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CONTENTS

KEIRAN HARDY	<i>NATIONAL SECURITY REFORMS AND FREEDOM OF THE PRESS</i>	1
EDWIN BIKUNDO	<i>THE PRESIDENT'S TWO BODIES: UHURU KENYATTA AT THE INTERNATIONAL CRIMINAL COURT</i>	30
MICHELLE MALONEY	<i>FINALLY BEING HEARD: THE GREAT BARRIER REEF AND THE INTERNATIONAL RIGHTS OF NATURE TRIBUNAL</i>	40
STEVEN FREELAND	<i>JUDICIAL DECISION-MAKING IN INTERNATIONAL CRIMINAL COURTS: "EFFECTIVE" JUSTICE?</i>	59
ADELE ANTHONY	<i>THE LAW AND BOXING: A PARADOX</i>	86
NIKOLAS FEITH TAN	<i>PRABOWO AND THE SHORTCOMINGS OF INTERNATIONAL JUSTICE</i>	103
FELICITY GERRY QC	<i>LET'S TALK ABOUT SLAVES ... HUMAN TRAFFICKING: EXPOSING HIDDEN VICTIMS AND CRIMINAL PROFIT AND HOW LAWYERS CAN HELP END A GLOBAL EPIDEMIC</i>	118
GEMIMA HARVEY	<i>THE PRICE OF PROTEST IN WEST PAPUA</i>	170

LET'S TALK ABOUT SLAVES ... HUMAN TRAFFICKING: EXPOSING HIDDEN VICTIMS AND CRIMINAL PROFIT AND HOW LAWYERS CAN HELP END A GLOBAL EPIDEMIC

FELICITY GERRY QC*

Human trafficking is a highly lucrative industry that extends to all corners of the globe. Developed countries have become the destination for those plucked from source countries and people are trafficked within their own states. These are generally the impoverished, the unempowered, the uneducated, and the dispossessed. The urgency with which this issue needs to be tackled nationally and transnationally has recently been fuelled by reports that profits are being used to fund terrorist activity. This makes cooperation between nations and their lawyers imperative. Criminal and corporate lawyers can help to end a global slavery epidemic through international cooperation, namely: identifying victims and diverting them out of justice systems, exposing transnational organised crime, and by ensuring corporate responsibility. This paper is an introduction to and overview of recent developments in the field of human exploitation, the efforts to combat human trafficking across Indonesia and Australia, and an analysis of how lawyers in all spheres can contribute to the global effort to end slavery. With a brief pause for thought on the use of technology, the purpose of this paper is to stimulate thinking and further innovation in the legal sector as independent actors in a unique position to improve the human condition.

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CONTENTS

I	INTRODUCTION.....	119
II	AUSTRALIA AND INDONESIA: AN OVERVIEW	121
III	THE REALITY OF HUMAN EXPLOITATION.....	122
IV	DEFINING HUMAN EXPLOITATION.....	126
V	TRANSNATIONAL ORGANISED CRIME.....	129
VI	LAWYERS.....	133
VII	AN HOLISTIC APPROACH TO SUPPORT AND JUSTICE.....	135
VIII	NON-PUNISHMENT OF VICTIMS.....	138
IX	JUDGES IN CRIMINAL CASES.....	140
X	USING TECHNOLOGY.....	144
XI	CORPORATE RESPONSIBILITY.....	147
XII	MANDATORY REPORTING.....	150
XIII	FINANCIAL REPORTING.....	153
XIV	CONCLUSION.....	158

I INTRODUCTION

Islamic State radicals gain more than \$3 million per day just from oil sales, while also earning huge sums from human trafficking and extortion, report US intelligence officials and experts. They are wealthier than any other terror group in history.¹

Taking a focus on Australia and Indonesia, this paper will consider exploitation of people, international cooperation, and how criminal and corporate lawyers can help to

¹ 'ISIS daily profits from oil, theft, human trafficking exceed \$3mn-report', *Russia Today* (online), 14 September 2014 <<http://rt.com/news/187720-isis-millions-daily-profit/>>.

end a global slavery epidemic by international cooperation, identifying victims and diverting them out of justice systems, exposing transnational organised crime, and by ensuring corporate responsibility.

Human trafficking is a highly lucrative industry that extends to all corners of the globe. The phrases “human trafficking”, “slavery”, and “forced labour” are used interchangeably but essentially amount to exploitation for profit and power.² Developed countries have become the destination for slaves plucked from source countries and people are trafficked within their own states. These are generally the impoverished, the un-empowered, the uneducated and the dispossessed — and largely women and girls, particularly in the context of sexual exploitation. The urgency with which this issue needs to be tackled nationally and transnationally has recently been fuelled by reports that profits are being used to fund terrorist activity.³ It makes cooperation between nations imperative.

The potential profits from human exploitation are huge. In a 2012 survey by the International Labour Office, it was estimated that 20.9 million men, women, and children are in forced labour globally, trafficked for labour and sexual exploitation or held in slavery like conditions:⁴

- Of the total, an estimated 9.1 million people (44 per cent) moved either internally or internationally.
- The Asia-Pacific region has the largest number of forced labourers, at almost 12 million (56 per cent of the global total and 89 per cent of those in bonded labour and debt bondage).
- Women and girls make up about 55 per cent of all forced labour victims, and they represent the vast majority of victims exploited for commercial sex work.

² There are concerns that the word “slavery” does not cover children exposed to hazardous work or those who are not given a fair wage, but this is probably semantics since those people have little choice, and in any event slavery and trafficking are now commonly understood terms used interchangeably. Human exploitation is more over-arching.

³ Loveday Morris, ‘Islamic State says it is buying and selling Yazidi women, and using them as concubines’, *Sydney Morning Herald* (online), 14 October 2014 <<http://www.smh.com.au/world/islamic-state-says-it-is-buying-and-selling-yazidi-women-and-using-them-as-concubines-20141014-115kp0.html#ixzz3GTDM2y8X>>.

⁴ International Labour Office, ‘Profits and Poverty: The economics of forced labour’ (Report, International Labour Office, 20 May 2014). This report is available in book format at <http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_243391/lang-en/index.htm>.

- The estimated total profits made by forced labour each year worldwide was estimated in 2012 at US \$150.2 billion per year with profits highest in Asia (US \$51.8 billion).
- Sexual exploitation makes up two-thirds of these profits at an estimated \$105 billion a year.
- Annual profits made per victim range from \$4 100 to \$37 100. This includes construction, manufacturing, mining and utilities, agriculture, fishing, and domestic work. Profits are highest in forced sexual exploitation.⁵

The 2014 International Labour Office report ('the ILO report'), *Profits and Poverty*, concludes that the 21 million victims are a 'vast nation of men, women and children ... virtually invisible, hidden behind a wall of coercion, threats and economic exploitation'.⁶ Socioeconomic factors for global forced labour include lack of education and literacy, poverty, and other wealth and income shocks — all of which need to be addressed to empower people to avoid exploitation.⁷

It is axiomatic that developing the role of lawyers in this context would require debate and professional guidance, but this paper is an introduction to and overview of recent developments in the field of human exploitation, the efforts to combat human trafficking across Indonesia and Australia, and an analysis of how lawyers in all spheres can contribute to the global effort to end slavery. With a brief pause for thought on the use of technology, the purpose of this paper is to stimulate thinking and further innovation in the legal sector as independent actors in a unique position to improve the human condition.

II AUSTRALIA AND INDONESIA: AN OVERVIEW

Both Australia and Indonesia are members of the United Nations. Put loosely, both have recognised international human rights instruments including the *International Convention on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

⁵ Morris, above n 3.

⁶ International Labour Office, above n 4.

⁷ Ibid.

The *Australian Constitution* does not contain a Bill of Rights but legal responses are generally enacted with a view to protecting individual rights. This is, of course, a generalisation and there remains significant concern over human rights abuses, particularly in the context of immigration, where human trafficking victims can be identified.

The *Indonesian Constitution* embodied human rights in the Second Amendment to the 1945 Constitution in 2000.⁸ Chapter XA (articles 28A–28J on Human Rights)⁹ includes various categories of human rights that cover most of the rights guaranteed in the *Universal Declaration of Human Rights*,¹⁰ the *International Covenant on Civil and Political Rights*,¹¹ and the *International Covenant on Economic, Social and Cultural Rights*.¹² The provisions of human rights in the Second Amendment to the 1945 Constitution can be used to test the provisions of a law through judicial review before the Constitutional Court. Nonetheless, concerns about human rights violations have been raised, most recently in the context of sentencing drug traffickers to the death penalty. Like immigration, drug trafficking is a field where victims of human exploitation can be identified.

This paper does not seek to highlight either positive or negative actions or inactions by either country, but instead seeks to highlight the similarity of human rights issues faced by two close countries in the context of serious organised crime and how bilateral cooperation can be effective to protect the exploited in both countries, in particular by engaging the legal sector.

III THE REALITY OF HUMAN EXPLOITATION

Australia is known as a destination country for human trafficking although it can also happen within country.¹³ Recent news reports have referred to the following cases:

- An Australian couple who were convicted in America of paying \$8 000 for a child sex slave;¹⁴

⁸ *The 1945 Constitution of the Republic of Indonesia* (Indonesia).

⁹ *The 1945 Constitution of the Republic of Indonesia* (Indonesia) Ch XA arts 28A-28J.

¹⁰ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

¹¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹² *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

¹³ Academy for Educational Development, *Australia* (2006) [humantrafficking.org](http://www.humantrafficking.org) <<http://www.humantrafficking.org/countries/australia>>.

