

## National Judicial College of Australia Conference 6<sup>th</sup> and 7<sup>th</sup> February 2016

Panel: Can sentencing of women who are victims of abuse accommodate the social problems that underpin the offending? Is enough being done to keep women offenders from returning to prison?

**By Felicity Gerry QC<sup>1</sup>**

*“Globally more than half a million women and girls are in prison serving a sentence following conviction, or awaiting trial and therefore to be presumed innocent. Criminal justice systems routinely overlook the specific needs of these women and girls, who represent an estimated two to nine per cent of national prison populations”.*

This paper provides an overview of some of the international obligations of Australia to women offenders and alleged offenders via the U.N. Bangkok Rules and highlights how abused women are being sent to prison in Australia. It proceeds on 2 bases (i) Judges should approach sentencing a woman as exceptional; (ii) Judges can approach a sentencing exercise differently when the offender is a woman. With reference to opportunities to challenge the treatment of women offenders through UN human rights mechanisms and, after suggesting how sentencing courts might accommodate international principles, this paper suggests a proactive judicial approach to sentencing women offenders to include understanding women offenders generally, a more critical analysis of the long term effect of short term sentences on homes and families and a potentially novel look at solutions for coerced and trafficked women in the criminal justice system. It concludes that sentencing of women who are victims of abuse can accommodate the social problems that underpin the offending and judges can do more to keep women offenders from going or returning to prison.

### **The Bangkok Rules 2010**

The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) were adopted by the UN General Assembly December 2010 (Resolution A/RES/65/229) after a unanimous vote from 193

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<sup>1</sup> [www.felicitygerry.com](http://www.felicitygerry.com)

<sup>2</sup> Toolbox on the UN Bangkok Rules on women offenders and prisoners < <http://www.penalreform.org/wp-content/uploads/2013/07/PRI-Short-Guide-Bangkok-Rules-2013-Web-Final.pdf>>

countries, including Australia. By voting for the Bangkok Rules, Australia acknowledged that women in the criminal justice system have gender-specific characteristics and needs, and agreed to both respect and meet them.<sup>3</sup> The 70 rules give guidance to policy makers, legislators, sentencing authorities and prison staff to reduce unnecessary imprisonment of women, and to meet the specific needs of women who are imprisoned. There is a recognition that distinct considerations apply in relation to women, an emphasis on preferring non-custodial measures for pregnant women and primary carers following the Tokyo Rules<sup>4</sup> and on health care treatment for women prisoners

### **It is exceptional to sentence a woman**

Australia is a signatory to The United Nations Convention for the Elimination of Discrimination Against Women (CEDAW) and the optional protocol to CEDAW which carries reporting provisions. Essentially this means that Australia has agreed work towards the elimination of discrimination against women. Over the past 30 years the CEDAW Committee has, through its general recommendations and jurisprudence, conceptualised violence against women as a form of “discrimination against women” within the meaning of the Convention and developed the obligation of “due diligence”. This means that governments can be held responsible for private acts, such as domestic violence, if they fail to take all reasonable measures to prevent, investigate, punish and remedy violations<sup>5</sup>. The CEDAW Committee has prioritised violence against women in its requests for reports and violations have been found against various countries for their poor response to this issue.

In Australia, violence against women is the subject of a *National Plan to Reduce Violence against Women and their Children* but the CEDAW Committee has called for further investment in service provision that is appropriate to meeting the needs of *all* women who have

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<sup>3</sup> Ibid n 2.

<sup>4</sup> *Rules on the Treatment of Women Prisoners and Non-custodial Measures for ..... Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)* < [https://www.unodc.org/documents/justice-and-prison-reform/women\\_and\\_imprisonment\\_-\\_2nd\\_edition.pdf](https://www.unodc.org/documents/justice-and-prison-reform/women_and_imprisonment_-_2nd_edition.pdf) >

<sup>5</sup> Australian NGOs' Follow-up Report to CEDAW Committee < <http://awava.org.au/convention-on-the-elimination-of-discrimination-against-women-cedaw/ngos-follow-up-report-to-cedaw/> >

experienced violence, and in comprehensive primary prevention strategies to drive long-term social change<sup>6</sup>.

