michelle Foster also praise the 2004 innovations but their comments are generally more in line with the criticisms of the new scheme, remarking that:

although the introduction of this visa scheme can be seen as a positive development in that it provides some basis upon which victims of sex-trafficking might remain in Australia, it is still gravely deficient in providing protection to the victims of trafficking because its application is confined to those who are useful to the criminal justice system.<sup>47</sup>

### 3.2 Misguided justifications for the visa scheme

Many commentators highlight the misguided belief that greater availability of visas for trafficking victims will 'open the floodgates' to potentially fraudulent or exploitative applicants claiming protection.<sup>48</sup> Fears that temporary protection would be exploited by undeserving applicants are portrayed as incorrect by Burn and Simmons, who argue that wider protection for victims can be advantageous as

[s]tates who issue temporary residence permits have a higher rate of success prosecuting traffickers than states that do not; the success rate is more pronounced if the residence permits are available to all trafficking victims, not simply those willing to testify against traffickers.<sup>49</sup>

Additionally, Marianne Leishman and also Sam Blay et al refute the "floodgate argument" noting that in countries such as Italy, where visas for trafficked persons are not linked to a

<sup>44</sup> Marie Segrave, 'Surely Something is Better than Nothing' (2004) 16(1) *Current Issues in Criminal Justice* 85 at 87.

<sup>45</sup> Lara Fergus, *Trafficking in women for sexual exploitation*, Briefing 5, Australian Centre for the Study of Sexual Assault (2005) 38.

<sup>46</sup> Sam Blay et al, 'Combating human trafficking: Australia's responses to modern day slavery' (2005) 79(9) *Australian Law Journal* 543 at 552.

<sup>47</sup> Anna Dorevitch & Michelle Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law' (2008) 9 *Melbourne Journal of International Law* 1 at 10.

<sup>48</sup> See, for example, Janet Phillips, *People trafficking: an update on Australia's response*, Parliamentary Library, Research Paper No 5 2008-09 (2008) 9, available at [www.aph.gov.au/library/pubs/rp/2008-09/09rp05.pdf](http://www.aph.gov.au/library/pubs/rp/2008-09/09rp05.pdf) (accessed 24 Oct 2009).

<sup>49</sup> Jennifer Burn & Frances Simmons, 'Rewarding Witnesses and Ignoring Victims: an evaluation of the new trafficking visa framework' (2005) 387 *Immigration Review* 1 at 11, citing Jenna Demir, *Trafficking of Women for Sexual Exploitation: A Gender-Based Well-Founded Fear?* (2003) 40. See also Marie Segrave, 'Surely Something is Better than Nothing' (2004) 16(1) *Current Issues in Criminal Justice* 85 at 88.

criminal justice process there has not been 'any significant abuse of trafficking visas by fraudulent claims'.<sup>50</sup>

As a result of the 'criminalisation approach' to trafficking, there has been widespread criticism that visas are granted solely on the basis of the applicant's ability to act as a useful witness, rather than to help vulnerable victims of crime.<sup>51</sup> It is contended that the visa system only assists proven witnesses as a form of 'reward' for their assistance, rather than aiding potential witnesses by providing them with guaranteed protection.<sup>52</sup>

A change in focus which emphasises the applicant's status as a victim of crime, rather than a valuable tool of law enforcement, has been suggested by a number of writers. Blay et al, for instance, comment that '[t]he central problem with the trafficking visa framework is that access to victim support services is contingent on whether or not a trafficked person is deemed to be a good witness, not on the person's status as a victim.'<sup>53</sup> In support of this approach, Anne Gallagher and Elaine Pearson also note the dual status of victims of trafficking as both victims of crime and victims of human rights breaches — a point that, in their view, has been ignored by the current scheme, including the 2009 reforms.<sup>54</sup> This statement is given further support by Sex Discrimination Commissioner Elizabeth Broderick who notes that under Australia's visa system, trafficking victims are only ever treated as tools to aid prosecutions, rather than as victims of rights abuses.<sup>55</sup>

Adopting a visa framework which supports victims could also aid the prosecution of traffickers. In support of this idea, Georgina Costello cites the example of Italy, where the victim-centred visa program for trafficked persons has led to this country having one of the world's highest success rates for the detection and prosecution of traffickers.<sup>56</sup> Bernadette

---

<sup>50</sup> Sam Blay et al, 'Combating human trafficking: Australia's responses to modern day slavery' (2005) 79(9) *Australian Law Journal* 543 at 551, citing Georgina Costello, *Donald Mackay Winston Churchill Fellowship to study people trafficking law and policy in Italy and the USA*, Winston Memorial Trust of Australia (2005); Marianna Leishman, 'Human trafficking and sexual slavery: Australia's response' (2007) 27 *Australian Feminist Law Journal* 193 at 201.