- An Australian teacher and sportsman currently charged with child sex offences having been found in a hotel room with young children in the Philippines;¹⁵
- Organ tourism — harvesting organs from living donors abroad.¹⁶

Often men, women, and girls are held in debt bondage, forced to provide profit for their traffickers to pay off a unilateral, legally unenforceable debt. Researcher with the Institute of Criminology, Samantha Lyneham said:

The majority of trafficked persons are female and they were trafficked for labour exploitation ... one in four victims were also children aged between 15 and 17 years ... This is regional data that we're looking at and it is specific to Indonesia but that does have an impact on Australia. We do see people being trafficked into Australia and also out of Australia and given that the majority of persons trafficked into Australia are known to originate from South East Asia, examining the trafficking patterns in our region is really important.¹⁷

The Australian non-government organisation ('NGO') Project Respect ran a weekend away for women in the sex industry. These women, in a safe and supported environment, recounted their experiences of trafficking:

What happened to us was a nightmare. We can never forget. It comes back to us in dreams. This will affect us til we die. It has changed us. We were treated very badly. We worked from 11:00am to 3:00 or 4:00pm. We slept only three or four hours a night. Sometimes some of us worked for 24 hours. For four or five months, all we did was prostitution. Even when we had our period, we had to work. Sometimes we worked until we couldn't walk. We had to work until we were very, very sick and the customers refused to take us. Only then were we allowed to rest, for one day. Some owners were not so cruel, but even

¹⁴ 'Australian paedophile Peter Truong jailed for 30 years in US after trafficking adopted son to Boy Lovers Network', *ABC News* (online), 10 December 2013 <<http://www.abc.net.au/news/2013-12-10/peter-truong-jailed-over-global-paedophile-ring/5146366>>.

¹⁵ *Ibid.*

¹⁶ Simon Lauder, 'Australian organ tourists drive sinister trade', *ABC News* (online), 1 September 2010 <<http://www.abc.net.au/news/2010-09-01/australian-organ-tourists-drive-sinister-trade/966408>>.

¹⁷ Calliste Weitenberg, 'Human trafficking: A crime of the 21st Century', *SBS News* (online), 3 September 2013 <<http://www.sbs.com.au/news/article/2013/06/07/human-trafficking-crime-21st-century>>.

when they were friendly, they still treated us like slaves. We were made to feel like animals. Customers were violent. Some of the customers were crazy. They treated us like animals. We were sexually abused, we were dragged, we were hit. Some of us were given drugs so we could work all the time. Some of the women we know have become drug addicts and now they have to keep doing prostitution to pay for drugs. It was like we were in jail — we had no free time, we couldn't go anywhere, we never had freedom. The traffickers treated us like slaves. We didn't have anywhere to go. It felt like we survived and died at the same time.¹⁸

There are many causes of human trafficking to Australia. Project Respect argues that the demand for trafficked women is fuelled by, for example, a lack of women in developed countries prepared to do prostitution, and racialised ideas that Asian women have certain qualities — for example, that they are more compliant and will accept higher levels of violence.¹⁹ Exploitation can arise in domestic servitude, treatment of employees in remote locations, the sex trade, organised gangs such as teams of “pick-pocketing” children, drug trafficking, and cultivation and immigration offences. Research by The Anti-Slavery Project, an Australian NGO, concluded that ‘slavery thrives in Australia 200 years after Abolition’.²⁰ They recommended adequately resourced victim service programs to meet the needs of victims who were left vulnerable to violence and exploitation, and with a reduced ability to cooperate with law enforcement.²¹ Research by the Australian Institute of Criminology has shown extensive human trafficking out of Indonesia.²² There are already Regional Cooperation Trafficking projects in the Asia-Pacific.²³

¹⁸ Victoria Law Foundation, ‘An open message of thanks to the Justices of the High Court of Australia’ (Press Release, 2008) 1 <http://projectrespect.org.au/system/files/PR-Womens-statement-2008_0.pdf>.

¹⁹ *Ibid.*

²⁰ Anti-Slavery Project, *Slavery thrives in Australia 200 years after Abolition* (5 April 2007) [humantrafficking.org <http://www.humantrafficking.org/updates/582>](http://www.humantrafficking.org/updates/582).

²¹ *Ibid.*

²² Rob McCusker, ‘Transnational crime in the Pacific Islands: real or apparent danger?’ (Research Paper No 308, Australian Institute of Criminology, 2006). <<http://www.aic.gov.au/documents/1/3/1/%7B131B91C4-909C-482F-B437-42EC40ED4449%7Dtandi308.pdf>>.

²³ US Department of State, ‘Human Rights Report’ (Report, Washington: US Department of State, 2006) 2006; US Department of State, ‘Trafficking in Persons Report’ (Report, Washington: US Department of State, 2007).

The Asia Regional Trafficking In Persons ('ARTIP') Project was a six-and-a-half-year AU \$20.9 million Australian Government initiative. ARTIP's goal and purpose was to contribute to the prevention of trafficking in persons in Asia by facilitating a more effective and coordinated approach to trafficking by the criminal justice systems of participating national governments.²⁴

We also have the Australia–Asia Program to Combat Trafficking in Persons ('AAPTIP'), which is a five-year (2013–2018) AU \$50 million initiative of the Australian aid program that aims to reduce the incentives and opportunities for trafficking of persons in the Association of South East Asia Nations ('ASEAN') region.²⁵ The AAPTIP initiative seeks to strengthen the criminal justice response to trafficking by: 'enhancing regional and national investigative and judicial cooperation on trafficking cases; strengthening legislative frameworks; providing adequate support for victim-witnesses; and expanding the evidence base for policy development and decision-making' and 'build[ing] the capacity of law enforcement officers, prosecutors and judges, and sett[ing] international standards for the basic building blocks of a functioning criminal justice system'.²⁶

Such funding arrangements are a start, but will ultimately fail if data is collected in a piecemeal way based on limited definitions of human trafficking or forced labour. They will also fail if there is no attitudinal change in relation to immigration and drug trafficking, which allows the exploited to be treated as criminals or illegal immigrants rather than victims of organised crime. It is here that the role of lawyers can be most effective in identifying the correct legal, policy, and support responses. The first step is to define the scale of the problem widely as human exploitation so that human rights discourse can be effective.

²⁴ Cardno, *Asia Regional Trafficking in Persons ('ARTIP') Project* (2015) Cardno
<<http://www.cardno.com/en-au/Projects/Pages/Projects-Asia-Regional-Trafficking-In-Persons-%28ARTIP%29-Project.aspx>>.

²⁵ Cardno, *Australia-Asia Program to Combat Trafficking in Persons (AAPTIP)* (2015) Cardno
<<http://www.cardno.com/en-au/Projects/Pages/Australia-Asia-Program-to-Combat-Trafficking-in-Persons-%28AAPTIP%29.aspx>>.

²⁶ Ibid.

IV DEFINING HUMAN EXPLOITATION

The 1926 *Slavery Convention* defines slavery as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.²⁷ The 1930 *Forced Labour Convention* defines forced labour as ‘[a]ll work or service, which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.²⁸ Forced labour therefore includes practices such as slavery. The 1999 International Labour Organization (‘ILO’) *Worst Forms of Child Labour Convention* defines ‘worst forms of child labour’ to include:

all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.²⁹

The 2005 *Convention on Action against Trafficking in Human Beings* (‘the Trafficking Protocol’)³⁰ has been signed and ratified by most countries including Australia and Indonesia.³¹ It defines trafficking as follows:

Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced

²⁷ Human Rights Education Associates, *Learn* (2015) Human Rights Education Associates <http://www.hrea.org/index.php?base_id=160>.

²⁸ International Labour Office, above n 4.

²⁹ *Ibid.*

³⁰ The Protocol was adopted by resolution A/RES/55/25 of 15 November 2000 at the fifty-fifth session of the General Assembly of the United Nations. In accordance with its article 16, the Protocol will be open for signature by all States and by regional economic integration organisations, provided that at least one Member State of such organisations has signed the Protocol, from 12 to 15 December 2000 at the Palazzi di Giustizia in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002; *The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organised Crime*, opened for signature 12 December 2000, A/55/383.

³¹ Australia signed the Convention on 11 December 2002 and ratified it on 14 September 2005. Indonesia signed the Convention on 12 December 2000 and ratified it on 28 September 2009.

labour or services, slavery or practices similar to slavery, servitude or removal of organs.³²

The ILO Committee of Experts on the Application of Conventions and Recommendations ('CEACR') has provided guidance on the scope of the definition of forced labour, stressing that it encompasses trafficking in persons for the purposes of labour and sexual exploitation as defined by the Trafficking Protocol. This guidance supplements the United Nations ('UN') *Convention Against Transnational Organised Crime* (2000)³³ criminalising trafficking in persons whether it occurs within countries or across borders, and whether or not conducted by organised crime networks.³⁴

Clearly human exploitation is much more than human trafficking. The Crown Prosecution Service in England and Wales' definition of human trafficking is more apposite for this paper, since it not only recognises human trafficking as 'a serious crime that can present challenges' — it looks at the reality of the exploitation:

- a) It is a crime that is clandestine; it is modern day slavery and victims may be physically or psychologically "imprisoned" in either residential properties (as domestic servants) or places offering sauna and massage services. They are not visible;
- b) Trafficked victims do not always wish, or are not always able to, co-operate with the authorities as they often fear the consequences of giving evidence against their traffickers;
- c) Victims of trafficking and slavery are by definition extremely vulnerable; the support required before and during trials to enable them to give evidence should not be underestimated;
- d) Victims of forced labour are reluctant to report; however bad their circumstances, they consider their situation [here]³⁵ to be better than that offered in their home country;

³² *The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organised Crime*, opened for signature 12 December 2000, A/55/383.

³³ *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, opened for signature 12 December 2000, A/55/25.

³⁴ International Labour Office, above n 4.

³⁵ "Here" is referring to the destination country.

- e) Human trafficking cases nearly always cross borders and jurisdictions, requiring investigations and evidence to be obtained from source and transit countries.³⁶

These prosecutorial guidelines for when to prosecute or not come somewhat closer to identifying the scale of human exploitation but also recognise the need to identify and divert victims rather than prosecute, largely as a result of the application of the non-punishment provisions of the Trafficking Protocol via the common law doctrine of abuse of process. This places a duty on prosecutors to not only indict suspects on credible evidence, but to divert victims into suitable support, thus maximising potential witness evidence. It is an approach that this paper considers further later. However, given the historical connection between England and Australia, which remains important in the context of the application of law, this approach is worthy of consideration in the context of defining human exploitation to enable proper policy responses both in Australia and in Australia's cooperation with one of its closest neighbours.

By taking a focus on Australia and Indonesia, this paper endeavours to demonstrate that focussing on narrow definitions of human trafficking or forced labour or sexual exploitation has the potential to inhibit legal and policy responses. This is due to the inevitable consequence that potentially criminal conduct will escape sanction and victims will be denied funded support because the actions or actors do not fit within existing definitions. This is particularly true, as set out above, in the context of drug trafficking where coerced couriers are treated severely as part of an illegal trade rather than approached as potential victims of human exploitation, and where illegal immigrants or refugees are treated as self-interested economic migrants. So, if women and girls are forced workers or sexually exploited, the fact that they may also carry drugs should not mean that they are denied protective support.

