

**NATIONAL JUDICIAL COLLEGE OF AUSTRALIA
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**PROSECUTING AND ADJUDICATING TRAFFICKING IN PERSONS
CASES IN AUSTRALIA: OBSTACLES AND OPPORTUNITIES**

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Distinguished participants, ladies and gentlemen,

I would like to begin by thanking the National Judicial College for organizing this event and for inviting me to participate. Much of my work on trafficking has taken place outside Australia. My exposure to this issue as it has played out in this country is more or less limited to involvement, since 2004, in training the specialist AFP investigators. I look forward to learning from the other presenters as well as from this highly diverse audience.

In the short time allotted, I would like to provide you with an overview of what my colleagues and I have learned about the prosecution and adjudication of trafficking in persons cases. I am fairly confident that much of this will not be new to you. Trafficking seems to be a marvelously homogenous crime and there is a striking level of similarity in the issues facing prosecutors and judges across countries and across regions. That being said, each country, and each legal system is different and clearly, there is no one model that works perfectly.

I begin by setting out what myself and my colleague Paul Holmes have identified as the essential elements of an effective criminal justice response to trafficking [**ref. powerpoint slide 2**]. While this goes beyond the strict subject matter of our seminar it does serve to highlight the many features that make up such a response - and to remind us all that weaknesses in one part of the system will inevitably compromise the performance of the rest. Put simply, if investigators are not doing their job properly, prosecutors cannot contribute effectively. If victims are not protected and supported, the likelihood of an optimal criminal justice outcome is much reduced.

The exercise of identifying elements of an effective criminal justice response forces us to consider the objectives of that response. What are we trying to achieve? While the answer to that question might be self-evident for some, experience has shown me that this is not always the case. In short, it's worth articulating up-front, that an effective criminal justice response to trafficking must be explicitly directed towards ending the impunity of exploiters *and* in securing justice for those who are exploited. This might sound obvious but it is often lost in disagreements, particularly between victim support advocates and criminal justice officials. It also gets shipwrecked on the rocks of political expediency, by States that would prefer trafficking be considered and dealt with simply as a problem of migration or of public order. These two goals are intrinsically linked and each one facilitates the attainment of the other. In my

¹ The opinions expressed in this presentation are those of the author and should not be taken to reflect, in whole or in part, those of the organizations with whom she is or has been associated. Thanks to Albert Moskowitz, Paul Holmes, and Fiona David for their invaluable input. Author contact: atgallagher@equityinternational.org

view, any strategy that aims to achieve only one of these goals, particularly at the expense of the other, is doomed to irrelevance and failure.

What *are* the obstacles to an effective response? That there are serious obstacles is beyond dispute. In every part of the world, traffickers are very rarely identified, prosecuted and convicted. Victims of trafficking rarely receive their day in court let alone any other form of justice for the harms committed against them. The list of challenges is straightforward and relatively uncontested:

- As everyone working on these cases knows so well, trafficking is a complex, time and resource-intensive crime to both investigate and prosecute.
- Except in cases of proactive, intelligence-led investigations (still the exception in every part of the world including this country) victims are usually the only witnesses able to give a full account of the crime and are therefore essential to proving a human trafficking case.
- Human trafficking and the forms of exploitation with which it is most commonly associated are, essentially “new” crimes. No country can lay claim to genuine, extensive experience in dealing with trafficking as a criminal phenomenon. Most countries are developing and adapting their criminal justice responses on the run, and principally through trial and error.
- This lack of experience is compounded by the fact that cooperation and cross-fertilization of ideas across borders is still very limited. Mistakes in one country are not corrected in another. Good practice is not disseminated as widely and quickly as it should be.

And finally, we need to acknowledge the highly charged political and social environment around trafficking. This is a crime that is inextricably caught up in broader controversies around terribly sensitive issues such as prostitution and labour migration – both legal and illegal. These are not low-level, local controversies. We should not forget that this is a crime in relation to which each country receives an annual report card from the Foreign Affairs Department of the world’s superpower. Like it or not, these factors shape the environment within which criminal justice officials are working.

What then, are the **specific** obstacles to effective prosecution and adjudication of TIP cases? Put another way, are there *additional*, special factors at work that make this so hard? The short answer is yes and most of these are tied to the point I made earlier about prosecution being so heavily reliant on the testimony of victim-witnesses. As a direct result of this reliance, other issues: for example, the obstacles to securing victim cooperation and support; the matter of victim credibility and the need for corroborative evidence, all become important. I will say a few brief words on each of these.

