AUSTRALIAN INSTITUTE OF CRIMINOLOGY

trends & issues

in crime and criminal justice

No. 208

Organised Crime and People Smuggling/ Trafficking to Australia

Rebecca Tailby

"Smuggling" and "trafficking" in human beings are similar concepts. Although in theory there are some important points of distinction, in practice the boundary between these concepts can become blurred. Within Australian law enforcement agencies, however, the crimes of people smuggling and people trafficking are largely treated separately (with little recognition of the latter). Increasingly, organised crime groups are being implicated in smuggling and trafficking of persons around the globe. This paper discusses recent changes in Australian law relating to people smuggling and trafficking, reviews the evidence on those responsible, and evaluates the involvement of organised crime in these activities.

Adam Graycar
Director

Migration Issues

Although the global population growth rate is slowing, world population figures remain on the increase. The United States Census Bureau reported in 1998 that 96 per cent of world population increases now occur in developing regions of Africa, Asia and Latin America (McDevitt 1998, p. 1). Along with other factors, this massive relative population expansion in developing countries has led to increased demand for migration. However, in recent years a counter-trend has seen reductions in legal opportunities for migration in many countries (International Organization for Migration 2000). For many, the desire to migrate—frequently stemming from economic and / or humanitarian needs—is stronger than the impediment provided by legal restrictions on immigration to many countries in the world. As a result, there are persons willing to seek migration outside of legal channels. The profits to be made from responding to such demand has motivated the development of illicit migration services, or people smuggling. Furthermore, the willingness, even desperation, of people to seek opportunities in more developed countries has increased their vulnerability to human trafficking.

The lucrative opportunities for those able to provide illicit people smuggling services have enticed not only local opportunistic criminals, but also transnational organised criminal networks, into the marketplace. Claims of increasing involvement of organised crime groups in people smuggling and trafficking have recently attracted attention and concern at an international level. Yet details on the criminal networks behind organised people smuggling are not always easy to obtain. An empirical analysis of criminal involvement in transnational people smuggling and trafficking requires one to identify:

- exactly what is meant by the terms "smuggling" and "trafficking";
- who is facilitating these activities; and
- whether this amounts to organised crime.

May 2001

ISSN 0817–8542
ISBN 0 642 24234 8

Australian Institute
of Criminology
GPO Box 2944
Canberra ACT 2601
Australia

Tel: 02 6260 9221
Fax: 02 6260 9201

For a complete list and the full text of the papers in the Trends and Issues in Crime and Criminal Justice series, visit the AIC web site at:

http://www.aic.gov.au

These analyses can then inform policy regarding appropriate legal and operational responses.

People Smuggling and Trafficking Under Domestic and International Law

Smuggling

The most recent international definition of "smuggling in migrants" appears in the Protocol against the Smuggling of Migrants by Land, Sea and Air (the Smuggling Protocol), supplementing the United Nations' Convention Against Transnational Organised Crime (the Convention). The Protocol defines people smuggling as:

> The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident. (Article 3)

The emphasis is on the illegal crossing of national borders for profit. As this Protocol has not yet been signed and ratified by Australia, it has no binding legal force in this country. A definition under domestic law may be inferred from relevant provisions in the *Migration Act 1958* (Cwlth). In creating the offence of organised people smuggling of groups of five or more persons, section 232A of the Act states that a person is guilty of an offence if he or she:

> …organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of five or more people…and does so knowing the people would become, upon entry into Australia, unlawful non-citizens.

Sections 233, 233A, 234, 235 and 236 create further offences relating to harbouring illegal entrants, using fraudulent documents in connection with entry, and other offences. Interestingly, none of these provisions require any element of profit by organisers / facilitators, merely that there is facilitated or organised crossing of national borders without legal right and that the organiser or facilitator knows this.