Ultimately, what it is all about is human exploitation for profit. Whatever laws or policies are drafted to strengthen the armoury of nations to combat this global epidemic, accurate terminology is vital and needs to be capable of being properly and fairly enforced transnationally. The simplest approach in most countries would be to criminalise human exploitation to include slavery, human trafficking, forced labour, and

³⁶ CPS, *CPS Legal Guidance* (2015) CPS <www.cps.co.uk>.

sexual exploitation and allow for extra territorial jurisdiction for the protection of both adult and child victims in the same way as already exists in many states in relation to international and online child sexual abuse.³⁷ Where existing provisions require proof that the act done must be an offence in the territory concerned as well as in the destination country, then consideration could be given to harmonising criminal laws transnationally. Negotiating, agreeing, and drafting such legislative changes are the functions of lawyers and the process of uniformity has arguably already started with the International Bar Association ('IBA') survey on global rape legislation.³⁸

Assuming the legal profession and the legislature is engaged with these initiatives, there are lessons which can be learned immediately as to how lawyers can help to end a global slavery epidemic both in the context of protecting victims and exposing organised crime.

V TRANSNATIONAL ORGANISED CRIME

As introduced above, we traditionally think of organised crime in the context of fraud, money laundering, and drug trafficking. Meanwhile there is a massive global trade in people, particularly women and girls. According to the United Nations Office on Drugs and Crime, the sectors most frequently associated with human trafficking are agriculture or horticulture, construction, garments and textiles under sweatshop conditions, catering and restaurants, domestic work, entertainment, and the sex industry.³⁹ Women and children are by far the main victims of sex trafficking.⁴⁰ Human trafficking has been identified as a major transnational crime in the Asia-Pacific.⁴¹ It is often misunderstood

³⁷ In England and Wales, for example, certain offences committed abroad are, in certain circumstances, triable in UK courts. These generally relate to conspiracies but are also applicable to those who facilitate trafficking into the UK and to individual sexual offences involving children. A foreign national is not liable under English law for a sexual offence committed abroad. Offences committed by foreign nationals within the jurisdiction are triable in UK courts. See also Felicity Gerry, Catarina Sjolín and Lyndon Harris, *The Sexual Offences Handbook*, (Wildy, Simmonds and Hill Publishing, 2nd ed, 2014) ch 1.8.

³⁸ The author was asked to provide details on the laws of England and Wales to the IBA for the purposes of this survey.

³⁹ United Nations Office on Drugs and Crime, *Human Trafficking Frequently Asked Questions* (2015) United Nations Office on Drugs and Crime <<http://www.unodc.org/unodc/en/human-trafficking/faqs.html>>.

⁴⁰ International Labour Office, above n 4.

⁴¹ *Ibid* 32.

due to concern over migration,⁴² but trafficking is a booming and secretive industry based on modern slavery. It has been called the crime of the 21st Century.⁴³

Unsurprisingly, given the scale of human exploitation, a high degree of criminal income is generated by modern slavery – particularly in the context of the sex trade.⁴⁴ The ILO report concluded that ‘there is an urgent need to address the socio-economic root causes of this hugely profitable illegal practice if it is to be overcome’.⁴⁵ In 2013, the UN's Office on Drugs and Crime reported on transnational organised crime in East Asia and the Pacific (‘the UNDOC Report’).⁴⁶ The UNDOC Report identified human trafficking as a major issue and found that human trafficking is on the rise in a quarter of countries around the world. The study concludes with 48 recommendations on how the problems in relation to transnational organised crime can be addressed, and summarised four imperatives:⁴⁷

- 1) Understanding the problem of transnational organised crime, including better collection of data;
- 2) Establishing a normative framework by expanding the consensus which has begun with countries setting legislative and regulatory frameworks following the *Convention against Transnational Organised Crime* and the *Convention Against Corruption*;⁴⁸
- 3) Building technical capacity thorough security strategies that put crime on the priority list; and
- 4) Expanding regional partnerships.

On a transnational level, the UNDOC report concludes:

⁴² United Nations Office on Drugs and Crime, *Smuggling of Migrants: A Global Review and Annotated Bibliography of Recent Publications* (January 2011) <http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Smuggling_of_Migrants_A_Global_Review.pdf>.

⁴³ Weitenberg, above n 17.

⁴⁴ Polaris, *Human Trafficking: Overview* (2015) Polaris Project <<http://www.polarisproject.org/human-trafficking/overview>>.

⁴⁵ International Labour Office, above n 4.

⁴⁶ United Nations Office on Drugs and Crime, *Transnational Organised Crime in East Asia and the Pacific: A Threat Assessment* (April 2013) <http://www.unodc.org/documents/data-and-analysis/Studies/TOCTA_EAP_web.pdf>.

⁴⁷ *Ibid.*

⁴⁸ *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, opened for signature 12 December 2000, A/55/25; *United Nations Convention against Corruption*, opened for signature 9 December 2003, A/58/422.

In our globalising world, none of the former three will work if we do not have the fourth — the response beyond borders. At present, most contraband flows begin on one continent and end on another. Often the activities are cycled through a third continent. Globalization permits trafficking groups to operate seamlessly across borders. High-volume, cross-border flows of people, money and commodities create greater opportunities for criminals to make money. There are simply more people and situations to exploit. For this reason, only interventions at a regional or global level are likely to have any chance of succeeding. Unfortunately, law enforcement is inherently national in character. It is therefore necessary to integrate national responses into international strategies. This can be done by promoting partnerships across borders and developing international networks that champion “transnational organised justice”. This includes promoting regional collaborative efforts on border control, mutual legal assistance, extradition and similar efforts that require a vision that transcends national boundaries. This will help minimize the growth of “safe havens” for transnational organised crime. As has been stated repeatedly ‘*it takes a network to defeat a network*’.⁴⁹

The ILO report found:

‘[C]omprehensive measures are required that involve governments, workers, employers and other stakeholders working together to end forced labour ... the continued existence of forced labour is not only bad for its victims, it’s bad for business and development as well ... forced labour is a practice that has no place in modern society and should be eradicated as a matter of priority’.⁵⁰

It follows that cooperation is needed at global and national levels. Virtually all countries have ratified the United Nations *Convention against Transnational Organized Crime*,⁵¹

⁴⁹ Ibid iii.

⁵⁰ International Labour Office, above n 4.

⁵¹ Ibid *Convention against Transnational Organized Crime*, UN Doc A/55/25; Save for Barbados, the Congo, Iran, Japan and the republic of Korea: above n 30.

which guides the adoption of necessary laws to support counter-trafficking measures. This allows for cooperation in context, for example, of policing crime and migration.⁵²

The UNDOC Report highlights key issues and implications for response to transnational organised crime in 13 categories, summarised here:⁵³

- (i) Disrupting organised crime by disrupting money laundering.
- (ii) Developing affordable, accessible safe and legal migration channels by expanding migration opportunities, harmonising regional procedures and generally making it easier for people to move transnationally so that they are not vulnerable to exploitation.
- (iii) Improving the monitoring of labour standards especially inspections in the workplace and improvement of detection and punishment of those who employ illegal workers.
- (iv) Complementary border controls with specialist transnational units to dismantle migrant smuggling and trafficking in people networks
- (v) Generating political will to combat migrant smuggling by coherent responses and inter-regional cooperation among origin, transit and destination countries with recognition of the vulnerability of victims.
- (vi) Strengthening national laws and policies particularly in relation to migrant smuggling and to reflect existing international obligations to refugees and commitments to human rights.
- (vii) Improving data collection on transnational migrant smuggling including the Voluntary Reporting System on Migrant Smuggling and Related Conduct ('VRS-MSRC').
- (viii) Improving victim identification systems to enable the provision of protection and support.
- (ix) Investing in a victim centred approach with appropriate training for law enforcement to include the vital importance of ensuring the protection of victims.
- (x) Encouraging intelligence-led approaches to include transnational cooperative criminal intelligence structures.
- (xi) Better regional criminal justice coordination.

⁵² United Nations Office on Drugs and Crime, *Countering Human Trafficking in Indonesia* (6 November 2009) United Nations Office on Drugs and Crime
<<https://www.unodc.org/indonesia/2009/11/HumanTrafficking/story.html>>.

⁵³ *Ibid* 39, 139.

- (xii) Expand countermeasures such as extra territorial legislation and actions to block sites and remove websites relating to online abuse.
- (xiii) More and better research.

All require standardised mechanisms, collaborative responses, and inter-agency coordination with data collection and properly trained specialists. It also requires a re-shifting of attitudes away from the traditional view of (our Australian example) “illegal immigrants” or “drug traffickers” in order to differentiate between traffickers and victims. Identification (as with any crime) is the most vital since progress will never be made unless efforts are made to separately identify bosses from workers, victims from perpetrators, conspirators from pawns, or terrorists from cannon fodder.

Lawyers are not specifically mentioned in either the ILO report or the UNDOC report but they can play a key role. Where there is criminal, cross-border, terrorist, or suspect financial activity, lawyers are almost inevitably connected to the potential solution, perhaps more than any other stakeholder.

VI LAWYERS

Inevitably, in this context, research and recommendations are largely carried out by academic lawyers, but here we focus on practitioners — not in the context of courtroom advocacy in trafficking cases — but where there are (or may be) obligations and opportunities to expose and prevent transnational organised crime.

At the end of June 2008, there were 99 696 persons employed across legal services in Australia.⁵⁴ There are 1.2 million lawyers in the US.⁵⁵ These equate to approximately one per 300 citizens.⁵⁶ By a conservative estimate therefore, there could be more than 23 million lawyers in the world. Increased globalisation has changed the landscape of legal services. In 2011, Don Boyd, deputy chief executive of international law firm Norton Rose, wrote of the strategic alliance between Norton Rose Australia, firms in South Africa and

⁵⁴ Australian Bureau of Statistics, *8667.0 Legal Services, Australia, 2007-08* (24 June 2009) Australian Bureau of Statistics <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8667.0Main+Features32007-08>>.

