



protecting the

an independent review of NZ's laws on trafficking , slavery & exploitation

vulnerable.



empowering kiwis to combat
slavery & exploitation
in New Zealand.

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about us

Justice Acts New Zealand is a charitable trust based in Auckland with volunteers and supporters around the country. Justice Acts NZ was established under the Charities Act 2005 in May 2011 and Incorporated under the Charitable Trusts Act 1957 in January 2011. Our goal is to empower kiwis to combat slavery and exploitation in New Zealand through evidence-based research and education and intentional action in order to see trafficking and slavery survivors rescued and restored as well as those responsible brought to justice.

Check us out at www.justiceacts.org.nz.

slavery is the commodification and forcing of a person into an activity by acts of coercion or deception, and holding them against their will, for profit or gain.

exploitation is the act of treating someone unfairly for selfish gain or abusing vulnerability for selfish gain.

forced labour or activity is labour or activity which a person is forced to do by acts of coercion or deception under threat of punishment.

servitude is the state of being a slave or completely subject to someone more powerful.

trafficking is the recruitment, transporting or holding of a person by coercion or deception for the purpose of exploitation.

justiceacts.org.nz

acknowledgements & thanks

The **Justice Acts Legal Research team** for their passion, enthusiasm and volunteering their knowledge and legal skills to this project.

Thank you also to **Wellington Community Justice Project** for partnering with us at the very beginning of this report and for the Human Rights team who did the original research for us.

Thank you to the many encouragers to continue working on this report.

Thank you to Peter Mihaere of **Stand Against Slavery** who gave us the ability to complete this report in Steph Lambert's role as Head of Advocacy and Capacity Building. This has effectively meant that Stand Against Slavery gave us four months of Steph's working time to complete the review.

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executive summary

Human trafficking (“trafficking”) is the method used by slave-owners, pimps, and traffickers to abduct, transport and/or move their victims in order to then sell or use them in one of the many forms of modern-day slavery. Trafficking is one of the nefarious impacts of globalisation which has enabled this new method of enslaving easier to achieve. Trafficking involves the victim being abducted or recruited in their country of origin usually by someone known to their family, then transferred through transit regions and exploited in the final destination country.¹ The end purposes differ but can include forced labour, bonded labour, domestic service, commercial sexual exploitation or forced prostitution, forced marriage, sweatshop labour, and other forms of servitude.² The scope of trafficking continues to grow as the second largest illicit crime in the world. There are almost 21 million people who are enslaved (victims of forced labour) around the world today.³ Almost 19 million victims are exploited by private individuals or enterprises, and 2 million by state or rebel groups. About 21 percent of those exploited by individuals or enterprises are victims of forced sexual exploitation (around 4.5 million).⁴ Forced labour in the private economy generates about \$US150,000 billion in illegal profits per year.⁵ The most exploitative sectors are domestic work, agriculture, construction, manufacturing and entertainment.⁶

With trafficking and slavery fast becoming a world-wide epidemic, still, many New Zealanders are shocked to think that slavery and trafficking might be happening here. Many believe we are too isolated and its too difficult to get people into New Zealand and so its less likely to be taking place. Whilst there is some truth in this, with the growth of globalisation and migration into and out of New Zealand, the ignorance of New Zealander’s and our government to trafficking, the lack of regulation and government intervention in the market and the legalisation of the sex industry have made it easier for trafficking and exploitation to go unnoticed.

Justice Acts New Zealand had some concerns over the lack of prosecutions of trafficking in New Zealand. Unlike others, we know that there has been trafficking in New Zealand but there have been no prosecutions or charges laid against traffickers. This, of itself, is worrying. We decided to take a look at all the laws that touch on the issue of trafficking, slavery and labour exploitation to see if there were issues with the legislation making it difficult for trafficking to be prosecuted.

What we found is that New Zealand legislation is inconsistent and incongruent with the ratified and signed international protocols and articles. Therefore, justice is constrained by a lack of empowering legislation. We also found some legal issues if a worker does not have a contract for service or deemed to be an employee. So this review covers some broader employment law themes including tripartite agreements and relevant case law.

One of the things that the review brought to our attention is the importance of identification and investigation, and to this end, the importance of comprehensive training for government officials as well as resourcing of the agencies. Furthermore, the provision of victim support services is a key issue and the result is that there are issues with access to justice for victims of trafficking (how they gain access to Immigration policy attributing independent legal advice to them) and are hopeful that recent discussions with government agents will start to allow the charitable sector and government to work together to ensure victims are supported and gain access to justice. We hope that together we can see victims rescued and supported, and the perpetrators of injustice, exploitation and slavery brought to justice.

A huge thank you to everyone who has contributed to the various aspects of creating this review including members of Justice Acts New Zealand, Wellington Community Justice Project human rights volunteers and Stand Against Slavery.

We encourage you to check out the recommendations and if you have any questions please contact us on info@justice-acts.org.nz.

there are almost 21 million people who are victims of forced labour around the world.

1 United Nations Office on Drugs and Crime (UNODC) Trafficking in Persons: Global Patterns (April 2006) at 17.

2 Advisory Council of Jurists Summary of the Advisory Council of Jurists Background Paper on Trafficking (2002) at 3.

3 International Labour Organisation Website Statistics: <http://www.ilo.org/global/topics/forced-labour/lang-en/index.htm>, Sourced 11/6/2014.

4 International Labour Organisation Website Statistics: <http://www.ilo.org/global/topics/forced-labour/lang-en/index.htm>, Sourced 11/6/2014.

5 International Labour Organisation Website Statistics: <http://www.ilo.org/global/topics/forced-labour/lang-en/index.htm>, Sourced 11/6/2014.

6 International Labour Organisation Website Statistics: <http://www.ilo.org/global/topics/forced-labour/lang-en/index.htm>, Sourced 11/6/2014.

trafficking is the recruitment, transporting, transfer, harbouring of a person(s), by means of coercion, threats, deception, abuse of vulnerability or exchange of benefits, for the purpose of exploitation.

- Palermo Protocol, Article 3(a)



Trafficking has made gains in International law and jurisprudence in recent years. It became a topic of renewed international concern and fervor due to the increasing disparity in the global distribution of wealth both within and between countries and the increased demand for cheap labour in the global-north ensuring global market competitiveness. The growth of globalization and its impact on technologies, travel and communication in addition to the glamorization of the western world has meant that populations living in poverty tend to migrate in search of a better life. Added to this, the tendency around the world has been to limit international border travel into the developed world to the highly skilled and economically privileged and to exclude the vulnerable from legitimate access to legal employment opportunities.¹ The International Labor Organisation (“ILO”) identifies that the tendency of many developed countries is to identify in the country of origin those considered to be at risk of irregular migration and to exclude them before they travel. Legal channels of labour migration are even more restrictive for women and ethnic minorities.² In the realms beyond legal migration, the trafficker provides a link between demand and supply. Yet unlike the smuggler who merely provides an illegal service to the migrant, the trafficker has more invested in the process inasmuch that they are usually part of a wider network, whether organized or small-time-gangs and seeks to exploit the person beyond the migration per se.³

In 2000, the adoption of the UN Convention against Transnational Organized Crime (the Palermo Convention) and its supplementary Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children which entered into force in December 2003, was a major breakthrough. Its object is to prevent and combat trafficking in persons and to promote cooperation within the International community. The ILO Conventions originate from different bodies but seek to contribute to the common goal of combating this egregious and heinous crime.

¹ International Labor Organization, Human Trafficking and Forced Labor Exploitation: Guidelines for Legislation and Law Enforcement (2005, Geneva) 11.

² International Labor Organization, Human Trafficking and Forced Labor Exploitation: Guidelines for Legislation and Law Enforcement (2005, Geneva) 11.

³ International Labor Organization, Human Trafficking and Forced Labor Exploitation: Guidelines for Legislation and Law Enforcement (2005, Geneva) 11.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (“the Palermo Protocol”) supplementing the United Nations Convention against Transnational Organized Crime was adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 on 15 November 2000.⁴

Article 2 states its purpose to prevent and combat trafficking in persons, paying particular attention to women and children; to protect and assist the victims of such trafficking, with full respect for their human rights; and to promote cooperation among States Parties in order to meet those objectives.

Article 3 (a) defines for the purposes of this Protocol, Trafficking in Persons, as:

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 the 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 labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

It further states in Article 3(b) that the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used. Additionally, that the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article and defines a child as meaning any person under eighteen years of age.

⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (“Trafficking Protocol”), (ratified on 19 July 2002).

ILO convention 182 on elimination of worst forms of child labour

The Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour was adopted by the Conference at its Eighty-Seventh (87th) Session in Geneva on 17 June 1999.

Article 1 prescribes that upon ratification, each Member State shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.

Article 2 defines the term “child” as applying to all persons under the age of 18.

Article 3 defines that, for the purposes of the Convention, the term “the worst forms of child labour” comprises all forms of slavery or practices similar to slavery, such as:

- a. 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;
- b. The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- c. The use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; and
- d. Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

UN convention on the rights of the child

UNCROC was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990, in accordance with article 49. The underlying principle to UNCROC is found in Article 3(1) inasmuch that the best interests of the child are to be the primary consideration in all actions concerning children.

There are a number of relevant provisions covering the issue of trafficking in persons and the sexual exploitation of children:

- a) Article 11 prescribes that States Parties take measures to combat the illicit transfer and non-return of children abroad.
- b) Article 19 prescribes that State Parties take all appropriate measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

c) Article 32 prescribes that States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. Article 32 (2) prescribes that States Parties take legislative, administrative, social and educational measures to ensure the implementation of the present article.

d) Article 33 prescribes that States Parties shall take all appropriate measures to prevent the use of children in the illicit production and trafficking of narcotics.

e) Article 34 prescribes that States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity; the exploitative use of children in prostitution or other unlawful sexual practices; or the exploitative use of children in pornographic performances and materials.

f) Article 35 prescribes that States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form. Furthermore, Article 36 prescribes that States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

g) Article 38 prescribes that States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts, which are relevant to the child, and take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

optional protocol to un convention on the rights of the child (UNCROC) on the sale of children, child prostitution and child pornography

The Optional Protocol was adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, and entered into force on 18 January 2002. The Optional Protocol establishes under Article 2 that:

a) For the purposes of the present Protocol, the sale of children means any act or transaction whereby a child is transferred, by any person or group of persons, to another for remuneration or any other consideration.

b) That child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration and Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.

c) The Protocol also prescribes under Article 3 that each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal law, whether such offences are committed domestically or transnationally or on an individual or organized basis, and in the context of sale of children as defined in Article 2:

(i) Offering, delivering or accepting, by whatever means, a child for the purpose of sexual exploitation of the child; transfer of organs of the child for profit; or engagement of the child in forced labour.

(ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption;

(iii) Offering, obtaining, procuring or providing a child for child prostitution, as defined in article 2;

(iv) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2.

(v) Furthermore, subject to the provisions of the national law of a State Party, the same shall apply to an attempt to commit any of the said acts and to complicity or participation in any of the said acts. Each State Party shall make such offences punishable by appropriate penalties that take into account their grave nature and subject to the provisions of its national law, shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of Article 2 herein.

(vi) Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative.

