

What is Human Trafficking?

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Trafficking in persons is suspected to be a world-wide problem, not because the statistics themselves are a matter for concern, but also because it is suspected to be largely unreported. The victims tend to be both economically and socially vulnerable, while the traffickers are usually wealthy and have the ability and the visas to enter and leave countries at will. In addition, the law enforcement agencies of a State often have neither the laws nor the political will to investigate and prosecute offences of trafficking.

There is also a widespread misunderstanding of what trafficking is in law. It is not the commercial exploitation of women and children, although many cases of trafficking may include such exploitation. It is not slavery, although the labour exploitation and sale of human beings may be evidence of trafficking. It is not sex work, although the movement and deception of sex workers may be evidence of trafficking.

So, what is trafficking?

The United Nations Protocol to Prevent, Suppress and Punish Trafficking In Persons (which Fiji has not ratified) defines the term as follows;

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of 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;

(b) 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;

(c) 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;

The definition of human trafficking used by the United States State Department is similar. In its annual Trafficking in Persons Report, it defines trafficking on persons as follows;

Over the past 15 years, “trafficking in persons” or “human trafficking” have been used as umbrella terms for activities involved when one person obtains or holds another person in compelled service. The Trafficking Victims Protection Act of 2000 describes this compelled service using a number of different terms: involuntary servitude, slavery, debt bondage, and forced labour.

Under the TVPA, a person may be a trafficking victim regardless of whether they once consented, participated in a crime as a direct result of being trafficked, were transported into the exploitative situation, or were simply born into a state of servitude. At the heart of this phenomenon are the myriad forms of enslavement – not the activities involved in international transportation.

1. The History of Human Trafficking Law in Fiji

Prior to the passing of the Crimes Decree 2009, Fiji had no specific human trafficking laws. Kidnapping and abduction, however, were offences under sections 249 and 250 of the Penal Code respectively. Kidnapping was defined as the conveying of a person “beyond the limits of Fiji without the consent of that person, or of some person legally authorised to consent on behalf of that person...” and abduction was defined as the compelling by force of a person, or the deceiving of a person in order to induce that person to go from any place. The maximum sentence for kidnapping was seven years imprisonment; the maximum sentence for abduction was 10 years imprisonment. Section 252 of the Penal Code provided that where a person kidnaps another, or abducts another “in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected, to grievous harm, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so disposed of...” then that person is guilty of a felony for which the maximum sentence was 10 years imprisonment. Convictions under these provisions were rare, although in 2003, a father was convicted under this section for forcing his 18 year old daughter to have sexual intercourse with him after he had tied her up with a rope, beaten her with a stick, and restrained her in the bush.¹

Under the Penal Code there was an offence of child-stealing, defined as the taking away, or leading away, by decoy, or enticement, or the detention of a child under the age of 14, with intent to deprive the parent or guardian of the possession of the child, or with intent to steal from the child. Section 255 created the offence of the abduction of girls under the age of 16, and section 257 created the offence of unlawful compulsory labour, defined as the unlawful compelling of a person to labour “against the will of that person”.

The old law did not define trafficking in accordance with the Trafficking in Persons Protocol, nor did it adequately define trafficking as an exploitative offence committed when there is a severe economic, and social power imbalance between the perpetrator and the victim. The old law was also paternalistic, and gender-specific, seeking to protect young girls (but not young boys) against something called “unnatural lust”², and against the proprietary rights of parents.

Yet often parents themselves sell their children into a life of exploitation.

2. The Crimes Decree

The Crimes Decree definition conforms to the definition of trafficking in the U.N. Protocol. The whole of Division 6 deals with trafficking offences. Section 111 defines the word “deceit” as meaning misleading “as to fact (including the intention of any person) or as to law, by words or other conduct”, and the word “threat” is defined as “ (a) a threat of force; or (b) a threat to cause a person’s removal from Fiji; or (c) a threat of any other detrimental action – unless there are reasonable grounds for the threat of that action”.