⁵⁵ Jeff Jacoby, ‘US legal bubble can’t pop soon enough’, *The Boston Globe* (online), 9 May 2014 <<http://www.bostonglobe.com/opinion/2014/05/09/the-lawyer-bubble-pops-not-moment-too-soon/qAYzQ823qpfi4GQ120iPZM/story.html>>.

⁵⁶ Mark McLaughlin, ‘More Lawyers than Doctors; More Lawyers than Soldiers’, *Examiner.com* (online), 15 April 2012 <<http://www.examiner.com/article/more-lawyers-than-doctors-more-lawyers-than-soldiers>>.

Canada and London-based Norton Rose, which already had a significant international presence.⁵⁷ In his view, 'the case for globalised legal services has been well made: the factors in favour include the ability to assist clients with offshore interests, overseas career opportunities for staff, improved multi-jurisdictional legal teams'.⁵⁸ He notes Australia's trade relationships with China, India, and other 'emerging powerhouses' gave significant and upward moving figures for Asia as a market for legal service providers.⁵⁹

The adoption of technology and a global approach by law firms are clearly driven by a desire to develop full-service legal provision in the context of high revenue markets including energy, transport, resources, infrastructure, and financial institutions worldwide. Mr Boyd had in mind, for example, Australian mining interests in Africa and China's trade with Africa in 2010 (mostly in oil, gas and mining), which reached \$114.81 billion, a 43.5 per cent year-on-year increase. For global legal firms these are sophisticated and competitive cross border jurisdictions, which require highly educated and skilled legal teams in Australia and China as well as other countries to work together. It follows that new legal trade routes can play a key role in the sort of security strategies that the UNDOC report had in mind, although care would have to be taken not to compromise client confidentiality.

In a 2011 article in *The Jakarta Post*, the provision of legal services in Indonesia was summarised as follows:⁶⁰

Being one of the largest emerging and developing markets in Asia, Indonesia is indeed a key influence in the Asian economy. As an Indonesian lawyer, I feel proud but at the same time worried about how Indonesia will evolve. Indonesia's legal system and infrastructure are out-dated and may be ill-suited to keep up with the growth of its economy. While it is believed that Indonesia is becoming one of Asia's most powerful economies, the country's legal industry however, is not as powerful as some people may think. At the present moment

⁵⁷ Don Boyd, 'Globalisation changes the legal service business', *The Australian* (online), 3 June 2011 <<http://www.theaustralian.com.au/business/legal-affairs/globalisation-changes-the-legal-service-business/story-e6frg97x-1226068246632?nk=e1c4a35a89cd79497fe69341e3c7d729>>.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Tony Budidjaja, 'The future of Indonesia's legal profession: A lawyer's perspective', *Jakarta Post* (online), 11 April 2013 <<http://www.thejakartapost.com/news/2013/04/11/the-future-indonesia-s-legal-profession-a-lawyer-s-perspective.html>>.

Indonesia has many challenges to overcome to become an Asian legal superpower. Indonesia's biggest challenge is its obsolete and complicated legal system as well as weak legal infrastructure. Since independence in 1945, there has been a general trend toward replacing out-dated Dutch laws with those enacted by the legislative body.

Yet, many Dutch laws remain in place. As a matter of fact, most court actions taken in Indonesia are still initiated by reference to a provision in the *Civil Code*, which is a replica of the 1838 *Dutch Civil Code*. In addition to the civil law system, other legal systems, such as customary law and Islamic law, are still applied across Indonesia in a non-western context, and they serve as an influential force in various aspects such as family and inheritance. Besides, Indonesia has been enacting many statute laws that are heavily influenced by the common law. Despite Indonesia's huge gross domestic product ('GDP') and economic growth of around 6 percent per year in the past few years, in my view, Indonesia should still be regarded as a "third world" country in terms of the development of its legal profession, its legal educational and professional training system, as well as its judicial performance.⁶¹

It follows that movement towards global legal services allows for international cooperation in applying laws, policies, and procedures and training lawyers whether they move from one country to another or operate globally concerning exploitation as part of international legal networks. Logically, such collaboration can be between firms and/or individual practitioners and, with the input of academics and universities, can lead to the development of a uniform and collaborative approach to human exploitation.⁶²

VII AN HOLISTIC APPROACH TO JUSTICE

An holistic approach to the treatment and support for victims of human exploitation is proving to be successful, notably in the global work of the International Justice Mission ('IJM') which partners with local authorities to rescue victims of violence, bring criminals to justice, restore survivors, and strengthen justice systems. IJM already works in 18 communities throughout Africa, Latin America, and South and Southeast

⁶¹ Ibid.

⁶² Charles Darwin University, *Engagement with Indonesia Law Discipline* (2015) Charles Darwin University <http://www.cdu.edu.au/the-northern-institute/kseitl_LAW>.

Asia.⁶³ This holistic approach to survivor support and boosting criminal justice procedures is reflected more and more in the work of NGO's such as Hagar International. Programs for those who are identified as trafficked victims and placed in protection include assistance with recovery and well-being, economic empowerment, reintegration, and social enterprise.⁶⁴ In 2011, Hagar established a legal and protection unit. Launching a justice tour programme in 2012, Hagar's legal and protection unit adviser Priscilla Chan said:

A major part of what I do is make sure all our clients have timely access to legal services ... We work with external lawyers to make sure children are adequately represented in court when they are acting as victim witnesses, whether that is in a Cambodian court or in foreign cases, which are mostly in the US ... In 2011 Hagar was involved in 27 cases, including four in foreign courts that involved sexual exploitation of children.⁶⁵

Hagar has also provided training as part of the Singapore Government's Inter-Agency Taskforce's commitment to combat human trafficking to 'help strengthen the capabilities of frontline law enforcement officers so that they will be adequately equipped to deal with this difficult group of perpetrators and assist their victims'.⁶⁶ Some of the key training topics included:

- Global Trafficking in Persons ('TIP') trends and potential impact on Singapore;
- Common modus operandi of organised criminal groups;
- Victim identification and rescue of TIP victims;
- Impact of TIP on victims and how TIP victims can be better managed, and more.⁶⁷

In a recent justice tour, indications were that the valuable work of Hagar is hampered by the difficult task of identification of victims and by the extent to which successful

⁶³ International Justice Mission, *Where We Work* (2015) International Justice Mission <<https://www.ijm.org/where-we-work>>.

⁶⁴ Hagar International, *What We Do* (2015) Hagar International <<http://hagarinternational.org/international/our-work/what-we-do/>>.

⁶⁵ Hagar International, 'Seeking Justice' (Press Release, 2012) <http://hagarinternational.org/australia/files/LIV_Article.pdf>.

⁶⁶ Hagar International, *Stamping Out Transnational Crime in Singapore* (2014) Hagar International <<http://hagarinternational.org/singapore/stamping-out-transnational-crime-in-singapore/>>.

⁶⁷ Hagar International, *Where We Work* (2015) Hagar International <<http://hagarinternational.org/international/our-work/where-we-work/cambodia/>>.

holistic programmes such as this depend on individual support.⁶⁸ Clearly such aftercare is vital and the work of organisations like Hagar provides a blueprint that can be rolled out globally. However, there is also a need for a focus on crime prevention.

Victims of crime are often involved in criminal activity including border offences and drug trafficking. An Organization for Security and Co-operation in Europe ('OSCE') paper prepared in consultation with the *Alliance against Trafficking in Persons* Expert Co-ordination Team found:⁶⁹

It is often a deliberate strategy of the traffickers to expose victims to the risk of criminalization and to manipulate and exploit them for criminal activities. It is therefore not uncommon that victims of trafficking commit criminal offences or other violations of the law directly connected with, or arising out of, their trafficking situation. In these situations they often come to the attention of the authorities primarily as offenders and they may not be easily recognized as actual victims of a serious crime.⁷⁰

It follows that transnational cooperation requires the intersection between law, health, and employment to ensure that combatting human exploitation in all its forms is successful, not just for the purposes of a prosecution, but also in relation to the long-term future of victims. The availability of programmes such as the few outlined here require political responses, but also the engagement of the legal sector to ensure that systems encourage and support victims through the process and ensure that the correct actors are prosecuted and punished.

⁶⁸ *First Hand look at Hagar programs in Phnom Penh* (October 2014) Hagar News <<http://us7.campaign-archive2.com/?u=ef02e431e8ea9c82e2efa0d17&id=eea879550d&e=3b71ad45e7>>.

⁶⁹ Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, 'Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking' (2013) <<http://www.osce.org/secretariat/101002?download=true>>.

⁷⁰ *Ibid.*

VIII NON-PUNISHMENT OF VICTIMS

Accurate victim identification is vital for the effective investigation of the trafficking crime, as well as to ensure effective protection of victims' rights, including non-punishment of victims for offences caused or directly linked with their being trafficked. It becomes all the more important in the context of international terrorism that those who are coerced are separated from those who volunteer.

The Trafficking Protocol requires identification and non-punishment of trafficked victims:

Article 26 — Non-punishment provision

Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.

Putting aside pre-conceived notions of criminal liability, the modern approach to modern slavery must involve non-punishment, that is: not to prosecute even clear criminal offending that occurs due to exploitation. For any prosecution authority (or investigating judge) that has to balance the public interest in prosecuting or not, these are issues that ought to be taken into account. In a sense, it does not matter if the Trafficking Protocol has not been ratified in a particular country. It is a matter of common sense. If the scourge of human exploitation is to be tackled, in the right case, it ought to be possible to argue that a trafficked individual should not be prosecuted at all, or that they should not be punished. With or without the protocol, this is a simple solution that lawyers and judges can achieve which will have even greater effect with the right support services in place.

At the ground level, someone suspected of committing a criminal offence might also be an exploited victim. European cases have dealt with the factual need to identify an individual's status as a victim on credible evidence.⁷¹ Any jurisdiction would require the same. On an evidential basis, this can mean more than just testimony; following up and tracking histories may be required.

⁷¹ *Rantsev v Cyprus and Russia*, Application no 25965/04 (Strasbourg 7 January 2010) and *CASE OF M AND OTHERS v ITALY AND BULGARIA*, Application no 40020/03 (31st July 2012).

For those victims apprehended committing a crime (national or transnational), if such evidence is sensitively gathered at an early stage, prosecutors (or investigating judges) can give consideration to the question of whether to proceed with prosecuting a suspect who might be a victim of trafficking, particularly where the suspect has been compelled or coerced to commit a criminal offence as a direct consequence of being trafficked.

