

# ROAD TO RECOVERY

ASSESSING STATUTORY COMPENSATION SCHEMES  
FOR SURVIVORS OF HUMAN TRAFFICKING



REUTERS / NAVESH CHITRAKAR

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# AUSTRALIA - NEW SOUTH WALES

## 1. EXECUTIVE SUMMARY

- 1.1 Australia is a primary destination country for cross-border human trafficking in the Asia-Pacific region and globally.<sup>1</sup> The majority of victims originate from South-East Asia.<sup>2</sup> This is consistent with a regional and global pattern in human trafficking where victims from relatively poorer countries are trafficked to comparatively richer countries.<sup>3</sup>
- 1.2 Victims are trafficked for sex work, forced labour, domestic servitude and forced marriages.<sup>4</sup> In 2013-14, the Australian Federal Police investigated 60 human trafficking allegations; almost 43 per cent of these allegations related to sexual exploitation, 35 per cent to labour exploitation and 17 per cent to forced marriage. While the exact number of victims is indeterminable, only 235 victims have accessed the Australian Government's support program for trafficked persons over 10 years.<sup>5</sup> This program provides support and financial assistance to victims and is part of the Australian Government's concerted and co-ordinated effort to address the problem of human trafficking in Australia. As part of its efforts, it has also introduced the Human Trafficking Visa Program to help victims of trafficking obtain a legal visa status.
- 1.3 Trafficking victims are able to apply for compensation under general state crime compensation schemes; there is no federal scheme, nor is there a specific human trafficking compensation scheme. Under the New South Wales scheme, victims must establish that they have suffered an injury as a result of a violent act that occurred in New South Wales.<sup>6</sup> It may be hard for victims to pinpoint a violent act that has resulted in an injury. Further, it will be difficult if not impossible for victims of trafficking to access compensation if they are fearful of cooperating with authorities, have not made a police report or do not understand English. Victims may be able to access compensation through reparations, however this is dependent on securing a conviction.

<sup>1</sup> United Nations Office on Drugs and Crime (UNDOC), *Global Report on Trafficking in Persons* (2012), 72; United Nations Office on Drugs and Crime (UNDOC) *Trafficking in Persons: Global Patterns* (April 2006), 20; <sup>1</sup> United States of America State Department, "Trafficking in Persons Report July 2015" (2015), 66 < <http://www.state.gov/documents/organization/142979.pdf>>.

<sup>2</sup> United Nations Office on Drugs and Crime (UNDOC), *Global Report on Trafficking in Persons* (2014), 77.

<sup>3</sup> United Nations Office on Drugs and Crime (UNDOC), *Global Report on Trafficking in Persons* (December 2012), 72.

<sup>4</sup> Frances Simmons, 'Making Possibilities Realities: Compensation for Trafficked People' (2012) 34 *Sydney Law Review* 521; Interdepartmental Committee on Human Trafficking and Slavery, *Trafficking in Persons: the Australian Government Response 1 July 2013-30 June 2014* (2014), 39 and 47 <<https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/TraffickingInPersons-TheAustralianGovernmentResponse2013-2014.pdf>>.

<sup>5</sup> Interdepartmental Committee on Human Trafficking and Slavery, *Trafficking in Persons: the Australian Government Response 1 July 2013-30 June 2014* (2014), 30. <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/TraffickingInPersons-TheAustralianGovernmentResponse2013-2014.pdf>.

<sup>6</sup> *Victims Rights and Support Act 2013* (NSW).

## 2. PRELIMINARY ISSUES

### Framework for anti-trafficking in the jurisdiction

#### 2.1 International conventions/treaties Australia has ratified:

Treaty	Signed/Ratified? (S, R or No)
UN Convention against Transnational Organised Crime (Transnational Organised Crime Convention)	R
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)	R
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	No
Forced Labour Convention 1930 (ILO No 29)	R
Abolition of Forced Labour Convention 1957 (ILO No 105)	R
Worst Forms of Child Labour Convention 1999 (ILO No 182)	R
Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956	R
UN Convention on the Rights of the Child	R
UN Convention on the Elimination of all forms of Discrimination against Women	R
UN Covenant on Civil and Political Rights	R

#### 2.2 Domestic legislation on human trafficking:

2.2.1 Trafficking of persons is primarily regulated at the federal level of government by divisions 270 and 271 of the Criminal Code Act 1995 (Cth). Division 271 outlines various offences relating to trafficking in persons. In summary, it is an offence to organise or facilitate the entry into, or exit out of, Australia, of a person by means of coercion, threat or deception for the purpose of exploitation of the person. The penalty for human trafficking offences ranges from 12-25 years imprisonment, depending on the level of aggravation. This legislation is enforced by the Australian Federal Police, state police forces, and the courts.

2.2.2 At the state level (NSW), the only offence related to human trafficking is sexual servitude, which is prohibited by sections 80D and 80E of the Crimes Act 1900 (NSW). The maximum penalty for the offence of causing sexual servitude is 20 years imprisonment. This legislation is enforced by



New South Wales Police, the New South Wales Department of Justice and the courts of New South Wales.

- 2.2.3 The definition of human trafficking in the Criminal Code Act 1995 (Cth) accords with the definition in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("**Palermo Protocol**"); it was enacted to implement Australia's obligations under the Protocol.

### 3. BASIS OF STATUTORY COMPENSATION

- 3.1 Statutory compensation is only available at the state level of government. It was established under the Victims Rights and Support Act 2013 (NSW) ("**the VRS Act**").
- 3.2 The existing scheme is different to the previous scheme under the Victims Support and Rehabilitation Act 1996 (NSW). The 1996 Act was repealed effective 2 June 2013 following a review of financial sustainability of the previous scheme by PricewaterhouseCoopers ("**PwC**") in 2012.<sup>7</sup> The quantum of payments available under the new scheme is modest when compared with compensation benefits that were available under the 1996 Act.
- 3.3 Under the VRS Act, a victim of violent crime may apply for:
- 3.3.1 financial assistance for immediate needs or economic loss;
  - 3.3.2 approved counselling services; and/or
  - 3.3.3 a recognition of suffering payment.
- 3.4 Claims are determined by the Commissioner of Victims' Rights ("**the Commissioner**"), a new role created under the VRS Act.<sup>8</sup>

### 4. TYPE OF SCHEME

- 4.1 The statutory support scheme under the VRS Act is not specific to victims of human trafficking. An applicant must be a victim of an act of violence to be eligible for support under the scheme. For a person to be eligible for compensation, he or she must be a primary, secondary or family victim of an act of violence.<sup>9</sup>
- 4.2 An "act of violence" is an act or series of related acts that occurred in the course of the commission of an offence in New South Wales, that involved violent conduct against one or more persons, which has resulted in injury or death to one or more of those persons.<sup>10</sup> The term "act of violence" does not therefore explicitly include trafficking.

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<sup>7</sup> PricewaterhouseCoopers, *NSW Department of Attorney General and Justice: Review of the Victims Compensation Fund* (12 July 2012) 3 <[http://www.victimsservices.justice.nsw.gov.au/Documents/report\\_pwc-vcf-review.pdf](http://www.victimsservices.justice.nsw.gov.au/Documents/report_pwc-vcf-review.pdf)>.

<sup>8</sup> *Victims Rights & Support Act 2013* (NSW) s 8.

<sup>9</sup> *Victims Rights & Support Act 2013* (NSW) s 23.

<sup>10</sup> *Ibid* s 19.

- 4.3 There is no requirement that the criminal act be an offence under New South Wales law. Therefore, although human trafficking is an offence under Commonwealth law, it appears that victims are eligible for support under the New South Wales scheme. As such, if a victim of sex slavery, forced labour, child labour, domestic servitude or child military service is able to demonstrate that he or she has suffered injury as a direct result of a violent criminal act that has occurred in New South Wales, he or she will be able to apply for compensation. Certain crimes, such as forced labour, may require evidence that the forced labour included some form of assault, or other act of violence.

