



02 February 2015

SUBMISSION ON THE ORGANISED CRIME AND ANTI-CORRUPTION LEGISLATION BILL

The Law & Order Committee
Parliament Buildings
Private Bag 18041
Wellington 6160

This joint submission is regarding Section 5 of the Organised Crime and Anti-Corruption Legislation Bill (219-1) and is made by Stand Against Slavery of 477 Great South Road, PO Box 12220, Penrose, Auckland 1642, New Zealand; and Justice Acts New Zealand of PO Box 74530, Greenlane, Auckland 1642, New Zealand.

We wish to appear before the Committee to speak to our submission.

Peter Mihaere of Stand Against Slavery can be contacted on 09 526 7533, 021 451 429 or peter@standagainstslavery.com, and Steph Lambert of Justice Acts New Zealand can be contacted on 027 256 8394 or steph@justiceacts.org.nz.

We wish to note that the following organisations and individuals are in support of our submission:

Organisations:

- Slave Free Seas, Tauranga;
- Streetreach, The Life Centre Trust, Auckland, Debbie Wiesehan, Manager;
- Nvader, Christchurch, Daniel Walker, Executive Director;
- Freedom from Sexual Exploitation, Auckland, Elizabeth Subritzky, Director;
- Marketplacers International Ltd, Auckland, John Osborne, Managing Director;
- ECPAT NZ, Auckland, Warren Ferdinandus, Director;
- Hagar NZ, Christchurch, Don Lord, Executive Director;
- Freetset International Limited, Kerry Hilton, Chief Executive;
- Loyal Charitable Trust, Michael & Joanne Simpson, Founding Trustees;

Individuals:

- Bryan Ventura (LLB(Hons) and BCom, Solicitor, of Mount Cook, Wellington;

- Greg Knowles, Auckland;
- John Osborne, Kolkata, India;
- Grant Warner, Auckland;
- Grant Harris, Auckland;

1 Introduction

Stand Against Slavery is a charitable trust that is committed to increasing the active participation of all New Zealanders in combating modern-day slavery,¹ particularly the issues of extreme worker exploitation, forced labour, slavery and human trafficking here in Aotearoa New Zealand. We genuinely believe that the only way New Zealand can rid itself of these hideous practices is for government and civil society to work together in a deliberate collaborative partnership.

Justice Acts New Zealand is a charitable trust who are passionate about empowering New Zealanders to combat modern-day slavery,² human trafficking and labour exploitation in New Zealand through evidence-based research, education and advocacy to see trafficking and slavery survivors rescued and restored as well as those responsible brought to justice.

Stand Against Slavery and Justice Acts New Zealand have consulted with the following individuals and organisations in the preparation of this submission:

- Thomas Harré, PhD Candidate, Melbourne, Australia;
- Bryan Ventura (LLB(Hons) and BCom, Solicitor, of Mount Cook, Wellington;

2 Submission

Support of the Submission

Stand Against Slavery and Justice Acts New Zealand are in broad support of the proposed Bill. This submission is in support of the intention of article 5 of the Bill, and in particular, our support is based on the following:

- a) Our concern at the lack of a comprehensive provision and/or Statute that deals with the issue of human trafficking in New Zealand law. We believe the insufficiencies and gaps in our laws, the lack of knowledge and resourcing of agencies indicates to the general public, potential traffickers, and the international community, that New Zealand lacks intention and focus to combat this crime,

¹ The term “modern-day slavery” refers to the types of slavery that exist in our modern world. It has been estimated that the primary form of modern-day slavery is bonded labor/debt bondage, then forced labour (including forced commercial sex work not trafficked), and finally people trafficked into other forced labour or sexual exploitation. The definition and estimations (not included in this document) of modern-day slavery is sourced from Siddharth Kara, 2012, *Bonded Labor: Tackling the System of Slavery in South Asia* (Columbia University Press) and are comparable to the Global Slavery Index estimations. The term, modern-day slavery, is used here in the description of the work of Stand Against Slavery and Justice Acts New Zealand by way of explanation. This submission relates to issues of human trafficking and our understanding of Human Trafficking and its definition is by way of the Palermo Protocol.