Guidance in the UK is that prosecutors should adopt a three-stage assessment:

- 1) Is there a reason to believe that the person has been trafficked? If so,
- 2) If there is clear evidence of a credible defence of duress, the case should be discontinued on evidential grounds; but
- 3) Even where there is no clear evidence of duress, but the offence may have been committed as a result of compulsion arising from trafficking, prosecutors should consider whether the public interest lies in proceeding to prosecute or not.⁷²

The rationale for non-punishment of victims of trafficking is that, whilst on the face of it, a victim may have committed an offence, the reality is that the trafficked person acts without real autonomy. They have no, or limited, free will because of the degree of control exercised over them and the methods used by traffickers, consequently they are not responsible for the commission of the offence and should not therefore be considered accountable for the unlawful act committed. The vulnerable situation of the trafficked person becomes worse where the State fails to identify such a person as a victim of trafficking, as a consequence of which they may be denied their right to safety and assistance as a trafficked person and instead be treated as an ordinary criminal suspect.⁷³

This requires qualified and trained officials to identify and help victims of trafficking and engaging lawyers in those duties. If evidence or information obtained supports the fact that the suspect has been trafficked and committed the offence whilst they were coerced, informed consideration can be given to diverting the victim away from prosecution and into programs such as those run by Hagar International, as set out above. It requires governments to ensure support is available and lawyers to ensure the

⁷² Taken from UK CPS Legal Guidance at <www.cps.co.uk>.

⁷³ Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, above n 69.

right people are diverted. Cooperation is required to ensure that those who have migrated transnationally under coercion will be sympathetically treated.

For criminal defence lawyers, suspicions that a client might be a victim of trafficking and compelled to commit a criminal offence, as a direct consequence of being exploited, is an opportunity to identify a victim and bring relevant evidence to the prosecutor's (or investigating judge's) attention and potentially secure an acquittal, regardless of the elements of the alleged offending. The questions are largely the same:

- Is there a reason to believe that the person has been trafficked? If so,
- Collect or seek clear evidence of trafficking — details and circumstances — enough to engage the prosecution (or investigating judge). This would be akin to a plea for clemency before any proceedings take place.
- Continue to defend on the facts and raise any relevant and available defences such as duress.

Such arguments are already being pursued by the author in an Indonesian matter and have been raised in the recent case of an alleged drug trafficker from New Zealand.⁷⁴

IX JUDGES IN CRIMINAL CASES

In civil law jurisdictions, with little or no history of jury trial, the decisive powers of investigative judges are wide and can accommodate an approach of non-prosecution/non-punishment. At common law, trial judges have the power to stay proceedings as an abuse of process of the court where to continue would be vexatious and oppressive.⁷⁵ In essence, the two systems can both accommodate a merciful approach to trafficked victims. The process is well underway in England and Wales: In *R v N; R v LE* [2012],⁷⁶ the UK Court of Appeal considered four unconnected appeals involving offenders who, at different stages after conviction, had been found to be victims of trafficking in human beings and to have been coerced into committing the offences.

⁷⁴ 'New Zealander on Indonesia drugs charge a 'victim of human trafficking'', *The Guardian* (online), 18 January 2015 <<http://www.theguardian.com/world/2015/jan/18/new-zealander-on-indonesia-drugs-charge-a-victim-of-human-trafficking>>.

⁷⁵ Felicity Gerry and Catarina Sjolín, *The Sexual Offences Handbook* (Wildy, Simmonds and Hill Publishing, 1st ed, 2010) ch 1. The second edition is due in 2014.

⁷⁶ EWCA Crim 189.

The second to fourth appellants had been found to have been trafficked from Vietnam. The second and fourth were sentenced to imprisonment for eight months and two years respectively for offences concerning the cultivation of cannabis, and the third to a detention and training order for 12 months. They had also later been found to have been under 18 years old when sentenced. The first appellant was a woman in her mid-thirties who had been sentenced to imprisonment for six months for possession of a false identity document. She had been given it when she was trafficked for the purposes of prostitution. It was not until after her imprisonment that it became clear that she had pleaded guilty because of a warning by her solicitor that if the police thought her account was false the charges would be more serious.

In giving judgement, the Court of Appeal gave guidance concerning how, after proceedings have begun, to best approach the 'interests of those who were or might be victims of human trafficking and who became enmeshed in criminal activities in consequence, in particular child victims'.⁷⁷ The court had the advantage of European Directive 2011/36 and previous decisions.⁷⁸ Provision is also made under Article 8 of the *European Convention on Human Rights* for the non-prosecution or non-application of penalties to victims who had offended under compulsion as a result of trafficking.⁷⁹ The court noted that the reasoning for what is effectively immunity from prosecution is that:

the culpability of the victims might be significantly diminished, and sometimes effectively extinguished, not merely because of age, but because no realistic alternative was available to them but to comply with those controlling them. Where victims were under 18 years old their best interests were the primary, though not sole, consideration. Victims were not safeguarded from prosecution for offences unconnected with the trafficking, though it might constitute substantial mitigation. A level of protection was required and it was provided by the exercise of the abuse of process jurisdiction.⁸⁰

The court went on to state that:

⁷⁷ *Ibid* [3].

⁷⁸ *R. v LM* [2010] EWCA Crim 2327, [2011] 1 Cr. App. R. 12 and *R. v N* [2012] EWCA Crim 189, [2013] Q. 379 applied.

⁷⁹ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

⁸⁰ *R v N; R v LE* [2012] EWCA Crim 189 [45], [54]-[55], [67], [74].

where a court considered issues relevant to age, trafficking and exploitation, the prosecution would be stayed if the court disagreed with the decision to prosecute.⁸¹

It held that:

if the facts of the second to fourth appellants' ages and their having been trafficked had been known when the decisions to prosecute were made, they would not have been prosecuted, and if they had been prosecuted an abuse of process argument would have been likely to succeed on the basis of the information later available. The same result would have been reached in the case of the first appellant.⁸²

The Court made clear that Article 26 of the Trafficking Protocol did not prohibit the prosecution or punishment of victims of trafficking *per se*, but did require the Prosecutor to give careful consideration as to whether public policy calls for a prosecution.⁸³ Per the then Lord Chief Justice:

Summarising the essential principles, the implementation of the United Kingdom's Convention obligation is normally achieved by the proper exercise of the long established prosecutorial discretion which enables the Crown Prosecution Service, however strong the evidence may be, to decide that it would be inappropriate to proceed or to continue with the prosecution of a defendant who is unable to advance duress as a defence but who falls within the protective ambit of Article 26. This requires a judgment to be made by the CPS in the individual case in the light of all the available evidence. That responsibility is vested not in the court but in the prosecuting authority. *The court may intervene in an individual case if its process is abused by using the "ultimate sanction" of a stay of the proceedings* (emphasis added)... The fact that it arises for consideration in the context of the proper implementation of the United Kingdom's Convention obligation does not involve the creation of new principles. Rather, well-established principles apply in the specific context of the Article 26 obligation, no more, and no less. Apart from the specific jurisdiction to stay proceedings where the process is abused, the court

⁸¹ *Ibid* [17].

⁸² *Ibid*.

⁸³ *Ibid*.

may also, if it thinks appropriate in the exercise of its sentencing responsibilities, implement the Article 26 obligation in the language of the article itself, by dealing with the defendant in a way which does not constitute punishment, by ordering an absolute or a conditional discharge.⁸⁴

In the context of criminal cases in any country, in many ways this approach to vulnerable suspects is not a wholly new approach; there have always been cases when there is a positive obligation not to prosecute that fundamentally engages the public interest test for any prosecution. It follows that there is an obvious and basic approach that lawyers and judges can adopt which can be used to deal with trafficked victims:

- Obtain evidence that the arrested suspect is a trafficked victim;
- The prosecutor (or investigating judge) decides not to prosecute and refers the trafficked victim to local services;
- Defence lawyers make representations about discontinuance;
- Defence lawyers consider any available defences of duress/coercion; and
- Trial judges stop the proceedings at the point that evidence is credible that the defendant is a trafficked victim.

International cooperation can be achieved by harmonising the approach of criminal justice and border systems in this regard. Concerns about slavery can therefore be assuaged by:

- Uniformity of law and policy across jurisdictions in the context of exploitation;
- Extra territorial laws agreed transnationally for prosecution;
- Principled advocates taking the time to advise on evidence and divert exploited people to the status of witness, not suspect;
- Judicial understanding and intervention; and
- Public understanding that trafficked victims should not face punishment in the wider public interest of identifying victims, and supporting them

⁸⁴ See also *R v O* [2008] EWCA Crim 2835, *R v LM, MB, DG, Talbot and Tijani* [2010] EWCA Crim 2327 and *R v O* [2011] EWCA Crim 226.

through the process not just for their rehabilitation but also in the prosecuting of the traffickers.

Importantly the non-punishment concept was adopted in the new ILO Protocol in June 2014 with 437 votes in favour.⁸⁵ It updates the existing ILO *Convention 29 on Forced Labour* adopted in 1930 into the modern era to address practices such as human trafficking.⁸⁶ These arguments are more easily harnessed when one considers the current implementation rate of the Trafficking Protocol in the Asia-Pacific region,⁸⁷ and since the UN recommended principles in regards to non-criminalisation.⁸⁸

X USING TECHNOLOGY

Law and data can combine to help to end a global slavery epidemic through financial reporting, modern policing, and corporate responsibility.⁸⁹ This is a huge topic and the real question for lawyers is how to use technology and the law ethically to combat human trafficking. The issues cover crime prevention, crime investigation, and crime prosecution but also engage human rights issues in relation to freedom of information, expression, and the right to private life.⁹⁰

The collection of data on those subject to exploitation does not have to wait for those people to be rescued or caught offending or coerced into terrorism. Subject to safety planning for victims, research, data collection, and analysis are critical to effective advocacy efforts and resource mobilisation, programme development, policy

⁸⁵ International Labour Office, 'ILO adopts new Protocol to tackle modern forms of forced labour' (Press Release, 2014) <http://www.ilo.org/global/about-the-ilo/media-centre/press-releases/WCMS_246549/lang--en/index.htm>.

