



People smuggling versus trafficking in persons: what is the difference?

People smuggling and trafficking in persons have had a considerable public profile in the past decade. Both involve the movement of people and the difference between them is not always well understood by the general public. This brief examines the difference between people smuggling and trafficking in persons by looking at the variations in principle and practice.

What is the difference in principle?

In principle, trafficking in persons and people smuggling are distinctly different. Trafficking does not require an illegal border crossing, nor is it necessarily transnational, such as in cases of internal trafficking, whereas people smuggling always involves an illegal border crossing. While victims of people trafficking are regarded as commodities, individuals who are smuggled across borders are more like clients who pay for the service.

UNITED NATIONS DEFINITIONS

Through the United Nations (UN), the international community has agreed on separate definitions for people smuggling and trafficking in persons. Australia ratified the UN Convention against Transnational Organized Crime (UNTOC), its Protocol against the Smuggling of Migrants by Land, Sea and Air (the Smuggling Protocol) on 27 May 2004, and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Trafficking Protocol) on 14 September 2005.

People smuggling | Article 3(a) of the Smuggling Protocol defines 'smuggling of migrants' 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.

Trafficking in persons | Article 3(a) of the Trafficking Protocol defines 'trafficking in persons' as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving

of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, force labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

LEGISLATION IN AUSTRALIA

A fundamental aspect of the Smuggling Protocol and Trafficking Protocol is the obligation on State Parties to: criminalise smuggling and trafficking; investigate, prosecute and convict offenders; and create penalties that take into account the grave nature of the offences.

People smuggling | Australia has strict anti-smuggling legislation with penalties of up to 20 years. The Commonwealth Criminal Code includes a variety of offences under the umbrella of smuggling. Section 73 includes the:

- › offence of people smuggling (10 years)
- › aggravated offence of people smuggling (intent to exploit; subjection to cruel, inhuman or degrading treatment; giving rise or being reckless to danger of death or serious harm) (20 years)
- › aggravated offence of people smuggling (at least five people) (20 years).

The *Migration Act 1958* (Cth) also sets out a variety of offences relating to smuggling. Specifically, sections 232A to 233A relate to the offence of smuggling, including:

- › bringing of groups of non-citizens into Australia (20 years)
- › persons concerned with bringing non-citizens into Australia in contravention of the Act or harbouring illegal entrants (10 years)
- › other offences relating to groups of non-citizens etc. (20 years).

Trafficking in persons | Australia has strict anti-trafficking legislation with penalties of up to 25 years imprisonment for slavery, sexual servitude and deceptive recruiting for sexual services. A 2005 amendment to the Criminal Code includes a variety

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of offences (and maximum sentences) under the umbrella of trafficking. Section 270 includes:

- › slavery (25 years)
- › sexual servitude (15 years)
- › deceptive recruitment for sexual servitude (seven years).

Section 271 includes:

- › trafficking in persons (12 years)
- › trafficking in children (25 years)
- › domestic trafficking in persons (12 years)
- › debt bondage (12 months).

These crimes are considered to be aggravated offences when children are involved, in which case they attract higher penalties. There are also relevant legislative provisions in the *Migration Amendment (Employer Sanctions) Act 2007* which considers the exploitation of unlawful non-citizen workers an aggravating factor attracting a higher penalty.

What is the difference in practice?

THE QUESTION OF CONSENT

In almost all instances of people smuggling, the individual being smuggled has consented to illegally crossing a border (Iselin & Adams 2003). In cases of aggravation such as cruelty, inhumane treatment or reckless endangerment, consent may be nullified.

Consent can be somewhat ambiguous with trafficking. First, consent is irrelevant when dealing with a child. Second, in some cases, trafficked victims can consent to the movement; however, the terms that are being consented to are generally fraudulent or deceitful (Iselin & Adams 2003). When the true conditions become clear – that is, the trafficked person has not been granted the promised type of employment, working conditions and/or payment arrangements – their initial consent, if given, is meaningless. Finally, if consent is given under coercion to comply, the consent is again meaningless.

THE RECRUITMENT PROCESS

Until the exploitation has occurred, it may be difficult to distinguish between a

‘trafficking in persons’ and a ‘smuggling’ case. People smugglers may advertise their services, although they do not generally recruit as such. It is more likely that they are approached for their services. In contrast, a trafficking ‘recruiter’ may make the initial contact with the potential trafficking victim if they fit the demand profile (Iselin & Adams 2003). The demand profile may be specific for the type of work required in the destination country. The recruiter has the intention of deceiving or coercing people to be trafficked and exploited for financial gain. Once lured, the recruiter will gain the consent of the person to be moved; however, the consent is nullified by the victim’s later exploitation (Iselin & Adams 2003).

ARRIVAL AT THE DESTINATION

Smuggled persons are generally left to make their own way after crossing the border. Fraudulent documents are often used and access to corrupt officials en route may also be needed to cross a border without detection (Tailby 2001). Trafficking syndicates may arrange for a ‘minder’ to travel with the victim and transfer them to their housing or employment upon arrival at the destination. Some victims will be issued with fraudulent documentation to enter the destination country.

THE ROLE OF VIOLENCE

The use and/or threat of violence may distinguish trafficking from smuggling. Smugglers generally have no need to force their customers into complying, hence the use of threats, force and violence is generally avoided. Aggravated smuggling, which involves exploitation, is more serious; however, it does not necessarily involve violence or the deprivation of liberty. Traffickers may use threats, force and violence as a means of recruitment, control and compliance of the trafficked victims throughout all stages of their journey.

POTENTIAL PROFITS

Trafficking and smuggling are crimes centred on making profits. Smuggling usually requires a single payment to assist the illegal migrant to cross

borders. Generally the terms are negotiated, taking into account the cost of transportation, cost of fraudulent documents, bribery and their profit margin (Iselin & Adams 2003).

Traffickers make profits at several points along the way. The recruitment, minding and/or harbouring stages may involve a number of people. This accumulates debt owed by the victim, and costs incurred such as medical treatment may be added to the debt for repayment through work.

How does the Australian Government respond to trafficking in persons?

A whole-of-government strategy to combat trafficking in persons was established in 2003, with additional funding provided in the 2007–08 Budget. Key measures include:

- › a targeted Communication Awareness Strategy implemented by the Attorney-General’s Department
- › improved legislation to combat trafficking in persons
- › Transnational Sexual Exploitation and Trafficking Team (TSETT) units within the Australian Federal Police to proactively investigate trafficking and sexual exploitation offences
- › enhanced visa arrangements to enable suspected victims and witnesses of trafficking to remain in Australia, and support the investigation and prosecution of trafficking offences
- › Senior Migration Compliance Officer positions in Thailand, China and the Philippines, which focus exclusively on trafficking issues in the region
- › victim support measures by the Office for Women
- › reintegration assistance project for trafficking victims returned to key source countries in South-East Asia
- › training and coordination of trafficking prosecutions through the Commonwealth Director of Public Prosecutions
- › research into regional trafficking issues by the Australian Institute of Criminology.

FURTHER READING

All URLs were correct at 5 May 2008

Iselin B & Adams M 2003. *Distinguishing between human trafficking and people smuggling*. Bangkok: United Nations Office on

Drugs and Crime, Regional Centre for East Asia and the Pacific. <http://www.unodc.un.or.th/material/document/Distinguishing.pdf>

Tailby R 2001. Organised crime and people smuggling/trafficking to Australia. *Trends &*

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