(vii) Lastly, States Parties shall take all appropriate legal and administrative measures to ensure that all persons involved in the adoption of a child act in conformity with applicable international legal instruments.

In 2006, the US State Department reported that 1 million children were trafficked for the global sex trade.





The prevalence of trafficking in the Asia Pacific region has been estimated at 3 people for every 1000 inhabitants.

- US State Department, 2010.

New Zealand became a party to ILO Convention 29¹ in 1938, the Convention of the Elimination of all forms of Discrimination Against Women (“CEDAW”) ² in 1985, the International Covenant on Civil and Political Rights (“ICCPR”) ³ in 1989, the Convention Against Torture (“CAT”) ⁴ in 1989, the Convention on the Rights of the Child (“UNCROC”) ⁵ in 1993. ILO Convention 182⁶ in 2001, the Trafficking Protocol⁷ in 2002, and the Optional Protocol to the UNCROC⁸ in 2011. This means that New Zealand has made a number of obligations and commitments.

prevention

Prevention is vital given the nature and effect of trafficking. Therefore the fact that New Zealand has agreed to promote international cooperation in respect of people trafficking⁹ is significant, this cooperation should not be exclusive to investigating offences but should include prevention. New Zealand has agreed to undertake research, information campaigns, and initiatives to prevent and combat trafficking in cooperation with non-governmental organisations and other appropriate organisations.¹⁰ This is best done in concert with global anti-trafficking organisations and government agencies.

New Zealand has agreed to tackle issues like poverty, under-development, and lack of equal opportunity that make people, especially women and children, at risk to trafficking.¹¹ New Zealand has agreed to identify and reach out to children at risk, particularly considering the situation of girls.¹² In addition to adopt appropriate measures to protect the rights and interests of child victims by, among other things, recognising the vulnerability of child victims¹³ and to allow the views of child victims to be presented.¹⁴ Lastly, New Zealand

has agreed to suppress the exploitation of the prostitution of women¹⁵ and to take measures, including legislative measures, to discourage demand that leads to exploitation.¹⁶

prosecution

New Zealand has agreed to not only prevent and combat trafficking in persons¹⁷ but also to protect and help the victims of trafficking;¹⁸ to provide victims with information about court and administrative proceedings and give them a chance to be heard in the case against the offenders.¹⁹

New Zealand has agreed to have adequate penalties for trafficking²⁰ taking into account its grave nature,²¹ and to strictly enforce these penalties.²² Additionally, inchoate offences, organisation and conspiracy are also prosecutable.²³ New Zealand has agreed to avoid unnecessary delay in prosecuting trafficking.²⁴ Furthermore, New Zealand has agreed to have measures that allow victims to seek compensation for damage suffered.²⁵

1 Convention on Convention concerning Forced or Compulsory Labour, No. 29 (“ILO Convention 29”), (NZ ratified 29 March 1938).

2 Convention on the Elimination of all forms of Discrimination Against Women (“CEDAW”), (Adopted 18 December 1979, NZ ratified 10 January 1985).

3 International Convention on Civil & Political Rights (“ICCPR”), (NZ ratified 28 December 1978).

4 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (“CAT”), (NZ ratified 10 December 1989).

5 UN Convention on the Rights of the Child (“UNCROC”), (ratified 6 April 1993).

6 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, No. 182 (“ILO Convention 182”), (NZ ratified 14 June 2001).

7 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (“Trafficking Protocol”), (ratified on 19 July 2002).

8 Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (“Optional Protocol”), (ratified 10 September 2010).

9 The Trafficking Protocol, Art. 2.

10 The Trafficking Protocol, Arts. 9(2), 9(3).

11 The Trafficking Protocol, Art. 9(4).

12 ILO Convention 182, Art. 7.

13 Optional Protocol, Art. 8(1)(a).

14 Optional Protocol, Art. 8(1)(c).

15 CEDAW, Art. 6.

16 The Trafficking Protocol, Art. 9(5).

17 The Trafficking Protocol, Art. 2; CEDAW, Art. 6; ICCPR, Art. 8; ILO Convention 29 (Forced Labor), Art. 1; ILO Convention 182 (Worst Forms of Child Labor), Art. 1; UNCROC, Arts. 11, 34, 35, 36; Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, Art. 1.

18 The Trafficking Protocol, Art. 2.

19 The Trafficking Protocol, Art. 6.

20 ILO Convention 29, Art. 25.

21 ILO Convention 182, Art. 3(3).

22 ILO Convention 29, Art. 25.

23 The Trafficking Protocol, Art. 5(2).

24 The Trafficking Protocol, Art. 8(1)(g).

25 The Trafficking Protocol, Art. 6(6).

revictimization

New Zealand has agreed to have measures that allow victims to remain in the territory at least temporarily, and permanently “in appropriate cases”, taking into account “humanitarian and compassionate factors”.¹ In cases where repatriation is necessitated, to give regard to his or her safety, and the repatriation should preferably be voluntary;² and this is especially pertinent as New Zealand has agreed to protect victims of trafficking from revictimization.³

resourcing the implementation of the trafficking legislation

A key element of combating trafficking is the implementation and enforcement of laws. Therefore, New Zealand’s commitment to ensure that law enforcement, immigration, and other authorities cooperate to determine whether individuals crossing borders are victims of trafficking, what kinds of documentation traffickers are using, and what methods traffickers’ use is vital.⁴ These authorities should have training on the prevention of trafficking, the prosecution of the traffickers, and protection of the victims, considering human rights, the interests of children, and gender issues.⁵ Also to have appropriate measures in place to ensure that border controls are strong enough to prevent and detect trafficking.⁶ This includes ensuring that travel and identify documents cannot be easily misused or falsified.⁷

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- 1 The Trafficking Protocol, Art. 7.
 - 2 The Trafficking Protocol, Art. 8(2).
 - 3 The Trafficking Protocol, Art. 9(1).
 - 4 The Trafficking Protocol, Art. 10(1).
 - 5 The Trafficking Protocol, Art. 10(2).
 - 6 The Trafficking Protocol, Art. 11.
 - 7 The Trafficking Protocol, Article 12.

victim support

New Zealand has recognised that holistic victim support is needed. As such, New Zealand has agreed to consider taking measures to provide for the full recovery of victims including the provision of housing; access to counselling in a language the victim can understand; medical, psychological, and material assistance; and employment, education, and training opportunities.⁸ In addition, to take the special needs of the victim into account in applying these measures.⁹

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- 8 The Trafficking Protocol, Art. 6(3).
 - 9 The Trafficking Protocol, Article 6(4).

the scope of trafficking in new zealand

New Zealand has been identified as a destination country for foreign men and women subjected to forced labor and as a source country for underage girls subjected to sex trafficking within the country. However there is no official evidence of trafficking and there have been no successful prosecutions of trafficking in New Zealand. However, there is anecdotal evidence of trafficking in the agriculture, viticulture, retail, fishing and sex industries as well as investigative reports within Government on the hospitality, nursing, horticultural, manufacturing, tourism, fishing and sex industries.





Nearly 21 million people are trapped in forced labour around the world today.

- International Labor Organisation

labour trafficking in new zealand

fisheries

Foreign men, largely from Indonesia, Cambodia, Vietnam, and Thailand, are subjected to conditions of forced labor, including debt bondage, aboard foreign-flagged fishing vessels in New Zealand waters. Alleged conditions experienced by workers on these boats (Mostly South Korean) include confiscation of passports, imposition of significant debts, physical violence, mental abuse, and excessive hours of work.¹ Press reports, and the UN Inter-Agency Project on Human Trafficking indicates that fishermen from Vietnam and elsewhere in Southeast Asia are also allegedly victims of forced labor on fishing vessels in New Zealand waters.²

agriculture

Some Asian and Pacific Islander individuals migrate voluntarily to New Zealand to work in the agricultural sector and are subsequently forced to work in conditions different from what was stipulated in their contracts.³ Some workers report being charged excessive and escalating recruitment fees, experiencing unjustified salary deductions and restrictions on their movement, having their passports confiscated and contracts altered, or being subjected to a change in working conditions without their permission, all of these are indicators of human trafficking.⁴ One such case was in the Waikato where in 2011, at least 17 Fijian farm labourers were duped out of thousands of dollars for bogus work visas to work on dairy farms in the Waikato. The workers paid up to \$12,000 each for the work visa and job, but after arriving found that the job and the visa they paid for did not exist.⁵ Some of the workers were arrested for stealing maize from a farm out of desperation and severe hunger. The guilty “agent”, an Otorohanga man, was convicted of forgery and misleading an Immigration Official; the scam had been going on since 2008 and his Auckland-based company had 17 staff members.⁶

construction

NZ based recruitment and building companies in the Christchurch rebuild have exploited Filipino migrant workers. Major Holdings Limited was registered in October 2013 and went insolvent in June 2014. During its operational months, it recruited about 7 carpenters from the Philippines and offered them a “package deal” to come to New Zealand to work. Each man paid about \$4,000 for airfares, visas, orientation and the contract with Major Holdings (and most are in debt

to Filipino lenders). Major Holdings provided overcrowded accommodation (3 men to a single room with cooking facilities), and witnesses told of having eight (8) men staying in a converted garage. Despite these conditions, each man paid rent of \$150 per week. After the company liquidated, the men were left stranded at the mercy of Immigration New Zealand to decide whether they would be deported as they were in breach of their visa conditions (for not working for Major Holdings), or if another visa would be issued to them to allow them to obtain alternative employment.⁷

Similarly, Tech5, a recruitment firm recruited a number of Filipino labourers for the rebuild. They gave oral agreements to the workers in the Philippines that there would be a cost of covering money for their “toolbox” and flights to New Zealand which would be taken out of their wages once in New Zealand. After their arrival to New Zealand, their contract was replaced and a schedule of expenses included which gave the total amount owing at \$7700 per worker. Also included in the contract is a debt bondage clause that if they left Tech5 prior to ending their 3 year contract, they would be each liable for just over \$10,000 USD. Similar to Major Holdings, Tech5 housed the men in overcrowded conditions and charged them each \$155 per person per week rent. Tech5 was also holding the passports and identity documentation of the workers. As at July 2014, Tech5 is under investigation by the Labour Inspectorate.⁸

In the Waikato, 17 farm labourers from Fiji were duped out of thousands of dollars for bogus work visas and contrary to promises, with no job. They were left to their own devices when local farmers found them foraging for food and in severe hunger.

orchards & fruit picking industry

Migrant workers in the Bay of Plenty were recruited by other migrants and promised jobs in various workplaces such as restaurants or offices. Once they arrived, they were told to pay a significant bond payment, and made to work in kiwifruit orchards in and around Te Puke. If they don't comply they risk beatings or deportation. The workers are essentially working in forced labour gangs run by other migrants that benefit the Te Puke Kiwifruit Industry.⁹

1 Simmonds, Glenn & Christina Stringer, “New Zealand’s fisheries management system: Forced labour an ignored or overlooked dimension?”, Marine Policy 50 (2014) 74-80.