⁸⁶ Ibid; *Convention Concerning Forced or Compulsory Labour* ILO 29 (entered into force 1 May 1932).

⁸⁷ Jacqueline Joudo Larsen, 'The trafficking of children in the Asia-Pacific' (Working Paper No 415, Australian Institute of Criminology, April 2011) <<http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi415.html>>.

⁸⁸ Bijan Hoshi, 'Persons in International Law' (2013) 1(2) *Groningen Journal of International Law* 54 <<https://groningenjil.files.wordpress.com/2014/01/02-hoshi.pdf>>.

⁸⁹ Felicity Gerry, 'Using Technology to Combat Human Trafficking' (Paper presented at the 5th CILS Conference, Indonesia, 2015); For a full discussion on the data issues surrounding human exploitation, see Felicity Gerry, 'Understanding the Data Protection and Privacy Issues Surrounding Human Trafficking' (Paper presented at CPDP Conference, Brussels, January 2015).

⁹⁰ For a fuller discussion see Felicity Gerry 'Using Technology to Combat Human Trafficking' (Paper presented at the 5th CILS Conference, Indonesia, 2015).

implementation and monitoring of interventions.⁹¹ Data showing life patterns can be used to improve lives for the most vulnerable in society. There are plainly “good” uses for data analysis such as the improvement of government services.⁹² The importance of data has been observed:

Many experts now believe that big data is the most important new weapon in the fight against modern slavery. When it comes to fighting human trafficking, technology is key. Law enforcement agents need constant access to a stream of big data in order to cross check and reference stolen and lost travel documents, background check suspected criminals, and reveal patterns in criminal behaviour. Old fashioned police and detective work is no longer sufficient to fight criminals who are using smartphones and bitcoins. Police now have to crack codes to access information saved on password-protected devices and analyze large quantities of data in order to monitor the fluid and ever-changing activities of criminals who have proven themselves capable of adapting to new methods and utilizing new tools to turn a profit.⁹³

Recently, a UN study showed that more people have mobile phones than toilets.⁹⁴ Technology makes many aspects of human trafficking more visible and more traceable.⁹⁵ The collection of data on those subject to exploitation does not have to wait for those people to be rescued or caught offending or coerced into terrorism. Economic prosperity and attracting foreign investment, as always for developing, requires confidence in future business and cooperation. Research, data collection, and analysis are critical to effective advocacy efforts and resource mobilisation, programme

⁹¹ United Nations Entity for Gender Equality and the Empowerment of Women, *Conducting research, data collection and analysis* (2012) United Nations Entity for Gender Equality and the Empowerment of Women <<http://www.endvawnow.org/en/articles/322-conducting-research-data-collection-and-analysis-.html>>.

⁹² Sarah Marsh ‘How should councils use data? – debate’, *The Guardian* (online), 28 February 2014, <http://www.theguardian.com/local-government-network/2014/feb/27/how-should-councils-use-data-live-debate?CMP=tw_t_gu>.

⁹³ Christine Maza, *How Technology is turning the tables on human traffickers* (25 December 2013) Policy.Mic <<http://mic.com/articles/77303/how-technology-is-turning-the-tables-on-human-traffickers>>.

⁹⁴ Yue Wang, ‘More People Have Cell Phones Than Toilets U.N. Study Shows’, *Time Magazine* (online), 25 March 2013 <<http://newsfeed.time.com/2013/03/25/more-people-have-cell-phones-than-toilets-u-n-study-shows/>>.

⁹⁵ Danah Boyd, *What is the role of technology in human trafficking?* (7 December 2011) Danah Boyd Apophenia <<http://www.zephoros.org/thoughts/archives/2011/12/07/tech-trafficking.html>>.

development, policy implementation, and monitoring of interventions.⁹⁶ Data showing life patterns can be used to improve lives for the most vulnerable in society. This builds on “good” uses for data analysis such as the improvement of government services.⁹⁷

Data analysis can go further — devices can be used to map the pattern of movement.⁹⁸ Mobile phones have already been used to track poachers of animals.⁹⁹ In Bahrain, for example, every migrant worker receives a SIM card and flyers by the government when entering the country, so the ministry of labour can track them and (officially) send them information related to the risk of human trafficking, including hotline numbers. With some creativity, the same can be done to monitor the appalling state of affairs as millions are confined to camps on the borders of Syria or individuals are trafficked and abused within countries and from one country to another. Smart technology, which gives big benefits to the public in developed countries by data analysis, adjusts the provision of services and facilities to only those which are *used* and *required*.¹⁰⁰ It is a small step to move the concept to less developed nations, but crowd-sourcing technology is already being used to protect people in dangerous environments — notably Jakarta.¹⁰¹

Of course, surveillance/data manipulation is one of the potentially greatest human rights abuses and those of us in the legal/technological community all recognise the dangers of intrusive surveillance and invasion of privacy. However, human society progresses with understanding and knowledge and harnessing data as a force for good can facilitate communication and understanding and enhance rights in developed and underdeveloped countries. Using technology in such contexts must be ethically and carefully handled and compliance with existing international obligations on human freedoms need not be compromised if such an approach is proportionate and according to law. At present it has

⁹⁶ Ibid 76.

⁹⁷ Marsh, above n 92.

⁹⁸ Ibid.

⁹⁹ Rhett Butler, *Discarded cell phones help fight rainforest poachers* (24 June 2014) Mongabay.com <<http://news.mongabay.com/2014/0624-rainforest-connection-interview.html>>.

¹⁰⁰ Taken in part from the author's book chapter for the CPDP conference 2015.

¹⁰¹ University of Wollongong, *Map Jakarta (PETAJAKARTA) Project*, (2015) University of Wollongong <<http://smart.uow.edu.au/projects/UOW164497.html>>.

to work outside of global agreement on cyber law,¹⁰² but taking the opportunity to use data to combat human rights abuses is a positive that ought to be embraced.¹⁰³

Ideas and practices developed in cosmopolitan centres such as the United Nations necessarily require translation into terms appropriate to the local context.¹⁰⁴ This is achieved by a combination of collective responsibility afforded to stakeholders networking together and government action plans, which involve active collaboration with civil organisations and communities.¹⁰⁵ Human rights abuses occur, as with all human behaviour, in three contexts: past abuse, ongoing abuse, and abuse to come. Human history is understood through security, economy, health, education, and culture. These are terms that scientists can understand too. It is time for some big thinking to be done on big data.¹⁰⁶ Clearly for such thinking to be effective, to protect from undue abuse through surveillance and to be properly scrutinised, law and policy needs to be engaged.

XI CORPORATE RESPONSIBILITY

Tackling global slavery does not stop with governments, NGO's, or criminal justice — corporate and financial entities are also engaged. Corporate enterprises in legitimate global markets now widely seek good practical advice in the move toward corporate responsibility.¹⁰⁷ It is seen as good public relations and large conglomerates are working to ensure that grand statements about corporate responsibility are reflected in observable actions. There is emerging human rights and international legal discourse focussing on the interplay between human rights law and other specific domains of international law. Business corporate responsibility is being seen as 'more than just a

¹⁰² For a fuller discussion on the rule of law online see Felicity's forthcoming report on the draft Cyber Law for Cambodia for the ILRS of the ABA; Felicity Gerry and Nadya Berova, 'The rule of law online: Treating data like the sale of goods: Lessons for the internet from OECD and CISG and sacking Google as the regulator computer' (2014) 30(5) *Law & Security Review*.

¹⁰³ Felicity Gerry QC, 'Data Uses to Combat Human Rights Abuses' (2014) 33 (4) *IEEE Technology & Society Magazine* 42-43.

¹⁰⁴ P.Levitt and S.E. Merry, 'Unpacking the Vernacularization Process: The Transnational Circulation of Women's Human Rights' (Research Report, New York University, 2008) <http://citation.allacademic.com/meta/p_mla_apa_research_citation/3/1/0/9/2/pages310922/p310922-1.php>.

¹⁰⁵ Jeswynn Yogarathnam, 'A Review of the 2010 Domestic Violence Law in Timor-Leste' (2013) 8(1) *Asian Journal of Comparative Law* 1-26.

¹⁰⁶ Gerry, above n 103.

¹⁰⁷ See the author's forthcoming paper on achieving the G20 gender equality target by uniformity, extra territoriality and corporate responsibility.

bolt-on'.¹⁰⁸ On 1 October 2014, President Barack Obama announced that the United States will develop a national action plan to promote responsible and transparent business conduct, in line with the *UN Guiding Principles on Business and Human Rights*. The European Commission has also invited Member States to develop a national plan for the implementation of these principles.¹⁰⁹ Corporate responsibility to respect human rights has been summarised as follows:¹¹⁰

- The UN Framework unequivocally recognises that States have the duty under international human rights law to protect everyone within their territory and/or jurisdiction from human rights abuses committed by business enterprises. This duty means that States must have effective laws and regulations in place to prevent and address business-related human rights abuses and ensure access to effective remedy for those whose rights have been abused.
- The UN Framework also addresses the human rights responsibilities of businesses. Business enterprises have the responsibility to respect human rights wherever they operate and whatever their size or industry. This responsibility means companies must know their actual or potential impacts, prevent and mitigate abuses, and address adverse impacts with which they are involved. In other words, companies must know — and show — that they respect human rights in all their operations.
- The UN Framework also recognises the fundamental right of individuals and communities to access effective remedy when their rights have been adversely impacted by business activities. When a business enterprise abuses human rights, States must ensure that the people affected can access an effective remedy through the court system or other legitimate non-judicial process. Companies, for their part, are expected to establish or participate in effective

¹⁰⁸ Robert Gibson, 'Corporate Responsibility is more than just a bolt on says construction boss', *The Journal* (online) 16 October 2014 <<http://www.thejournal.co.uk/business/smes/corporate-responsibility-more-just-bolt-on-7948059>>.

¹⁰⁹ CSR Europe, *US to develop National Action Plan consistent with UN Guiding Principles on Business & Human Rights* (1 October 2014) CSR Europe <<http://www.csreurope.org/us-develop-national-action-plan-consistent-un-guiding-principles-business-human-rights#.VEYtO4oayK0>>.