2.1 *International Trafficking*

Section 112 provides that the offence of trafficking of persons is committed if;

“ (a) the first person organises or facilitates the entry or proposed entry, or the receipt, of another person into Fiji; and

(b) the first person uses force or threats; and

(c) that use of force or threats results in the first person obtaining the other person’s compliance in respect of that entry or proposed entry or in respect of that receipt.

Penalty – 12 years imprisonment.”

Section 112 (2) provides that the same conduct is an offence if committed to organise or facilitate the exit of any person out of Fiji, and Section 112 (3) creates the offence of trafficking to exploit for labour. Subsection (3) (b) provides that it is an offence if entry or exit is organised, and the perpetrator “is reckless as to whether the other person will be exploited, either by the first person or another after entry.” It was this section that was used to prosecute the accused, an Indian national in *State v. Murti* in 2011.³

The word “exploit” is defined by the Crimes Decree. Section 4 of the Crimes Decree defines “exploitation” as occurring if “ (a) the exploiter’s conduct causes the victim to enter into slavery, forced labour or sexual servitude; or (b) the exploiter’s conduct causes an organ of the victim to be removed and – (i) the removal is contrary to law; or (ii) neither the victim nor the victim’s legal guardian consented to the removal, and it does not meet a medical or therapeutic need of the victim”

The word “recklessness” is defined 4 as being aware of a substantial risk that a circumstance or result will occur, and having regard to the circumstances known to him or her, it is unjustifiable to take that risk.`

Section 112 (5) defines yet another type of trafficking. It provides that where entry is organised and facilitated and the perpetrator deceives the other person about the fact that the entry and the arrangements for entry or proposed entry includes the provision of sexual services or exploitation or debt bondage or the confiscation of the other person’s travel or identity documents. What does this mean? This means that where a person is promised entry to Fiji, and is told that he or she will work in a garment

factory, but in fact the person finds that he or she will have to work in a brothel, the offence is committed. The crux of the offence is not the sexual services, but the deceit used to facilitate entry.

Section 112(7) creates yet another type of trafficking offence. It is when the entry or exit of a person is organised or facilitated, and there is an arrangement for the person to provide sexual services, but the deceit is as to the nature of the sexual services to be provided, or the extent to which the person is free to leave the place where sexual services are provided, or the extent to which the person is free to cease providing sexual services, or the extent to which the person is free to leave a place of residence, or “if there is a debt owed or claimed to be owed by the other person in connection with the arrangement for the other person to provide sexual services – the quantum, or the existence of the debt owed or claimed to be owed.” This means that if a sex worker has been brought to Fiji willingly, but that when she arrives, she finds that she is unable to leave the brothel in which she works, then an offence has been committed. If she is deceived about the nature of the sexual services she is expected to provide, an offence is committed. If she is forced to work without payment on the basis that she owes the perpetrator money and the debt is excessive, an offence is committed.

Section 113 creates the offence of aggravated trafficking in persons, for which the penalty is a maximum of 20 years imprisonment. The offence is aggravated if the offence is committed with intention that the victim will be exploited, or if in committing the offence the perpetrator subjects the victim to cruel, inhuman or degrading treatment, or if the perpetrator engages in conduct that gives rise to a danger of death or serious harm to the victim and is reckless about causing that danger.

2.2 Child Trafficking

The Crimes Decree creates separate offences of child trafficking. Section 114 provides that a person commits this offence when he or she organises or facilitates the entry or proposed entry into Fiji, or the receipt in Fiji, of another person and the other person is under the age of 18, and the perpetrator intends that the child will be used to provide sexual services or will otherwise be exploited, either by the perpetrator or another after entry or receipt, or is reckless as to whether the child will be used to provide sexual services or be otherwise exploited, after entry or receipt. The maximum sentence is 25 years imprisonment. The words “sexual service” are defined as “the use or display of the body of the person providing the service for the sexual gratification of others”.⁵

This definition of child trafficking is capable of covering the exploitation of child labour in addition to trafficking for sexual purposes. Section 114(1) (c) includes the offence of facilitating the entry of children and being reckless about their exploitation in general. Thus organising the entry (or exit under section 114(2)) of children in order that they will be used in garment factories as a source of cheap labour, is an offence under this section. In addition to this, the trafficking of children for any type of sexual service (and the definition includes the use of children for child pornography) is an offence. This definition conforms to the UN Protocol on the trafficking of Persons definition for the trafficking of children.