2 US Department of State Trafficking in Persons Report 2013, 279-280.

3 US Department of State Trafficking in Persons Report 2013, 279-280.

4 US Department of State Trafficking in Persons Report 2013, 279-280.

5 Stuff Website: “Workers duped left to starve”, 10 February 2011, <<http://www.stuff.co.nz/national/4641619/Workers-duped-left-to-starve>>;

6 Stuff Website: “Workers duped left to starve”, 10 February 2011, <<http://www.stuff.co.nz/national/4641619/Workers-duped-left-to-starve>>;

7 TV3, “Christchurch Rebuild Migrants face Debts, Cramped Accommodation”, <<http://www.3news.co.nz/Christchurch-rebuild-migrants-face-debts-cramped-accommodation/tabid/1771/articleID/352955/Default.aspx>>.

8 TV3, “Christchurch Rebuild Migrants face Debts, Cramped Accommodation”, <<http://www.3news.co.nz/Christchurch-rebuild-migrants-face-debts-cramped-accommodation/tabid/1771/articleID/352955/Default.aspx>>.

9 Telephone Conversation with Employment Consultant Advocate, Rachel Rollston, ERNZ Consultants, Tauranga, 25 July 2014.

A woman with long dark hair, wearing a black sleeveless dress and light-colored high-heeled shoes, is walking on a wet, reflective street at night. She is leaning against the side of a dark-colored car. The background is dark with blurred city lights, creating a bokeh effect. The overall mood is somber and mysterious.

Sex trafficking accounts
for **58%** of all global
trafficking cases.

- UN Office on Drugs and Crime, Global
Report on Trafficking in Persons, 2012.

sex trafficking in new zealand

international sex trafficking

Sex trafficking was first identified in New Zealand pre-legislation when in 2001, a group of Thai women handed themselves into Immigration and were found to have been trafficked into New Zealand. They were taken from the brothel, and repatriated back to Thailand by Immigration New Zealand within 7 days and it is likely that they were re trafficked. No case was brought against any person including the brothel owners. The New Zealand Police, at that time considered that without bondage or physical restraints, the women were free to come and go from the home and the brothel, and so there were no grounds for prosecution. One of the girls told her story: She has been told that for NZ\$10,000 she could get a job at a restaurant in Auckland. After agreeing to pay that sum to an agent at an interest rate of 36 percent, she traveled to New Zealand. When she arrived in Auckland, she was picked up at the airport and her money, return tickets, and passports were confiscated. She was taken to a house in Central Auckland where she lived with fourteen other Thai women, and six slept to a room. She was charged \$150 in rent per week each, which was added to their mounting debt. Every day she were taken at 1.00pm to a brothel and returned at 3.00am. She worked 14 hour days, 7 days a week servicing countless men. Throughout the entire time she never saw any of the money she earned as it was taken to repay her "debt".¹ After Immigration investigated, the women were removed and repatriated within 7 days but no case of any kind was brought against the traffickers or the brothel owners.² Then in 2006, three young Ukrainian girls were trafficked into Auckland by Ukrainians. One of the girls had been previously trafficked into Israel so when she arrived at Auckland airport, she was arrested for being in possession of a false Israeli passport. After a lengthy legal battle, she was acquitted by the jury when they acknowledged her as a trafficking victim. Again, no charges were brought against her traffickers.³

In 2011, an adult Filipino migrant worker was approached by a brothel operator who misled her to believe that she didn't need a work visa to work in the brothel. This woman had significant financial stress, with 30 children and elderly parents in the Philippines dependent on her and her partners remittances. After being subjected to a deportation notice, the notice was ultimately cancelled due to humanitarian considerations including that she had been deceived as to her legal status to work in the industry.⁴ It doesn't appear that any charges were laid against the brothel operator. In May 2014, New Zealand Police raided Emily's 8 Gentlemen's Club in the

Auckland CBD in search of trafficked victims and underage sex workers. Emily's 8 has a history of non-compliance with Immigration NZ and the Ministry of Business, Innovation and Employment (MBIE) and so the police were expecting to find exploitation and trafficking behind the barred gates and doors of the brothel.⁵ However, no underage workers were found and it is unclear if any trafficking victims were found although three sex workers were issued deportation liability notices at the time.

domestic sex trafficking

In 2010, a 60-year-old New Plymouth based brothel operator was found guilty of exploiting an under-18 year old in prostitution from his home.⁶ He had deceived and seduced her around 2006, paid for her bus ticket to New Plymouth where he exploited her. She thought she was moving to the sea to live with her 20-year-old surfer-lover and when she arrived and learned the truth, her indebtedness and vulnerability was exploited by the brothel owner. The brothel owner was charged under the child exploitation sections of the PRA for charges relating to the girl and another young person.⁷ Unfortunately, New Zealand does not recognise domestic trafficking in law and so the offender could not be prosecuted for trafficking.

kiwi sex traffickers

In 2010, an Auckland motelier was charged with organizing child sex tours in South-East Asia⁸ and in 2012, he pled guilty to the charges and had name suppression lifted.⁹ The Ministry of Justice notes that there is evidence to show that New Zealanders are among the child sex abusers in a number of countries and charges of child sex abuse brought against New Zealand men in countries such as India and Fiji indicate the extent of the problem.¹⁰ Also, in January 2014, Mr Baha Ukes, a New Zealander of Iranian descent and a Kenyan, were arrested in Kenya and charged with trafficking underage girls for sexual exploitation after giving their father cows and cash as a dowry for the alleged sham marriages. The charge stated that on November 5 2013, at Ndonyowasin village in

1 Justice Susan Glazebrook, "Human Trafficking in the Asia Pacific Region", 18; Susan Coppedge, "People Trafficking: An International Crisis fought at the Local Level" (2006) <http://www.fulbright.org.nz/voices/axford/docs/axford2006_coppedge.pdf>.

2 Justice Susan Glazebrook, "Human Trafficking in the Asia Pacific Region", 18; Susan Coppedge, "People Trafficking: An International Crisis fought at the Local Level" (2006) <http://www.fulbright.org.nz/voices/axford/docs/axford2006_coppedge.pdf>.

3 Jeremy Boetiletti, Presentation, Prevent People Trafficking Conference, Wellington, 2009.

4 *Re Amoroto* [2014] NZIPT 501014.

5 Stuff Website: "Brothel Raid Sparks Court Action", <http://www.stuff.co.nz/national/10103579/Brothel-raid-sparks-court-action>, Sourced 17/6/14.

6 Stuff Website: "Hastie Guilty over Young Prostitute", 19 August 2010, <<http://www.stuff.co.nz/taranaki-daily-news/news/4038549/Hastie-guilty-over-young-prostitute>>.

7 *Hastie v R* [2011] NZCA 498; CA153/11.

8 TVNZ: "Auckland man accused of Organising Child Sex Tour", 31 October 2011, <http://tvnz.co.nz/national-news/auckland-man-accused-organising-child-sex-tour-4492008>.

9 3 News: "Identity of Child Sex Tour Operator Revealed", 7 May 2012, <<http://www.3news.co.nz/Identity-of-child-sex-tour-operator-revealed/tabid/423/articleID/253321/Default.aspx>>.

10 Ministry of Justice, "Child Sex Tourism", <http://www.justice.govt.nz/publications/publications-archived/2002/protecting-our-innocence/child-sex-tourism>.

Samburu East District, they jointly, intentionally and knowingly arranged for travel of two girls aged 14 and 16 years within the borders of Kenya for sexual exploitation. A cash bail was denied and time was given for police and the prosecution to conclude their investigations.¹¹

kiwi baby trafficker

In 2012, a grandmother from Lower Hutt was convicted as the mastermind and coordinator of a baby-trafficking ring that recruited surrogates, treated them in the Ukraine and then sold the babies for amounts up to \$180,000 USD, was arrested and convicted in a California Court for trafficking offences.¹²

kiwi victims of trafficking

In 2011, a British born woman who grew up in Auckland, but was living in the US was invited to travel to the Philippines to attend a Martial Arts Convention. Upon her arrival from the States, she was kidnapped, forced into prostitution, and held in a bug-infested room for five months and forced to service around nine men a day.¹³ Then, in June 2014, Baston, a Miami-based violent pimp and sex trafficker was convicted of sex trafficking and money laundering. He trafficked women from Australia, New Zealand and the US and forced them into prostitution. He was a violent pimp beating, threatening and raping his victims, bragging about being a member of the Bloods and keep for himself hundreds of thousands of dollars of the women's earnings. The sex slavery survivor was a witness and helped to secure his conviction.¹⁴

11 Kenya News Agency, "Child Trafficking", <http://kenyanewsagency.go.ke/?p=3750>, Sourced 17 July 2014.

12 Stuff Website: "Evil Kiwi Sold Designer Children" <http://www.stuff.co.nz/world/americas/6555640/Evil-Kiwi-sold-white-designer-children>, 11 March 2013.

13 NZ Herald: "Kiwi Woman Kept as Sex Slave in Philippines", 20 September 2011: http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10752933.

14 NZ Herald: "Kiwi helps put away global sex trafficker", 2 July 2014: http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=11286028.

recent investigations in 2012-13

The Trafficking in Persons 2013¹ report indicated that there were nine investigations during the 2012-2013 reporting period into trafficking in New Zealand. Of those nine, five investigations were closed due to a lack of information from the complainants and covered a broad range of industries including the hospitality, nursing, horticultural, manufacturing and tourism industries, the investigations were:

- a) An allegation against a café owner that was charging for job offers and exploiting migrant workers. The allegation followed an Employment Relations Authority hearing, however, there was no evidence of exploitation obtained and therefore the investigation was closed.
- b) An allegation against a nursing bureau in relation to the exploitation of migrant workers. No information was forthcoming to allow an investigation to continue.
- c) An anonymous allegation against horticultural companies in the Hawkes Bay that they were offending against the Immigration Act including acts of exploitation. Investigation was closed due to lack of information allowing it to proceed.
- d) An allegation against a manufacturing company that they were charging migrants for sponsorship and paying the migrants less than the agreed rate. Alleged victim left New Zealand and no further information was obtained to allow investigation to proceed, therefore, the investigation closed.
- e) An allegation of a tourism company being involved in the exploitation of migrant workers. Complainant did not provide enough information and subsequently left the country, investigation was closed

From these investigations, it appears that most investigations do not proceed to prosecution due to the lack of evidence, and often this is due to the witness leaving New Zealand. Our sources describe the dichotomy of not being able to promise more than a temporary visa for the duration of the legal proceeding, and as a result many witnesses decide to return home to their families and communities immediately. What we do not know is the process of their repatriation and if any advocacy or support is given to them once they arrive in their home state to mitigation revictimisation.

1 The US Trafficking in Persons Report, 2013.

the brothel owner, pimps, transporters and others involved in the 2001 Thai sex worker scandal survived without any form of rebuke or charges against them. due to the police, at the time, believing that because the women were not held by physical restraints, they were free to leave at any time. the reality is that the coercive tactics of traffickers make it extremely difficult for victims to escape. what is more shocking is that no other charges were ever laid against the people responsible for trafficking the women and exploiting them here in Auckland City.



Girls as young as 13, are
selling their bodies for
sex for as little as \$20.

-TV3 News, 2012

the crimes act 1961

The Crimes Act defines the offence of human trafficking as the use of coercion or deception to arrange, or attempt to arrange the entry of a person into New Zealand, or another State.¹ The offence in New Zealand involves the crossing or attempted crossing of a victim across a state's borders by means of coercion or deception.² This requirement reflects the dominant New Zealand approach of implementing international obligations: inserting new provisions into pre-existing domestic legislation. Unlike in other jurisdictions, New Zealand is yet to enact any legislation that specifically sets out a national policy concerning human trafficking practices.