To avoid conscious or unconscious discrimination at all stages of the criminal justice system, the treatment of women, including by judges, must be gender-sensitive. True gender equality does not mean treating everyone the same. Treating women offenders in the same way as men will not achieve gender equality and the circumstances in which women commit criminal offences are different from men:

- A considerable proportion of women offenders are in prison as a direct or indirect result of multiple layers of discrimination and deprivation.
- Women mainly commit petty crimes closely linked to poverty, such as theft, fraud and minor drug related offences.
- Only a small minority of women are convicted of violent offences, and a large majority of them have been victims of violence themselves<sup>7</sup>.

The numbers are also very different: At 30 June 2014, there were 31,200 male prisoners in Australian prisons, an increase of 10% (2,774 prisoners) from 28,426 prisoners at 30 June 2013. The number of female prisoners also increased by 10% (242 prisoners) from 2,349 prisoners at 30 June 2013, to 2,591 prisoners at 30 June 2014. This is the highest number of male and female prisoners since 2004.<sup>8</sup> On these figures it is still only 8.3% of the total prison population, 0.02% of the female population and 0.01 of the current population of Australia (if we take the population of Australia on the population clock for the 16<sup>th</sup> of January 2016)<sup>9</sup>:

23 801 157 Current population

11 862 554 Current male population (49.8%)

11 938 603 Current female population (50.2%)

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<sup>6</sup> *ibid* n4

<sup>7</sup> Toolbox on the UN Bangkok Rules on women offenders and prisoners < <http://www.penalreform.org/wp-content/uploads/2013/07/PRI-Short-Guide-Bangkok-Rules-2013-Web-Final.pdf>>

<sup>8</sup> ABS, 4517.0 Prisoners in Australia

<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2014~Main%20Features~Sex~5>>

<sup>9</sup> <http://countrymeters.info/en/Australia>

Most women are sentenced for minor offences: The UNODC Handbook on Women and Imprisonment makes it plain that the majority of women offenders do not need to be in prison at all: “Most are charged with minor and non-violent offences and do not pose a risk to the public. Many are imprisoned due to their poverty and inability to pay fines. A large proportion is in need of treatment for mental disabilities or substance addiction, rather than isolation from society. Many are victims themselves but are imprisoned due to discriminatory legislation and practices. Community sanctions and measures would serve social integration requirements of a vast majority much more effectively than imprisonment”.<sup>10</sup>

The special needs of women prisoners are set out in The UNODC Handbook on Women and Imprisonment which opens with the following:<sup>11</sup>

“Women constitute a vulnerable group in prisons, due to their gender. Although there are considerable variations in their situation in different countries, the reasons for and intensity of their vulnerability and corresponding needs, a number of factors are common to most. These include:

- The challenges they face in accessing justice on an equal basis with men in many countries;
- Their disproportionate victimization from sexual or physical abuse prior to imprisonment;
- A high level of mental health-care needs, often as a result of domestic violence and sexual abuse;
- Their high level of drug or alcohol dependency;
- The extreme distress imprisonment causes to women, which may lead to mental health problems or exacerbate existing mental disabilities;
- Sexual abuse and violence against women in prison;
- The high likelihood of having caring responsibilities for their children, families and others;

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<sup>10</sup> UNODC Handbook for Prison Managers and Policymakers on Women and Imprisonment, Criminal Justice Handbook series, UN New York, 2008, p3, < <http://www.unodc.org/documents/justice-and-prison-reform/women-and-imprisonment.pdf> >

<sup>11</sup> 2nd edition, with reference to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules) < <https://www.unodc.org/documents/justice-and-prison-reform/women-and-imprisonment.pdf> >

- Gender-specific health-care needs that cannot adequately be met;
- Post-release stigmatization, victimization and abandonment by their families.