## 5. ELIGIBILITY

### Eligible victims

- 5.1 The applicant must be a victim of an "act of violence". It is not necessary that the offender is found guilty. The Commissioner must be satisfied on the balance of probabilities that the act of violence has occurred.<sup>11</sup>
- 5.2 Primary, secondary and family victims are able to apply for compensation. A primary victim is a person who is injured by an act of violence committed against him or her.<sup>12</sup> A secondary victim is a person who is injured as a result of witnessing an act of violence.<sup>13</sup> A family victim is a person who, at the time of the act of violence, was a "member of the immediate family" of a primary victim, who has died as a direct result of the violent act.<sup>14</sup> Therefore, only family of deceased victims including de facto partners are able to apply as family victims. It does not appear that they have to reside in the jurisdiction to claim compensation.

### Types of injuries recognised

- 5.3 An injury is defined as actual bodily harm, grievous bodily harm or psychological or psychiatric harm, but does not include injury arising from loss or damage to property.<sup>15</sup>
- 5.4 In contrast to the equivalent Victorian statute (the Victims of Crime Assistance Act 1996 (Vic)), pregnancy is not included in the definition of injury under the VRS Act.

### Jurisdictional requirements

- 5.5 Although the act of violence must have occurred in New South Wales, it appears the injury may occur outside of New South Wales and still be compensable.<sup>16</sup> There appears to be no restrictions on the location of the victim, or their residence or visa status at the time of applying for compensation.

### Exclusions on grounds of illegal or immoral behaviour

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<sup>11</sup> Ibid s 39(2).

<sup>12</sup> Ibid s 20.

<sup>13</sup> Ibid s 21.

<sup>14</sup> Ibid s 22.

<sup>15</sup> Ibid s 18.

<sup>16</sup> Ibid s 18.



- 5.6 In determining whether or not to approve the provision of victims support, and the amount of financial support to be given or recognition payment to be made, the Commissioner must, amongst other matters, have regard to:
- 5.6.1 any behaviour (including past criminal activity), condition, attitude or disposition of the primary victim concerned, that directly or indirectly contributed to the injury or death sustained by the victim.<sup>17</sup> Taking into account whether any condition or disposition of the primary victim contributed to his or her injury may disadvantage some victims of human trafficking. It is unclear how this would affect victims who had agreed to come to Australia but were unclear of the nature of the transaction;
  - 5.6.2 whether the act of violence was reported to the police within a reasonable time.<sup>18</sup> Good cause must be shown where a matter is not reported to the police promptly, such as the age of the victim or fear of retaliation;<sup>19</sup> and
  - 5.6.3 whether the victim failed to co-operate in the investigation of the act of violence or somehow participated in the commission of the act of violence.<sup>20</sup> Again, good cause must be shown where there has been a failure to co-operate such as the age of the victim or fear of retaliation.<sup>21</sup>

### **Time limits for application**

- 5.7 Strict time limits apply to applications under the VRS Act. Unlike the previous scheme under the Victims and Rehabilitation Act 1996 (NSW), there is no provision for leave to be granted for an application outside the time limit.
- 5.8 An application must be made within two years of the occurrence of the relevant act of violence (or two years after a child victim turns 18 years old) in order to claim for financial assistance for economic loss.<sup>22</sup>
- 5.9 Applications for recognition payments for victims of domestic violence, child abuse or adult sexual assault must be made within 10 years of the act of violence (or for a child victim, within 10 years of the child turning 18 years old).
- 5.10 No time limit applies to an application for financial support made under clause 8 of the Regulations, or for a recognition payment for a person, who is a primary victim of a sexual offence when that person is under 18 years of age. However, victims of child sexual assault who apply outside the two year period after turning 18 years of age are unable to access financial assistance for loss of actual earnings, or medical or dental expenses.

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<sup>17</sup> Ibid s 44(1)(a).

<sup>18</sup> Ibid s 44(1)(b).

<sup>19</sup> Ibid s 44(2)(a) and (d).

<sup>20</sup> Ibid s 44(1)(d) and (e).

<sup>21</sup> Ibid s 44(2)(a) and (d).

<sup>22</sup> Ibid s 40(1).

## Requirements for referral, reporting and cooperation

- 5.11 There is no requirement that the person be referred/officially identified as a victim of human trafficking.
- 5.12 The crime must have been reported to the police or government agency, such as community services. As noted previously, the Commissioner must refuse to make an award of assistance if it is satisfied that the act of violence was not reported to the police within a reasonable time. An applicant must state whether he or she has reported the matter, and include the date of the report, as well as the name and station of the police or government officer to whom the matter was reported. The application form for Support under the Victims Support Scheme also requires details of the police station or government organisation to which the report was made. Reporting may be prohibitive for some victims of trafficking, as they may be unwilling to report the act of violence to police if they do not have a valid visa and/or are fearful of person(s) who exploited them.
- 5.13 As noted, the Commissioner must consider whether the applicant cooperated. Similar to above, this may be prohibitive for some victims of trafficking who are unwilling to fully cooperate out of fear of their persecutor.

## 6. APPLICATION PROCESS

- 6.1 An application can be completed online.<sup>23</sup> The application form is not available in different languages. Therefore, its accessibility to those who do not understand English is limited, although the application forms include phone contact details for the Telephone Interpreting Service. A victim or third party, including parent or guardian on his or her behalf, can contact Victims Services by phone, mail or email ([vs@justice.nsw.gov.au](mailto:vs@justice.nsw.gov.au)) to make an application or seek assistance in doing so.

### Evidence

- 6.2 The applicant must be able to show that they are a victim of a relevant offence and that, as a result of the offence, they have suffered a physical or psychological injury. For approved counselling services, there are no evidentiary requirements under the VRS Act.
- 6.3 There are strict requirements for documentary evidence in support of all other applications.<sup>24</sup>
- 6.4 For an application for financial assistance for immediate needs, documentary evidence (such as a medical or police report) must be sufficient to support, on the balance of probabilities, the applicant's claim to be a victim of an act of violence.<sup>25</sup>
- 6.5 For applications for financial assistance for economic loss or for a recognition payment, the documentary evidence required includes a police report or report of a government agency and a medical, dental or counselling report verifying that the applicant or child who is the primary victim concerned has actually been injured as a

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<sup>23</sup> New South Wales Government, *Victims Services* <<http://www.victimsservices.justice.nsw.gov.au>>

<sup>24</sup> *Victims Rights & Support Act 2013* (NSW) s39.

<sup>25</sup> *Ibid.*

result of an act of violence.<sup>26</sup> Particulars of economic loss for which assistance is sought must include receipts, invoices or other approved forms substantiating the expenditure incurred, or to be incurred, in the case of actual expenses. For loss of earnings or economic loss, the name and address of the employer, the period of absence from work and a statement from the employer substantiating those particulars must be provided.<sup>27</sup>

- 6.6 Supporting documents can be submitted after making an application. The Commissioner has negotiated access to the New South Wales Police COPS system, which grants the Commissioner access to police reports and removes the requirement for victims to furnish them.<sup>28</sup>

### **Hearing**

- 6.7 Applications under the VRS Act are generally determined without a hearing.

### **Standard of proof**

- 6.8 The VRS Act provides that documentary evidence (such as a medical or police report) must support an application under the VRS Act on the balance of probabilities.<sup>29</sup>

### **Assistance**

- 6.9 The Commissioner does not pay for victims' legal fees.
- 6.10 The Australian Red Cross delivers the Support for Trafficked People Program, which involves legal assistance. Victims can apply to obtain legal assistance through this program by lodging an application. Anti-Slavery Australia is another organisation that currently provides legal assistance to victims of human trafficking, although it is not clear whether they aid victims with compensation applications.
- 6.11 It is not clear how long a typical application process takes under the VRS Act. Parliamentary support for the VRS Act was largely based on the length of delays victims were experiencing in receiving compensation under the previous scheme.<sup>30</sup>

## **7. ASSESSMENT OF COMPENSATION**

- 7.1 Primary victims may have access to four categories of support under the VRS Act.
- 7.2 First, victims are entitled to "approved counselling services", which can be awarded separately to any financial assistance.<sup>31</sup> Victims are able to select from a list of professional counsellors that have been approved by the Commissioner.

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<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> The Shopfront Youth Legal Centre, *Victim's Compensation and Support* (28 June 2013), 5 <[http://www.theshopfront.org/documents/Victims\\_\\_compensation\\_and\\_support.pdf](http://www.theshopfront.org/documents/Victims__compensation_and_support.pdf)>.