Trafficking

People smuggling may be contrasted with the related and somewhat more complex concept of people trafficking. This has been defined in a second Protocol to the same United Nations Convention, namely the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Trafficking Protocol), 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. (Article 3)

Here there is no requirement of movement across national borders. Rather, the emphasis is on the movement of persons, involving an element of duress, for the purpose of exploitation. Australia has not yet signed nor ratified this Protocol; thus, this international instrument has no legal force in Australia.

In relation to trafficking, the gap between international and domestic law becomes wider. There is no offence of "trafficking in persons" under Australian domestic law. Rather, recent amendments to the Commonwealth Criminal Code were incorporated to create offences of slavery, sexual servitude and deceptive recruiting for sexual services—*Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cwlth), amending the *Criminal Code Act 1995* (Cwlth). There are specific provisions relating to *sexual servitude*, which is defined as the condition of a person who provides sexual services and who, because of the use of force or threats, is not free to cease providing sexual services or leave the place where those services are performed (s. 270.4(1)). In addition, it is now a crime to recruit someone to perform sexual services if one deceives that person about the fact that the engagement is for the provision of sexual services (s. 270.7(1)). This injects the deception element into the picture, yet unfortunately limits the deception to the nature of the work. As such, cases where a person knows he or she has been engaged to provide sexual services but has been deceived regarding conditions of work (such as remuneration or other working conditions) fall outside the provision. Anecdotal reports suggest that the majority of foreign nationals (mostly women) entering Australia to work "illegally" in the sex industry (that is, who have entered illegally or are working in contravention of visa requirements) fall into the latter category. Unless such situations amount to slavery, these cases will fall outside the scope of the recent amendments.

The broader and more general provision relates to *slavery*. Rather than focusing on exploitation per se, this section defines slavery as the condition of a person:

> …over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person. (s. 270.1)

This focus on ownership rights over an individual makes no mention of explicit deception or other form of duress, although it may be reasonable to presume duress and exploitation as an implied facet of slavery conditions. Yet establishment of ownership rights over another is arguably a more onerous burden than establishing the presence of exploitation on the basis of the various forms of duress mentioned in the Trafficking Protocol. In this sense, domestic law creates a more onerous legal test than international law. Under the Criminal Code provisions, provided the "ownership rights over another" criterion is met, the offence is broad enough to

encompass slavery conditions in any sector, not just the sex industry.

Australia's Experience

The above definitional issues may become relevant if comparative pictures are sought regarding the extent of human smuggling and / or trafficking to Australia and other countries. Each country may have a different domestic legal conceptualisation of these offences, particularly as regards trafficking. Alternately, no local laws may exist which cover these crimes. As such, any transnational comparisons of prevalence must be approached with this knowledge and caution. Yet even gaining a local picture may present its own difficulties.

Smuggling

Information held by law enforcement agencies in Australia largely maintains a distinction between cases of people smuggling and those of trafficking. Although the Department of Immigration and Multicultural Affairs (DIMA) has traditionally been the lead agency in matters of illegal immigration, Australia is now adopting a "whole-of-government" approach to tackling people smuggling. There is wide cooperation between a number of agencies with roles to play in this area of enforcement, with one example being the joint Australian Federal Police (AFP) and DIMA People Smuggling Strike Team. Clear records are maintained by DIMA about people who are detected being *smuggled* to Australia, including statistics outlining the number of illegal arrivals intercepted at Australia's air and sea borders, their origins, and so on.