'Human trafficking' as a term, can bear a wider meaning than it is given in the New Zealand Crimes Act. Kapplehoff (2009) notes that the term 'human trafficking' (in the context of the United States legislation) means coercing or deceptively compelling a person to perform labour, services or commercial sex and does not necessarily involve crossing a state border.³ Therefore, under this definition, trafficking can occur within a single country's borders. In New Zealand, forms of 'internal trafficking' are dealt with through separate, pre-existing offences in Crimes Act with offences such as 'dealing in slaves'.⁴ This approach questions the appropriateness of denying a victim a legitimate label of 'trafficked person' when that victim has been subjected to forced labour or forced commercial sex work in other parts of a country but has not crossed a state border. Terms that are associated to victims can have a significant affect on the victim themselves and the crimes committed against them.⁵ Labeling also affects how an offence is identified and recorded and how the offender is dealt with in the criminal justice system in terms of sentence severity and deterrence.⁶ On a national level, it can affect how a country views the type and occurrence of offences within its borders and committed by its citizens in other jurisdictions (to date there is no recorded convictions of human trafficking in New Zealand). Labeling can affect offence reporting and recording practices and a failure to label an act of trafficking appropriately can affect international statistics on the prevalence of trafficking in the south-pacific context, effectively stopping the offence being identified or sufficiently dealt with on a national or international level. Additionally, the lack of recognition of domestic trafficking in New Zealand does not stigmatise all offenders and ensure that they are properly dealt with by the Criminal Law. One of the necessary parts of combating trafficking is that not only the relevant

offender is brought to justice but also those further up the chain of command so that entire networks of traffickers and organised crime and/or smaller gang networks can be abolished. We are concerned about correct labeling of victims to ensure the right support services are given to them, and so that crime statistics tell government officials and the wider public the real story, as well as ensuring that offenders are brought to justice.

Trafficking by Means of Deception or Coercion

Section 98D in Part 5 of the Crimes Act was inserted in 2002 and specifically creates the offence of trafficking in people by means of coercion or deception.⁷ A convicted person under this section can face a term of imprisonment up to 20 years, a fine not exceeding \$500,000 or both.⁸ These penalties are subject to aggravating features included in s98E to be considered by a Judge at sentencing.⁹

Under s98D(1)(a) offenders may be convicted where that offender arranged the entry of a person into NZ or any other state, using either one or more acts of coercion (including threats to the victim or a third party)¹⁰ against the person, or one or more acts of deception.¹¹ Alternatively, under s98D(1)(b) a person may be convicted of arranging, organizing or procuring the reception of a person, the concealment of a person, or harboring of a person in New Zealand or any other state, knowing that the person's entry into New Zealand or other state was arranged by an act of coercion or an act of deception.¹² Proceedings can be brought under this section even if the person coerced or deceived did not in fact enter the state (of which it is alleged was illegally entered into/out of) or was not actually received, concealed or harbored in that particular state.¹³ Inchoate liability is specifically included and the attempted crossing of a state's borders remains a necessary requirement.¹⁴

Aggravating features for the offence of human trafficking is shared with that of human smuggling under New Zealand law.¹⁵ They include subjecting the victim to bodily harm (including psychological and financial harm, sexual mistreatment, or causing harm to reputation, status or prospects) or death, during the commission of the offence.¹⁶ Other aggravating features include whether the offender(s) is associated with an organised criminal group, whether the victim was subjected to inhuman or degrading treatment through offending, and whether the conviction involved two or more victims. Section 98E(2) lists aggravating features that are specific to the human trafficking offence; whether the victim or another person was subjected to exploitation (e.g. sexual exploitation, a requirement to undertake forced labour, or the removal of organs), and whether the victims(s) is under the age of 18 years.¹⁷

1 Crimes Act 1961, s98D (1)(a).

2 Crimes Act 1961, s98D(1).

3 Kappelhoff, M. J. "Federal Prosecutions of Human Trafficking Cases Striking a Blow Against Modern Day Slavery." (2008-2009) 6 Univ. of St. Thomas Journal of Law and Policy at [9-20].

4 Crimes Act 1961, s98.

5 Rieger, April. "Missing the mark: why the Trafficking Victims Protection Act fails to protect sex trafficking victims in the United States." (2007) 30 Harv. J. L & Gen.

6 Rieger, April. "Missing the mark: why the Trafficking Victims Protection Act fails to protect sex trafficking victims in the United States." (2007) 30 Harv. J. L & Gen.

7 Crimes Act 1961, s98D.

8 Crimes Act 1961, s98D (1).

9 Crimes Act 1961, s98E.

10 Crimes Act 1961, s98C.

11 Crimes Act 1961, s98D (1)(a).

12 Crimes Act 1961, s98D (1)(b).

13 Crimes Act 1961, s98D(3)(a)-(b).

14 Crimes Act 1961, s98D (3).

15 Crimes Act 1961, s98C.

16 Crimes Act 1961, s98E(1).

17 Crimes Act 1961, s98E(2).

Dealing in Slaves

Section 98 creates the offence of dealing in slaves, a person found guilty of dealing in slaves may face an imprisonment term of up to 14 years, which is a shorter maximum penalty to the penalty under s98D. This section defines someone used or kept as a slave as a person subjected to debt-bondage or serfdom.

Debt Bondage is the status or condition arising from a pledge by a debtor of his personal services, or of the personal services of any person under his control, as security for debt, if the value of those services, as reasonably assessed, is not applied towards the liquidation of the debt or if the length and nature of those services are not limited and defined.¹⁸

Serfdom is the status or condition of a tenant who is by any law, custom or agreement, bound to live and labour on land belonging to another person and to render some determinate service to that other person, whether for reward or not, and who is not free to change that status or condition.¹⁹

The two terms are distinct. Serfdom has historical connection to cultural practices, accepted norms and legally enforced custom, and could exist without the need of any form of debt on the victim.²⁰ While debt-bondage asserts that debt is owed by a victim and this claim is used to maintain control of victims (although the debt is often never paid off due to fictitious interest and repayments).²¹

Section 98 creates the offence of dealing with slaves; it includes selling, purchasing, hiring or dealing in any form whatsoever with any person as a slave within or outside of New Zealand.²² The scope of this section is wider than s 98D and includes employers using a person (under debt bondage or serfdom) or, detaining, confining, imprisoning, carrying away, removing, receiving transporting, importing or bringing that person into any place to sell, let or give himself/herself, or a person dependent on himself/herself as a slave.²³ 'Importing' in this section can mean bringing a person across a border into New Zealand or into another state, but the offence does not require importing to constitute an act of slavery. When contrasting this offence with human trafficking as defined in s 98D, human trafficking requires that coercion or deception or both are present and assumes that coercion or deception must have featured as a factor in transferring that victim across a border. Culpability of dealing with slaves under s98 requires a lesser evidentiary burden as the section casts a broader 'offending net' allowing a greater variety of actors to be liable.

This section covers not only those who are directly dealing in slaves, but also those who assist in or encourage the offence less-directly. Anyone can be liable under this section who 'builds, fits out, sells, purchases, transfers, lets, hires, uses, provides with personnel, navigates, or serves on board any ship or aircraft [for any of the aforementioned purposes].'²⁴ It also

includes giving someone in marriage, without that person's consent and being a parent/guardian of a child under 18 and delivering that child to another person with intent that the child or their labour will be exploited.²⁵ This section can be viewed as a legislative tool that operates to 'catch' offenders who may not be able to have charges made successfully under s 98D.

Dealing in people under 18 for sexual exploitation, removal of body parts, or engagement in forced labour

Section 98AA of the Crimes Act 1961 imposes a maximum sentence of 14 years for those convicted of selling, buying, transferring, renting, hiring or in any other way entering into a dealing involving a person under 18 for the purposes of sexual exploitation, the removal of body parts or the engagement of the person in forced labour.²⁶ It includes detaining, confining, imprisoning or carrying away such a person or removing, receiving, transporting, importing or bringing to a place, a person under the age of 18 to sell, rent or give themselves for these purposes.²⁷ This section specifically targets minors and classifies those that are involved in the acts mentioned above as 'dealers in slaves.' Importantly, the section also includes exploitative conduct of a pornographic nature. Under 98AA(3) 'sexual exploitation' is stated to include taking or transmitting in any way, still or moving images of a person engaged in explicit sexual activities (real or simulated). The offence in s98AA seems to constitute acts which may be regarded as trafficking in other jurisdictions, but are capable of being committed wholly within state borders. This section therefore applies to New Zealand citizens who cause, through coercive or deceptive means, the movement of a person for exploitative purposes (maintained by the controls of serfdom or debt bondage), entirely within New Zealand borders, but will not recognise the offending parties as human traffickers (or attribute the maximum penalties which trafficking offences carry).

Organising or promoting child sex tours

Section 144C of the Crimes Act makes it an offence for anyone to facilitate the preparation or actual carrying of a person across borders, where those acts are purposefully aimed at assisting a person to pursue offences against victims in places outside of New Zealand's borders and jurisdiction. This section may be significant because the victims of such offending may be victims of human trafficking themselves, subjected to environments where detection of offending is less likely to occur than within New Zealand.²⁸

This provision actively aims to convict New Zealand citizens who assist anyone seeking to support the illicit international sex industry, in effect supporting trafficking practices by assisting consumers to access victims.²⁹ It creates the offence of making or organising travel arrangements for or on behalf of any person, with the intention to facilitate the commission of an offence under s144A or who transports such a person with the aforementioned intention.³⁰ It is an important section, because it denounces these practices in any place, and

18 Crimes Act 1961, s98(2).

19 Crimes Act 1961, s98(2).

20 International Labor Organization (2010) "Child Labour in Fiji." (IPEC) Retrieved 2011 26-June from United Nations Office on Drugs and Crime: http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-suva/documents/publication/wcms_155659.pdf

21 Shea, H. J. "Human Trafficking: Global and National Responses to the Cries for Freedom." (2008-2009) 6 University of St. Thomas J.L & Pub Pol, 1-8.

22 Crimes Act 1961, s98(1).

23 Crimes Act 1961, s98(1).

24 Crimes Act 1961, s98.

25 Crimes Act 1961, s98 (1)(f).

26 Crimes Act 1961, s98AA (1)(a)(i)-(iii).

27 Crimes Act 1961, s98AA (1)(i).

28 Segrave, M. "Human Trafficking and human rights." Australian Journal of Human Rights., 71-94.

29 Crimes Act 1961, s144C.

30 Crimes Act 1961, s144C.

holds New Zealand citizens accountable and deters them from pursuing or doing such acts in an a foreign domain where legislative controls or enforcement may be relatively more relaxed.

The Crimes Act criminalises various forms of offences that in other jurisdictions are legislatively defined as human trafficking. Trafficking and slavery are dealt with separately, with a distinction in what constitutes each and specific sections have been included to account for specific acts involving people under 18 years. Other aspects concerning the international trafficking market have been addressed by creating specific penalties for travellers who seek to abuse victims in environments that make exploitation more accessible. Acts which do not fall within the s98D human trafficking definition carry a lesser maximum sentence but are easier to prove to the criminal standard. This is due to requiring less essential elements and list a wider range of acts which may constitute an offence.