<sup>29</sup> *Victims Rights & Support Act 2013* (NSW) s 8.

<sup>30</sup> Victorian Parliament, *Parliamentary Debates*, Legislative Assembly, 21 May 2013, 20531 (Chris Patterson).

- 7.3 Second, victims may be entitled to financial assistance for expenses for treatment or urgent measures taken as a direct result of an act of violence, to secure the victim's safety, health or well-being.<sup>32</sup> This benefit is capped at a maximum of \$5,000. Examples include relocation expenses and emergency medical expenses.
- 7.4 Third, victims may be entitled to financial assistance for economic loss suffered by a primary victim as a direct result of that act of violence, to a maximum of \$30,000.<sup>33</sup>
- 7.5 Fourth, victims may be entitled to recognition payments for trauma suffered. By contrast to compensation payable under the previous scheme, recognition payments are payable by reference to the nature of the violent act rather than injury or harm suffered by the victim.
- 7.6 There are four categories of recognition payment under Division 5 of the VRS Act.
- 7.7 A Category A recognition payment is given in respect of an act of violence that occurred in the course of the commission of a homicide. The maximum entitlement is \$15,000 to a family victim who was financially dependent on the primary victim and \$7,500 to each parent, step-parent or guardian of a primary victim.
- 7.8 A Category B recognition payment is given in respect of:
- 7.8.1 a sexual assault resulting in serious bodily injury, or which involved an offensive weapon, or which was carried out by two or more persons; or
  - 7.8.2 a sexual assault, indecent assault or attempted sexual assault involving violence that was one of a series of related acts.
- 7.9 The maximum entitlement is \$10,000.
- 7.10 A Category C recognition payment is given in respect of:
- 7.10.1 a sexual assault other than one referred to under sub-paragraph (b) of Category B;
  - 7.10.2 an attempted sexual assault resulting in serious bodily injury;
  - 7.10.3 an assault resulting in grievous bodily harm; or
  - 7.10.4 the physical assault of a child that is one of a series of related acts.
- 7.11 The maximum entitlement is \$5,000.
- 7.12 A Category D recognition payment is given in respect of:
- 7.12.1 an indecent assault;
  - 7.12.2 an attempted sexual assault involving violence other than one referred to under paragraph (b) of Category C;

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<sup>31</sup> *Victims Rights and Support Act 2013* (NSW) s 26(1)(a). The initial grant is for 10 hours of counselling and for additional periods subject to approval of the Commissioner.

<sup>32</sup> *Ibid* s 26(1)(b).

<sup>33</sup> *Ibid* s 26(1)(c).

- 7.12.3 a robbery involving violence; or
  - 7.12.4 an assault (not resulting in grievous bodily harm).
- 7.13 The maximum entitlement is \$1,500.
- 7.14 The scheme is funded by the New South Wales Government.

## 8. BARRIERS / OBSTACLES

- 8.1 Various obstacles stand in the way of victims of human trafficking having access to compensation, particularly the accessibility of the scheme, availability of legal aid and the disjoint between the offences and the victim compensation scheme.

### Accessibility

- 8.2 There are various factors that may limit the accessibility of the scheme under the VRS Act to victims of trafficking. First, victims must be aware of the existence of the compensation scheme and procedure. This is unlikely if a victim has not been informed about it by authorities or support services. Secondly, the form and the information on the website<sup>34</sup> are only in English, which may be prohibitive for victims cannot communicate in English. Thirdly, the victim must be able to be contacted by the Commissioner, which may be difficult if the victim does not have stable accommodation.
- 8.3 The scheme is strictly time barred and requires victims to have reported the crime to the police or a government agency within a reasonable time. This may be difficult for trafficking victims who may initially be reluctant to go to the Police or seek help, particularly if they have suffered trauma. Some victims may be afraid to report crimes to police or other government agencies.
- 8.4 Community Legal Centres NSW ("**CLC NSW**") notes that the requirement under the VRS Act for documentary evidence in support of applications also creates barriers for some victims. In addition, the requirement that reports must be made by victims to police or government agencies has been an obstacle to victims' support claims since the introduction of the VRS Act.<sup>35</sup> CLC NSW makes the point that while some form of documentary evidence is necessary, the documentary evidence standard under the VRS Act has been criticised as being too narrow and prescriptive. One way to overcome this obstacle would be to allow victims to rely on documentation from non-government organisations where such documents establish the commission of an act of violence and resulting injury.<sup>36</sup>
- 8.5 Support under the VRS Act is available to all victims of crime and compensation is largely awarded according to specified criteria including payments in recognition of the injury suffered as a result of an offence, rather than on a discretionary basis. While the quantum of financial assistance payments under the VRS Act is inadequate, it is understood that applications are generally handled promptly on the papers and without a hearing.

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<sup>34</sup> New South Wales Government, *Victims Services* <<http://www.victimsservices.justice.nsw.gov.au>>

<sup>35</sup> Community Legal Centres NSW, *Letter to Attorney General of NSW: First 12 Months of Victims Right and Support Act 2013* (16 June 2014), 3 <[www.clcnsw.org.au/public\\_resource\\_details.php?resource\\_id=53](http://www.clcnsw.org.au/public_resource_details.php?resource_id=53)>.

<sup>36</sup> *Ibid* 4.

## Awareness

- 8.6 Awareness of the human trafficking problem in immigration and law enforcement agencies has increased. The Australian Federal Police ("**AFP**") has conducted operations specifically targeted at exposing human trafficking perpetrators.<sup>37</sup>
- 8.7 The need to further increase awareness amongst target groups has been recognised at a national level. The Federal Government's "National Action Plan to Combat Human Trafficking and Slavery 2015-2019" ("**National Action Plan**") has identified increasing awareness of human trafficking among relevant stakeholders, as well as the general community, as a key focus in the life-span of the plan through a "Communication and Awareness Strategy for Human Trafficking and Slavery".<sup>38</sup>

## Legal aid

- 8.8 Victims of trafficking are able to access legal advice through the "Support for Trafficked People Program" ("**the Support Program**"), but the extent of available legal aid is unclear. A goal outlined in the National Action Plan is to provide victims of trafficking with access to legal advice through the Support Program.
- 8.9 Legal aid is generally not available for the type of legal work involved in preparing applications under the VRS Act. In contrast to the previous NSW scheme, the Commissioner does not pay for victims' legal fees. It is understood that the Commissioner actively discourages victims from retaining lawyers.<sup>39</sup> The fact that significant lump sum compensation awards are not available under the VRS Act also points to there being no real financial scope for victims to pay for legal advice out of awards.
- 8.10 CLC NSW notes that the report of the Chairperson of the Victims Compensation Tribunal for 2012-2013 indicated that 70% of victims were legally represented at the Tribunal prior to the end of the previous NSW scheme. According to CLC NSW, under the current scheme approximately 5% of victims have legal representation. CLC NSW has found it necessary to assist a number of victims with lodging their victims support claims.<sup>40</sup>
- 8.11 The Second Reading Speech for the VRS Act noted that under the new scheme there would be no need for legal representation as victims of violence would be assisted by support co-ordinators and case managers at NSW Victims Services. The experience of CLC NSW is that staff at NSW Victims Services are unable to provide the required legal advice. Nor are they able to write submissions for a victim, for example, addressing matters which may otherwise result in a refusal or reduction of

<sup>37</sup> Nick McKenzie et al, 'Legal Brothels linked to international sex trafficking rings', *The Sydney Morning Herald* (online) 10 October 2011 <<http://www.smh.com.au/national/legal-brothels-linked-to-international-sex-trafficking-rings-20111009-1lfxs.html>>.

<sup>38</sup> Commonwealth of Australia, 'National Action Plan to Combat Human Trafficking and Slavery 2015-2019' (2014). <<http://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Trafficking-NationalActionPlanToCombatHumanTraffickingAndSlavery2015-19.pdf>>.

<sup>39</sup> Victorian Parliament, *Parliamentary Debates*, Legislative Assembly, 21 May 2013, 20531-32 (Chris Patterson).