<sup>51</sup> Georgina Costello, *Donald Mackay Winston Churchill Fellowship to study people trafficking law and policy in Italy and the USA*. Winston Memorial Trust of Australia (2005) 16 [copy held by author]; Jennifer Burn & Frances Simmons, 'Rewarding Witnesses and Ignoring Victims: an evaluation of the new trafficking visa framework' (2005) 387 *Immigration Review* 1 at 8; Sam Blay et al, 'Combating human trafficking: Australia's responses to modern day slavery' (2005) 79(9) *Australian Law Journal* 543 at 550; Elizabeth Broderick, 'Trafficking: The Need for a Human Rights Based Approach', speech to the *Inaugural Anti-Trafficking Forum* (2008) 7, available at [www.antislavery.org.au/pdf/ElizBroderickKeynoteAddress.pdf](http://www.antislavery.org.au/pdf/ElizBroderickKeynoteAddress.pdf) (accessed 24 Oct 2009).

<sup>52</sup> Jennifer Burn & Frances Simmons, 'Rewarding Witnesses and Ignoring Victims: an evaluation of the new trafficking visa framework' (2005) 387 *Immigration Review* 1 at 10; Bernadette McSherry & Susan Kneebone, 'Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights' (2008) 12(1) *International Journal of Human Rights* 67 at 77.

<sup>53</sup> Sam Blay et al, 'Combating human trafficking: Australia's responses to modern day slavery' (2005) 79(9) *Australian Law Journal* 543 at 550.

<sup>54</sup> Anne Gallagher & Elaine Pearson, *Detention of trafficked persons in shelters: a legal and policy analysis* (Asia Regional Trafficking in Persons Project, 2008) 9. See also Anna Dorevitch & Michelle Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law' (2008) 9 *Melbourne Journal of International Law* 1 at 1.

<sup>55</sup> Elizabeth Broderick, 'Trafficking: The Need for a Human Rights Based Approach', speech to the *Inaugural Anti-Trafficking Forum* (2008) 7, available at [www.antislavery.org.au/pdf/ElizBroderickKeynoteAddress.pdf](http://www.antislavery.org.au/pdf/ElizBroderickKeynoteAddress.pdf) (accessed 24 Oct 2009).

<sup>56</sup> Georgina Costello, *Donald Mackay Winston Churchill Fellowship to study people trafficking law and policy in Italy and the USA*, Winston Memorial Trust of Australia (2005) 9 [copy held by author]. See also Australia, Human Rights and Equal Opportunities Commission (HREOC),

McSherry and Susan Kneebone make similar comments in noting that 'if the Australian [G]overnment wants to achieve more successful prosecutions and to get information about the networks it needs to secure the cooperation of trafficked persons.'<sup>57</sup>

### 3.3 Failure to acknowledge the vulnerability of victims

There is general discontent in the literature regarding the current visa scheme's failure to acknowledge the inherent vulnerability of victims of trafficking. The trauma experienced by trafficked persons would impede their ability to take part willingly in judicial proceedings.<sup>58</sup> Yet they are only able to obtain certainty about their status once they have 'proved themselves' as reliable witnesses by making 'a contribution' to trafficking investigations.<sup>59</sup>

David describes the characteristics of victims of trafficking as including 'fear and confusion; shame; concern about their debt, their immigration status or what might happen to their family; the need to keep earning money to send home; the unwillingness to become involved in a lengthy prosecution process; and lack of trust in police'.<sup>60</sup> Burn and Simmons additionally comment that:

by making access to the visas contingent on the quality of the evidence provided the new visa framework fails to alleviate the fears of trafficking victims. Ultimately unless trafficking victims make good witnesses the door to victim support stays closed: detention and removal remain the reality.<sup>61</sup>

Dorevitch and Foster support this view in declaring that the visa requirements for victims are onerous, given the psychological fragility of many victims of trafficking.<sup>62</sup> Further, in relation to the fears of trafficked persons in engaging with law enforcement bodies, Leishman notes: 'because trafficking in its nature involves a significant abuse of trust and betrayal, cooperation with officials is a similar leap of faith and trust that can be particularly daunting.'<sup>63</sup>

---

Submission to the Senate Committee into the Criminal Code Amendment, cited in Jennifer Burn & Frances Simmons, 'Rewarding Witnesses and Ignoring Victims: an evaluation of the new trafficking visa framework' (2005) 387 *Immigration Review* 1 at 5.