Securing the trust and cooperation of victims

By the time prosecutors and investigators make contact with victims, they have generally been exposed to trauma for an extended period of time. I think it is fair to say that Australian cases seem, at least so far, to differ markedly from the international norm in terms of the level and severity of recorded physical and psychological violence and intimidation. Whether this reflects the uniqueness of Australia's trafficking experience or serious shortcomings in the investigatory process remains to be seen.

Trauma is generally compounded by fear – not just the very real fear of reprisals, but fear of being deported, of publicity; of the criminal justice process itself. Victims of trafficking might also exhibit disadvantages common to vulnerable populations in relation to education level and communication skills. I know that in Australia there is some rejection of the idea that those who have been involved in criminal justice proceedings in this country are poor and uneducated. For sure, this is a stereotype that deserves to be challenged with any available evidence. At the same time, we should not underestimate the impact that distance, language, culture and legal status can have on one's negotiating and communication skills.

These kinds of factors just compound the reality that victims of trafficking rarely have any real incentive to cooperate in the prosecution of their exploiters. Securing such cooperation is therefore always difficult. Securing the **trust** of the victim, a necessary prerequisite for their effective involvement in a prosecution, is even harder.

The issue of victim credibility

The credibility of victim's account can be undermined in many ways and I will touch on the ones that we come across most often, referring you to Albert Moskowitz's paper for more detailed consideration of these issues.

First: prior inconsistent statements. It is our experience that during initial interviews, traumatized and suspicious victims may provide incomplete or even untruthful accounts. More complete and truthful accounts can often be secured once the victim has had a chance to develop security and trust in the process. But prior inconsistent statements don't go away and will be used by a competent defence to cast doubt on the reliability of the victim-witness. It is a rare prosecutor who has the patience to develop a relationship of trust with the victim and the skill to explain the reasons for discrepancies in a way that is understandable to the court.

Second: Victim-witness accounts can damage credibility by appearing to be in conflict with the physical evidence and with commonsense. The absence of physical restraint, for example, is a frequent issue in TIP cases. The victim's failure to escape an exploitative environment will lead to questions about

whether she or he was really in a coercive or exploitative situation. It is our experience that the qualities of the criminal justice officials involved in the case, including judges, will determine the extent to which such issues affect victim credibility. The essential qualities include an understanding of how trafficking works, in particular, how psychological coercion is exercised. The prosecutors ability to present this information effectively in court and the judges ability to consider the evidence in an informed way, are both crucial.

Third: Victim credibility can be affected by what can be referred to as 'external factors'. These might include prejudices about the victim's background, his or her mode of entry into the country; his or her involvement in a stigmatized industry like prostitution. Once again, the understanding and skill of the criminal justice official, most particularly the prosecutor will often determine the extent to which such factors damage victim-witness credibility,

The importance of corroborative evidence

Case evidence from around the world confirms the critical importance of being able to corroborate the account of the victim-witness. This is because the victim's testimony may not (and perhaps *should not*) be enough to carry the burden of proof. There are a few reasons for this.²

First: victims are not always good witnesses. They may be unable or unwilling to communicate effectively. They may be inconsistent. Sometimes, quite often because of local prejudices, they don not present particularly well.

Second: Even if they *are* persuasive witnesses, that testimony alone may not be enough to tip the scales in favour of the prosecution. The credibility of the victim-witness will almost always be subject to challenge from a good defence that will be well aware of the heavy reliance of the prosecution on that testimony.

Developing corroborative evidence is time-consuming and difficult. Conducting evidence searches; effectively working with other witnesses; dealing with experts; or overseeing complex financial investigations takes expertise and skill. However, I disagree with the implication in the flyer presenting this seminar that corroborative evidence is likely to be limited. Skilled and experienced prosecutors and investigators will recognize the need for corroboration; they will know how and where to find that evidence; and they will be able to develop that evidence for use in court. It is important to highlight that there seems to be a link between strong corroborative evidence and the early and sustained involvement of the prosecutor in the case.

I will conclude with a few personal, and therefore subjective, comments on the Australian situation. The caveats have all been put in place and you remain free to challenge any or all of these observations – which are offered in the

² Once again, for more detail on this point, see the accompanying paper by Albert Moskowitz.

same spirit with which I hope they will be received. In the interests of time and out of respect for the caliber of this group, I have avoided the sugar-coating that would normally accompany such an analysis.

1. Narrow range of (difficult) cases

The Australian typology of trafficking cases is, in my experience, uniquely narrow. Almost all of the cases that get to court in this country involve trafficking for sex work. Almost all victims presenting in court are female and from just a couple of countries. Almost all have entered into some kind of unenforceable contract. The physical evidence of violence and intimidation that are typical of trafficking cases in every other country does not seem to be the norm here. In short, these are what we might term the 'hard' cases. Certainly they are the kinds of cases that raise the most serious evidentiary challenges and issues of credibility. They also feed into a stereotype of the 'victim of trafficking' that may ultimately, may not be helpful to an effective criminal justice response to trafficking in this country.