Sexual conduct with children and young people outside New Zealand

Section 144A of the Crimes Act makes domestic criminal provisions, such as sexual connection with a child (under 12 years) or young person (under 16 years) and the respective sentences, applicable to New Zealand citizens or residents who commit or attempt to commit these acts extra-territorially.³¹

For sexual connection with a child, there is a maximum penalty of 14 years imprisonment and an attempted sexual connection with a child carries a 10 year maximum penalty.³² An act of sexual connection with a young person and an attempt to perform an act carries a maximum penalty of 10 years.³³ This section also creates the offence of committing or attempting to commit an act of sexual connection for commercial purposes in a foreign jurisdiction with a person under 18 years, as governed domestically by s23(1) of the Prostitution (Reform) Act.³⁴

The fate of these most vulnerable people in our world is an affront to human dignity and a challenge to every State, every people and every community.

-Kofi Annan, 2000.

31 Crimes Act 1961, s144A.

32 Crimes Act 1961, s132 (1)-(3).

33 Crimes Act 1961, s134 (1)-(3).

34 Prostitution Reform Act 2003.

the prostitution reform act 2003

At the time of decriminalisation of prostitution, sex-work proponents claimed that the Prostitution Reform Act ("PRA") would ensure safety for sex workers,¹ there would be no increase in demand² and it would eliminate street and underage prostitution.³ In interpreting section 3 of the Act,⁴ it appears that the primary end goal was to reduce street and underage prostitution, and a secondary end goal was the framework that would safeguard human rights of sex workers and protect them from exploitation, prohibit exploitation of underage workers, and promote the health & safety of sex workers, and that prostitution would move from creating public health issues to being controlled so that it was conducive to public health. The prostitution reform framework was created, but due to minimal regulation, the industry is now managed by the market and on rare occasions by the Courts.

In reviewing the PRA, we noted that the target of the Act is the protection of adult-consenting sex workers in New Zealand. The Act does not propose to deal with issues facing migrant workers, trafficked victims or children involved in forced prostitution (outside of prohibiting exploitation of persons under 18).

Safeguarding Human Rights and the NZ Regulatory Model

The framework under the Act has created an increase in sex workers reporting offences to the police and exercising the right of refusal.⁵ One case has been highlighted by the client commencing civil proceedings against the prostitute for breach of contract.⁶ However, significant sectors of the industry are unregulated including Small Owner Operated Brothels,⁷ underage and street workers, migrant workers and trafficking victims. Therefore, sex workers in those sectors are unprotected by the law.

The Act also prescribed Health & Safety standards, these standards apply to brothel owners but are not proactively enforced, this is due to the fact that prostitution is not deemed

a dangerous or special sector to engage proactive regulation from the Labor Inspectorate. Regulation relies on a complaint from the sex worker but many factors hinder sex workers from laying a complaint including threats, coercion and other forms of duress. Therefore, regulation of the prostitution industry is reactive and we believe that sex workers are not sufficiently protected by the Prostitution Reform Act.

Underage Prostitution

In 2004, a Police survey by the Ministry of Justice found about 210 underage prostitutes working in New Zealand. Twenty-five percent were in escort agencies, and ten percent on the streets.⁸ Reportedly in a survey relied on by the Ministry of Justice, 41 of 772 participants reported entering the sex industry when they were aged under 18 after the enactment of the PRA, and of these 41, 75 percent started work in the street-based sector, 19 percent in the managed sector and 4.8 percent in the private sector.⁹ NZ Police in 2007 noted that legalisation resulted in police having less contact with the sex industry and there is no systematic intelligence gathering and collation.¹⁰ In 2008, a police sting operation in South Auckland found high numbers of underage prostitutes.¹¹ In 2010 a book of interviews¹² with 12 young people released by ECPAT NZ Child Alert and the BodyShop, 50 percent of the interviewees admitted that they were under 15 years when they first engaged in commercial sexual activity. In 2012, TV3 covered the issue of underage prostitutes in South Auckland¹³ where girls as young as 13 were selling themselves for around \$20 in order to buy alcohol. One interviewee was just 17 years old and was being pimped out by her uncle. Some news outlets in 2012 claimed that there were around 20-30 underage prostitutes out at night, with some earning up to \$600 a night. Community workers confirmed that those claims were correct.¹⁴

Street Prostitution and Danger

In December 2008, Mellory Manning, a sex worker in Christchurch was sexually violated, brutally raped, tortured and murdered by members of the Mongrel Mob, a prominent gang. She sustained 66 wounds to her body. It is not clear whether Ms Manning had refused to pay the Mob's "tax" on

1 Ka Hon Chu, Sandra and Catherine Healy, Ottawa Citizen, "The New Zealand sex-work model", March 16, 2014. <http://www.ottawacitizen.com/opinion/op-ed/Zealand+work+model/9623498/story.html>.

2 Ka Hon Chu, Sandra and Catherine Healy, Ottawa Citizen, "The New Zealand sex-work model", March 16, 2014. <http://www.ottawacitizen.com/opinion/op-ed/Zealand+work+model/9623498/story.html>.

3 Shuttleworth, Kate, NZ Herald, "Key weighs in on NZ sex hotel", 14 November 2012, http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10847329.

4 The Prostitution Reform Act 2003 set out its objectives as firstly decriminalising prostitution while not condoning its use, and secondly, setting up a framework that would safeguard the human rights of sex workers and protect them from exploitation, promote the occupational health and safety of sex workers, be conducive to public health, and prohibit the use of prostitution of persons under 18 years old.

5 Section 17(1) Prostitution Reform Act 2003.

6 International Business Times, 26 March 2014, "Kiwi Man Sues Prostitute for \$70,000 for Incomplete Sex Session", <http://au.ibtimes.com/articles/544923/20140326/kiwi-man-sues-prostitute-70-000-incomplete.htm#.U2lZcl4xHFI>.

7 The Act definition of an "operator" excludes persons involved in SOOBs. SOOBs are a group of not more than 4 sex workers, where each worker retains control over their earnings from prostitution carried out at the brothel. The fact that SOOBs are excluded means that they are not required to obtain a license from their Council, and so are completely unregulated. I assume that this was the threshold of defining what constitutes a brothel (sex club) but SOOBs are now an unknown quantity. As such, it is uncertain how the rights of sex workers are safeguarded or enforced.

8 Ministry of Justice, "Prostitution Law Review Committee Report 2005: The use of under age people in prostitution", <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/7-the-use-of-under-age-people-in-prostitution#741>.

9 Ministry of Justice, "Prostitution Law Review Committee Report 2005: The use of under age people in prostitution", <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/7-the-use-of-under-age-people-in-prostitution#741>.

10 Ministry of Justice, "Prostitution Law Review Committee Report 2005: The use of under age people in prostitution", <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/7-the-use-of-under-age-people-in-prostitution#741>.

11 Police Association Newsletter, "Under Age and Under Radar", May 1 2013, <http://www.policeassn.org.nz/newsroom/publications/featured-articles/under-age-and-under-radar>.

12 ECPAT NZ Child Alert, "'Speaking for Ourselves': Children of the streets – their story", 2010.

13 TV3 News, "Police target patrons of underage prostitutes", <http://www.3news.co.nz/Police-target-patrons-of-underage-prostitutes/tabid/423/articleID/257983/Default.aspx>, 16 June 2012.

14 Police Association Newsletter, "Under Age and Under Radar", May 1 2013, <http://www.policeassn.org.nz/newsroom/publications/featured-articles/under-age-and-under-radar>.

sex workers or had drug debts owing,¹⁵ it is likely that her death was due to her refusal to pay drug debts. Notwithstanding, other workers in Christchurch are now fearful of working on the streets, so much so, that the local Council is setting aside an area to reassure sex workers of safety in that cordoned area. The effectiveness of this proposal remains to be seen.

The PRA provisions in relation to persons under 18 Years

Section 23(1) of the PRA prescribes that it is an offence to breach prohibitions on use in prostitution persons under 18 years old. Therefore, this offence carries a maximum penalty of seven years imprisonment¹⁶ and includes causing, assisting, facilitating or encouraging a person under 18 years of age to provide commercial sexual purposes.¹⁷ It also includes receiving any earning from commercial sexual services provided by a person under 18 years (of which is known or reasonably ought to have been known) and being a client to a person performing commercial sexual services who is under the age of 18 years.¹⁸ Section 23(1) is relevant to s144A of the Crimes Act (mentioned above).

The PRA provisions in relation to person over 18 Years

Section 16 (1) PRA provides that it is an offence to induce or compel persons to provide commercial sexual services or provide earnings from prostitution. This includes an implied threat and improper use of any power or authority arising out of any occupational position or pre-existing relationship, threats upon the reputation of the victim, use of knowledge of the victims illegal immigration status, or the supply or withholding supply of any illegal controlled drug. Contravention of s16(1) is an offence liable on conviction to imprisonment for a term not exceeding 14 years. Section 17 confers the right of refusal (to provide sexual services) regardless of whether a contract has been agreed upon.

Conclusion

The Prostitution Reform Act 2003 has been successful in conferring the legal right of refusal to all sex workers; reaffirming their human rights and empowering them to make the choice to or not to provide sexual services. The law created the opportunity for sex workers lay complaints to the police of rape, assault and other crimes against them including sexual harassment (e.g. to the Human Rights Tribunal). It has also provided avenues for the protection of under 18 year olds from exploitation and penalties for those who exploit them. However, the Act has removed police jurisdiction to enter private brothel establishments and conduct random raids. This means that trafficking is not likely to be identified and exploitation may continue undisturbed for months, even years. It follows that Justice Acts New Zealand believes that the Prostitution Reform Act does not sufficiently protect against trafficking and that it cannot be used against trafficking.

¹⁵ Stuff News, 1 May 2014, "Life in Jail for Mellory Manning Murder", <http://www.stuff.co.nz/the-press/9996631/Life-in-jail-for-Mellory-Manning-murder>.

¹⁶ Prostitution Reform Act 2003, s23 (1).

¹⁷ Prostitution Reform Act 2003, s20-22.

¹⁸ Prostitution Reform Act 2003, s20-22.

the employment relations act 2000

The object of the Employment Relations Act is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship.¹ The Act is premised upon all persons involved being a party to the employment relationship.² Section 6 prescribes that unless the context otherwise requires, employee means any person or any age employed by an employer to do any work for hire or reward under a contract of service, and includes a homemaker, or a person intending to work but excludes a volunteer who does not expect to be rewarded for work performed as a volunteer and receives no reward for the work done, and excludes a number of persons relating to film production. Therefore, a contract between the employer and employee is required.

However Section 6(2) establishes that in deciding whether a person is employed by another person under a contract, the Court or Authority must decide the real nature of the relationship between them. Furthermore, for this purpose, the Court or Authority must consider all relevant matters, including any matters that indicate the intention of the persons and is not to treat as determinative any statement by the persons describing the nature of the relationship.³ Therefore, the question of whether a person is an “employee” for the purposes of the law depends on the facts and if a person is not an employee, they are not entitled to the minimum rights established under the Act.