² See above n. 1.

which may result in the perception that our country is as an easy trafficking destination.³

- b) Our concern that the lack of a comprehensive provision or Statute also limits our ability as a nation to track and record incidences of human trafficking; and
- c) Our belief that New Zealand should have zero-tolerance for the crime of human trafficking whether in New Zealand or internationally; and
- d) Our concern at the lack of legislated protections and support for victims and believe that a comprehensive definition of the offence is the basic starting point to provide access to justice and support services to victims in New Zealand; and
- e) The non-recognition of internal/domestic trafficking victims has stopped trafficking charges being laid within New Zealand,⁴ and domestic trafficking victims (which may include young New Zealanders and vulnerable migrants) may only lay alternate charges such as kidnapping, abduction, unlawful sexual connection, assault with intent to injure, servitude, debt bondage, or sexual exploitation of an underage person.
- f) Therefore, we believe that the net result of the lack of recognition in law, has been that:
 - (1) The penalties of alternative charges are less than trafficking (if only one charge is laid) and are not sufficient to deter acts of trafficking. Although we note that if multiple charges are laid, then penalties may be equal to that of trafficking or more; and
 - a) The trafficking offence (s 98D of the Crimes Act) has a penalty of not more than 20 years imprisonment, \$500,000 fine, or both. In comparison, if human trafficking were prosecuted under alternate offenses, some of the available offences and penalties include but are not limited to:
 - a) rape (s 129) is imprisonment of 10 years maximum;
 - b) organising sex tours (s 144C) is imprisonment of 7 years maximum;
 - c) assault with intent to injure (s 193), is imprisonment of 3 years maximum;
 - d) abduction for purpose of forced sexual connection (s 208) is imprisonment of 14 years maximum;

³ Official Information Act requests by Slave Free Seas (available upon request) indicate that the Interagency Group on Human Trafficking led by MBIE has been largely inactive since it was established in 2006. In addition, the group has had no NGO representation to date.

⁴ The Prosecution in *R v Hastie* [2010] argued in the New Plymouth District Court that Mr Hastie lured the troubled 15-year-old to New Plymouth by pretending to be a 22-year-old surfer with his own home. In terms of counter-trafficking practice, an abuse of vulnerability coupled with deception is a powerful tool of coercion and in this case, Mr Hastie tricked the victim into thinking she was moving to the Taranaki to live with her “boyfriend”, his intention was to exploit her in his brothel, which he did. But in order to exploit her, he needed to condition or groom her for prostitution. He did this by way of his having sex with her and taking care of her necessities, which meant she felt indebted to him. She had been living with her grandparents and he abused her vulnerability (age, gender, her family situation). Therefore, her vulnerability and his abuse of it, the deceptive recruitment, paying for her bus fare to New Plymouth, her transportation to New Plymouth from Wellington, and then his exploitation of her in the sex industry means that this case reflects the generally accepted elements of internal human trafficking.

- e) abduction of a young person under 16 (s 210) is imprisonment of 7 years maximum;
 - f) the three prohibitions against using an under 18 year old in prostitution each have a penalty of imprisonment of 7 years maximum;
 - g) trading in human tissue (s56 of the Human Tissue Act 2008) is 1 year imprisonment or \$50,000 fine;
 - h) Immigration offence by an employer who allows any person to work for them with knowledge that they do not have entitlement under the Immigration Act to do that work (s 350(1)(a) Immigration Act 2009) is a fine not exceeding \$50,000.
 - i) an employer who allows any person to work for them, without knowledge that they do not have entitlement under the Immigration Act to do that work (s 350(1)(b) is a fine not exceeding \$10,000;
 - j) exploits persons not legally entitled to work in New Zealand (s 351(1) Immigration Act 2009) is imprisonment for 7 years maximum and/or a fine not exceeding \$100,000 or both.
- (2) Victims are not receiving recognition from authorities of the crime committed against them, and not obtaining the requisite supports to enable them to be rehabilitated, restored and to have the capacity to contribute to society; and
- (3) Our ability to track and record trafficking in New Zealand is limited.