2.3 Domestic Trafficking

Sections 115 and 116 deal with domestic trafficking. This is defined under section 115 as follows;

“ (1) A person.....commits an indictable offence of domestic trafficking in persons if (a) the first person organises or facilitates the transportation or proposed transportation of another person from one place Fiji to another place in Fiji; and (b) the first person uses force or threats; and (c) that use of force or threats results in the first person obtaining the other person’s compliance in respect of that transportation or proposed transportation. “

The maximum penalty is 12 years imprisonment.

Subsection (2) provides that the offence of domestic trafficking is committed when the transporting is organised or facilitated, and the perpetrator is reckless as to whether the victim will be exploited either by the perpetrator or someone else. Again, domestic trafficking does not have to be about sexual services. It can also be about any type of exploitation. Subsection (2) is easier to prove, because it is not an element of the offence that force or threats be used to secure compliance.

One example of how this might work is where a woman in Labasa is transported to Suva in order to do the work of a house girl. The accused organises the transportation, either knowing, or being reckless about the exploitative terms of her employment. This is an offence under section 115(2) of the Crimes Decree.

Section 115(3) creates yet another offence of domestic trafficking. The section provides that where a person “organises or facilitates the transportation of another person from one place in Fiji to another place in Fiji; and.....the first person deceives the other about the fact that the transportation, or any arrangements the first person has made for the other person following the transportation, will involve the provision by the other person of sexual services or will involve the other person’s exploitation or debt bondage or the confiscation of the other person’s travel or identity documents” that person commits an offence of domestic trafficking.

Subsection (4) provides for another type of domestic trafficking. The section states that an offence is committed where a person organises or facilitates the transportation of another person from one place in Fiji to another, and there is an arrangement for sexual services, and the first person deceives the other about any of the following;

1. the nature of sexual services to be provided;
2. the extent to which the other person is free to leave the place where the service is to be provided;
3. the extent to which the other person will be free to cease providing sexual services;
4. the extent to which the other person will be free to leave his or her place of residence;
5. if there is a debt in relation to the providing of sexual services, the quantum or the existence of the debt owed or claimed to be owed.

Aggravated domestic trafficking occurs under Section 116, when the accused acts with an intention that the person transported will be exploited, or where the accused subjects the victim to cruel inhuman or

degrading treatment, or where, in committing the offence, the accused subjects the victim to conduct that gives rise to a danger of death, or serious harm to the victim, and the accused is reckless as to that danger. The maximum penalty for the aggravated offence is 20 years imprisonment.

The offence of domestic trafficking in children differs from the section 115 provisions. Section 117 provides that where a child under the age of 18 is transported from one place in Fiji to another, and the person who organises or facilitates such transportation intends that the victim will be used to provide sexual services, or will be otherwise exploited, or where the accused is reckless about the fact that the child will be used for sexual services or will be exploited, the offence of domestic child trafficking is committed.

3. Related Offences

These are the offences of human trafficking in the Crimes Decree. There are additional related offences which are often used interchangeably with trafficking offences: debt bondage⁶ and people smuggling⁷.

Debt bondage is engaging in conduct which causes another to enter into debt bondage (defined under section 4 as the “status or condition that arises from a pledge by a person of his or her personal services or of the personal services of another person under his or her control as security for a debt owed, or claimed to be owed, (including any debt incurred or claimed to be incurred, after the pledge is given) by that person if – (i) the debt owed or claimed to be owed is manifestly excessive; or (ii) the reasonable value of those services is not applied toward the liquidation of the debt or purported debt; or (iii) the length and nature of those services are not respectively limited and defined”).

Thus debt bondage is about the abuse of an unequal and potentially exploitative employment relationship, centred on the provision of personal services. Evidence of debt bondage can constitute an element of the offences of trafficking, but trafficking is also about the transportation of human beings from one place to another. Thus trafficking can include evidence of debt bondage, to prove exploitation, but debt bondage is not necessarily trafficking.