Trafficking

As regards trafficking, the position is somewhat muddier. First, trafficking as a concept under international law does not require the movement of persons across national borders (thus need not involve a migration aspect) so, in this regard, is different to smuggling. Second, the Australian offences of slavery and sexual servitude are created not under the Migration Act, but under the Criminal Code. As a result, jurisdiction for such matters would rest primarily with police. In cases where persons are moved transnationally into Australia, DIMA will have a role to play as well as the AFP. At present, however, there is no Australian team or officer dedicated to the investigation of people trafficking or slavery and sexual servitude crimes. There is no central repository of cases which are considered to fall within these categories. The extent of trafficking to Australia is largely unknown, although incidence appears to be low. In its 1999 review of illegal workers, DIMA reported figures on the main employer categories of located illegal workers (DIMA 1999a). It is not clear how many of these workers were being exploited and were working under duress (making them trafficking victims under international law) or were working in slavery conditions (meeting Commonwealth Criminal Code provisions). From another perspective, some law enforcement agencies use the term "trafficking" to describe the organised movement of women from South East Asia into the sex industry in Australia for short-term work (see, for example, DIMA 1999a; Pacor 1994). In the majority of instances, such cases do not amount to offences under the Criminal Code provisions or the Trafficking Protocol.

Who are the Organisers and Facilitators?

Aside from quantifying the problem, *qualitative* information about those behind illegal migration is needed to direct law enforcement action against these criminals. Commonsense dictates that in order for someone to be moved across national borders without conforming to law, some form of planning will be present. When movement is through multiple transit points and countries, the required level of organisation increases. When considering people smuggling and trafficking at a global level, the degree of criminal involvement and sophistication varies, from loose amateur groups concentrating on particular routes, through to transnational crime groups specialising in trafficking migrants for subsequent exploitation by the group. This variation in operators also characterises smuggling and trafficking to Australia. There are a range of operators facilitating unauthorised entry of persons, including:

- migration agents in source countries assisting with the preparation of fraudulent travel documentation;
- corrupt officials facilitating irregular movement through international airports;
- Indonesian boat crews bringing migrants from Indonesia (a transit point) to Ashmore Reef;
- Chinese criminal operations arranging clandestine entry of Chinese nationals by sea;
- Thai syndicates recruiting Asian prostitutes for short-term (illegal) work in the Australian sex industry; and
- Middle Eastern syndicates facilitating movement of Iraqis, Afghans and Turks to Australia.

So what is known about those groups and individuals facilitating or organising illegal immigration to Australia?

Unlike Europe, where road and rail are frequently used, the two means of entry to Australia are by sea and by air. Not all cases of illegal entry will involve facilitation by criminal organisers; in some cases individuals plan and arrange their own travel. Yet organised facilitation of illegal entry does occur, via both routes. In the case of the majority of *boat* landings, the arrival is overt, the boats used are Indonesian fishing vessels, and landing takes place on the north-west coast or outlying islands (Ashmore and Christmas Islands). People arriving in this manner comprise a variety of nationalities. Evidence suggests that persons from a variety of source countries make their way to Indonesia, which usually serves as the final staging

point for boat travel to Australia. The spread of nationalities arriving by boat suggests the operation of a number of criminal groups or individuals from different regions facilitating passage of these people to a common destination (South East Asia). While Indonesia is a major staging point for boat travel to Australia, it must be noted that it is not the only staging country in the region (for instance, in 1998–99, a small proportion of boat arrivals embarked from Papua New Guinea). The high number of persons of particular nationalities (for example, Afghans, Iraqis) arriving in Australia on boats suggests there are organisers capable of moving large numbers of persons from the Middle East through to Indonesia. Having the capacity to move large numbers of individuals undetected suggests a well organised criminal syndicate(s) with contacts throughout various transit countries, safehouses to accommodate groups en route, means of transporting these groups, and possible links to corrupt officials. In addition, arrests of Iraqi residents and naturalised citizens in Australia for involvement in people smuggling (DIMA 1999b) suggest a local presence of Middle Eastern smuggling syndicates.