<sup>40</sup> Community Legal Centres NSW, *Letter to Attorney General of NSW: First 12 Months of Victims Right and Support Act 2013*(16 June 2014) 3 <[www.clcnsw.org.au/public\\_resource\\_details.php?resource\\_id=53](http://www.clcnsw.org.au/public_resource_details.php?resource_id=53)>.



financial support under section 44 of the VRS Act.<sup>41</sup> CLC NSW is aware of instances where support coordinators have provided incorrect information about some of the more technical aspects of the legislation, such as the ability to withdraw an application under the old scheme and apply under the new scheme.<sup>42</sup>

- 8.12 A conflict of interest arises where staff from the NSW Victims Services both assist victims in preparing applications for support and also play the role of determining whether or not support is awarded to victims.<sup>43</sup>
- 8.13 CLC NSW states that many of its centres have seen transitional matters that were refused or only partially successful at first instance but were ultimately successful following an Internal Review. Some of these were due to an oversight rather than a mistake in the application of the law. While victims of violence may receive correspondence from NSW Victims Services informing them of a right to appeal, in the absence of legal representation clients will not know on what grounds to base the appeal, particularly given the technical nature of some matters.<sup>44</sup>

### **Protection of victim's identity**

- 8.14 Victims' identities may be protected in various ways. As noted, most applications are determined without a hearing.
- 8.15 In prosecuted cases of human trafficking, victims are able to provide evidence remotely, have their contact with the defendant limited and have a support person with them while they give evidence. They are also able to provide victim impact statements. It is an offence to identify a trafficked person in the media.<sup>45</sup>

### **Restitution**

- 8.16 Lawyers at CLC NSW have found that many victims of domestic violence and sexual assault do not pursue recognition payments if it means that perpetrators are going to be pursued to pay restitution. Many victims have informed CLC NSW that they fear for their safety, believe their perpetrator(s) would try to seek retribution, re-enter their lives and recommence the cycle of violence if restitution were pursued.
- 8.17 Unfortunately, these victims miss out on immediate financial assistance and recognition payments that could help them to rebuild their lives. This is problematic and contrary to the United Nations principle of protecting victims from intimidation and retaliation.<sup>46</sup>
- 8.18 The PwC report on the old NSW scheme recognised restitution as a significant barrier to victims of domestic violence, sexual assault, child sexual abuse and child abuse exercising their right to claim compensation. PwC recommended that "victims have the ability to opt out of the restitution process in circumstances where they can

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<sup>41</sup> Ibid 6.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> *Crimes Act 1914* (Cth) Part IAD.

<sup>46</sup> United Nations General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GARes 40/34 (29 November 1985) Article 6(d).

demonstrate a safety concern as a result of restitution being pursued". PwC recognised that "whilst the principle of restitution is important, the safety of the primary, secondary and family victims should take precedence".<sup>47</sup>

- 8.19 In other cases, victims of domestic violence, sexual assault, child sexual abuse or child abuse are unwilling to claim compensation in the knowledge that the perpetrator may be pursued for restitution. In light of this, CLC NSW recommends that victims of domestic violence, sexual assault, child sexual abuse and child abuse should have the right to elect whether or not restitution is pursued. Such a provision would empower victims and support the concerns of victims regarding their ongoing safety.

### **Access to services**

- 8.20 The Support Program, a federal government initiative, provides suspected victims of human trafficking with medical assistance, counselling, secure accommodation, financial assistance, legal and migration advice and skills training, including English classes. This program also helps victims meet their safety needs and integrate into the community.

### **Low prosecution rate**

- 8.21 There is a low prosecution rate for perpetrators of human trafficking. Between 1 July and 31 December 2014, the AFP received 74 referrals relating to human trafficking. However, there were no charges or convictions during this same period,<sup>48</sup> nor were any traffickers convicted during the first half of 2014.<sup>49</sup> Since the introduction of the human trafficking crimes, only 17 people have been convicted.<sup>50</sup> It is believed that the low prosecution rate may stem from the complexity and time consuming nature of human trafficking cases.<sup>51</sup>

### **Disjoint between offences and victim compensation scheme**

- 8.22 The offence of human trafficking does not easily align with the current New South Wales scheme. As noted above, to be eligible for a payment, it is necessary that a person has suffered an injury as a result of an act of violence (i.e. a criminal act committed in New South Wales). Therefore, a victim of human trafficking must show that he or she has suffered a mental or physical injury as a result of the human trafficking which must take the form of an act of violence. This requirement may prove difficult and distressing for victims. It may also be difficult to pinpoint a violent act that resulted in injury, as the definition of violent act does not extend to trafficking.

<sup>47</sup> PricewaterhouseCoopers, *NSW Department of Attorney General and Justice: Review of the Victims Compensation Fund* (12 July 2012) 42 <[http://www.victimsservices.justice.nsw.gov.au/Documents/report\\_pwc-vcf-review.pdf](http://www.victimsservices.justice.nsw.gov.au/Documents/report_pwc-vcf-review.pdf)>.

<sup>48</sup> Commonwealth of Australia, 'Australian Government Strategy to Combat Human Trafficking and Slavery Whole-of-Government Performance Management Reporting 1 July-31 December 2014' (2015) <<http://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/CAPSPerformanceManagementFrameworkPMFNarrativeForPublicRelease1JulyTo31December2014.pdf>>.

<sup>49</sup> United States of America State Department, 'Trafficking in Persons Report July 2015' (2015), <<http://www.state.gov/j/tip/rls/tiprpt/2015/>>.

<sup>50</sup> Interdepartmental Committee on Human Trafficking and Slavery, *Trafficking in Persons: The Australian Government's Response 1 July 2013-31 June 2014* (2014) 22.

<sup>51</sup> Albert Moskowitz, 'Challenges and Priorities in Prosecuting and Adjudicating TIP Cases' (Paper presented at the Trafficking in Persons Research and Data Forum, University of Hong Kong, 3-4 November 2008) 7 <[http://www.aaptip.org/2006/artip-project/documents/Paper\\_J&P-Challenges-TIP\\_22Oct08\\_fnl.pdf](http://www.aaptip.org/2006/artip-project/documents/Paper_J&P-Challenges-TIP_22Oct08_fnl.pdf)>.

While it is not explicitly stated that a violent act must be physical, it may be more difficult to apply for compensation for injuries resulting from psychological or emotional abuse.

- 8.23 Although suspected victims of human trafficking are eligible for assistance under the Support Program, they only receive short-term support while they transition to security and freedom, rather than compensation for loss and expenses resulting from the crime. The National Action Plan to Combat Human Trafficking and Slavery 2015-2019 notes that the Attorney-General's Department is monitoring the availability of state and territory victims of crime compensation schemes and whether there is a need for a federal scheme.<sup>52</sup>

### **Counselling**

- 8.24 As noted, the Commissioner has a list of approved professional counsellors from which victims can select a counsellor. Experience of CLC NSW is that many victims develop a therapeutic relationship with a counsellor who is not part of the Victims Services Approved Counselling Services. Victims may be reluctant to develop another relationship with a counsellor who is part of the Victims Services Approved Counselling Service.

### **Legal**

- 8.25 Victims of trafficking are not prosecuted for not holding a valid visa. The Human Trafficking Visa Framework enables victims of human trafficking who do not hold a valid visa to regularise their visa status. Under this framework, a victim of human trafficking who does not hold a valid visa is given a 30 day bridging visa while the AFP determine whether they wish for the person to remain in Australia to assist with an investigation. This visa does not include work rights. If the AFP decide that they wish for the person to participate in the investigation or prosecution of the offender, he or she will be granted a Criminal Justice Stay visa. This visa allows the person to work, access Centrelink, Medicare and continued support under the Support for Trafficked Persons program. Following the conclusion of the relevant investigation/prosecution, if it is unsafe for a victim to return to his or her country of origin, he or she may be granted a Witness Protection (Trafficking) (Permanent) visa, which includes work and social security rights and the possibility of family reunification. Without a Witness Protection visa, a victim will be returned to his or her country of origin.
- 8.26 Alternatively, a victim may claim refugee status. This has been possible for some victims of trafficking. For example, in *VXAJ v MIMIA* [2006] FMCA 234, a Thai woman who was trafficked to Australia to engage in sex work was granted protection.