It is also worth noting that discriminatory treatment can be the subject of an individual application to the CEDAW Committee which can find violations and order compensation. In *Inga Abramova v Belarus*, *Communication No. 23/2009*<sup>12</sup>, the District Court of Belarus found Inga Abramova guilty of “minor hooliganism” in the context of a protest and ordered her to serve five days administrative arrest. She complained about the conditions and humiliating treatment by staff. Following unsuccessful attempts to obtain redress at the domestic level, she submitted a communication to the CEDAW Committee which found that Belarus’ treatment of a woman detained under administrative arrest constituted discrimination and sexual harassment and violated various articles under CEDAW when read in conjunction with article 1 and the Committee’s General Recommendation No. 19 on violence against women. In reaching its determination, the Committee also took into account rule 53 of the Standard Minimum Rules for Treatment of Prisoners and the UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules).

In its recommendations, the Committee called on Belarus to provide appropriate reparation, including compensation, to Abramova. In addition, it recommended that Belarus take measures to, *inter alia*: protect the dignity, privacy and physical and psychological safety of women detainees; ensure access to gender-specific health care for women detainees; and provide safeguards to protect women detainees from all forms of abuse, including gender-specific abuse<sup>13</sup>.

### *Women in the system*

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<sup>12</sup> UN Doc. CEDAW/C/49/D/20/2008 (29 August 2011) <http://www2.ohchr.org/english/law/docs/CEDAW-C-49-D-23-2009.pdf>

<sup>13</sup> *Cusack S.*, Treatment and conditions of detention for women must be gender-sensitive, says CEDAW 29 August 2011 <<http://hrlc.org.au/inga-abramova-v-belarus-communication-no-232009-un-doc-cedawc49d202008-29-august-2011/>>

A 2012 study by the Australian Centre for the study of Sexual Assault found that “Statistical analysis and empirical research on female offending since the 1980s demonstrates that the trajectories by which women end up within the criminal justice system are not the same as men’s offending trajectories. A significant evidence base demonstrates that both the profile of female offenders and their pathways into offending are fundamentally different compared to male offenders (e.g., Carlen, 1983; Chesney-Lind, 1989, 1997; Daly, 1998; Kruttschnitt & Gartner, 2003; Salisbury & Van Voorhis, 2009; Worrall, 1990). Although the total number of women in Australian prisons is much smaller than the number of men, they are nevertheless recognised as a “high needs” population”. These high needs are particularly acute on remand. Unfortunately, in Australia there is an increase, in the remand population, most women serve shorter sentences, meaning they are imprisoned for very minor offences, particularly Indigenous women and women serve longer sentences for minor crimes, rather than suspended or community sentences<sup>14</sup>.

### *Women Offenders generally*

In 2004 a study of women prisoners sentenced for drug/alcohol related crime across six jurisdictions in Australia found that 87% were victims of sexual, physical or emotional abuse in either childhood (63%) or adulthood (78%). Most were victims of multiple forms of abuse<sup>15</sup>. A significant majority of women in prison are mothers of dependent children<sup>16</sup>. Things have changed but not for the better: The Australian Institute of Family Studies reports that “the characteristics of the female inmate population have changed, with more mental ill-health, substance abuse and social disadvantage present, particularly among remandees. Female offenders demonstrate high levels of previous victimisation, poor mental health, substance misuse and social disadvantage compared to women in the community<sup>17</sup>. The logical conclusion is that judges are sending victims to prison. The 2012 study by the Australian Centre for the study of Sexual Assault referred to above found that “In the last 20 years the numbers of

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<sup>14</sup> Addressing women's victimisation histories in custodial settings <<http://www3.aifs.gov.au/acssa/pubs/issue/i13/i13b.html>>

<sup>15</sup> Holly Johnson *Drugs and Crime: A study of Female Incarcerated Offenders*, Research and Public Policy Series, No 63, Australian Institute of Criminology, Canberra, 2004

<sup>16</sup> Debbie Kilroy, Reanna Maloney; Kobie Mulligan, Suzi Quixley and Kate Warner, *Human Rights in Action: A Resource for Women in Prisons (and their advocates)*, Sisters Inside Brisbane, 2009, p8.