¹¹⁰ *The UN Guiding Principles on Business and Human Rights: An Introduction* (2012) <http://www.ohchr.org/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf>. This document summarises the content of the UN Guiding Principles and describes the mandate of the UN Working Group on Business and Human Rights, which has been established to aid in their implementation. For the full text of the Guiding Principles, see OHCHR.org.

grievance mechanisms for any individuals or communities adversely impacted by their operations.

- Importantly, the UN Framework clarifies that the corporate responsibility to respect human rights exists independently of States' ability or willingness to fulfil their duty to protect human rights. No matter the context, States and businesses retain these distinct but complementary responsibilities.¹¹¹

In their book *Enron and World Finance: A Case Study in Ethics*, Paul H Dembinski, Carole Lager, Andrew Cornford, and Jean-Michel Bonvin cover the different aspects of corporate practice and governance, law and ethics involved in the Enron case, and of the policy responses to the recent corporate scandals in the USA and internationally. Broadly, they classify corporate responsibility (albeit in the context of the Enron investment scandal) under the following headings:¹¹²

- (i) Transactions and institutional structure and the need for transparency of operations.
- (ii) High-quality accounting and auditing conforming with regulations.
- (iii) Corporate governance and the need for good corporate governance with Boards of Directors, regulators, banks and investors, credit rating agencies and investment analysts all having essential roles as "gatekeepers".
- (iv) Ethical corporate culture. A firm's organisation and functioning which is conducive to the observance of fundamental values and moral principles (including in relations with those external to the firm, that assure, or are significantly affected by, its functioning).¹¹³

For all countries, particularly those developing at a rapid rate, this requires attention as, if the corporate responsibility concept grows elsewhere, some companies will avoid

¹¹¹ Ibid.

¹¹² See Bill Keller, 'Enron For Dummies', *New York Times* (online) 26 January 2002 <<http://www.nytimes.com/2002/01/26/opinion/enron-for-dummies.html>>.

¹¹³ Paul H. Dembinski, Carole Lager, Andrew Cornford and Jean-Michel Bonvin (eds), *Enron and World Finance: A Case Study in Ethics* (Palgrave MacMillan, 2006) <<http://www.strongwindpress.com/pdfs/tuijian/enron%20and%20world%20finance%20-%20a%20case%20study%20in%20ethics.pdf>>.

doing business with those implicated in human exploitation. For example, Caroline Quinteros observed:¹¹⁴

The global garment-manufacturing industry will confront significant changes from 2005, when the system of quotas established under the Multi-Fibre Agreement comes to an end. These changes pose serious threats to jobs in the Central American assembly plants, or maquila industry. One possibility, however, is that “politically correct” consumption could provide a niche market for firms that are committed to corporate social responsibility and the respect for human rights, and that this might even be a way to improve working conditions in the region. In this sense, notwithstanding the grave risks it represents for the very poorest, the market could serve to bring about changes favourable to working people.¹¹⁵

Lawyers representing clients in businesses such as construction or mining, which often employ subcontractors or migrant workers, can influence clients to adopt policies to ensure the ethical treatment of their employees or the employees of those to whom they subcontract work. Lawyers can advise on the establishment of procurement policies that require sub-contractors to demonstrate their dealings are ethical, they can train their own legal staff appropriately, and can report suspicions about human exploitation to clients before deals are done. It is therefore clear that on a global business level, international cooperation is vital to create good governance transnationally and this is where lawyers are key.

XII MANDATORY REPORTING

In many countries the law has developed to target organised crime. These include mandatory and financial reporting. In Australia, there are duties to report certain crimes. In NSW, for example, this exists under s 316 of the *Crimes Act 1900*,¹¹⁶ but only applies where a person knows or believes that an offence has been committed, not where there is mere suspicion on reasonable grounds. Section 316 provides:

¹¹⁴ Carolina Quinteros, ‘Corporate responsibility and the US-Central America Free Trade Agreement (CAFTA): are they compatible?’ (2005) 15(3 & 4) *Development in Practice* <<http://www.developmentinpractice.org/journals/corporate-responsibility-and-us-central-america-free-trade-agreement-cafta-are-they-compati>>.

¹¹⁵ *Ibid.*

¹¹⁶ *Crimes Act 1900* (NSW).

- (1) If a person has committed a serious offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.
- (2) A person who solicits, accepts or agrees to accept any benefit for himself or herself or any other person in consideration for doing anything that would be an offence under subsection (1) is liable to imprisonment for 5 years.
- (3) It is not an offence against subsection (2) merely to solicit, accept or agree to accept the making good of loss or injury caused by an offence or the making or reasonable compensation for that loss or injury.
- (4) A prosecution for an offence against subsection (1) is not to be commenced against a person without the approval of the Attorney General if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection.
- (5) The Governor may make regulations, not inconsistent with this Act, prescribing a profession, calling or vocation as referred to in subsection (4).

In terms of definitions, 'Person' includes 'any society, company or corporation'.¹¹⁷ 'Serious offence' means any offence that is punishable by imprisonment for five years or more. Therefore most of the human trafficking offences would be covered (e.g. slavery offences under s 270.3 of the *Criminal Code* carry terms of 25 and 17 years, and trafficking offences under s 271.2 carry terms of 12 years).¹¹⁸ Legal Practitioners have been prescribed under s 316.5.¹¹⁹

The prosecution does not have to prove that the accused knew that the offence was a serious offence. The accused must have subjective knowledge of the commission of the

¹¹⁷ *Crimes Act 1900* (NSW) s 4.

¹¹⁸ *Criminal Code Act 1899* (Cth) s 260.3, 271.2.

¹¹⁹ *Ibid* s 316.5; Others are medical practitioners; psychologists; nurses; social workers (including victim support workers and counsellors), academic and professional researchers but not accountants or investigators.

offence, not mere suspicion.¹²⁰ Material facts are not facts already known to the police.¹²¹ So, subject to the Attorney General's fiat, there is the potential for prosecution of lawyers directly and, in any event, for their clients.

In the Northern Territory of Australia, under s 26 of *The Care and Protection of Children Act*,¹²² it is mandatory to report child abuse and neglect cases where children have been or are likely to be a victim of a sexual offence, which clearly can be applied to the sexual exploitation of children. The objective of the Act is to promote the well-being of children by protecting them from harm and exploitation and by maximising their opportunities to realise their full potential.¹²³ The Department of Children and Families or the police *must* be contacted if *any person* believes on reasonable grounds that:

- Any child aged less than 18 has suffered or is likely to suffer harm or exploitation;
- Any child less than 14 years has been or is likely to be the victim of a sexual offence (includes sexually active);
- Any child aged less than 18 years has been or is likely to be a victim of a sexual offence occurring in the context of a special care relationship.

There are also provisions in the *Domestic and Family Violence Act* that require every adult in the Northern Territory to report to the police, if they believe on reasonable grounds, either or both of the following:¹²⁴

- Another person has caused or is likely to cause serious physical harm to someone else with whom they are in a domestic relationship;
- The life or safety of another person is under serious or imminent threat because domestic violence has been, is being, or is about to be committed.¹²⁵

The workability and success of these provisions is still under review but again, it is a perception issue as the broad scope of the legislation has the potential to engage not

¹²⁰ *Wozniak* (1989) 40 A Crim R 290.

¹²¹ *Stone* [1981] VR 737.

¹²² *The Care and Protection of Children Act 2007* (NT) s 4.

¹²³ *Ibid* s 229.

¹²⁴ *Domestic and Family Violence Act 2007* (NT).

¹²⁵ *Ibid* s 124A.

just individual situations of abuse and violence, but organised operations, and the reporting duties here are mandatory.¹²⁶

XIII FINANCIAL REPORTING

In relation to anti-money laundering and counter-terrorism, the law has also developed in many countries to target profit from organised crime. It is in this context that the concerns about terrorist funding arise. The UNDOC Report urges that across all crime types, the mantra “follow the money” should apply:

Connected to all crime is the threat and existence of money laundering which amounts to billions of US dollars worldwide ... past experience points to one main conclusion: money laundering is a crime that has a unique impact on those countries where it is left unchecked. It damages reputations and frightens away honest investment. It opens up financial institutions to criminality. By tackling money laundering — by “following the money” — law enforcement efforts disrupt organised crime by tackling its lifeblood. Disruption also undermines the role-model status of organized crime bosses in the eyes of small-scale offenders and may prevent them from becoming major criminals themselves. By addressing the issues of money laundering governments also promote a fair and just society where crime is seen not to pay and, which prevents criminals from enjoying the fruits of their crimes.

In relation to certain businesses, lawyers can and should advise in relation to disclosure responsibilities. In Australia this is effected by the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* ('AML/CTF Act')¹²⁷ and the *Financial Transaction Reports Act 1988*.¹²⁸

Under s 41 of the AML/CTF Act, reporting entities have an obligation to report suspicious matters to Australian Transaction Reports and Analysis Centre ('AUSTRAC')

¹²⁶ Board of Inquiry into the Child Protection System in the Northern Territory 2010, 'Growing them Strong, Together: Promoting the safety and wellbeing of the Northern Territory's children (2010) <http://www.childprotectioninquiry.nt.gov.au/_data/assets/pdf_file/0009/49779/CPSR_Summary.pdf>.

¹²⁷ *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).

¹²⁸ The AUSTRAC Regulatory Guide advises that 'Regulated Entities' should be mindful of all their legislative obligations when developing an AML/CTF framework, such as the *Crimes Act 1914*, *Charter of the United Nations Act 1945*, *Privacy Act 1988*, *Criminal Code Act 1995*, *Corporations Act 2001*, *Suppression of the Financing of Terrorism Act 2002*, *Proceeds of Crime Act 2002* and the *International Trade Integrity Act 2007*; <http://www.austrac.gov.au/files/regguide_full.pdf>.

if these matters are connected to the actual or potential provision of a designated service.¹²⁹ A reporting entity is a person who provides a designated service.¹³⁰ Designated services are essentially financial services, bullion services, and gambling services.¹³¹ There is a provision to specify other services. There is no obligation on a provider of legal services to report, but if a lawyer is giving comprehensive advice, then, by that route, the legislation will target those businesses through which criminal funds are channelled.