All “employees” are entitled to the minimum employment standards afforded by the Health and Safety in Employment Act, Employment Relations Act 2000, Holidays Act 2003, Human Rights Act 1993, and the Minimum Wage Act 1983. This means that all employees are entitled to be paid the minimum wage, to be paid for public holidays and annual, bereavement, parental and sick leave and to be free from any form discrimination on the basis of sex, race, marital status, religious belief, colour, employment status, ethnic or national origins, disability, age, sexual orientation, political opinion or family status. In addition, every employee must have a written employment agreement and employers must also meet minimum health and safety requirements. Furthermore, employers cannot request that employees agree to less than the minimum rights owed to them.

Yet, there are a few types of workers that fall outside of the strict definition of an employee. These include Contractors in triangular employment arrangements, Foreign Charter Vessel (FCV) crew, illegal workers and migrant workers and illegal workers. Due to not fulfilling the technical criteria, these workers do not have access to the minimum employment rights conferred on all “employees” in New Zealand.

Triangular Employment Arrangements

Triangular Employment Arrangements refer to situations where contractual arrangements are unclear. This is typically where there is no clear written contract for service between the employer and the worker. Although the worker may have a contract for service with an agent, who has a contractual

relationship with the employer.

The current law is that where it appears that there is a clear contractual relationship between the agency and the business owner, the worker is deemed to be an employee of the agency and not the business owner.⁴ However, pursuant to section 6(2) of the Employment Relations Act 2000, the Court will look at the real nature of the employment relationship when considering who the employer is. Evidence such as any employment contract (written or verbal), payment of wages and any tax paid are indicative of a contract for service. The leading New Zealand case in this area of law is *McDonald v Ontrack Infrastructure Limited*.⁵

*McDonald v Ontrack*⁶

Mr McDonald had a contract for service with Allied, the second defendant (a labour hire company) who provided individuals on a casual basis to cover temporary work requirements. Ontrack was one of those clients, Ontrack had a number of employees as well as using Allied to provide casual labour when required. There was a formal contractual relationship between Ontrack and Allied for the provision of such workers. Mr McDonald accepted an assignment from Allied to work for Ontrack in a gang of eleven, repairing the railway line between Picton and Invercargill. Nine members were permanent employees with Mr McDonald, and one other being employed by Allied and contracted to Ontrack for this project. Mr McDonald’s placement was then terminated. Mr McDonald sought to bring a claim against Ontrack saying that the circumstances of the placement constituted a contract of service between him and Ontrack enabling him to invoke the provisions of the Employment Relations Act 2000 and bring a personal grievance that he had been unjustifiably dismissed by Ontrack. Mr McDonald claimed that although his contract with Allied remained during his service to Ontrack, another additional employment agreement arose between himself and Ontrack. The defendants disagreed and claimed there was no such agreement of that nature between Mr McDonald and Ontrack.

The Authority endeavoured to apply the s 6(2) test to determine whether a contract of service between Mr McDonald and Ontrack existed. They also agreed with the defendants in that they were bound to apply the traditional tests adopted by the Supreme Court in *Bryson v Three Foot Six Limited*,⁷ namely, the intention, control, integration and the fundamental tests, although the Authority noted that in the particular factual situation these tests would not be straightforward to apply. The Authority found it was not necessary to imply an employment agreement between Ontrack and Mr McDonald, the Authority found that there was no such agreement but rather that Mr McDonald was employed by Allied and there was no grounds for a claim by Mr McDonald for unjustifiable dismissal from Ontrack.

However, Allied was ordered to pay Mr McDonald 8 per cent of his gross earning during his placement with Ontrack under s 23(2) of the Holidays Act 2003.

1 Employment Relations Act 2000, s3(a).

2 Employment Relations Act 2000, s4.

3 Employment Relations Act 2000, s6(3).

4 Kate Stone, Wellington Community Law Centre, Email, 2011.

5 *McDonald v Ontrack Infrastructure Limited and Anor* [2010] NZEMPC 132 (5 October 2010).

6 *McDonald v Ontrack Infrastructure Limited and Anor* [2010] NZEMPC 132 (5 October 2010).

7 *Bryson v Three Foot Six Limited* [2005] ERNZ 372.

In summary, the Courts approach to the issue of whether there was a contract of service is to apply the following:

- a) The onus is on the plaintiff to establish the existence of a contract.
- b) A factual inquiry into the real nature of the relationship under s 6(2) Employment Relations Act 2000 that must include consideration of all relevant matters.
- c) Apply Bryson⁸ in undertaking a common law inquiry to establish the existence of a contract of service by ascertaining whether the core fundamentals of a contract exists, that is, offer, acceptance, contractual intention, consideration, and certainty.
- d) An “implied contract” can only be established from the parties’ overt conduct.
- e) Although Parliament had legislated in s 6 of the Act, a considerable overlay of judge-made law would be necessary.

For migrant workers and contractors, this law is especially pertinent. It may be a means to obtain recognition where the business owner is exploiting or abusing the worker and/or not fulfilling their obligations under the Employment Relations Act. However, the worker will have to show that a contractual relationship exists between the business owner and themselves. If they cannot, then they may be able to claim against the agency for breach of their rights under the Employment Relations Act, if they can show an employment contract between themselves and the agent.

Post-Migration Exploitation

Post-Migration Exploitation is when exploitation is initiated after migration has taken place. A typical scenario is when migrant workers enter the destination state on a temporary work permit to engage in employment within a pre-arranged work place, typically, and the conditions which they are subjected to are substantially different from those that were promised. In some cases, post-migration exploitation can take place after time has passed in their destination country, and after finding themselves in a situation of vulnerability (lack of funds, medical needs, no visa), and so they are exploited by a more powerful party, usually an employer. Depending on the level of exploitation, this can morph into forced labour, slavery or servitude, instead of mere exploitation. However deciphering this in the current legal context is difficult due to having no clear definitions of slavery, servitude or forced labour in NZ law.

The term ‘migrant worker’ is used internationally to refer to a “person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a state of which he or she is not a national.”⁹ New Zealand has many migrant workers who are vulnerable to exploitation and abuse. Some forms of post-migration exploitation are where:

- a) A worker comes to New Zealand through an agreement with an agent who arranges their first 12 month working visa (for a fee) but due to not being paid a fair wage, they are unable to pay for and arrange a continuing visa or may not be able to get another visa. If they remain, they become “illegal” and are at greater risk of exploitation due to this status often stopping them from seeking help from the authorities because with it comes a risk of deportation.

- b) A migrant comes to New Zealand and once here, she is told by a brothel operator that she can work in the brothel under her temporary entry visa. She is misled, is in breach of her visa conditions, and is exploited by her employer who only pays her cash at a rate lower than what was agreed and who threatens to go to Immigration if she complains.

Aggravating factors may include isolation, post-traumatic stress disorder or abnormal levels of anxiety or stress but not reaching the threshold of PTSD, lack of knowledge of cultural practices, english language or comprehension (inability to converse in New Zealand english), and fear of authorities.

International Standards

Historically, the International Labour Organisation (ILO) has led the way in defining and enforcing workers’ rights. While the early United Nations conventions do not make reference to migrant workers, the ILO has addressed migrant labour rights through specific conventions and recommendations.¹⁰ The 1998 Declaration on Fundamental Principles and Rights at Work, which binds all ILO members, protects all migrant workers regardless of status. The two key ILO conventions are 97, on Migration for Employment (1949), and 143, on Migrant Workers (supplementary provisions) (1975).

ILO convention 97 provides the foundations for equality of treatment of nationals and regular migrants (a regular migrant is a migrant who is lawfully entitled to be present in a country), in areas such as recruitment procedures, living and working conditions, access to justice, tax and social security regulations. It sets out details for contract conditions and the participation of migrants in job training or promotion, and deals with provisions for family reunification and appeals against unjustified termination of employment or expulsion, as well as other measures to regulate the entire migration process.

The United Nations also adopted the Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (Migrant Workers Convention) in 1990 following continued concern. The convention brings together the rights that already protect migrants (including irregular workers) and that have already been accepted by most states through ‘core’ human rights treaties. The convention is based on concepts and language drawn from ILO conventions 97 and 143. It considerably extends the legal framework for migration, the treatment of migrants and the prevention of exploitation and irregular migration,¹¹ and identifies some further rights, including the right to family reunification.

New Zealand Ratification

New Zealand has ratified ILO Convention 97 but not ILO Convention 143 or the Migrant Workers Convention, but successive governments consider that New Zealand law and practice is in compliance with the principles that underline them. ILO Convention 143 was adopted at a time when concern about irregular migration (including smuggling and trafficking) was growing. It sets out requirements for respecting the rights of

⁸ Bryson v Three Foot Six Limited [2005] ERNZ 372.

⁹ Migrant Workers Convention, Article 2(1).

¹⁰ Migrant Workers Convention, Article 2(1).

¹¹ It emphasises that the rights contained in the convention apply to ‘all’ migrant workers, irregular as well as regular, by obliging state parties to ensure that “migrant workers are not deprived of any right by reason of any irregularity in their stay or employment” (Article 25(3)).

migrants with an irregular status, while providing for measures to end clandestine trafficking and penalise employers of irregular migrants.

The Human Rights Commission has said that, “New Zealand generally complies with the provisions of ILO Convention 97. However, it does not comply with a number of aspects of ILO Convention 143 or the Migrant Workers Convention. For example, migrants continue to experience discrimination and harassment, and have difficulty accessing educational services, pre-settlement information and social services. Migrants continue to face barriers to employment and, when employed, are subject to adverse working conditions. In addition, New Zealand does not fully support the right to family reunification. For example, because of changes made to immigration policy in 2009, migrant workers on supplementary seasonal employment are not eligible to support their partner and children for permits under visitor, student or work policies. Some of these issues could be addressed through changes specifically relating to migrants, while others would require changes that would affect all citizens”.¹²

Therefore, it is recommended that New Zealand ratify ILO Convention 143 and the Migrant Workers Convention to confirm its commitment to the rights of migrant workers and their families in New Zealand.

The Otorohanga Agent and the Piopio Labourers

In February 2010, a group of Fijian farm laborers were found foraging for food in Piopio, South Waikato. It turned out that each of the men had paid an Otorohanga-based agent between \$6,000 and \$12,000 for a work visa, flights to New Zealand, the orientation programme with a job on a local farm confirmed as part of the agreement. The company provided an orientation programme for the migrants but upon completing the programme, the migrant workers found themselves without a job or a way to get back home. After they were found and the incident was reported to the authorities, the agent was charged and convicted with forgery and misleading an Immigration Official but no charges in relation to migrant exploitation were ever laid. It is unclear what happened to the men. In this case, the men were not employees of the agent and so there is no legal remedy through employment or immigration legislation. Further, the agent had not “exploited them” in terms of a worker exploitation such as forced labour, trafficking or slavery, in New Zealand. So their only recourse would have been to sue the agent for fraud or breach of contract.

A migrant worker is a “person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a state of which he or she is not a national”

¹² Human Rights Commission, “Human Rights in New Zealand Report”, 2010, p. 329.

the immigration act 2009

Section 3 of the Immigration Act 2009 states that the purpose of the Act is to manage immigration in such a way as to balance the national interest (as determined by the Crown) and the rights of individuals. The key areas of the Act, for our purposes, is the definition of an unlawful person, exploitation of unlawful migrants, and new provisions to protect lawful migrants from exploitation, as well as the process of deportation and/or repatriation.