<sup>17</sup> AIFS, Addressing women's victimisation histories in custodial settings <<http://www.aifs.gov.au/acssa/pubs/issue/i13/i13b.html>>

women entering Australian prisons have risen dramatically. Many of these women have a history of sexual assault traumatisation from child sexual abuse as well as physical and sexual abuse they have encountered as adults. The prison system can often exacerbate trauma for female criminal offenders with a trauma history. This paper explores the prison as a possible site of re-traumatisation. The reasoning behind this is that prisons are built on an ethos of power, surveillance and control, yet trauma sufferers require safety in order to begin healing. A trauma-informed approach may offer an alternative to delivering a less traumatic prison environment and experience for female criminal offenders with a history of sexual abuse and assault”<sup>18</sup>.

The study recommended that the key principles of trauma and gender may be utilised to create frameworks that can be applied in penal environments to address women’s complex needs arising from a history of sexual victimisation. This paper suggests that such an approach needs to be taken by judges much earlier, by treating any sentencing exercise involving a woman as exceptional.

### *Mothers*

A discussion paper, *Reducing Women’s Imprisonment Sentencing of Mothers* was recently published by the Prison Reform Trust (PRT) in England and Wales. It makes a number of practical proposals which are worthy of consideration in Australia. In England and Wales, there is a statutory obligation (in Section 10 of the Offender Rehabilitation Act 2014) to identify and address women’s needs in arrangements for the supervision and rehabilitation of offenders. With or without such a provision, judges can consider childcare and parenting support and the effects of a sentence on mothers and children. Jenny Earle, programme director for Transforming Lives at the Prison Reform Trust and contributing author of the paper said:

“For mothers, prison is a double punishment as they experience the guilt, grief and pain of separation from their children and the knowledge that their children will bear the scars.”

Juliet Lyon, Director of Prison Reform Trust, said:

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<sup>18</sup> Addressing women's victimisation histories in custodial settings  
<<http://www3.aifs.gov.au/acssa/pubs/issue/i13/i13b.html>>

“Courts must weigh up aggravating and mitigating factors in individual cases but there is a wider balance to strike in the sentencing framework when so many women are sentenced to short spells in prison for petty, persistent offending, mostly shoplifting, and at the same time so many of these women are victims of serious crime, domestic violence, abuse, exploitation and rape.”

Around two-thirds of the women in prison in Australia are the mothers of dependent children.<sup>19</sup> Participants in a Victorian study indicated that the needs of dependent children were not taken into account when sentencing their mothers<sup>20</sup>. Do judges ask the parental status of the offender or how many children she has under the age of 18? If so, for what purpose: To criticise her for offending? To suggest she is a bad example? To mitigate a sentence? To find a reason not to send her to prison? Correctional Services are unlikely to ask and contact arrangements will be largely dependent on external arrangements<sup>21</sup>. Women suffer significant distress and difficulties reuniting with children without aggressive programmes to ensure contact is maintained and meaningful.<sup>22</sup> Fathers tend not to shoulder the burden of child care responsibilities when a woman is imprisoned or the subject of a community order that conflicts with child care arrangements. The consequences for children are appalling. Children who are separated from a parent due to prison suffer multiple problems associated with their loss. Disruption of the attachment bond between mother and child is particularly deleterious. Other problem areas and behaviours exhibited by children of incarcerated parents include physical health problems, hostile and aggressive behaviour, use of drugs or alcohol, truancy, running away from home, disciplinary problems, withdrawal, fearfulness, bedwetting, poor school performance, excessive crying, nightmare, problems in relationships with others, anxiety and depression and attention problems<sup>23</sup>. Women suffer distress, often have existing health and dependency problems which are exacerbated by consequent depression and suicide rates can be

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<sup>19</sup> Catherine Flynn, Responding to the children of women in prison: Making the invisible visible. Family Relationships Quarterly No. 19. AFRC Newsletter No. 19 - August 2011 <<https://aifs.gov.au/cfca/publications/family-relationships-quarterly-no-19/responding-children-women-prison-making-invisible>>