<sup>57</sup> Bernadette McSherry & Susan Kneebone, 'Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights' (2008) 12(1) *International Journal of Human Rights* 67 at 81.

<sup>58</sup> Amnesty International, 'New permanent visas still do not fully protect trafficking victims' (19 June 2009) available at [www.amnesty.org.au/news/comments/21207/](http://www.amnesty.org.au/news/comments/21207/) (accessed 24 Oct 2009).

<sup>59</sup> In the words of the new Witness Protection visa class: DIAC, 'Changes to the People Trafficking Visa Framework', available at [www.immi.gov.au/legislation/amendments/2009/090701/lc01072009-08.htm](http://www.immi.gov.au/legislation/amendments/2009/090701/lc01072009-08.htm) (accessed 24 Oct 2009).

<sup>60</sup> Fiona David, *Trafficking of Women for Sexual Purposes* (2008) (2008), 30. See also Bernadette McSherry & Susan Kneebone, 'Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights' (2008) 12(1) *International Journal of Human Rights* 67 at 77.

<sup>61</sup> Jennifer Burn & Frances Simmons, 'Rewarding Witnesses and Ignoring Victims: an evaluation of the new trafficking visa framework' (2005) 387 *Immigration Review* 1 at 7.

<sup>62</sup> Anna Dorevitch & Michelle Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law' (2008) 9 *Melbourne Journal of International Law* 1 at 12, citing Jennifer Burn & Frances Simmons, 'Rewarding Witnesses and Ignoring Victims: an evaluation of the new trafficking visa framework' (2005) 387 *Immigration Review* 1.

<sup>63</sup> Marianna Leishman. 'Human trafficking and sexual slavery: Australia's response' (2007) 27 *Australian Feminist Law Journal* 193 at 200.

There is also the risk that victims will be further traumatised through their engagement in the judicial process. The requirement for these persons to testify in court if called upon potentially exposes them to the risk of painful court-room experiences, such as being disbelieved or having their character questioned during cross-examination.<sup>64</sup> The proceedings themselves can also be a source of confusion and fear for victims, especially if they are unfamiliar with judicial procedures.<sup>65</sup> Lengthy criminal justice proceedings, or the repeated delay or rescheduling of proceedings, may also contribute to uncertainty about the victim's long-term legal and immigration status in Australia.<sup>66</sup> The common reality of trafficking as a form of organised crime also puts victims and their families at risk of reprisal if they testify against their traffickers.<sup>67</sup> Mary Crock argues that trafficked persons will often be constrained in their ability to cooperate with police action against traffickers because of fears for their own personal safety or the safety of family members in their country of origin.<sup>68</sup>

Thus, despite lowering the criterion for trafficking visas from making a 'significant contribution' to an investigation to simply making 'a contribution', the visa system currently fails to adequately address or ameliorate trafficked persons' fears, as the requirements for their protection may rest on putting themselves or their families at risk through involvement in the criminal justice system.

### 3.4 Unclear Requirements for visa eligibility

One of the most widely criticised aspects of the Australian visa system for trafficked persons is the criterion that evidence provided by victims must be 'significant', if they are to qualify for the protection of the Australian Government. While this has subsequently been modified into a requirement merely that 'a contribution' be made to an investigation, this is a similarly vague criterion that potentially allows for victims who are too traumatised to testify to be removed from Australia due to their inability to provide evidence.

In justifying its previous 'significant contribution' requirement, DIAC has indicated that the aim of this limitation was to avoid issuing visas to those persons who were implicated as traffickers themselves, or to persons with unsubstantiated claims of being trafficked. Testing the veracity of these claims was argued by DIAC to depend on the existence of a judicial proceeding.<sup>69</sup>

This restrictive gateway to the visa system is seen by some authors as being based on vague assessments of the 'quality' of a victim's evidence, which leads to further uncertainty. Thus, merely providing evidence was not sufficient as if the victim's testimony is judged to be inadequate, these persons will be denied the opportunity to be granted a visa.<sup>70</sup> Many

---

<sup>64</sup> Elaine Pearson, 'Australia' in, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007) 28 at 51

<sup>65</sup> Fiona David, *Trafficking of Women for Sexual Purposes* (2008) 61; Elaine Pearson, 'Australia' in, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007) 28 at 51.