Unlawfully in New Zealand

A person who is not a New Zealand citizen is unlawfully in New Zealand if the person is in New Zealand but is not the holder of a visa granted under the Immigration Act,¹ nor has been granted entry permission under the Act or is in breach of their particular visa conditions.

Hiring Worker without Work Permit/Visa

Under Section 350 of the Immigration Act 2009, an employer must not employ a person who is not legally entitled to work in New Zealand. The penalty for breach is a fine of between \$10,000 and \$50,000. Recent amendments to the Act have put more pressure on employers to do their homework on prospective employees and the Ministry of Business, Innovation and Employment (“MBIE”) Labour Group introduced new tools and guidance to assist employers.² In terms of the effect on the worker, it is likely that in a situation where they are exploited in a situation where they were working illegally, the exploitation should act as a mitigating factor, whilst their actions and illegality will act as an aggravating factor. It will depend on the approach of the Court, but the end result for the worker is either repatriation or deportation but we hope that the new changes mean that the employer will also be held to account for breaching the Act.

Exploitation of Unlawful or Illegal Workers

Under Section 351 of the Immigration Act 2009, the exploitation of unlawful migrant workers is an offence. Serious sanctions are provided for, up to 7 years imprisonment and/or a fine of up to \$100,000 for employers who seriously breach the Holidays Act 2003, the Minimum Wage Act 2003 or the Wages Protection Act 1983 while employing an unlawful migrant worker. Under the Act, an unlawful worker, is defined as a person who the employer knows is not entitled to work in their service either because they are without lawful work status or because the work involves a breach of the work conditions. Additionally, employment law provides for redress if an employee’s entitlements are not met. Therefore, the minimum standards of employment should apply regardless of whether the person is legally entitled to work in New Zealand or not. Under the Immigration Act 2009, temporary visa class holders who exploit unlawful workers may be deportable, but residence class visa holders are not. Although it appears that unlawful workers are, on paper, protected by general employment relations frameworks, they are unlikely to access these rights due to their illegal status.

The key to claims is the contractual basis of the relationship and action must be taken against the appropriate party in order to obtain relief. The difficulty is that some workers may be deemed contractors and not employees and therefore do not have access to minimum employment rights, unless they can prove on the facts pursuant to *Ontrack* that there is an employment relationship. The difficulty here is that the worker would need to go to the Employment Relations Authority or a similar Court, and go through a legal process. But this is premised upon the ability of the worker to have the capacity (legal status (no fear of deportation), financial and emotional) to do so. The better option would be to have all basic employment rights affirmed in statutory law so that every legal worker can thwart any attempt at exploitation without the need to go to Court.

*Glomax Super Tailors v Raju*³

In 2006 in Auckland, Glomax Super Tailors hired Ms Raju as a machinist. The owner was well aware Ms Raju did not hold a work permit, which is an offence under the Immigration Act. Ms Raju worked for Glomax until November 2006. She was required to work nine hours a day at a contracted rate of \$10 an hour, which was below the minimum wage of \$10.25 at the time. In reality, however, Ms Raju was simply not paid at all for the five months she worked for Mr Lal. Ms Raju lodged a written complaint with the Labour Inspectorate which investigated and took the employer to the Employment Relations Authority. Although Ms Raju did not hold a work visa throughout her employment at Glomax, the authority commented that, as a matter of public policy, any employee working in New Zealand, irrespective of work visa status, is entitled to the protection of the Employment Relations Act and related employment legislation. The authority ordered payment of more than \$10,000 in wages and holiday pay and a \$3000 penalty to the Crown for the failure to keep and provide wage and time records. It appears that Glomax was not prosecuted for hiring an employee without a work visa so the law effectively says: “Don’t do it, but if you do, pay the migrants correctly”.

Exploitation of Legal Workers

The Immigration Act 2009 itself (in its present form) offers no protection to workers who work in accordance with their visa status; it only provides remedies for illegal workers that are exploited by their employer (who does so with the knowledge that they are not legally entitled to work in New Zealand). This means that currently migrant workers with lawful immigration status have no recourse under the Immigration Act 2009 to prosecute their employers. Notwithstanding, migrant workers (like all other persons in New Zealand) have access to the rights affirmed under the New Zealand Bill of Rights 1990 (in relation to action taken by the government or a government agency), and if the actions of the employer is prosecutable under the Crimes Act 1961 or any other enactment, they are able to commence legal proceedings in respect of those action under the relevant Act. The Employment Relations Act 2000 provides for remedial action where the worker can show that there is a contractual basis for their relationship to their employer. In cases of serious and wilful breaches of employment standards, the current legislative framework may not always provide for sanctions proportionate to the harm caused.

¹ Immigration Act 2009, s9(1).

² See http://www.immigration.govt.nz/NR/rdonlyres/F118F8F2-69BD-4D36-B621-7BF3B8E8624F/0/web_DOL11311Ccheckworkentitlemetns_Feb11.pdf and <http://www.immigration.govt.nz/NR/rdonlyres/81094635-B28D-42D2-9411-0FA27CCAC454/0/EnforcingthelmAct.pdf>.

³ “Authority Orders Boss to pay his Illegal Immigrant Worker”, http://www.cullenlaw.co.nz/Site/Publications_Media/2009/Authority_orders_boss_to_pay_his_illegal_immigrant.aspx

Some migrant workers may struggle to access their rights as they are employed as contractors or subbies (sub-contractors). Although they may be able to show on the facts, according to *Ontrack*, as highlighted in the Employment Relations section, this requires them taking formal action and won't allow them to challenge exploitation as it happens with their employer but citing the Employment Relations and related Acts which affirm the basic employment rights.

The Immigration Amendment Act (No 2) Bill (currently before Parliament) seeks to make exploitation of migrants on temporary entry class visas with work conditions an offence and makes employers who hold residence class visa's liable for deportation if they exploit migrant workers or knowingly employ migrant workers without work rights. However, there is no clear definition of "exploitation" under the Act although certain actions are deemed to be exploitation under s 351(1)-(4) including:

- (a) Being responsible for a serious failure to pay to the employee money payable under the Holidays' Act 2003;
- (b) Being in serious default under the Minimum Wage Act 1983 in respect of the employee;
- (c) Seriously contravening the Wages Protection Act 1983;
- (d) Taking an action with the intention of preventing or hindering the employee from leaving the employer's service, New Zealand or seeking the employee's entitlements under New Zealand law, or disclosing to any person the circumstances of his or her work for the employer. Examples of such actions are:
 - (i) Taking, retaining possession or being in control of a person's passport, any other travel or identity document, or travel tickets.
 - (ii) Preventing or hindering a person from having access to a telephone, using a telephone (privately), leaving the premises or leaving the premises unaccompanied.
 - (iii) Preventing or hindering a labour inspector from having access to the premises, to which they are entitled to have access under the Act.

Work Visas Linked to Employers

Currently, migrant work visas are linked to their employers and this fact may contribute to the reticence of migrants to complain about abusive labour conditions.⁴ The ILO Committee of Experts in 2012 commented on New Zealand's implementation of the forced labour conventions and noted the New Zealand Council of Trade Union's concern that:

"[t]hose found working illegally will be deported by Immigration New Zealand so there is little incentive for illegal workers to report exploitative employers... [and that] the Plan of Action to Prevent People Trafficking does not address in any depth the issue of non-cooperation with authorities for fear of deportation."⁵

Immigration New Zealand at the 2014 Prevent People Trafficking Conference mentioned that discussions were underway of providing an open work visa for exploited migrants and/or trafficking victims. However, New Zealand agreed to have measures to allow victims to remain in the territory at least temporarily, and permanently "in appropriate cases"

4 Ministry of Business, Innovation and Employment, "Regulatory Impact Statement: Protecting Migrant Workers from Exploitation", 27 May 2013, 4.

5 "Forced Labour Convention, 1930, New Zealand" (2013) Direct Request (CEARC) – adopted 2012, published 102nd ILC session, International Labour Organisation, Information System on International Labour Standards: http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID:3058243.

taking into account "humanitarian and compassionate factors"⁶ under the Palermo Protocol, ratified in 2002.

Therefore provision of a temporary visa for all trafficked victims should be Immigration policy and we argue should be extended to all lawful migrant workers who are exploited in New Zealand.

the new zealand bill of rights act 1990

The New Zealand Bill of Rights Act 1990 sets out to affirm, protect, and promote human rights and fundamental freedoms in New Zealand and affirm New Zealand's commitment to the International Covenant on Civil and Political Rights (ICCPR).⁷ The Bill of Rights Act did not create any new rights but merely confirmed existing common law rights and section 28 provides that just because a right or freedom is not expressly provided for in the Bill of Rights Act, this does not mean that the right or freedom does not exist or is otherwise restricted.⁸

The rights affirmed include but are not limited to:

- a) The right not to be deprived of life (Section 8);
- b) The right not to be subjected to torture or cruel treatment (Section 9);
- c) The right not to be subjected to medical or scientific experimentation (Section 10);
- d) The right to freedom of association (Section 17);
- e) The right to freedom of movement (Section 18);
- f) The right to be secure against unreasonable search or seizure (Section 21); and
- g) The right not to be arbitrarily arrested or detained (Section 22); and
- h) The right to natural justice (Section 24(a)).

The Bill of Rights Act places limits on the actions of government and government agencies and any person or body in the performance of any public function or power imposed on them by law⁹ and enables judicial review of the conduct of government agencies or the exercise of public powers in cases where the rights affirmed in this Bill of Rights Act are breached.

However, if Parliament passes legislation that undermines a particular right enshrined in the Bill of Rights Act, section 6 directs those charged with the interpretation of legislation to prefer a rights-consistent meaning wherever one is available.¹⁰ Yet, subject to Section 4, Section 5 prescribes that the rights and freedoms contained in the Bill of Rights Act may be subject only to such reasonable limits prescribed by

6 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Art. 7.

7 Ministry of Justice Website: "Introduction to the Bill of Rights Act" <<http://www.justice.govt.nz/publications/global-publications/t/the-guidelines-on-the-new-zealand-bill-of-rights-act-1990-a-guide-to-the-rights-and-freedoms-in-the-bill-of-rights-act-for-the-public-sector/part-i-an-introduction-to-the-bill-of-rights-act>>, Sourced 17/6/14.

8 Ministry of Justice Website: "Introduction to the Bill of Rights Act" <<http://www.justice.govt.nz/publications/global-publications/t/the-guidelines-on-the-new-zealand-bill-of-rights-act-1990-a-guide-to-the-rights-and-freedoms-in-the-bill-of-rights-act-for-the-public-sector/part-i-an-introduction-to-the-bill-of-rights-act>>, Sourced 17/6/14.

9 The New Zealand Bill of Rights Act 1990, s3.

10 Geiringer, Claudia "On a road to nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act", (2009) 40 VUWL, 613-648, 614.

law as can be demonstrably justified in a free and democratic society. Then, if a rights-consistent meaning is not possible, Section 4 prohibits the Courts from striking down or refusing to apply legislation.¹¹ In reality this means that the Bill of Rights cannot strike down other legislation but merely affirms the rights and hopes that a rights-consistent meaning can be applied in most cases but where it doesn't, then the other legislation prevails.