<sup>20</sup> Ibid n 6

<sup>21</sup> PARENTING STATUS OF COMMUNITY CORRECTIONAL CLIENTS

<http://www.vacro.org.au/Portals/0/PDF/Research/Publications/Parenting%20Status%20of%20Community%20Correctional%20Clients.2014.pdf>

<sup>22</sup> Stanley E., Byrne S., Mothers in Prison: Coping with separation from children <[http://www.aic.gov.au/media\\_library/conferences/womencorrections/stanbyrn.pdf](http://www.aic.gov.au/media_library/conferences/womencorrections/stanbyrn.pdf)>

<sup>23</sup> Stanley E., Byrne., S: Mothers in Prison: Coping with separation from children University of South Australia <[http://www.aic.gov.au/media\\_library/conferences/womencorrections/stanbyrn.pdf](http://www.aic.gov.au/media_library/conferences/womencorrections/stanbyrn.pdf)>

high. It follows that Courts have an obligation to consider the best interests of the child and the mother and to recognise that the imprisonment of a mother or the effective removal of a mother from a family home due to the requirements of an onerous community order can have a fundamental effect on what is the appropriate disposal. In a threshold case, the impact on a dependent child can tip the scales and a proportionate sentence can become disproportionate. There is no standard or normative adjustment for dependent children but their best interest ought to be a primary consideration. This can include rehabilitative community orders which do not conflict with child care as women will engage

### *Women Offenders coerced or trafficked*

Most victims of human trafficking are women<sup>24</sup>. Many are coerced into committing crime. This can be local, national or transnational<sup>25</sup>. In Australia, there is no general defence that an offender was trafficked in order to commit criminal offences on behalf of others. Such a defence exists in relation to some offences in England and Wales under the Modern Slavery Act 2015. However, the lack of legislation in Australia is not a barrier to just outcomes: Where there is a causal link between the trafficking and the crime, this paper suggests a judicial approach to non –punishment which has been approached in England through the principles of abuse of process. At present, the protection of victims in Australia is left to referral mechanisms and witness protection not to those victims who commit crime themselves. In order to effectively tackle trafficking in human beings (THB), States need to identify all types of victims and divert them out of criminal justice systems.

The 2005 Convention on Action against Trafficking in Human Beings (The Trafficking Protocol)<sup>26</sup> has been signed and ratified by most countries including Australia<sup>27</sup> It defines trafficking in persons (THB) as follows:

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<sup>24</sup> Gerry, F., Let's talk about slaves...Human Trafficking: Exposing hidden victims and criminal profit and how lawyers can help end a global epidemic (2015) 1 Griffith Journal of Law and Human Dignity 1.

<sup>25</sup> Ibid n20

<sup>26</sup> The Protocol was adopted by resolution A/RES/55/25 of 15 November 2000 at the fifty-fifth session of the General Assembly of the United Nations. In accordance with its article 16, the Protocol will be open for signature by all States and by regional economic integration organizations, provided that at least one Member State of such organization has signed the Protocol, from 12 to 15 December 2000 at the Palazzi di Giustizia in Trafficking, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.

<sup>27</sup> 11 Dec 2002 / 14 Sep 2005

*Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or removal of organs.*<sup>28</sup>

The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has provided guidance on the scope of the definition of forced labour, stressing that it encompasses trafficking in persons for the purposes of labour and sexual exploitation as defined by the Trafficking Protocol. This guidance supplements the UN Convention Against Transnational Organised Crime (2000) criminalising trafficking in persons whether it occurs within countries or across borders, and whether or not conducted by organised crime networks<sup>29</sup>. Human trafficking is “a serious crime that can present challenges<sup>30</sup>”: It is a crime that is clandestine; it is modern day slavery and victims may be physically or psychologically “imprisoned” in either residential properties (as drug “gardeners”) or places offering sauna and massage services. They are by definition extremely vulnerable; but can also be valuable witnesses against traffickers (rather than as co-defendants)<sup>31</sup>