<sup>66</sup> Fiona David, *Trafficking of Women for Sexual Purposes* (2008) 60, 61; Elaine Pearson, 'Australia' in, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007) 28 at 40.

<sup>67</sup> Anna Dorevitch & Michelle Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law' (2008) 9 *Melbourne Journal of International Law* 1 at 12.

<sup>68</sup> Cited in Marianna Leishman. 'Human trafficking and sexual slavery: Australia's response' (2007) 27 *Australian Feminist Law Journal* 193 at 200.

<sup>69</sup> Jennifer Burn & Frances Simmons, 'Rewarding Witnesses and Ignoring Victims: an evaluation of the new trafficking visa framework' (2005) 387 *Immigration Review* 1 at 10.

<sup>70</sup> Jennifer Burn & Frances Simmons, 'Rewarding Witnesses and Ignoring Victims: an evaluation of

commentators believe that the requirement for this standard of evidence is excessive.<sup>71</sup> Burn and Simmons further contend that the evidence victims are able to provide is often undervalued, as police could use any data provided to compile profiles of offenders, or to track trends in recruitment.<sup>72</sup> This information should be seen as valuable enough to merit access to legal protection and government victim support schemes.<sup>73</sup>

### 3.5 Removal of trafficking victims

Prior to 2004, all trafficked persons found in Australia were removed as illegal non-citizens.<sup>74</sup> However, estimates of the number of trafficked persons in Australia at that time are largely unavailable. For example, Lara Fergus notes that 243 foreign non-citizens were deported between 1998-1999 after being located in Australian brothels, but is cautious in linking these all of these deportations to instances of trafficking in persons.<sup>75</sup>

While the creation of specialist trafficking visas can be seen as an improvement on this previous scheme,<sup>76</sup> the continuing removal of victims of trafficking from Australia is seen as an enduring flaw of the present system. It is difficult to estimate how many victims of trafficking have been removed under this system. Given the limited number of temporary protection visas issued, and the fact that no permanent witness protection visas have ever been granted, it is apparent that persons holding other visa classes would have either left Australia of their own accord or been deported. Additionally, estimates about the number of trafficked persons removed directly, without receiving a visa (due to their inability or unwillingness to assist police with their enquiries) are similarly uncertain given the lack of reporting on this topic.

Dorevitch and Foster remark that the fact that so few temporary witness protection visas had been issued (prior to their eventual removal in July 2009) 'suggests that a considerable number may well have been returned to their countries despite having risked their lives to assist with the enforcement of Australian law.'<sup>77</sup> Additionally, removing victims from Australia may actually impede criminal investigations in the eyes of other critics, who argue that this 'deports the evidence' of trafficking.<sup>78</sup>

Others have criticised the manner in which trafficking victims are housed while awaiting their removal from Australia. Gallagher and Pearson, for instance, denounce the mandatory

---

the new trafficking visa framework' (2005) 387 *Immigration Review* 1 at 10, 11.

<sup>71</sup> Jennifer Burn & Frances Simmons, 'Rewarding Witnesses and Ignoring Victims: an evaluation of the new trafficking visa framework' (2005) 387 *Immigration Review* 1 at 9, 10; Lara Fergus, *Trafficking in women for sexual exploitation*, Briefing 5, Australian Centre for the Study of Sexual Assault (2005) 27.

<sup>72</sup> Jennifer Burn & Frances Simmons, 'Rewarding Witnesses and Ignoring Victims: an evaluation of the new trafficking visa framework' (2005) 387 *Immigration Review* 1 at 10.

<sup>73</sup> Jennifer Burn & Frances Simmons, 'Rewarding Witnesses and Ignoring Victims: an evaluation of the new trafficking visa framework' (2005) 387 *Immigration Review* 1 at 10.

<sup>74</sup> Lara Fergus, *Trafficking in women for sexual exploitation*, Briefing 5, Australian Centre for the Study of Sexual Assault (2005) 38.

<sup>75</sup> Lara Fergus, *Trafficking in women for sexual exploitation*, Briefing 5, Australian Centre for the Study of Sexual Assault (2005) 18, citing DIMIA 2000.

<sup>76</sup> Lara Fergus, *Trafficking in women for sexual exploitation*, Briefing 5, Australian Centre for the Study of Sexual Assault (2005) 25.

<sup>77</sup> Anna Dorevitch & Michelle Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law' (2008) 9 *Melbourne Journal of International Law* 1 at 9, 12.