Judicial Review

The prominent right is that of freedom of movement which affirms that every person (migrant workers, permanent residents, temporary visa holders, as well as citizens) has the right to movement within New Zealand. Other rights include the right to be secure from unreasonable search and seizure, not to be arbitrarily detained or arrested and the right to natural justice. If government agencies breach these rights to any person, the Bill of Rights Act authorises challenge of the exercise of that power by way of judicial review. However, if another enactment (such as the Immigration Act 2009) gives powers to Officials to detain persons then the Courts will need to apply s 6, s 5 and then s 4 of the Act to ascertain whether the exercise of the power is unjustified and therefore challengeable.

organised crime & anti-corruption bill

The Organised Crime and Anti-corruption Legislation Bill has been introduced to amend a number of Acts including the trafficking provision (s 98D) in the Crimes Act 1961. Clause 5 replaces section 98D and supplements the offence of trafficking in persons. The penalty for the offence is imprisonment for a term not exceeding 20 years, or a fine not exceeding \$500,000, or both.

The proposed amendment is as follows:

98D Trafficking in Persons

(1) Every one is liable to the penalty stated in subsection (2) who arranges, organises, or procures—

- (a) the entry of a person into, or the exit of a person out of, New Zealand or any other State— (i) for the purpose of exploiting or facilitating the 15 exploitation of the person; or (ii) knowing that the entry or exit of the person involves 1 or more acts of coercion against the person, 1 or more acts of deception of the person, or both; or
- (b) the reception, recruitment, transport, transfer, concealment, or harboring of a person in New Zealand or any other State— (i) for the purpose of exploiting or facilitating the exploitation of the person; or
- (ii) knowing that the reception, recruitment, transport, transfer, concealment, or harbouring of the person involves 1 or more acts of coercion against the person, 1 or more acts of deception of the person, or both.

(2) The penalty is imprisonment for a term not exceeding 20 years, a fine not exceeding \$500,000, or both.

(3) Proceedings may be brought under this section even if—

- (a) parts of the process by which the person was exploited, coerced, or deceived were accomplished without an act 35 of exploitation, coercion, or deception;
- (b) the person exploited, coerced, or deceived— (i) did not in fact enter or exit the State concerned; or (ii) was not in fact received, recruited, transported, transferred, concealed, or harbored in the State concerned.

(4) For the purposes of this section, exploit, in relation to a person, means to cause, or to have caused, that person, by an act of deception or coercion, to be involved in—

(a) prostitution or other sexual services:

(b) slavery, practices similar to slavery, servitude, forced labour, or other forced services:

(c) the removal of organs.”

The original 98D was confusing in its lack of distinguishing trafficking from human smuggling and only recognised transnational trafficking but not domestic trafficking. This Bill will solve both of those issues as it recognises domestic trafficking and includes exploitation as the third-prong to the offence, and defines exploitation for the purpose of the provision.

The definition of exploitation relies upon understanding of the terms of “deception, coercion, slavery, servitude, forced labour, and similar forced services”. Section 98B provides some definitions in relation to the human smuggling and trafficking offences, but only in relation to an act of coercion, debt bondage and serfdom. There is no definition of what a “slave” is, or “slavery”, only that the definition of a slave includes a person who is subject to either debt bondage or serfdom. We believe that the Courts are well able to make a determination of trafficking without clear definitions. But believe that documents such as the ILO indicators of trafficking would be useful for the purpose of building knowledge in the relevant agencies who would identify and investigate cases of trafficking.

the fisheries (foreign charter vessels and other matters) amendment bill

This Bill passed its third reading on the last sitting day of Parliament before the September election and is soon to be enacted into law.

Sections 103A(a)-(g) of this Bill is particularly relevant especially to the issue of employment rights for migrant workers.

These sections apply to any FCV that has been granted an exemption from the Chief Executive from the requirement to be a NZ ship, or if the ship is owned or operated by an overseas person who has obtain consent under the overseas investment fishing provisions or is exempt from the requirement for that consent, while the vessel is in New Zealand fisheries waters. The provisions prescribe that basic employment rights pursuant to the Minimum Wage Act 1983 and the Wages Protection Act 1983 and other relevant Acts are conferred to all employees on board vessels in NZ Fisheries waters. The definition of an employee and employer is defined, and the period of assessment in relation to payments is deemed to be the whole of the period of such engagement or employment in New Zealand fisheries waters, and it empowered Labour Inspectors in relation to the employees as defined in the Act, on board the FCVs, and confers jurisdiction to the Employment Relations Authority and the Employment Court in relation

These provisions are important because they confer onto all legal workers on board FCVs, New Zealand employment rights, while they are working in New Zealand waters.

11 Geiringer, Claudia “On a road to nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act”, (2009) 40 VUWLJ, 613-648, 614.



JUSTICE ACTS.



NZ



Our recommendations

legislation

Crimes Act 1961

- 1) We support the **Organised Crime & Anti-Corruption Legislation Bill** which will amend s98D to reflect New Zealand's international obligations and define trafficking as:
 - a) The recruitment, reception, transport, transfer, concealment or harbouring of any person;
 - b) By means of deception or coercion; and
 - c) The purpose of (a) and (b) are to exploit the victim of this crime in a commercial context.

The Bill also recognises domestic trafficking in New Zealand.

- 3) As the Crimes Act currently does not have definitions of slavery, slave, servitude, forced labour, or acts of deception, we recommend that definitions be incorporated into a policy document to enable Officials to understand the terms and apply indicators of each of these offences in the process of investigating claims of trafficking and/or slavery.
- 5) To assist, we have outlined some definitions:
 - a) **Slavery** is the forcing of a person into an activity (labour, service, organ harvesting), by way of acts of coercion or deception, holding them against their will and subjecting them to inhumane conditions and treatment, little or no payment, for the profit of another.
 - b) A **slave** is a person who is subjected to slavery (as above).
 - c) **Servitude** is the state of being a slave or completely subject to someone more powerful.
 - d) **Forced Labour or Activity** is any work or services, or activity which a person is forced to do against their will by means of deception or coercion, usually under threat of some form of punishment
 - e) **Acts of Deception** include but are not limited to, deception regarding the:
 - i) Nature of the job, location or employer;
 - ii) Conditions of work or employment;
 - iii) Content or legality of work contract;
 - iv) Family reunification;
 - v) Housing and living conditions;
 - vi) Legal documentation;
 - vii) Travel and Recruitment Conditions;
 - viii) Wages or Earnings;
 - ix) Through promises of marriage or adoption;

Immigration Act 2009

The definition of **exploitation** in s98D(4) of the Crimes Act should inform a similar amendment to the Immigration Act 2009 to include a definition of exploitation under the Act. Changes to s 351 includes some actions which are deemed exploitative but the list is not comprehensive and should take notes from the ILO indicators of trafficking.

Temporary Visa Permit

New Zealand has agreed to have measures to allow victims to

remain in the territory at least temporarily, and permanently "in appropriate cases" taking into account "humanitarian and compassionate factors" under the Palermo Protocol, which New Zealand ratified in 2002. New Zealand has also agreed to protect victims of trafficking from revictimization. As the easiest way to revictimize a repatriated trafficked victim is to re-traffick them even before they make it home to their community, it is important that New Zealand does all it can to protect victims while they are in country and during the process of repatriation.

As such, provision of a temporary visa currently policy for trafficking victims should be extended to all lawful migrant workers who are exploited in New Zealand, at least temporarily until provision is made for the worker to obtain another job in New Zealand or to return home voluntarily, without any form of coercion or duress from Immigration Officials. Therefore, although the Amendment Act (No 2) Bill has sought to extend the ability of migrants who are exploited, while having legal immigration status, to be able to prosecute their employer under the Act, the fact remains that the immigration status of migrant workers is connected to their particular employer. Therefore, a provision should be enacted for any person who engages Section 350 or 351 of the Act may be provided with a "Temporary Residence Permit" by virtue of being an potential or actual victim of labour exploitation, forced labour, trafficking or slavery. This would require definitions of labour exploitation, forced labour, trafficking and slavery being incorporated into the Act, similar to the recommendations in relation to the Crimes Act.

Additionally, the offence of trafficking should be mentioned in the Immigration Act and referred to, in the Crimes Act, whilst providing the temporary permit for the trafficking victim.

Employment Relations Act 2000

Some migrant workers are not given a contract for their labour or services and are deemed to be contractors; and have no access to basic employment rights. Although the *Ontrack* precedent and s6(2) of the Employment Relations Act 2000 allows for the Courts to look into the circumstances to determine if there was, in fact, an employment contract, this requires that the exploited migrant file legal proceedings in order to gain affirmation that they were an employee on the facts.

Prostitution Reform Act 2003

Under the Palermo Protocol, New Zealand has agreed to suppress the exploitation of the prostitution of women and to take measures including legislative measures to discourage demand that leads to exploitation. Even under the Prostitution Reform Act, most would agree that street and under-age prostitution is still an issue as well as safety issues for some sex-workers. Justice Acts NZ believes that the PRA does not offer sufficient protection against trafficking and recommends a national review of the industry. The review should include interviews with sex-workers in the multiple sectors and in the different regions to document the issues that each sector (brothels/clubs, street, underage, migrants, residential and SOOBs) are facing as well as seeing if some

of the issues have geological distinctions. This data will allow the government to be informed about the real issues in the industry, so that a New Zealand solution to abolish exploitation, violence, and sex slavery and trafficking in the sex industry can be established.

enforcement

New Zealand has committed to ensure that law enforcement, immigration, and other authorities cooperate to determine whether individuals crossing borders are victims of trafficking, what kinds of documentation traffickers are using, and what methods traffickers' use and to have training in the prevention of trafficking, and prosecution of traffickers. Also to have appropriate measures in place to ensure that border controls are strong enough to prevent and detect trafficking. During the course of this review we have not investigated the current status of government agency cooperation and partnership. Additionally, we request information about the training that is given to officials and especially the indicators of trafficking so that we could review its efficiency and compliance with the Palermo Protocol and international jurisprudence or standard/best practice.

research

New Zealand has an obligation to undertake research as well as campaigns to prevent and combat trafficking cooperating with charities (non-government organisations) and other organisations. Therefore, Justice Acts NZ is very pleased that the Ministry of Business, Innovation and Employment is undertaking an empirical research study to assess evidence of trafficking and slavery in New Zealand. We look forward to learning more about this research and seeing the results in due course.

victim support

New Zealand has recognised that holistic victim support is needed; they agreed to consider taking measures to provide for the full recovery of victims including the provision of housing, access to counselling in a language the victim can understand, medical, psychological, and material assistance; and employment, education, and training opportunities.

The overwhelming sense from our review and looking at cases ranging from the Thai sex workers in the "pink ribbon campaign", the Ukrainian girls trafficked into Auckland, the Piopio farm labourers, the crews of the Oyang and the Shin Ji, or underage girls trapped in street prostitution in Auckland, and various farm and orchard labourers around the country, is that there is very little victim support and no preparation work is being done to set up specific exploited persons aftercare facilities or services. Justice Acts NZ therefore recommends that the government allocate resources to work on creating aftercare facilities for trafficking victims (forced labour, sex trafficking, and children/teens) as well as emergency and/or social housing for exploited migrant workers. Officials should be trained in how to provide access to emergency counselling, medical and dental care as well as helping victims through the immigration process to gain the temporary residents permit.

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