## **9. EXAMPLES IN PRACTICE**

- 9.1 There are no reported cases under the VRS Act, let alone human trafficking-related cases.
- 9.2 Frances Simmons states that she is aware of eight cases in which a human trafficking victim has successfully obtained an award of compensation, most of which

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<sup>52</sup> Above n 23.

were in NSW under the previous scheme.<sup>53</sup> For example, in 2010 a woman who was a victim of sexual servitude was awarded two separate amounts of compensation, amounting to almost \$30,000, for two acts of violence, which were forced deprivation of liberty for the purposes of sexual penetration and threats of death.<sup>54</sup>

- 9.3 The absence of reported cases makes it difficult to assess how the Commissioner is responding to applications made by victims under the VRS Act.
- 9.4 NSW Victim Services has published data profiles outlining how many victims of trafficking or victims of other crimes have accessed compensation or support under the VRS Act.<sup>55</sup> The data is useful in demonstrating how many applications have been made and how many of those applications have been successful. The data shows that a large number of recent applications for financial support have not been successful. Of 3,883 applications lodged for financial support between 1 July 2014 and 30 June 2015, 2,918 were determined in the same year, only 1,832 of which were approved.<sup>56</sup>

## 10. SUGGESTIONS FOR IMPROVEMENT

### Short term

- 10.1 The amounts available to victims under the VRS Act are considerably less than the amounts of compensation that were available to victims under the Victims Support and Rehabilitation Act 1996 (NSW). The maximum amount of compensation is also considerably less than amounts available under other state schemes. In addition, the nature of the payments available to victims under the VRS Act are not well designed to meet the needs of victims of human trafficking.
- 10.2 Recognition payments under the VRS Act are available for the most part to victims who suffer physical injuries. Under the previous scheme, the Schedule of Injuries included psychological or psychiatric injury. Under the VRS Act, a victim who suffers emotional or psychological abuse over an extended period, which does not amount to grievous bodily harm, would at best be able to recover \$1,500 as a Category D recognition payment if it were accepted that there was an assault. The sum of \$1,500 is inadequate recognition of the psychological damage that a victim of human trafficking may sustain as a resulting of violence.
- 10.3 The VRS Act recognises the impact of repeated sexual assaults, providing a higher payment in the form of a Category B payment. However, it is not clear whether human trafficking for sexual exploitation would enable a victim to obtain a recognition payment under Category B. The VRS Act does not explicitly recognise the effect of repeated and ongoing violence involved in sexual servitude under the Crimes Act 1900 (NSW). This is of particular concern in light of the fact that, unlike other countries, traffickers in Australia may not rely on overt force but instead use more

<sup>53</sup> Frances Simmons, above n 4, 512.

<sup>54</sup> Ibid 511.

<sup>54</sup> Ibid 521.

<sup>55</sup> New South Wales Government, Department of Justice, Victims Services & Support, *Publications – Service Providers* (8 March 2016)

<[http://www.victimsservices.justice.nsw.gov.au/Pages/vss/vs\\_publications\\_brochures\\_reports/vs\\_publicationsserviceproviders.aspx](http://www.victimsservices.justice.nsw.gov.au/Pages/vss/vs_publications_brochures_reports/vs_publicationsserviceproviders.aspx)>

<sup>56</sup> Ibid.

subtle means of psychological coercion including playing on victims' fears of deportation.<sup>57</sup> In the context of this discussion, it is worth noting that the data profiles recently published by the NSW Victim Services indicate that 58% of unsuccessful applications for recognition payments were dismissed on the basis that there was "no act of violence".<sup>58</sup> This begs the question whether the data evidences the failure of the VRS Act, as it provides for too narrow a definition of "act of violence" and fails to respond to acts which take the form of repeated and ongoing violence causing sexual servitude.

- 10.4 It is important that the nature and quantum of awards payable to victims of crime under the VRS Act are reviewed. It appears that improvements to the quantum of awards cannot be achieved until there is a change in Government policy resulting in increased funding levels.<sup>59</sup> An essential part of this is to provide victims with access to funded legal assistance (of the type available under the previous scheme) to assist them in overcoming barriers in making applications under the VRS Act.
- 10.5 The strict time limits under the VRS Act have the potential to deny human trafficking and other victims of violent crime access to justice when compared to victims of other crimes.<sup>60</sup> There are any number of legitimate reasons why victims of human trafficking do not report acts of violence within two years of occurrence. The existing two year limit on applications for financial assistance and for many applications for recognition payments should be removed. At a bare minimum, there should be exceptions introduced into the VRS Act which the Commissioner may have regard to when considering an application outside time limits. For example, the equivalent statute in Victoria, the Victims of Crime Assistance Act (1996) (Vic), provides for a number of appropriate exceptions which the Victims of Crime Assistance Tribunal must have regard to when considering applications outside time. These include whether the perpetrator of the act of violence was in a position of power, influence or trust in relation to the applicant.
- 10.6 Further efforts should be made to inform victims of trafficking of their rights to compensation and/or reparation. For example, when victims enter the Support Program they should be informed of the compensation options available to them. When prosecuting cases, the Commonwealth Director of Public Prosecutions should seek to obtain reparation for victims.<sup>61</sup>

### Long term

- 10.7 A Commonwealth funded compensation scheme specific to victims of trafficking should be introduced.<sup>62</sup> Such a scheme could be incorporated into the Support for Trafficked People Program so that when a victim is connected with the program, he or she will obtain support as well as compensation. A scheme that is specific to

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<sup>57</sup> Ibid, above n 3, 525

<sup>58</sup> Ibid, above n 54, Victims Services Data profiles - Recognition applications, 1.

<sup>59</sup> PricewaterhouseCoopers, *NSW Department of Attorney General and Justice: Review of the Victims Compensation Fund* (12 July 2012) 3 <[http://www.victimsservices.justice.nsw.gov.au/Documents/report\\_pwc-vcf-review.pdf](http://www.victimsservices.justice.nsw.gov.au/Documents/report_pwc-vcf-review.pdf)>.

<sup>60</sup> See Letter from Law Society of New South Wales to Attorney General of NSW (15 July 2014) 2 <<https://www.lawsociety.com.au/cs/groups/public/documents/internetpolicy submissions/886958.pdf>>

<sup>61</sup> Ibid, above n 3, 527.

<sup>62</sup> Ibid 529.

trafficking would ameliorate the disjoint between the eligibility requirements of the New South Wales scheme and the needs of victims.

## **11. ALTERNATIVES TO STATUTORY COMPENSATION SCHEMES**

### **Civil proceedings**

- 11.1 Victims of human trafficking are able to initiate a claim in tort for actions such as false imprisonment, rape, trespass and assault. However, there are no reported cases in which this has occurred.<sup>63</sup> This may be because of the danger of a costs order being awarded against the victim. Further, the respondent must have the ability to pay.
- 11.2 Under the Fair Work Act 2009 (Cth), the Fair Work Ombudsman may institute proceedings against employers who are in breach of their obligations under the Act in order to recover wages entitled to exploited employees.

### **Criminal proceedings**

- 11.3 Section 21B of the Crimes Act 1914 (Cth) provides for reparation orders. However, no reparation orders have been awarded in the 17 cases where traffickers have been convicted. Therefore, at present, such orders do not provide a viable alternative to the NSW compensation scheme. Hopefully this will change in the future, as the Commonwealth Government has identified the need to ensure that the Commonwealth Director of Public Prosecutions informs victims of the availability of reparation orders.<sup>64</sup> However, even if a reparation order is imposed, the offender may be unable to pay. Further, in contrast to the statutory compensation scheme, a conviction must be secured before reparation is possible.

### **Pros and cons of alternatives**

- 11.4 The disadvantages of recovering loss through a civil action are the time taken, the possibility of a costs order and the possibility of needing to bring another action to enforce the judgment. The disadvantages of recovering loss through a criminal action are the need to secure a conviction and the fact that in the cases where convictions have been imposed, no reparation orders have been made. An advantage of these avenues is that the amount recoverable is not capped and the amount recoverable in damages is potentially higher than the statutory compensation scheme limit.

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<sup>63</sup> Ibid 534.

<sup>64</sup> Commonwealth of Australia, above n 37.