<sup>78</sup> Jennifer Burn & Frances Simmons, 'Rewarding Witnesses and Ignoring Victims: an evaluation of the new trafficking visa framework' (2005) 387 *Immigration Review* 1 at 6.

detention of victims of trafficking<sup>79</sup> as a violation of international law (including the rights to freedom from arbitrary detention and freedom of movement).<sup>80</sup> Additionally, Leishman notes that 'in arbitrary and prolonged detention, women and girls may be subject to violence, harassment by male or adult detainees, staff, guards and peers, and disciplinary measures'.<sup>81</sup> Pearson supports these criticisms, adding that even victims of trafficking who are housed in hotel-style accommodation are at risk of trauma, given their isolation and anxiety as a result of their experiences.<sup>82</sup>

Furthermore, victims of trafficking, like all other unlawful non-citizens who are detained prior to their removal, incur a debt to the Australian Government for the cost of their detention, a fact which has received widespread criticism.<sup>83</sup> Pearson also condemns the fact that even victims of trafficking who are placed in detention and then receive a Criminal Justice Stay Visa or other visas are required to repay these costs to the government.<sup>84</sup>

Some victims of trafficking may also experience further rights abuses when they return to their country of origin. There is no legislative requirement in place for victims to be protected from harm such as retaliation from their recruiters and exploiters. Trafficked persons are also likely to experience trauma and social isolation when repatriated, particularly if their families and communities become aware of their work in the sex industry.<sup>85</sup> In addition, minimal assistance is available to protect against re-trafficking.<sup>86</sup> This is seen as unacceptable by Dorevitch, who notes that:

rather than protecting victims and allaying their fears of reprisal, the Australian Government is paradoxically emulating a tactic of traffickers by enticing women to cooperate, using the women for their own ends and abandoning them once their services are spent. It is unacceptable that women who pursue this path of protection on the encouragement of the DIAC may then be returned to their countries of origin, potentially in greater danger than before.<sup>87</sup>

<sup>79</sup> Section 189 *Migration Act 1958* (Cth).

<sup>80</sup> Anne Gallagher & Elaine Pearson, *Detention of trafficked persons in shelters: a legal and policy analysis* (Asia Regional Trafficking in Persons Project, 2008) 3, 11, 12.

<sup>81</sup> Marianna Leishman, 'Human trafficking and sexual slavery: Australia's response' (2007) 27 *Australian Feminist Law Journal* 193 at 200, citing the Division for the Advancement of Women in collaboration with UNICEF Report of the Expert Group Meeting, *Elimination of all Forms of discrimination and Violence against the Girl Child* Innocenti Research Centre, Florence, Italy, 25-28 Sept 2006.

<sup>82</sup> Elaine Pearson, 'Australia' in, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007) 28 at 46.

<sup>83</sup> Section 209 *Migration Act 1958* (Cth); Elaine Pearson, 'Australia' in, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007) 28 at 46.

<sup>84</sup> Australia, Senate Legal and Constitutional Affairs Committee, *Administration and operation of the Migration Act 1958, Chapter 6 - Mandatory detention in practice* (2004) available at [www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2004-07/migration/report/c06.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/migration/report/c06.htm) (accessed 19 Mar 2009), cited in Elaine Pearson, 'Australia' in, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007) 28 at 46.

<sup>85</sup> Lara Fergus, *Trafficking in women for sexual exploitation*, Briefing 5, Australian Centre for the Study of Sexual Assault (2005) 75.

<sup>86</sup> Anne Gallagher, Human Rights and Human Trafficking: A Preliminary Review of Australia's Response, *Castan Centre for Human Rights*, [6] <<http://www.law.monash.edu.au/castancentre/events/2004/gallagherpaper-refereed.pdf>> 14 May 2009; Lara Fergus, *Trafficking in women for sexual exploitation*, Briefing 5, Australian Centre for the Study of Sexual Assault (2005) 75; Jenna Demir, *Trafficking of Women for Sexual Exploitation: A Gender-Based Well-Founded Fear?* (2003) 23; Amnesty International 'New permanent visas still do not fully protect trafficking victims', 19 June 2009, <<http://www.amnesty.org.au/news/comments/21207/>>.

<sup>87</sup> Anna Dorevitch & Michelle Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law' (2008) 9

This contradicts the repatriation benchmarks set out in Article 8(2) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, and Article 18 of the *UNHCR Guidelines for Trafficking in Persons* which state that trafficked persons face numerous risks if deported to their country of origin and accordingly, should be protected.