A minority of boat arrivals to Australia are clandestine, and detected landings have involved Chinese nationals. These arrivals have landed on Australia's east coast. The boats involved in these landings have, in many cases, been larger, steel-hulled ships rather than wooden fishing boats and have possessed sophisticated navigational technology. These boats have travelled longer distances (mainly from China direct to Australia) and in most cases there has been an onshore presence to meet the smuggled group upon landing. The involvement in this case is suggestive of a syndicate with control from beginning to end, employing sophisticated methods (including flexibility of entry route in response to law enforcement monitoring), which has local connections in Australia who serve as the landing party to meet and house the immigrants upon arrival. These covert boat arrivals are likely in most cases to be smuggling cases only, although if those smuggled here are subsequently forced into exploitative labour by the local arm of the syndicate, this would elevate the activity to trafficking.

Illegal arrival by *air* is somewhat more difficult, as some form of fraudulent documentation or access to corrupt officials en route will usually be needed. As to the former, individual forgers and document mills exist which can provide this service, so long as one has the connections and the money. One example is a Taiwan-based syndicate organising Taiwanese passports (both stolen and fraudulent) for Chinese nationals travelling to Australia (DIMA 1999b). Another involves illegitimate migration agents who assist individuals with fraudulent visa applications, and recruiters who can pre-arrange illegal employment in the destination country. The level of organisation involved in illegal movement by air varies. Some illicit movement occurs in groups (such as tour groups) with a third-party escort. There may be exploitation of the visitor visa system, such as the racket involving business visitors from China which was uncovered by DIMA in 1998 (DIMA 1999b). Boarding pass swaps at airports also require involvement of third parties.

A distinction can be drawn between smuggling for entry (where whatever happens after arrival is of no concern to the syndicate, so long as payment is made) and smuggling for entry and subsequent work for the syndicate. The latter scenario provides greater potential for trafficking. A characteristic example of smuggling and subsequent work is organised international prostitution, where the prostitution ring has agents in source countries to recruit women, usually an escort to accompany them en route to Australia, and the brothel owner who employs the women once here. Women may come in with their own passports and tourist visas, or may come in on false papers—in which case the syndicate will have further contacts who can arrange documentation. In Australia, the majority of foreign women entering for sex work are recruited from South East Asia and fly in (on tourist visas) bonded to verbal contracts (Brockett & Murray 1994). There have been cases where women have claimed that their agreement was for waitressing work and they were coerced into prostitution—such allegations, if substantiated, would probably amount to trafficking, given the elements of deception and exploitation, and "deceptive recruiting for sexual services" under the Criminal Code. Yet it has been reported by both enforcement agencies and sex industry bodies that the majority of women know they are coming to Australia for sex work; what may not be known are the conditions under which they will work. It is therefore questionable whether the practice of South East Asian women coming to Australia for contracted sex work constitutes "trafficking" under the United Nations definition or sexual servitude or slavery under the Criminal Code. The term appears to be used as shorthand by law enforcement sectors to describe organised movement into Australia to perform sex work contrary to entry visa conditions.

Who Will They Smuggle?

In the case of both air and sea smuggling, while the pattern is not clear-cut or static, there does appear to be a trend whereby criminal groups focus on their own nationals or on migrants from neighbouring geographic areas. This is a trend driven largely by practicality—for instance, the ease of tapping a local market for irregular migration coupled with local contacts, a local presence and shared

language. By way of example, Iraqi or Turkish syndicates have a ready market in the form of Iraqis, Afghans, Turks and other Middle Eastern nationals wishing to escape oppressive regimes and difficult living conditions, whether for economic, political, religious or personal reasons. Similar situations exist for Chinese syndicates moving Chinese economic migrants, or Russian mafia groups trafficking women from the former Soviet states. Despite this, there is, in all likelihood, some intermingling of criminal networks and contacts during transit, given the common staging points used in smuggling of migrants from various regions. For instance, while Middle Eastern nationals may initially deal with a Middle Eastern smuggler, they may link in with Asian associates or networks in transit who facilitate their passage through South East Asia.