# AUSTRALIA - VICTORIA

## 1. EXECUTIVE SUMMARY

- 1.1 Australia is primarily a destination country for human trafficking. Victims are trafficked for sex work, forced labour, domestic servitude and forced marriage.<sup>1</sup> In 2013-14, the Australian Federal Police ("**AFP**") investigated 60 human trafficking allegations. Almost 43 per cent of these allegations related to sexual exploitation, 35 per cent to labour exploitation and 17 per cent to forced marriage. The Australian Government has made a concerted and co-ordinated effort to address the problem of human trafficking in Australia. It funds the Support for Trafficked People Program, which provides support and financial assistance to victims. It has introduced the Human Trafficking Visa Program to help victims of trafficking regularise their visa status. It also has a national long-term plan to combat human trafficking. The exact number of victims is impossible to discover; we do know that only 235 victims have accessed the Australian Government's support program for trafficked persons over 10 years.<sup>2</sup>
- 1.2 Trafficking victims are able to apply for compensation under general state crime compensation schemes; there is no federal scheme, nor is there a specific human trafficking compensation scheme. Under the Victorian scheme, victims must establish that they have suffered an injury as a direct result of a violent act that has occurred in Victoria. It may be hard for victims to pinpoint a violent act that has directly resulted in an injury. Further, it may be difficult for victims of trafficking to access compensation if they are fearful of cooperating with authorities, have not made a police report or do not understand English. Victims may be able to access compensation through reparations; however, this is dependent on securing a conviction, which does not have a high success rate.

## 2. PRELIMINARY ISSUES

### Framework for anti-trafficking in the jurisdiction

- 2.1 International conventions/treaties the State has ratified:

Treaty	Signed/Ratified? (S, R or No)
UN Convention against Transnational Organised Crime (Transnational Organised Crime Convention)	R
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)	R

<sup>1</sup> Frances Simmons, 'Making Possibilities Realities: Compensation for Trafficked People' (2012) 34 *Sydney Law Review* 521; Interdepartmental Committee on Human Trafficking and Slavery, 'Trafficking in Persons: the Australian Government Response 1 July 2013-30 June 2014' (2014) <<https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/TraffickingInPersons-TheAustralianGovernmentResponse2013-2014.pdf>>.

<sup>2</sup> Interdepartmental Committee on Human Trafficking and Slavery, 'Trafficking in Persons: the Australian Government Response 1 July 2013-30 June 2014' (2014) <<https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/TraffickingInPersons-TheAustralianGovernmentResponse2013-2014.pdf>>.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	No
Forced Labour Convention 1930 (ILO No 29)	R
Abolition of Forced Labour Convention 1957 (ILO No 105)	R
Worst Forms of Child Labour Convention 1999 (ILO No 182)	R
Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956	R
UN Convention on the Rights of the Child	R
UN Convention on the Elimination of all forms of Discrimination against Women	R
UN Covenant on Civil and Political Rights	R

## 2.2 Domestic legislation on human trafficking:

2.2.1 Trafficking in persons is primarily regulated at the federal level of government by divisions 270 and 271 of the Criminal Code Act 1995 (Cth). Division 271 outlines various offences relating to trafficking in persons. In summary, it is an offence to organise or facilitate the entry into, or exit out of, Australia, of a person by means of coercion, threat or deception for the purpose of exploitation of the person. The penalty for human trafficking offences ranges from 12-25 years imprisonment, depending on the level of aggravation. This legislation is enforced by the Australian Federal Police, state police forces, and the courts.

2.2.2 At the state level in Victoria, the only offence related to human trafficking is sexual servitude, which is prohibited by sections 60AB and 60AC of the Crimes Act 1958 (Vic). The maximum penalty for this offence is 20 years imprisonment. This legislation is enforced by Victoria Police, the Victorian Department of Justice and Regulation and Victorian courts.

2.2.3 The definition of human trafficking in the Criminal Code Act 1995 (Cth) accords with the definition in the Palermo Protocol, as it was enacted to implement Australia's obligations under the Protocol.

## 3. BASIS OF STATUTORY COMPENSATION

3.1 Statutory compensation is only available at the state level of government, under the Victims of Crime Assistance Act 1996 (Vic). The scheme allows primary, secondary or related victims of violent crime to access compensation for any injuries suffered as a direct result of the crime.

## 4. TYPE OF SCHEME

4.1 The statutory compensation scheme is not specific to victims of human trafficking. However, it covers injuries relating to all forms of trafficking, provided the victim

meets the eligibility criteria. For a person to be eligible for compensation, he or she must be a primary, secondary or related victim of an act of violence. An "act of violence" is a criminal act that has occurred in Victoria and directly resulted in injury or death. A "criminal act" is an act or omission constituting a relevant offence. A "relevant offence" is an offence, amongst other things, punishable on conviction by imprisonment, that involves an assault on, or injury or a threat of injury, to a person.<sup>3</sup> The injury may be physical or psychological, including experience of trauma, or pregnancy.

- 4.2 There is no requirement that the criminal act be an offence under Victorian law. Therefore, although human trafficking is an offence under Commonwealth law, it appears that victims are eligible for compensation under the Victorian scheme. As such, if a victim of sex slavery, forced labour, child labour, domestic servitude or child military service is able to demonstrate that he or she has suffered injury as a direct result of a criminal act that has occurred in Victoria, he or she will be able to apply for compensation. Certain crimes, such as forced labour may require evidence that the forced labour included some form of assault, injury or threat of injury to be eligible. It does not appear that the relevant acts need be physical violence.<sup>4</sup>

## 5. ELIGIBILITY

### Eligible victims

- 5.1 Primary, secondary and related victims are able to apply for compensation. A primary victim is a person who is directly injured by an act of violence committed against him or her.<sup>5</sup> A secondary victim is a person who is present at the scene of an act of violence and is injured as a result of witnessing the act.<sup>6</sup> A related family member is a person who, at the time of the act of violence, was a close family member, or a dependent of, or had an intimate relationship with, a primary victim, who has died as a direct result of the violent act.<sup>7</sup> Therefore, only family of deceased victims are able to apply. It does not appear that they must reside in the jurisdiction to claim compensation.

### Types of injuries recognised

- 5.2 Both physical and psychological injuries are recognised. An injury is defined as:
- 5.2.1 actual physical bodily harm;
  - 5.2.2 mental illness or disorder or an exacerbation of a mental illness or disorder, whether or not flowing from nervous shock;
  - 5.2.3 pregnancy; or

<sup>3</sup> *Victims of Crime Assistance Act 1996* (Vic) s 3.

<sup>4</sup> *AVA and GAR v Victims of Crime Assistance Tribunal (General)* (2010) VCAT 2078.

<sup>5</sup> *Victims of Crime Assistance Act 1996* (Vic) s 7.

<sup>6</sup> *Ibid* s 9.

<sup>7</sup> *Ibid* s 11.

5.2.4 any combination of the above arising from an act of violence.<sup>8</sup>

### **Jurisdictional requirements**

5.3 Although the act of violence must have occurred in Victoria, the injury may occur outside of Victoria and still be compensable.<sup>9</sup>

### **Exclusions on grounds of illegal or immoral behaviour**

5.4 No persons are expressly excluded on the grounds of illegal or immoral behaviour; however, the Victims of Crime Assistance Tribunal ("**Tribunal**"), when determining an application, must have regard to the character, behaviour (including past criminal activity and the number and nature of any findings of guilt or convictions) and attitude of the applicant.<sup>10</sup> Therefore, at the discretion of the Tribunal, a person may be denied compensation on the grounds of criminal activity if the activity suggests "an ongoing disregard for others" safety and property and for societal morals.<sup>11</sup>

5.5 The Tribunal must take into account whether any condition or disposition of the applicant directly or indirectly contributed to his or her injury.<sup>12</sup> This may disadvantage some victims of human trafficking. For example, if an individual agreed to come to Australia to work in the sex industry, but was deceived about the conditions of work, there appears to be a risk that she or he may be seen to have contributed to his/her injuries.