On the other hand, several reports confirm that many victims have a strong desire to leave Australia and return to their home country as soon as possible.<sup>88</sup> Leishman highlights a finding that ‘many organisations believe that women trafficked into the sex industry would rather be deported as illegal immigrants, as there is no incentive for women who have suffered severe exploitation to claim they are trafficked, and they may suffer serious stigma or be ostracised from their communities.’<sup>89</sup>

### 3.6 Conflict between the visa system and international best practice

Australia’s visa program for trafficked persons is seen as being in conflict with many human rights principles, particularly those enunciated in the United Nations (UN) *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, and the ‘soft law’ principles of the *UN Recommended Principles and Guidelines on Human Rights and Human Trafficking*.<sup>90</sup> Leishman characterises the conditional nature of victims’ rights under the Australian system as being contrary to the nature of human rights, which should be unconditionally available.<sup>91</sup> She notes that trafficked persons’ rights are only recognised while they are of service to the Australian Government, a breach which she sees as being facilitated by their lack of political representation.<sup>92</sup>

The conditionality of Australia’s response to victims of trafficking is also seen as contravening the specific terms of Part II of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* which creates guidelines for the assistance and protection of victims, their status in receiving countries and their repatriation.<sup>93</sup> Australia’s visa program additionally fails to meet the benchmarks in relation to the primacy of human rights, the identification of trafficking victims, requirements for victim support and provisions for child victims set out in Guidelines 1, 2, 6, and 8 of the High Commissioner for Human Rights’ *Recommended Principles and Guidelines*.<sup>94</sup> Many authors comment on the conflict

---

*Melbourne Journal of International Law* 1 at 13. See also Lara Fergus, *Trafficking in women for sexual exploitation*, Briefing 5, Australian Centre for the Study of Sexual Assault (2005) 27.

<sup>88</sup> Marianna Leishman. ‘Human trafficking and sexual slavery: Australia’s response’ (2007) 27 *Australian Feminist Law Journal* 193 at 203; Sam Blay et al, ‘Combating human trafficking: Australia’s responses to modern day slavery’ (2005) 79(9) *Australian Law Journal* 543 at 551.

<sup>89</sup> Marianna Leishman. ‘Human trafficking and sexual slavery: Australia’s response’ (2007) 27 *Australian Feminist Law Journal* 193 at 203; Sam Blay et al, ‘Combating human trafficking: Australia’s responses to modern day slavery’ (2005) 79(9) *Australian Law Journal* 543 at 551.

<sup>90</sup> Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, UN Doc E/2002/68/Add.1 (20 May 2002).

<sup>91</sup> Marianna Leishman. ‘Human trafficking and sexual slavery: Australia’s response’ (2007) 27 *Australian Feminist Law Journal* 193 at 200.

<sup>92</sup> Marianna Leishman. ‘Human trafficking and sexual slavery: Australia’s response’ (2007) 27 *Australian Feminist Law Journal* 193 at 200, citing Elaine Pearson, ‘Australia’ in, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007) 28.

<sup>93</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, 2237 UNTS 319.

<sup>94</sup> Marianna Leishman. ‘Human trafficking and sexual slavery: Australia’s response’ (2007) 27 *Australian Feminist Law Journal* 193 at 200. Anne Gallagher & Elaine Pearson, *Detention of trafficked persons in shelters: a legal and policy analysis* (Asia Regional Trafficking in Persons Project, 2008) 11; UN ECOSOC, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, UN Doc E/2002/68 Add.1 (20 May 2002).

between these documents' requirement for protection irrespective of the capacity or willingness of the trafficked person to cooperate in legal proceedings and the conditional nature of Australia's criminalised visa program.<sup>95</sup>

International best practice for visas designed to protect trafficking victims are highlighted by many critics of Australia's system, in arguing that the schemes used in Italy and the United States which feature an approach based on the needs of victims rather than the courts, are superior to the Australian examples. Burn et al claim that 'Australia's approach to visas lags behind international best practice'.<sup>96</sup> These authors instead favour the US approach, where trafficking victims can apply for a three-year, renewable 'T Visa' themselves if they assist with trafficking investigations, as well as recommending the Italian system under Article 18 of the *Alien Law*, where 'social protection residence permits' are provided to all victims irrespective of their collaboration with law enforcement bodies.<sup>97</sup> Georgina Costello and also Jema Demir argue that the Italian system also means that victims who give evidence against traffickers are less likely to be accused of having been 'bought' with visas, arguably supporting a higher rate of convictions.<sup>98</sup> Thus, the criticism of Australia's visa system in comparison to the support for other jurisdictions, especially Italy, demonstrates the multiple benefits of 'victim-based' rather than 'criminalised' visa responses to trafficking.