All cases of trafficking and debt bondage have extra-territorial jurisdiction. Thus it does not matter where the offence was committed: as long as the offender is a Fiji citizen or resident, the Fiji courts may try him or her⁸.

People smuggling is often confused with trafficking. Section 122 of the Crimes Decree provides that a person commits an indictable offence if the first person organises or facilitates the entry of another person into a foreign country (whether or not via Fiji) and the entry does not comply with the foreign country’s requirements for entry, and the other person is not a citizen or permanent resident of the foreign country, and the first person organises or facilitates entry for a benefit. The maximum sentence is 10 years imprisonment, or 500 penalty units, or both.

Aggravated people smuggling is committed⁹ when the offence is committed and the accused intends that the victim will be exploited after entry, or subjects the victim to cruel, inhuman or degrading treatment,

or the accused's conduct exposes the victim to the danger of death or serious harm and the accused is reckless about such risk.

The main difference between trafficking and smuggling is that for trafficking there must be some level of deceit, or force, whether it is deceit as to the type of sexual services that are to be provided, or force in gaining the compliance of the victim to the entry or exit of the victim. No such deceit or force is required to prove smuggling. All that is required to prove smuggling is that a non-national of a foreign country organises the entry into that country of persons in breach of that country's immigration laws, and that he or she does so for benefit. In the case of aggravated smuggling, there must be additional evidence of an intention to expose the victim to exploitation, serious harm or cruel and inhuman treatment.

All the offences require the consent of the Director of Public Prosecutions before the charges can be filed.¹⁰

4. Trafficking In Fiji

Given the complexity of the trafficking offences in the Crimes Decree, it is obvious that investigation and prosecution under these new provisions are not for the faint-hearted. Although reports of trafficking in Fiji have been discussed¹¹ there is no evidence that there are uninvestigated cases of human trafficking in Fiji. There has been only one conviction for trafficking under section 112(3), but that was a case of Fiji being used as a transit country for the entry of Indian nationals into New Zealand. There is currently a case of debt bondage charges before the courts, but judgment is still pending.

It is possible that anecdotal accounts of "trafficking" are reported without any real knowledge of the legal definition of trafficking under the Crimes Decree. Thus commercial sexual exploitation of children is not necessarily trafficking, although such cases may exhibit some elements of the offences of trafficking.

It can be said, however, that the Crimes Decree offences of trafficking in adults and children conform to the definition of trafficking in the U.N. Protocol for the Trafficking of Persons. The US State Department definition is wider, and includes slavery as a type of trafficking.

The Crimes Decree includes the offence of slavery¹² and 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."¹³

What is interesting about this definition is that a case of debt bondage or of trafficking could quite easily also be a case of slavery. The definition, as broad as it is, is consistent (together with the offences of trafficking and people smuggling as well as debt bondage) with the US State Department's definition of trafficking.

5. Case Study

Fiji's only case is that of *State v. Kadali Suryanayanara Murti* (2011) HAC 195 of 2010. The accused, a national of India, was charged on one count of trafficking in persons, contrary to section 112 of the Crimes Decree, and seven counts of obtaining property by deception. The prosecution called seven

victims to give evidence. They said they met the accused in Delhi after learning that he was arranging overseas work for Indian nationals. They paid him money, in rupees or in New Zealand dollars, after he showed them documents that they had been offered jobs in New Zealand. He then made travel arrangements for them, telling them that Nadi was in New Zealand and that from Nadi they would take domestic flights to New Zealand. In fact, no arrangements had been made for the victims to work in New Zealand, and the evidence revealed that the accused intended simply to leave the victims in Fiji to an uncertain fate. The accused in his defence said that he had made no travel arrangements for the victims that they had paid him no money and that he had met them at the airport in Delhi where he had agreed to be their interpreter. The judge¹⁴ asked the assessors to consider the following questions in deciding whether this was a case of trafficking;

1. Did the accused facilitate the entry of the complainants into Fiji?
2. If he did was he aware of a substantial risk that the complainants will be exploited?
3. If he was aware of the substantial risk, was he justified in taking the risk having regard to the circumstances known to him?