The AUSTRAC Regulatory Guide focusses on money laundering and financing of terrorism as issues of concern at UN level especially where:

organised crime, drug trafficking, and corruption are involved, the consequences of money laundering are bad for business, development, government, and the rule of law ... criminals are now taking advantage of the globalisation of the world economy by transferring funds quickly across international borders. Rapid developments in financial information, technology, and communication allow money to move anywhere in the world with speed and ease. This makes the task of combating money laundering more urgent than ever.¹³²

Here the focus is on funding crime and terrorism, but clearly such funds are largely linked to the abusive source of massive human exploitation. The incentives for legitimate businesses to report are not just ethical, but the penalties for non-compliance are significant. The AUSTRAC guide continues:

Reporting entities that do not develop and implement robust AML/CTF control frameworks face increased risk of being used to facilitate money laundering and terrorism financing. This could result in both business and regulatory risks that may well result in costly financial and reputational damage. There are many international examples of the damage suffered by businesses that have failed to implement soundly based AML/CTF controls, particularly in the United States ('US') and the United Kingdom ('UK'). Where reporting entities do not comply with the

¹²⁹ *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 41

¹³⁰ *Ibid* s 5.

¹³¹ *Ibid* s 6.

¹³² AUSTRAC, *AUSTRAC compliance guide* (2015) AUSTRAC Regulatory Guide <http://www.austrac.gov.au/files/regguide_full.pdf>.

AML/CTF legislation, part 15 of the AML/CTF Act (Enforcement) illustrates the substantial financial penalties that may be imposed for a serious offence. For example, the maximum civil penalty for a body corporate is up to \$11 million for a corporation and up to \$2.2 million for an individual. Conversely, a reporting entity that develops and implements a robust AML/CTF control framework reinforces its defences against the threat of criminals successfully using the entity's products and delivery channels to facilitate their criminal activities. It also reduces regulatory risk.¹³³

An obligation to report a suspicious matter to AUSTRAC arises at an early stage where 'a reporting entity is commencing to provide, or proposing to provide, a designated service to a person', or in relation to:

a person requesting a reporting entity to provide a designated service (of a kind ordinarily provided by the reporting entity), or a person inquiring of a reporting entity whether it would be willing to provide a designated service (of a kind ordinarily provided by the reporting entity).¹³⁴

A Suspicious Matters Report ('SMR') must be submitted to AUSTRAC if the reporting entity forms *a suspicion on reasonable grounds* that information that the reporting entity has may be relevant to the investigation or prosecution of a person for (inter alia) *an offence against a Commonwealth, state or territory law*,¹³⁵ or of assistance in enforcing the *Proceeds of Crime Act 2002* (or regulations under that Act), or a state or territory law that corresponds to that Act or its regulations.¹³⁶

In addition, the *Financial Transaction Reports Act 1988* ('FTR Act') requires "cash dealers", as defined, to report suspect transactions, cash transactions of \$10 000 or more or the foreign currency equivalent and international funds transfer instructions.¹³⁷ "Suspect transactions" are ones where the cash dealer has reasonable grounds to suspect that information that the cash dealer has concerning the transaction

¹³³ Australian Transaction Reports and Analysis Centre, 'AUSTRAC Regulatory Guide' (2015) <http://www.austrac.gov.au/files/regguide_full.pdf>.

¹³⁴ *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 51B.

¹³⁵ (emphasis added).

¹³⁶ *Proceeds of Crime Act 2002* (Cth).

¹³⁷ *Financial Transaction Reports Act 1988* (Cth) s 7

(inter alia) may be relevant to the investigation of, or prosecution of, a person for *an offence against a law of the Commonwealth or of a Territory*;¹³⁸ or may be of assistance in the enforcement of the *Proceeds of Crime Act 1987* and *2002* regulations made under that Act.¹³⁹ So, businesses and lawyers paid in cash have a duty to report, thus targeting profit made in cash transactions and exposing those who obtain that cash through organised crime.

The FTR Act also requires “cash dealers” to verify the identity of persons who are signatories to accounts, and also prohibits accounts being opened or operated in a false name.¹⁴⁰ The legislation provides penalties for avoiding the reporting requirements and in respect of false or incomplete information.¹⁴¹ It also has penalties for persons who facilitate or assist in these activities.¹⁴² Such legislation, in any country, helps to expose those who exploit people.

The Law Council of Australia gives guidance on when these may or may not apply.¹⁴³ For example, solicitors are exempt from the operation of the AML/CTF Act but only in respect of the provision of certain services, which would otherwise be caught as “designated services”, namely, ‘providing a custodial or depository service’. This exemption is effected by paragraph 40.2 of the AML/CTF Rules, which provides that service is taken to be an ‘exempt legal practitioner service’ if:¹⁴⁴

- (i) it is provided in the ordinary course of carrying on a law practice and is a custodial or depository service other than conduct that under s 766E(1) *Corporations Act 2001* constitutes providing a custodial or depository service;¹⁴⁵ or

¹³⁸ (emphasis added).

¹³⁹ Ibid; *Proceeds of Crime Act 1987* (Cth); *Proceeds of Crime Act 2002* (Cth).

¹⁴⁰ ‘Cash dealers’ are currently defined in the FTR Act to include: banks, building societies and credit unions, referred to as ‘financial institutions’, financial corporations, insurance companies and insurance intermediaries, securities dealers and futures brokers, cash carriers, managers and trustees of unit trusts, firms that deal in travellers cheques, money orders and the like, persons who collect, hold, exchange or remit currency on behalf of other persons, currency and bullion dealers, casinos and gambling houses and the totalisator agency board.

¹⁴¹ *Financial Transaction Reports Act 1988* (Cth).

¹⁴² Ibid.

¹⁴³ The Law Council of Australia guidance on the obligations of the legal profession: Australian Transaction Reports and Analysis Centre, ‘Information from AUSTRAC about the Anti-Money Laundering and Counter-Terrorism Financing Reporting Obligations of Legal Practitioners’ (2011) The Law Council of Australia <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/LCA_AUSTRACArticleoncurrentAMLobligationsofthelegalprofession-May2011.pdf>.

¹⁴⁴ *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 6.

¹⁴⁵ *Corporations Act 2001* (Cth).

(ii) it is provided in the ordinary course of carrying on a law practice and is a safe than in relation to physical currency.¹⁴⁶

It follows that care must be taken by lawyers to ensure reporting is complied with. For example, Australia's laws criminalising human trafficking are contained within the *Criminal Code Act 1995*.¹⁴⁷ Divisions 270 and 271 of the *Criminal Code Act 1995* contain offences for human trafficking, slavery, and slavery-like practices including servitude, forced labour, deceptive recruiting for labour or services, debt bondage, and forced marriage.¹⁴⁸

The human trafficking offences include provisions for trafficking people into, out of, and within Australia, and specific provisions for domestic trafficking, organ trafficking, and trafficking in children. Penalties for the offences in Divisions 270 and 271 range from four years imprisonment for debt bondage, to 25 years imprisonment for slavery and trafficking in children.¹⁴⁹

Therefore a SMR should be submitted to AUSTRAC if a reporting entity under the AML/CTF Act or a cash dealer under the FTR Act forms *a suspicion on reasonable grounds* that information that the reporting entity has may be relevant to the investigation or prosecution of a person for any of the human trafficking offences.¹⁵⁰ Lawyers have an important role in ensuring that reporting entities are fully complying with their reporting requirements.

In relation to Indonesia, the 2011 joint World Bank and International Monetary Fund ('IMF') reports on the Observance of Standards and Codes ('ROSC') found that Indonesia has made:

significant efforts to improve the quality of corporate financial reporting. Considerable progress has been made to strengthen the institutional framework of accounting and auditing and to move toward

¹⁴⁶ *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) [40.2].

¹⁴⁷ *Criminal Code Act 1995* (Cth).

¹⁴⁸ *Ibid* s 270, 271.

¹⁴⁹ Australian Government Human Trafficking legislation: Attorney-General's Department, *Human trafficking legislation* (2015) Attorney-General's Department <<http://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Pages/Humantraffickinglegislation.aspx>>.

¹⁵⁰ (emphasis added).

convergence with International Financial Reporting Standards ('IFRS') and adoption of International Standards of Auditing ('ISA').¹⁵¹

However, it also concluded that 'further improvements are necessary to make sure that Indonesia emerges as a good practice country in accountancy reform in the developing world'.¹⁵² It is here that cooperation is an effective tool to ensure increased consistency with international standards and to build on existing systems and for what the IMF see as 'preparation and implementation of a country action plan geared towards a strengthened infrastructure of corporate financial reporting in Indonesia'. Australia and Indonesia are uniquely placed to give each other such assistance.¹⁵³

Of course, such legislation generally only applies to businesses involved in specified financial services and finance based transactions. Therefore, it is necessary to consider the extent to which other kinds of businesses are or could be impressed with similar obligations. One option would be to apply a suspicious matter-reporting regime to all businesses or to a broader subset of businesses. All in all, what such legislation demonstrates is that by following the money as the UNDOC report suggests, human exploitation can be exposed.

XIV CONCLUSION

In the context of human exploitation, lawyers must think laterally and responsibly. International lawyers can cooperate to enable the convergence of well-drafted uniform/consistent and potentially transnational legislation in this context to protect victims, expose those who exploit others, regulate finance, and prosecute transnational organised crime and terrorist activity. Criminal lawyers can and do already have obligations to expose and identify hidden victims, if only to act in the best interests of their vulnerable clients. Corporate lawyers can and do have an impact on human exploitation without compromising privilege/client confidentiality. Proper advice on reporting requirements and the guiding principles of corporate responsibility assist

¹⁵¹ Indonesia Report on the Observance of Standards and Codes (ROSC) is a joint World Bank and International Monetary Fund (IMF) initiative: ROSC, 'Report on the Observance of Standards and Codes (ROSC) Indonesia' (Report, ROSC, 8 March 2010) <http://www.worldbank.org/ifa/rosc_aa_indonesia.pdf>.

¹⁵² Ibid.

¹⁵³ Ibid.

corporate and commercial clients to avoid investments in exploited people and block financial avenues for organised criminals and terrorists.

As Hagar has observed, tackling the global exploitation of people in an holistic way is a necessity. The law cannot work in isolation; victims need to be supported and diverted to suitable services, and systems need to be in place to remove or block the financial incentives for those who take advantage of human exploitation. Of course it requires law development and enforcement but it also necessitates crime prevention. In a global market place, this requires transnational cooperation at every level, including the legal sector, and if the urgency is increased by the spectre of terrorism, then driving immediate international cooperation becomes the imperative.

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