Australia is known as a destination country for human trafficking although it can also happen within country.<sup>32</sup> Often, men, women and girls are held in debt bondage, forced to provide profit for their traffickers to pay off a unilateral, legally unenforceable debt. Researcher with the Institute of Criminology, Samantha Lyneham said:

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<sup>28</sup> The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organised Crime

<sup>29</sup> Ibid n3

<sup>30</sup> Taken from UK CPS Legal Guidance at [www.cps.co.uk](http://www.cps.co.uk)

<sup>31</sup> Taken from UK CPS Legal Guidance at [www.cps.co.uk](http://www.cps.co.uk)

<sup>32</sup> <http://www.humantrafficking.org/countries/australia>

*"The majority of trafficked persons are female and they were trafficked for labour exploitation .....one in four victims were also children aged between 15 and 17 years.....This is regional data that we're looking at and it is specific to Indonesia but that does have an impact on Australia. We do see people being trafficked into Australia and also out of Australia and given that the majority of persons trafficked into Australia are known to originate from South East Asia, examining the trafficking patterns in our region is really important."<sup>33</sup>*

There are many causes of human trafficking to Australia. Project Respect argues that the demand for trafficked women is fuelled by, for example, a lack of women in developed countries prepared to do prostitution and racialized ideas that Asian women have certain qualities, for example that they are more compliant and will accept higher levels of violence.<sup>34</sup> Exploitation can arise in domestic servitude, treatment of employees in remote locations, the sex trade, organised gangs such as teams of “pick-pocketing” children, drug trafficking and cultivation and immigration offences<sup>35</sup>. Research by the Australian NGO, The Anti-Slavery Project concluded that “slavery thrives in Australia 200 years after Abolition”. They recommended adequately resourced victim service programmes to meet the needs of victims leaving them vulnerable to violence, exploitation and endangerment of their ability to cooperate with law enforcement.<sup>36</sup> Research by the Australian Institute of Criminology has shown extensive human trafficking out of Indonesia<sup>37</sup>. There are already Regional Cooperation Trafficking projects in the Asia Pacific.<sup>38</sup> In particular tThe Asia Regional Trafficking In Persons (ARTIP) Project was a 6.5-year AU\$20.9 million Australian Government initiative includes “strengthen[ing] the criminal justice response to trafficking by: enhancing regional and national investigative and *judicial cooperation* on trafficking cases; strengthening legislative frameworks; providing adequate support for victim-witnesses; and expanding the evidence base for policy development and decision-making” and build[ing] the capacity of law enforcement officers, prosecutors and *judges*, and sett[ing] international standards for the basic building blocks of a functioning criminal justice system”.

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<sup>33</sup> <<http://www.sbs.com.au/news/article/2013/06/07/human-trafficking-crime-21st-century>>

<sup>34</sup> Ibid

<sup>35</sup> Gerry, F., Let's talk about slaves...Human Trafficking: Exposing hidden victims and criminal profit and how lawyers can help end a global epidemic (2015) 1 Griffith Journal of Law and Human Dignity 1.

<sup>36</sup> Anti-Slavery Project: Slavery thrives in Australia 200 years after Abolition

<sup>37</sup> <http://www.aic.gov.au/documents/1/3/1/%7B131B91C4-909C-482F-B437-42EC40ED4449%7Dtandi308.pdf>

<sup>38</sup> 2006 US State Department Human Rights Report and 2007 US State Departments Trafficking in persons report

In tackling THB, accurate victim identification is vital for the effective investigation of the trafficking crime, as well as to ensure effective protection of victims' rights, including non-punishment of victims for offences caused or directly linked with their being trafficked. The Trafficking protocol contains a non –punishment provision:

***Article 26- Non-punishment provision***

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

Putting aside pre conceived notions of criminal liability, the modern approach to modern slavery must involve non-punishment. If the scourge of human exploitation is to be tackled, in the right case, it ought to be possible to argue that a trafficked individual should not be prosecuted at all, or that they should not be punished. With or without the protocol this is a simple solution that lawyers and judges can achieve which will have even greater effect with the right support services in place. At ground level, someone suspected of committing a criminal offence might also be an exploited victim. European cases have dealt with the factual need to identify an individual's status as a victim on credible evidence<sup>39</sup>. Any jurisdiction would require the same. On an evidential basis this can mean more than testimony but following up and tracking histories. For those victims apprehended committing crime (national or transnational) if such evidence is sensitively gathered at an early stage, prosecutors (or investigating judges) can give consideration to the question of whether to proceed with prosecuting a suspect who might be a victim of trafficking, particularly where the suspect has been compelled or coerced to commit a criminal offence as a direct consequence of being trafficked. The rationale for non-punishment of victims of trafficking is that, whilst, on the face of it, a victim may have committed an offence, the reality is that the trafficked person acts without real autonomy. They have no, or limited, free will because of the degree of control exercised over them and the methods used by traffickers, consequently they are not responsible for the commission of the offence and should not therefore be considered accountable for the unlawful act committed. The vulnerable

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<sup>39</sup> Rantsev v Cyprus and Russia Application no. 25965/04 (Strasbourg 7 January 2010) and CASE OF M. AND OTHERS v. ITALY AND BULGARIA Application no. 40020/03 (31<sup>st</sup> July 2012)

situation of the trafficked person becomes worse where the State fails to identify such a person as a victim of trafficking, as a consequence of which they may be denied their right to safety and assistance as a trafficked person and instead be treated as an ordinary criminal suspect<sup>40</sup>.

To avoid unjust outcomes requires qualified and trained officials to identify and help victims of trafficking and engaging judges in those duties. Judges can be proactive: The process is already underway in England and Wales: In R v N; R v LE<sup>41</sup>, the Court of Appeal, in quashing criminal convictions of defendants who were THB victims noted that the reasoning for what is effectively immunity from prosecution is that “the culpability of the victims might be significantly diminished, and sometimes effectively extinguished, not merely because of age, but because no realistic alternative was available to them but to comply with those controlling them. Where victims were under 18 years old their best interests were the primary, though not sole, consideration. Victims were not safeguarded from prosecution for offences unconnected with the trafficking, though it might constitute substantial mitigation. A level of protection was required and it was provided by the exercise of the abuse of process jurisdiction”. The court went on to state that “where a court considered issues relevant to age, trafficking and exploitation, the prosecution would be stayed if the court disagreed with the decision to prosecute”. The Court made clear that Article 26 of The Trafficking Protocol did not prohibit the prosecution or punishment of victims of trafficking *per se*, but did require the Prosecutor to give careful consideration as to whether public policy calls for a prosecution. Per Judge LCJ:

*Summarising the essential principles, the implementation of the United Kingdom's Convention obligation is normally achieved by the proper exercise of the long established prosecutorial discretion which enables the Crown Prosecution Service, however strong the evidence may be, to decide that it would be inappropriate to proceed or to continue with the prosecution of a defendant who is unable to advance duress as a defence but who falls within the protective ambit of Article 26. This requires a judgment to be made by the CPS in the individual case in the light of all the available evidence. That*

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<sup>40</sup> ‘Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking’: <<http://www.osce.org/secretariat/101002?download=true>>

<sup>41</sup> [2012] EWCA Crim 189

*responsibility is vested not in the court but in the prosecuting authority. The court may intervene in an individual case if its process is abused by using the "ultimate sanction" of a stay of the proceedings. ....The fact that it arises for consideration in the context of the proper implementation of the United Kingdom's Convention obligation does not involve the creation of new principles. Rather, well established principles apply in the specific context of the Article 26 obligation, no more, and no less. Apart from the specific jurisdiction to stay proceedings where the process is abused, the court may also, if it thinks appropriate in the exercise of its sentencing responsibilities implement the Article 26 obligation in the language of the article itself, by dealing with the defendant in a way which does not constitute punishment, by ordering an absolute or a conditional discharge<sup>42</sup>.*

In many ways, in the context of criminal cases in any country, this approach to vulnerable suspects is not a wholly new approach and judges can approach such cases involving women at every stage with THB obligations in mind.