The assessors found the accused guilty on all counts. The judge agreed. In sentencing His Lordship said that because this was the first case of trafficking in Fiji, there was no guideline judgment on sentencing tariffs. He considered overseas cases including *R v. Maka*¹⁵, *R v. Saini and Others*¹⁶ and *R v. Feng Lin*¹⁷ and found these cases to be of limited assistance because the maximum penalties in those other jurisdictions were not the same as the Crimes Decree penalties. He considered the international law in relation to trafficking offences, referring specifically to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Trafficking Protocol) and the Protocol against the Smuggling of Migrants by Land, Sea and Air (the Migrant Protocol) and said this;

“Trafficking in persons is a human rights issue. Traffickers are motivated by greed to take advantage of vulnerable victims. Traffickers use coercive tactics including deception, fraud, intimidation, isolation, threat and use of physical force, and/or debt bondage to control their victims. The victims are generally subjected to degrading forms of exploitation such as forced prostitution, domestic servitude and other kinds of work.”

He picked six years as a starting point (having found that trafficking for labour exploitation was less serious than trafficking involving physical harm) and after adjusting for mitigating and aggravating circumstances, sentenced the accused to six years imprisonment for each count to be served concurrently with each other. He ordered a non-parole period of four years imprisonment.

There is obviously room for harsher sentences in the future for more serious kinds of trafficking.

6. The Future

Fiji is fortunate in that there is no known national problem of trafficking. However, we have all the features of developing countries that make us vulnerable to trafficking. One is poverty. Another is gender inequality. In a patriarchal society, where girls are valued less than boys, girls and women are more likely

to be sold into exploitative situations. Another factor that makes us vulnerable is lack of legal knowledge and lack of access to justice. Many victims may not know that a crime has been committed and that they have a right to report the matter to the police. Lastly, a lack of expertise in the police force and in the Director of Public Prosecution's Office, because there have been so few reported cases, makes us vulnerable to trafficking activity.

As I have said in this article, trafficking prosecutions are not for the faint-hearted. Together with the legal expertise factor, there are significant logistical problems: there is a high degree of sensitivity required, witnesses are likely to be young, foreign nationals unable to speak much English, and may be unwilling to use the legal system for fear of being prosecuted themselves.

A strategy for the future must not be limited to legal knowledge. It must include a public education programme which reaches the rural parts of Fiji and the suburbs where incomes are low and financial demands are high. Law enforcement agencies need to work with immigration officials and quarantine officers, in order that border control processes are aware of the danger of trafficking offences. Lastly, different Government agencies need to have protocols to respond to the practical problems connected to trafficking prosecutions; for example, where will we accommodate the witnesses until trial?; who will pay for their daily expenses?; can they work in Fiji?; what is the role of the diplomatic representatives of the witnesses and the accused?

In approaching a strategy for Fiji, a consideration of the way that other jurisdictions have dealt with trafficking cases would be helpful. Trafficking is, after all, a global problem. It is not just a Fijian problem, or a regional problem. If trafficking is fundamentally about the exploitation of the weak by the strong, for motives of greed and opportunism, then it will flourish through, and in spite of, national boundaries.

End Notes

1 State v. Samu Seru [2003] HAC 21/02. The accused was sentenced to a total of 10 years imprisonment on multiple counts including one under section 252.

2 A term unsatisfactorily defined by the courts- see Jone Civatabua and Saimoni Kacilala v. Reginam (1987) 33 FLR 86

3 State v. Kadali Suryanayanara Murti Crim Case No HAC 195 of 2010

4 Section 21

5 Section 114(3)

6 Section 118, 119

7 Section 122

8 Section 120 Crimes Decree

9 Section 123

10 Section 124

11 See the US State Department Trafficking in Persons Report 2011

12 Section 103

13 Section 102

14 Hon. Justice Daniel Goundar, High Court of Fiji

15 [2005] EWCA Crim 3356

16 [2004] EWCA Crim 1900

17 [2001] NSW CCA 7