### 3.7 Failure to implement adequate reforms to the visa system

While the visa reforms in July 2009 go some way to addressing the criticisms of this visa scheme, they represent only small changes, with the emphasis on participation in criminal justice investigations and prosecutions remaining the key requirement for visa access.

In defence of these changes, DIAC has noted that the amendments will allow for faster results for victims and an overall simplification of the existing visa scheme. This will allow for both DIAC and its partners to 'respond to the range of circumstances of trafficking victims and provide for a more balanced approach to combating trafficking while providing protection to victims'.<sup>99</sup>

---

<sup>95</sup> Anna Dorevitch & Michelle Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law' (2008) 9 *Melbourne Journal of International Law* 1 at 13; Sam Blay et al, 'Combating human trafficking: Australia's responses to modern day slavery' (2005) 79(9) *Australian Law Journal* 543 at 551; Jennifer Burn & Frances Simmons, 'Rewarding Witnesses and Ignoring Victims: an evaluation of the new trafficking visa framework' (2005) 387 *Immigration Review* 1 at 10; Elaine Pearson, 'Australia' in, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007) 28 at 41.

<sup>96</sup> Sam Blay et al, 'Combating human trafficking: Australia's responses to modern day slavery' (2005) 79(9) *Australian Law Journal* 543 at 551.

<sup>97</sup> Sam Blay et al, 'Combating human trafficking: Australia's responses to modern day slavery' (2005) 79(9) *Australian Law Journal* 543 at 551; Georgina Costello, *Donald Mackay Winston Churchill Fellowship to study people trafficking law and policy in Italy and the USA*. Winston Memorial Trust of Australia (2005) 8, 11 [copy held by author].

<sup>98</sup> Georgina Costello, *Donald Mackay Winston Churchill Fellowship to study people trafficking law and policy in Italy and the USA*. Winston Memorial Trust of Australia (2005) 10 [copy held by author], citing a 2001 report from the Italian Ministry of the Interior, 14; Jenna Demir, *Trafficking of Women for Sexual Exploitation: A Gender-Based Well-Founded Fear?* (2003) 38. See also Phillips (2008), 9.

<sup>99</sup> 'DIAC, 'Changes to the People Trafficking Visa Framework', available at [www.immi.gov.au/legislation/amendments/2009/090701/lc01072009-08.htm](http://www.immi.gov.au/legislation/amendments/2009/090701/lc01072009-08.htm) (accessed 24 Oct 2009).

However, it has been suggested that these reforms do not go far enough, and fail to address the concerns of a number of bodies about the ability of trafficked persons to access Australian visas. Supporters have praised the reforms as solving some of the previous scheme's access problems,<sup>100</sup> and the changes were commended by the Australian Human Rights Commission as 'humanitarian and compassionate improvements which will help people recover from appalling violations of their basic human rights'.<sup>101</sup> The removal of temporary witness protection visas was seen by the Commission as a particular highlight of the reform package, in offering greater security to victims of trafficking by giving them a permanent place in Australia, including the rights to work, study and to be reunited with their immediate family.<sup>102</sup>

Despite this, other commentators have suggested that these changes do not adequately resolve the concerns about the system's protection of trafficked persons.<sup>103</sup> For example, Kathleen Maltzahn, chair of trafficking victims' organisation Project Respect, suggests that implementing a victim compensation scheme and an investigation into the demand side of human trafficking are reforms that are urgently required in addition to the recent visa changes.<sup>104</sup> Amnesty International additionally criticises the extent of the reforms, noting that the requirement for victims to make 'a contribution' to a criminal investigation in order to receive a permanent visa is inappropriate, due to the trauma suffered by victims of this crime. The organisation also noted that trafficked persons are liable to be returned to their country of origin if they do not pass this test, and criticised the Australian Government for failing to take steps to prevent the re-trafficking of these persons. Accordingly, it recommends that this criterion be removed in order to provide visas for all trafficked persons, along with the introduction of 'complementary protection' to grant protection to trafficked persons at risk of violence who are not officially classed as refugees under the 1951 *Refugee Convention*.<sup>105</sup>

#### 4. The Way Ahead

Recommendations for reform to the Australian visa system are generally founded on a desire to institute a generalist visa program for all victims that does not require criminal justice participation as a precondition for assistance. This is symptomatic of the desire to change the visa system's foundation from a criminal justice framework to a victim-driven, supportive one. A number of individual proposals for change, based on the application process for visas and their duration, are briefly explored in the following paragraphs.