Comments and Amendments on the Proposed Amendment

We wish to make the following comments about the proposed amendment to Section 98D of the Crimes Act 1961:

- a) Clause (1) - Although we agree with the general intent of this clause, we feel that it should be expanded to more clearly identify and distinguish between internal and transnational human trafficking (or state that international movement is not necessary to fulfil the elements of the human trafficking offence in compliance with international jurisprudence and best practice). Moreover, we feel that the acts of coercion and deception be expanded to include fraud, abduction, the abuse of power or the giving or receiving of payments or benefits. Lastly, we are of the view that criminal negligence should be included in the mens rea of the offence, and in the event that the mens rea reflects a standard less than intentionality, the mens rea element should be in line with inchoate offending for other serious offences. Therefore, we suggest that Clause (1) be re-worded as follows.

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 exploitation of the person; and
- (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 abduction, fraud, or 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; or
- iii) having ought to have known, or having reckless disregard, or criminal negligence, 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 abduction, fraud, or 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.

(b) the reception, recruitment, transport, transfer, concealment, or harbouring 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 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 abduction, fraud, or 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; or
- (iii) having ought to have known, having reckless disregard, or criminal negligence, 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 abduction, fraud, or 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.

- b) Clause 2 - We support this clause but note that the amendment has not sufficiently considered the Sentencing Act in relation to human trafficking specific mitigating factors.
 - i. We suggest that such mitigating factors could include duress by means of deception, coercion, fraud, and/or abuse of power but this is not an exhaustive list.
 - ii. The purpose of these inclusions is to ensure that if there are persons involved in the crime of human trafficking yet their involvement is due to being coerced or under some kind of threat or use of force to themselves or family members, then any sentence attributed to that person will reflect the full context of the situation and distinctions will be made on whether or not they

were the instigator or leader of the offence. Any person found guilty of being involved in human trafficking should warrant a proportionate punishment. We submit that a restorative justice approach be used where the offender has admitted guilt and is amenable to this process to ensure that the person is fully aware of the effect of their actions on the victims, and he or she is able to provide restitution. Finally, there should be some provision for the rehabilitation of the offender from future offending. In the event that the offender is not amenable to restorative justice (or has not admitted guilt) then the Sentencing Act applies.

- iii. We believe that the organisers of human trafficking groups be subjected to greater punitive measures due to their being guilty of further crimes of incitement and conspiracy, as well as the leadership of such a group. This is particularly so given their offending obtaining participation by others in the group by means of coercion, deception, control, psychological threats, or threats of violence against the person or their family members, or actual violence. It is our belief that s 98E of the Crimes Act 1961 outlines these aggravating factors.

- c) Clause 3 - We support this clause for of the following reasons:
 - a. When a victim is trafficked for a second or third time, the initial acts of coercion, deception, abduction, fraud, the giving or exchange of benefits or rewards, psychological threats, threats of violence, actual violence, or intimidation tactics are no longer necessary to control the victim as the will of the victim has already been broken. Yet, this fact does not negate that the victim has been trafficked to be exploited and the offenders have exploited the victim or have sought to facilitate that exploitation; and
 - b. If the alleged offenders are arrested before the act of exploitation took place, or if the victim did not exit or enter the State concerned, then the alleged offender can only be found guilty for what the Court is able to prove to the criminal standard of beyond reasonable doubt that they did in fact do and had the requisite mens rea to do. Anything beyond this impinges on rights of natural justice in the New Zealand Bill of Rights Act 1990.

- d) Clause 4 - Although we agree with the general intent of this clause, since neither the Crimes Act 1961, the Interpretation Act 1999, nor any other enactment in New Zealand contains a definition for slavery, servitude, and forced labour or services, we believe that the application of this provision lacks potency, and it has potentially limited the ability of relevant agencies to identify, investigate, and prosecute cases of slavery, servitude and forced labour. As such we submit that
 - a. slavery, servitude and forced (or compulsory) labour be defined in the Act in line with international law and best practice; and

- b. serious forms of labour exploitation, forced marriage, and forced surrogacy should be added to the list under Clause (4) of Article 5 of the Bill.

Slavery, Servitude and Forced or Compulsory Labour

Slavery and forced labour are criminalised in ss 98 and 98AA of the Crimes Act 1961 with maximum sentences of 14 years. Section 98(2) defines a slave as including “without limitation, a person subject to debt-bondage⁵ or serfdom⁶”. However, there is no definition of slavery, servitude, forced labour or severe labour exploitation in the Act, or in any relevant New Zealand law.