### **What Judges can do when faced with a sentencing exercise involving a woman.**

#### *Take a rights based / protective approach*

Even in cases where international law has not, by legislation or valid executive action, been incorporated into national law, there are occasional circumstances where that law may be used by judges and other independent decision-makers in the national legal system to influence their decisions. This is particularly so in the case of international human rights principles as they have been expounded, and developed, by international and regional bodies. The tradition of strict dualism, from decisions such as *R v Secretary of State for the Home Department; Ex parte Bhajan Singh*<sup>43</sup> which expounded the classical divide has changed. Modern theoretical underpinning of dualist systems (national and international) recognize that courts can accommodate international law whether given effect by valid legislation or by assisting in the development of the common law.

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<sup>42</sup> See also *R v O* [2008] EWCA Crim 2835, *R v LM, MB, DG, Talbot and Tijani* [2010] EWCA Crim 2327 and *R v O* [2011] EWCA Crim 226

<sup>43</sup> [1976] 1 QB 198 at 207.

An expression of what The Hon Justice Michael Kirby AC CMG has called this “modern approach” was given in February 1988 in Bangalore, India, in the so-called *Bangalore Principles*. The meeting was chaired by Justice P N Bhagwati, a former Chief Justice of India. Present was Lord Lester of Herne Hill). Relevantly, the *Bangalore Principles* state, in effect<sup>44</sup>:

- International law (whether human rights norms or otherwise) is not, in most common law countries, part of domestic law.
- Such law does not become part of domestic law until Parliament so enacts or the judges (as another source of law-making) declare the norms thereby established to be part of domestic law.
- The judges will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty -- even one ratified by their own State.
- But if an issue of uncertainty arises (by a gap in the common law or obscurity in its meaning or ambiguity in a relevant statute), a judge may seek guidance in the general principles of international law, as accepted by the community of nations.
- From this source material, the judge may ascertain and declare what the relevant rule of domestic law is. It is the action of the judge, incorporating the rule into domestic law, which makes it part of domestic law.

In terms, the *Bangalore Principles* declare:

- [T]here is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law -- whether constitutional, statute or common law -- is uncertain or incomplete (*Bangalore Principles* No 4)
- It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes -- whether or not they have been incorporated into domestic law -- for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law (*Bangalore Principles* No 4)

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<sup>44</sup> Taken in part from Kirby, Michael --- "Domestic Implementation of International Human Rights Norms" [1999] AUJlHRights 27; (1999) 5(2) Australian Journal of Human Rights 109

The application of law to women offenders in Australia should develop in line with international research and legal obligations. This is logical to ensure conformity where, for example, the law has been opened up to international remedies to individuals pursuant to accession to international instruments. This brings to bear the powerful influence of CEDAW and the international standards it imports and the recognition of the Bangkok Rules. An approach founded on unjust discrimination is contrary both to international standards and to the fundamental values of our justice system. The practical effect of this theorising is that judges can ensure they are trained, including unconscious bias training, that they are familiar with the materials in this paper and more in relation to women offenders, recognising that women offenders are victims and reflecting that in conducting sentencing exercises to include finding exceptional circumstances in order to exculpate those women who are human trafficked victims and putting women and children first.

**A final thought on making findings about what services should be available:**

It is rare to find judges commenting on what services should be available. However, as a final note on what women offenders can achieve, a plug for Coaching Inside and Out<sup>45</sup>: Claire McGregor started CIAO to encourage women prisoners to think and obtain self-direction asking not what she could do for a “client” but what they could do for themselves, seeing the similarity between professional clients who came to her for life coaching and those in prison. Focussing not on what offences have been committed but practical and tough solutions to help women achieve inner strength, the challenges involved patience, dedication and exhaustion and were rewarded through hard work, bravely done. Women prisoners have achieved weight loss, tackled addiction and abuse, started their own businesses, found housing, freedom from debt, contact with children, confidence and hope: Achieving CIAO’s ambition to create lifelong change. To understand the reference, read the book - it will change your life and the lives of others - inside and out.

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<sup>45</sup> Website and Book Coaching Inside and Out <<http://coachinginsideandout.org.uk/>>