### **Time limit for application**

5.6 An application must be made within 2 years of the occurrence of the act of violence. An application submitted after this time must be struck out by the Tribunal unless an exception is called for by the particular circumstances. In reaching its decision the Tribunal must have regard to:

5.6.1 the age of the applicant at the time of the occurrence of the act of violence;

5.6.2 whether the applicant is intellectually disabled;

5.6.3 whether the person who committed, or is alleged to have committed, the act of violence was in a position of power, influence or trust in relation to the applicant;

5.6.4 whether the applicant was a child at the time of the occurrence of the act of violence and the application was made within a reasonable time after he or she reached the age of 18; and

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<sup>8</sup> Ibid s 3.

<sup>9</sup> Ibid s 3.

<sup>10</sup> Ibid s 54(a).

<sup>11</sup> *Meinderts v Victims of Crime Compensation Tribunal* [2011] VCAT 1831, [24].

<sup>12</sup> *Victims of Crime Assistance Act 1996* (Vic) s 54(e).

5.6.5 all other circumstances that it considers relevant.<sup>13</sup>

### **Requirements for referral, reporting and cooperation**

- 5.7 There is no requirement that the person be referred/officially identified as a victim of human trafficking. The Tribunal will determine on the balance of probabilities whether the person has incurred an injury as a result of an act of violence.
- 5.8 The crime must have been reported to the Police. The Tribunal must refuse to make an award of assistance if it is satisfied that the act of violence was not reported to the police within a reasonable time, unless the Tribunal determines that there are special circumstances.<sup>14</sup> An applicant must state in the application whether he or she has reported the matter to police, and include the date of the report, as well as the name and station of the officer to whom the matter was reported.<sup>15</sup> This may be prohibitive for some victims of trafficking, as they may be unwilling to report the act of violence to police if they do not have a valid visa and/or are fearful of persons who exploit them.
- 5.9 The Tribunal must also refuse to make an award of assistance if the applicant failed to provide reasonable assistance to any person or body engaged in the investigation of the act of violence or in the arrest or prosecution of any person by whom the act of violence was committed or alleged to have been committed.<sup>16</sup> Similarly to above, this may be prohibitive for some victims of trafficking who are unwilling to fully cooperate out of fear of their persecutor.

## **6. APPLICATION PROCESS**

- 6.1 An application can be completed online (<https://www.vocat.vic.gov.au/>) or in writing. In the case of the latter, the application must be sent to the nearest Tribunal location. The application form is not available in different languages; therefore, its accessibility to those who do not understand English is limited unless support is obtained.

### **Evidence**

- 6.2 The applicant must be able to show that they are a victim of a relevant offence and that they have sustained a physical or psychological injury. Depending on the type of assistance claimed, various documents must be provided to the Tribunal as evidence to support the application, such as reports or receipts. For example, when claiming medical expenses the applicant should provide a report from a medical practitioner linking the treatment provided/proposed to the injury sustained by the applicant. For safety-related expenses, the application should include a receipt, invoice or quote substantiating the safety-related expenses.

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<sup>13</sup> Ibid s 29.

<sup>14</sup> Ibid s 52.

<sup>15</sup> Ibid s 27.

<sup>16</sup> Ibid s 52.

## Hearing

- 6.3 An application may be determined with, or without, a hearing. An applicant can express a preference for the matter to proceed without a hearing; however, the Tribunal may determine that a hearing is necessary if the matter is complex or the Tribunal would like to hear evidence.<sup>17</sup> A person may appear personally or be represented by a legal practitioner.<sup>18</sup> While the perpetrator is not usually involved, in one known case a Magistrate wished to ask the offender to the hearing of the application, despite the Australian Federal Police and the victim's objections. The case was one of rape of a trafficking victim. The victim had to decide whether to withdraw her claim or face the probability of facing her abuser in court.<sup>19</sup>
- 6.4 If an individual disagrees with the outcome of the decision, they can ask for a review of the decision, or for a statement of reasons for the final decision. A request for review must be made within 28 days of either the final decision or when the person received the statement of reasons. If they are still unsatisfied they can appeal to the Victorian Civil and Administrative Tribunal.<sup>20</sup> There are costs associated with an appeal, although these can be waived in certain situations, particularly if the applicant has very little income.

## Standard of proof

- 6.5 The standard of proof for any question of fact to be determined by the Tribunal is on the balance of probabilities.<sup>21</sup>

## Assistance

- 6.6 There may be some costs relating to obtaining evidence, such as police and medical records. These can occasionally be waived if the individual cannot afford them. Any reasonable legal costs incurred by an applicant will be paid by the Tribunal. Legal practitioners cannot charge an applicant for any costs incurred in preparing an application or appearing before the Tribunal.<sup>22</sup> Victims may be awarded interim financial assistance before the determination of a final award to assist them to obtain counselling or medical support. If their application is accepted, any expenses relating to obtaining a psychological report will be paid.
- 6.7 The Australian Red Cross delivers the Support for Trafficked People Program, which involves legal assistance. Victims can apply to obtain legal assistance through this program by lodging an application. Anti-Slavery Australia is another organisation that currently provides legal assistance to victims of human trafficking, although it is not clear whether they aid victims with compensation applications.
- 6.8 It is not clear how long the application process takes. Under section 32 of the Act, the Tribunal is required to act expeditiously. In our experience, applications for

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<sup>17</sup> Ibid s 33.

<sup>18</sup> Ibid s 36.

<sup>19</sup> *Application of RG: Victims of Crime Assistance Tribunal 2010/1373* (2012); cf *Fronst v VOCAT* (2002) VCAT 1390 per Bowman J.

<sup>20</sup> *Victims of Crime Assistance Act 1996* (Vic) 2 59. .

<sup>21</sup> *Victims of Crime Assistance Act 1996* (Vic) s 31.

<sup>22</sup> Ibid s 48.



compensation under this regime can take anywhere between 9 and 12 months, depending on the circumstances.

## 7. ASSESSMENT OF COMPENSATION

- 7.1 Primary victims are able to access compensation for economic loss, physical injury and psychological injury. They may be awarded up to \$60,000, which may include counselling expenses, medical expenses, loss of earnings, loss or damage to clothing worn at the time of the incident, safety-related expenses and other exceptional expenses.<sup>23</sup> Additionally, the Tribunal may make an award of Special Financial Assistance of up to \$10,000 if the victim has suffered a significant adverse effect, which reflects a payment on behalf of the community in recognition of the harm suffered by the victim. Related victims may access compensation for psychological expenses and economic loss. They may be awarded up to \$50,000 for counselling expenses, medical or funeral expenses, distress and dependency.
- 7.2 Compensation is assessed on the basis of expenses actually and reasonably incurred by the individual, or reasonably likely to be incurred, as a direct result of the act of violence.
- 7.3 Counselling expenses may also be awarded completely separately to compensation and prior to a final determination of the claim.
- 7.4 The scheme is funded centrally by the Victorian Government.

## 8. BARRIERS / OBSTACLES

- 8.1 There are a number of potential obstacles which may stand in the way of victims of human trafficking accessing compensation, particularly the accessibility of the scheme, availability of legal aid and the disjoint between the offences and the victim compensation scheme.

### Accessibility

- 8.2 Although the compensation procedure is, in general, quite straightforward, there are various factors that may limit the accessibility of the scheme to victims of trafficking. First, victims must be aware of the existence of the compensation scheme and procedure. This is unlikely if a victim has not been informed of its existence by authorities or support services. Second, the form and the information on the website are only in English, which may be prohibitive for victims who do not understand English well. Third, the victim must be able to be contacted by the Tribunal, which may be hard if the victim does not have stable accommodation.
- 8.3 The scheme is also time barred and requires victims to have reported the crime to the Police within a reasonable time. This may be difficult for trafficking victims who may initially be reluctant to go (or unable to go) to the Police or seek help, particularly if they have suffered trauma.
- 8.4 Finally, if the applicant is required to assist with the arrest or prosecution of the trafficker, as mentioned earlier, they may not come forward to access compensation.

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<sup>23</sup> Ibid s 8.

Victims may either fear or identify with their attackers, in both cases reducing the likelihood of them applying for compensation.