We note that the provision is framed for flexibility, but we submit that the loose definition of slavery does not encapsulate the right of ownership central to international definitions of slavery.⁷

The definition of slavery, which has been accepted in International Law, is “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”.⁸ This meaning is now largely understood to denote the “powers attached to the right of ownership” instead of the legal right of ownership,⁹ which no longer exists. It has been explained that the “powers attached to the right of ownership” were the purchase, transfer, absolute control over a person, their labour and the product of that labour, and that the end of the status of conditions was indeterminate for the enslaved.¹⁰ The accepted definition of slavery therefore focuses on the exercise of control over another person, and it also creates a pathway to hold individuals criminally liable for exploiting another person through the exercise of control tantamount to ownership. In the Australian case of *R v Tang*,¹¹ the definition of these powers was expanded to include making a person an object of purchases; using a person and his or her labour in a substantially unrestricted manner; an entitlement to the fruits of a

⁵ Debt Bondage is defined in Section 98 as “the status or condition arising from a pledge by a debtor of his or her personal services of any person under his or her control, as security for a 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”.

⁶ Serfdom is defined in Section 98 as “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”.

⁷ Katja Heesterman, “Protection Against Slavery in New Zealand” (Laws 489 Research Paper) Faculty of Law, Victoria University of Wellington, 2014, 12; United States Department of State “Trafficking in Persons Report” (2013) at 280; United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and the Institutions and Practices Similar to Slavery 226 UNTS 3 (entered into force 30 April 1957), art 1; Slavery Convention 182 UNTS 51 (entered into force 7 July 1955), article 1; see also *Siliadin v France* (2006) 43 EHRR 16 (ECHR) at [122].

⁸ Slavery Convention 182 UNTS 51 (signed 25 September 1926, entered into force 7 July 1955), article 1.

⁹ United Nations, Security Council, International Criminal Tribunal for the former Yugoslavia, *Kunarac et al.* (IT-96-23 & IT-96-23/1-A) Judgment, 12 June 2002, paras. 117-119; *Travaux préparatoires* of the 1926 Slavery Convention.

¹⁰ See United Nations Economic and Social Council, Slavery, the Slave Trade, and other forms of Servitude (Report of the Secretary-General), UN Doc. E/2357, 27 January 1953; Allain, Jean, “International Criminal Law and Anti-Slavery Today”, School of Law, Queen’s University of Belfast at (*Panel: Going Global: New Perspectives on Slavery Studies, Symposium: Closing the Slave Trade*), 29-31 May 2008.

¹¹ *R v Tang* (2008) 237 CLR 1.

person's labour without commensurate compensation; and controlling and restricting a person's movement.

British law makes no distinction between slavery and forced labour due to its compliance with the European Human Rights Convention. Yet, Australia has adopted into its law the definition of slavery in *R v Tang*,¹² yet distinguishes between slavery and forced labour, through the difference in penalties for the two acts.

The question of whether New Zealand should adopt into law a definition, and set out an offence for forced labour should be considered; although it is probably not the place within this human trafficking amendment. We submit that more consideration of the offences of Slavery, Forced Labour, Servitude, and Human Trafficking and related forms of exploitation should be considered. Furthermore we submit that an Act that sets out the offences for Forced Labour, Labour Exploitation, Slavery, and Human Trafficking as well as relevant protections and support for its victims should be tabled. This will provide the Committee with the opportunity to set up clear distinctions between each of the offences.

For now, we submit that slavery, servitude and forced labour be defined according to international law and best practice, and propose the following as possible definitions:

Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. These powers include the purchase, transfer, absolute control over a person, their labour and the product of their labour, where the end of the status of slavery is indeterminate.

Servitude is the obligation to provide one's labour or services imposed by the use of deception or coercion and linked with the concept of slavery.¹³

Forced labour is all involuntary labour or services extracted from any person under the menace of any penalty (by means of coercion).¹⁴

¹² *R v Tang* (2008) 237 CLR 1.

¹³ *Siliadin v France* (2006) 43 EHRR 16 (ECHR) at [124].

¹⁴ Convention Concerning Forced or Compulsory Labour (ILO No 29), 39 UNTS 55 (entered into force 1 May 1932), Article 2(1); Protocol of 2014 to the Forced Labour Convention, 1930.