Specialisation of Smugglers/ Facilitators

The specialisation and sophistication of groups facilitating irregular migration also shows some variation. For instance, boat crews smuggling irregular migrants through Asia, and from Indonesia to Australia, are the endpoint of a chain of facilitators and take up an opportunistic and specialised role (boat transfer). However, information from the AFP suggests that some of those involved in smuggling drugs have incorporated people smuggling into their illegal activities, using similar infrastructures and equipment for both (AFP 2000). Thus, syndicates involved in people smuggling may increasingly be linked with other types of crime. In contrast, people trafficking, by its nature, involves not just irregular movement of migrants but also subsequent exploitation for criminal purposes. As such, the group requires contacts throughout the journey and a presence in the destination country in order to exploit arriving migrants and enforce debt repayment. Typically, those trafficked end up in sectors associated with organised crime (for example, prostitution or other sex work) or doing "under the table" labour in establishments or markets controlled by criminal groups (for example, gambling houses or clubs, drug couriering). As such, there are often links with other types of crime.

Knowing something of those responsible for smuggling and trafficking to Australia, the question becomes, do these syndicates represent "organised crime"? One must look to legal definitions of organised crime and see whether these activities and groups meet the criteria.

Organised Crime under Domestic Law

In Australia, there is no provision in domestic law which defines an "organised crime group". The AFP investigate transnational crime as part of their duty to safeguard Commonwealth interests and enforce Commonwealth laws (*Australian Federal Police Act 1979*, s. 8). The agency with specific responsibility for investigating organised crime is the National Crime Authority (NCA), yet its enabling legislation does not refer to organised crime. Rather, NCA's functions are defined with reference to "relevant offences". Under section 4 of the *National Crime Authority Act 1984*, these are defined as offences involving two or more offenders, substantial planning and organisation, and the use of sophisticated methods and techniques. These offences are ordinarily committed in conjunction with other offences of a like kind, and involve activities amounting to serious crime (as listed under the Act to encompass a broad array of activities from fraud to drug dealing to forging passports) punishable by at least three years' imprisonment. Immigration malpractice associated with people smuggling is of interest to the NCA, although there is no reference specifically for this activity. Within this context, it can be considered whether those smuggling or trafficking persons to Australia constitute organised crime as defined by the NCA Act.

First, in almost all cases of air and sea smuggling (aside from those where the individual arranges his / her own travel), two or more offenders are involved, as is substantial planning and organisation (the latter could almost be taken as a given whenever international travel is involved). The use of sophisticated methods and techniques is present whenever fraudulent documents are produced, whenever large numbers of individuals are smuggled without detection over long distances (including across international borders), or when organisers show some degree of flexibility in response to law enforcement action. The third and fourth criteria are similar, and require that these offences are ordinarily committed in conjunction with other offences, at least some of which amount to serious crime. These criteria are likely to be met in:

- smuggling by air, as this must be accompanied by some form of fraud (either false papers, lack of bona fides or bribing of corrupt officials); and
- organised international prostitution, where the syndicate obtains financial benefit by vice engaged in by others.

The situation is less clear in the case of seaward smuggling, where the only offence may be entry without proper authority. However, if the movement of these persons involved some fraud, corruption or other crime whilst they were in transit prior to their boat departure from Indonesia, this may be sufficient to constitute a relevant offence. The complicating factor is the existence of permissive legal regimes along migration routes; in many countries, people trafficking (and in some cases smuggling) is not a crime.

In the majority of cases, those facilitating people smuggling and trafficking to Australia can be considered as "organised crime". However, analysis of those

involved in organising and/or facilitating illegal entry to Australia does not reveal a picture consistent with the "traditional" organised crime group (that is, a structured hierarchical organisation and/or secret society whose membership is centred along ethnic lines). Rather, the nature of organised criminal involvement in people smuggling/trafficking to Australia is tending towards flexible, fluid networks of organisers and facilitators playing various roles, with increasing transnational collaboration among different groups and with local criminal actors.