Without speculating as to **why** Australia is in this unique position, we can be fairly confident that the cases currently coming before courts are not a full and accurate reflection of the trafficking problem in this country. Evidence is emerging, for example, of a significant problem of labour trafficking.

Legislative shortcomings

On the basis of a fairly broad experience of dealing with domestic trafficking legislation, I have concluded that the Australian legal framework is incomplete, confusing and overly complicated. Certainly I would not wish to be an investigator or prosecutor operating under such a framework. The fact that the definition of trafficking does not precisely match the international legal definition is a matter of concern. Another concern is the absence of solid alternative offences. Debt bondage, very much part of the *modus operandi* in this country, provides an example. The gap between the penalty for debt bondage and the penalties for slavery and trafficking is too great to make the former a sensible alternative charge. I also note that despite Australia's obligations under international law, forced labour is not specifically criminalized in this country.

The *Tang Case* is also instructive on the point of legislative shortcomings. This case has become famous in international legal circles because of its consideration of the 1926 international legal definition of slavery. That is, I think, a tribute to the strength of the relevant judgments. But we should perhaps be asking why Australia is the only country in the world to be tying up its trafficking prosecutions in complex legal arguments about the elements of ownership. The development of an internationally agreed definition of trafficking was supposed to remove the kinds of uncertainties that surrounded old legal concepts like slavery and servitude. I believe there is significant

room for rationalizing the current laws and bringing them in line with what is shown to be working effectively in other countries.

Investigatory limitations

In terms of international best practice, there appear to be some significant shortcomings in Australia's investigatory response. Australian law enforcement agencies do not, for example, appear to have the capacity or resources to conduct proactive, intelligence-led investigations. This means that the current heavy reliance on victim-witnesses to secure prosecutions is likely to continue into the foreseeable future – with all the problems that go along with that.

This situation is likely contributing to the very narrow range of cases presenting in your court. To be blunt, reactive, victim-led investigations into trafficking in the sex industry do not exactly represent the difficult edge of the law enforcement response to this crime. There are likely to be more and varied cases of trafficking out there. A properly resourced and directed investigatory response is the only way you will find out the true nature and extent of Australia's trafficking problem.

Inadequacies and inconsistencies in victim-witness protection, support and preparation

There appear to be considerable inconsistencies between the protections available to victims and witnesses. These seem to reflect jurisdictional differences as well as differences between courts. For example, in the *Rasalingam Case*, the victim's name was suppressed in the criminal trial but not in the subsequent case before a federal magistrate for breach of the *Workplace Relations Act*. In view of such inconsistencies, it is particularly important that judges are alert to the fact that they may need to exercise their discretionary powers in providing appropriate protection to both complainants and witnesses.

Before leaving this heading, I'd like to touch on two other matters where the reality in Australia is removed from accepted international practice. First: while the situation has recently improved, victims of trafficking in this country do not yet have prompt and uniform access to specialist shelters. Victim and victim-witness support and protection mechanisms that do exist, appear to have been developed without full consideration of the rights of the individuals involved, including their right to seek and receive justice.

A second, related concern is that unlike many other countries, there appears to be no partnership between police and counselors in the preparation and management of victim interviews. It is likely that this lack of effective partnership compounds the kinds of problems we are seeing in the courtroom.

Unacceptable delays between statement and trial with no fast-track alternatives

Finally, and specifically in relation to criminal proceedings, it does not seem to be sustainable to continue with a reactive, victim-as-witness approach under circumstances where two to three years will routinely elapse between statement and trial. In this connection I bring to your attention the *Wei Tang* case, begun with an arrest that took place more than six years ago, is still not completed.

This reality creates impossible hurdles for the Australian criminal justice system, most particularly, of course, for the AFP. A number of countries have acknowledged this challenge with innovations such as immediate judicial depositions (mostly inquisitorial systems) and / or fast-tracking of cases to the trial court (the UK approach). While I cannot prescribe what would be the right solution for Australia, it clear that something must be done to reduce these damaging delays.

I conclude by noting that those of us working in the field are under no doubt that the kind of exploitation which is commonly associated with trafficking is not decreasing and is quite probably getting worse. Your job will certainly become more complicated and probably more politicized. A clear understanding of the goals of Australia's criminal justice response to trafficking; an appreciation of the obstacles you are up against; and a willingness to consider changing what is not working will stand you in good stead, now and in the future.

I thank you for your attention.