In regards to access to visas for victims, it is argued that discretion should operate so that previous false applications (such as protection visas applied for under the coercive influence of traffickers) should not totally stand in the way of victims' access to permanent residency in

---

<sup>100</sup> See for example, Jessica Matthew, 'Overhaul of human trafficking visas "will help victims"', *The Australian* (Sydney); Carol Nader, 'Visa restrictions eased for sex trafficking victims', *The Age* (Melbourne), 6, 17 June 2009.

<sup>101</sup> HREOC, 'For trafficked people, Government changes put human rights first' (17 June 2009) available at [www.hreoc.gov.au/about/media/media\\_releases/2009/50\\_09.html](http://www.hreoc.gov.au/about/media/media_releases/2009/50_09.html) (accessed 14 Oct 2009).

<sup>102</sup> HREOC, 'For trafficked people, Government changes put human rights first' (17 June 2009) available at [www.hreoc.gov.au/about/media/media\\_releases/2009/50\\_09.html](http://www.hreoc.gov.au/about/media/media_releases/2009/50_09.html) (accessed 14 Oct 2009).

<sup>103</sup> See for example, Kathleen Maltzahn, 'So far so good, but more can be done to end sex slavery' (18 June 2009) *The Age* (Melbourne), 21; Amnesty International 'New permanent visas still do not fully protect trafficking victims' (19 June 2009), available at [www.amnesty.org.au/news/comments/21207](http://www.amnesty.org.au/news/comments/21207) (accessed 26 Oct 2009).

<sup>104</sup> Kathleen Maltzahn, 'So far so good, but more can be done to end sex slavery' (18 June 2009) *The Age* (Melbourne), 23.

<sup>105</sup> Amnesty International 'New permanent visas still do not fully protect trafficking victims' (19 June 2009), available at [www.amnesty.org.au/news/comments/21207](http://www.amnesty.org.au/news/comments/21207) (accessed 26 Oct 2009).

Australia. Several sources recommend that the visa regime be amended to allow victims who hold a CJSC to apply for temporary witness protection visas, rather than waiting for a discretionary visa at the close of the judicial process, in order to better support the needs of victims.<sup>106</sup> Costello further submits that the application process for visas should be subject to increased levels of scrutiny, with the potential for decisions to be appealed, rather than depending on Ministerial discretion alone.<sup>107</sup>

Finally, the duration of visas is also a topic meriting amendment in the eyes of some authors. Elizabeth Broderick has argued that the Bridging Visa F should be extended to three months as longer-term visas would assist law enforcement agencies in gaining the trust of traumatised persons, by providing them with greater security.<sup>108</sup>

It is apparent that, despite the recent changes, the credibility of Australia's visa scheme for trafficked persons has been significantly undermined by the criticisms examined in this report. The notably unanimous disapproval of a criminalisation approach to trafficking in persons, along with the other widespread condemnations explored here, displays the need for a substantive re-examination of this visa system. Changing the migration provisions to allow for a more victim-centred approach would not only bring Australia in line with other nations on this issue, but would also affirm the Australia's commitment to fundamental human rights. Ultimately, the criticisms offered by commentators noted above highlight that the 2009 visa reforms should only mark the beginning of the changes Australia makes to the way it addresses trafficking in persons and assists its victims.

An electronic copy of this document is available at [www.law.uq.edu.au/humantrafficking](http://www.law.uq.edu.au/humantrafficking)  
© 2009, A Schloenhardt, The University of Queensland, Brisbane, Australia

---

<sup>106</sup> Jennifer Burn & Frances Simmons, 'Rewarding Witnesses and Ignoring Victims: an evaluation of the new trafficking visa framework' (2005) 387 *Immigration Review* 1 at 11.

<sup>107</sup> Georgina Costello, *Donald Mackay Winston Churchill Fellowship to study people trafficking law and policy in Italy and the USA*. Winston Memorial Trust of Australia (2005) 19 [copy held by author].

<sup>108</sup> Elizabeth Broderick, 'Trafficking: The Need for a Human Rights Based Approach', speech to the *Inaugural Anti-Trafficking Forum* (2008) 10, available at [www.antislavery.org.au/pdf/ElizBroderickKeynoteAddress.pdf](http://www.antislavery.org.au/pdf/ElizBroderickKeynoteAddress.pdf) (accessed 24 Oct 2009).