Response Issues

Current Anti-Smuggling Measures Targeting Organisers

To date there have been a number of prosecutions under the Migration Act, typically involving action against Indonesian skippers and boat crews for bringing in groups of unlawful non-citizens. In addition, there have been a small number of prosecutions of Australian-based facilitators of people smuggling. Action against foreign organisers of illegal migration to Australia remains the most difficult task for law enforcement. There have been a number of notable successes in dismantling and disrupting people smuggling rackets overseas, brought about through cooperative information sharing between Australian and foreign authorities. This includes disruption of a Sri Lankan smuggling racket, and numerous arrests in the Middle East of criminals involved in a people smuggling and document fraud racket (DIMA 1999b). Yet given the chaotic political climates and permissive legal regimes characterising many source and transit countries where people smuggling is flourishing, disruption of organised criminal syndicates in these countries will remain a very difficult task.

Current Anti-Trafficking Measures

The extent of trafficked victims in Australia is unknown but thought to be small. As at 1 March 2001, there have been no charges laid or prosecutions under the slavery and sexual servitude provisions in the Criminal Code. Taking the example of foreign women working unlawfully in the Australian sex industry, the number of such workers located in Australia by DIMA has increased from 56 in 1996–97 to 190 in 1999–2000 (DIMA 2001, p. 69), yet it is unknown how many of these women were brought to Australia under deception and forced to work in exploitative conditions. One of the few examples of action taken against a local organiser of international prostitution is the prosecution of hotel owner Gary Glasner, who was behind the illegal importation of at least 20 Thai women to work in brothels in Melbourne. However, the light sentence he received (a suspended sentence and $31,000 fine) suggests that effective punishment for organisers of international prostitution is not occurring.

It remains to be seen whether Australia's recent signing of the United Nations' Convention Against Transnational Organised Crime will result in stronger action, or frameworks for action, against organised criminal groups involved in people smuggling and trafficking to Australia. Signing of the two optional Protocols relating to migrant smuggling and trafficking in persons will be an important additional step for Australia to take in this regard.

References

Australian Federal Police (AFP) 2000, *Annual Report 1999–2000*, Australian Federal Police, Canberra.

Brockett, L. & Murray, A. 1994, "Thai sex workers in Sydney", in R. Perkins, G. Prestage, R. Sharp & F. Lovejoy (eds.), *Sex Work and Sex Workers in Australia*, University of New South Wales Press, Sydney.

Department of Immigration and Multicultural Affairs (DIMA) 1999a, *Review of Illegal Workers in Australia: Improving Immigration Compliance in the Workplace*, Department of Immigration and Multicultural Affairs, Canberra.

——1999b, *Protecting the Border: Immigration Compliance*, Department of Immigration and Multicultural Affairs, Canberra.

—— 2001, *Protecting the Border: Immigration Compliance*, Department of Immigration and Multicultural Affairs, Canberra.

International Organization for Migration 2000, "There are ways to curb the worldwide traffic in migrants", *Trafficking in Migrants Quarterly Bulletin*, no. 21, see http://www.iom.int/PDF_Files/Trafficking_in_Migrants/TB21.pdf.

McDevitt, T. 1998, *World Population Profile: 1988*, United States Census Bureau, Washington DC, see http://www.census.gov/ipc/www/wp98.html.

Pacor, P. 1994, Briefing paper on the movement of South East Asian women for prostitution in Australia, Australian Federal Police, Canberra.

United Nations 2000, *Convention against Transnational Organised Crime*, A/55/383, incorporating the Protocol Against the Smuggling of Migrants by Land, Sea and Air, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

Rebecca Tailby is a Research Analyst at the Australian Institute of Criminology

General Editor, Trends and Issues in Crime and Criminal Justice series:
Dr Adam Graycar, Director
Australian Institute of Criminology
GPO Box 2944
Canberra ACT 2601 Australia

Note: Trends and Issues in Crime and Criminal Justice are refereed papers.