### **Awareness**

- 8.5 Awareness levels regarding the human trafficking problem in immigration and law enforcement have increased. The Australian Federal Police ("**AFP**") have conducted operations specifically targeted at exposing human trafficking perpetrators.<sup>24</sup>
- 8.6 The need to further increase awareness amongst target groups has been recognised. In the Victorian Government's "Inquiry into People Trafficking for Sex Work: Government Response", it is stated that any campaigns to increase awareness about sex trafficking should be initiated by the Federal Government, as human trafficking is regulated at a national level.<sup>25</sup> The Federal Government's "National Action Plan to Combat Human Trafficking and Slavery 2015-2019" has identified increasing awareness of human trafficking among relevant stakeholders, as well as the general community, as a key focus in the life-span of the plan through a "Communication and Awareness Strategy for Human Trafficking and Slavery".<sup>26</sup>

### **Legal aid**

- 8.7 Victims of trafficking are able to access legal advice through the Support for Trafficked People Program, however the extent of available legal aid is unclear. A goal outlined in the National Action Plan to Combat Human Trafficking and Slavery 2015-2019 is to provide victims of trafficking with access to legal advice through the Support for Trafficked People Program.

### **Protection of victims' identity**

- 8.8 Victims' identities may be protected in various ways.
- 8.9 Victims may apply for a closed hearing in the Tribunal. The Tribunal may agree to a closed hearing if the Tribunal is satisfied that the victim will suffer distress, feel intimidated or be stressed if the hearing is public.<sup>27</sup> However, this is not guaranteed; as outlined above, at least one Magistrate has requested that the offender be present at the hearing.<sup>28</sup>
- 8.10 In prosecuted cases of human trafficking, victims are able to provide evidence remotely, have their contact with the defendant limited and have a support person

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<sup>24</sup> Nick McKenzie et al, 'Legal Brothels linked to international sex trafficking rings', *The Sydney Morning Herald* (online) 10 October 2011 <<http://www.smh.com.au/national/legal-brothels-linked-to-international-sex-trafficking-rings-20111009-1lfxs.html>>.

<sup>25</sup> Drug and Crime Prevention Committee, Parliament of Victoria, *Inquiry into People Trafficking for Sex Work: Government Response* (December 2011).

<sup>26</sup> Commonwealth of Australia, 'National Action Plan to Combat Human Trafficking and Slavery 2015-2019' (2014) <<http://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Trafficking-NationalActionPlanToCombatHumanTraffickingAndSlavery2015-19.pdf>>.

<sup>27</sup> *Victims of Crime Assistance Act 1996* (Vic) s 42.

<sup>28</sup> *Application of RG: Victims of Crime Assistance Tribunal 2010/1373* (2012); cf *Fronst v VOCAT* (2002) VCAT 1390 per Bowman J

with them while they give evidence. They are also able to provide victim impact statements. It is an offence to identify a trafficked person in the media.<sup>29</sup>

- 8.11 However, as an application is unable to succeed if the victim has not reported the crime to the Police or assisted the Police with their investigations, the protections of privacy are only as good as those provided by the criminal justice system which is likely to require the defendant to know the identity of the complainant/victim.

### **Low prosecution rate**

- 8.12 There is a low prosecution rate for perpetrators of human trafficking. Between 1 July and 31 December 2014, the Australian Federal Police received 74 referrals relating to human trafficking. However, there were no charges or convictions during this same period.<sup>30</sup> Since the introduction of the human trafficking crimes, only 17 people have been convicted.<sup>31</sup> It is noted that the low prosecution rate may stem from the complexity and time consuming nature of human trafficking cases.<sup>32</sup>

### **Disjoint between offences and victim compensation scheme**

- 8.13 The offence of human trafficking does not easily align with the Victorian victim compensation scheme. As noted above, to be eligible for an award of compensation, it is necessary that a person has suffered an injury as a direct result of an act of violence (ie. a criminal act committed in Victoria). Therefore, a victim of human trafficking must show that he or she has suffered a mental or physical injury as a direct result of the human trafficking, which may be difficult and distressing. It may also be difficult to pinpoint a violent act that directly resulted in injury. While it is not explicitly stated that a violent act must be physical, it may be more difficult to apply for injuries resulting from purely from psychological or emotional abuse.
- 8.14 Although suspected victims of human trafficking are eligible for assistance under the Support for Trafficked People Program, they only receive short-term support while they transition to freedom, rather than compensation for loss and expenses, both past and future, that result from the crime. The National Action Plan to Combat Human Trafficking and Slavery 2015-2019 notes that the Attorney-General's Department is monitoring the availability of state and territory victims of crime compensation schemes and whether there is a need for a federal scheme.<sup>33</sup>

### **Legal**

- 8.15 Victims of trafficking are not prosecuted for not holding a valid visa. The Human Trafficking Visa Framework enables victims of human trafficking who do not hold a

<sup>29</sup> *Crimes Act 1914* (Cth) Part IAD.

<sup>30</sup> Australian Government, 'Australian Government Strategy to Combat Human Trafficking and Slavery Whole-of-Government Performance Management Reporting 1 July-31 December 2014' (2015) <<http://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/CAPSPerformanceManagementFrameworkPMFNarrativeForPublicRelease1JulyTo31December2014.pdf>>.

<sup>31</sup> Interdepartmental Committee on Human Trafficking and Slavery, *Trafficking in Persons: The Australian Government's Response 1 July 2013-31 June 2014* (2014) 22.

<sup>32</sup> Albert Moskowitz, 'Challenges and Priorities in Prosecuting and Adjudicating TIP Cases' (Paper presented at the Trafficking in Persons Research and Data Forum, University of Hong Kong, 3-4 November 2008) 7 <[http://www.aaptip.org/2006/artip-project/documents/Paper\\_J&P-Challenges-TIP\\_22Oct08\\_fnl.pdf](http://www.aaptip.org/2006/artip-project/documents/Paper_J&P-Challenges-TIP_22Oct08_fnl.pdf)>.

<sup>33</sup> Commonwealth of Australia, above n 26.

valid visa to regularise their visa status. Under this framework, a victim of human trafficking who does not hold a valid visa is given a 30 day bridging visa while the AFP determine whether they wish for the person to remain in Australia to assist with an investigation. This visa does not include work rights. If the AFP decide that they wish for the person to participate in the investigation or prosecution of the offender, he or she will be granted a Criminal Justice Stay visa. This visa allows the person to work, access Centrelink, Medicare and continued support under the Support for Trafficked Persons Program. Following the conclusion of the relevant investigation/prosecution, if it is unsafe for a victim to return to his or her country of origin, he or she may be granted a Witness Protection (Trafficking) (Permanent) visa, which includes work and social security rights and the possibility of family reunification. Therefore, unless a trafficking victim is granted a Witness Protection visa, he or she will be returned to his or her country of origin.

- 8.16 Alternatively, a victim may claim refugee status. This has been possible for some victims of trafficking. For example, in *VXAJ v MIMIA* [2006] FMCA 234, a Thai woman who was trafficked to Australia to engage in sex work was granted protection.

## 9. EXAMPLES IN PRACTICE

- 9.1 There are some instances where victims of human trafficking have received an award of compensation under the Victorian victim's compensation scheme. Frances Simmons states that she is aware of eight cases in which a victim has successfully obtained an award of compensation, most of which were in New South Wales.<sup>34</sup> For example, in 2010 a woman who was a victim of sexual servitude was awarded two separate amounts of compensation, amounting to almost \$30,000, for two acts of violence, which were forced deprivation of liberty for the purposes of sexual penetration and threats of death.<sup>35</sup>

## 10. SUGGESTIONS FOR IMPROVEMENT

### Short term

- 10.1 Further efforts should be made to inform victims of trafficking of their rights to compensation and/or reparation. For example, when victims enter the Support for Trafficked People Program they should be informed of the compensation options available to them. When prosecuting cases, the Commonwealth Director of Public Prosecutions should seek to obtain reparation for victims.<sup>36</sup>

### Long term

- 10.2 A compensation scheme specific to victims of trafficking should be introduced.<sup>37</sup> Such a scheme could be incorporated into the Support for Trafficked People Program so that when a victim is connected with the program, he or she will obtain support as well as compensation. A scheme that is specific to trafficking would ameliorate the

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<sup>34</sup> Frances Simmons, above n 1, 512.

<sup>35</sup> Ibid 511.

<sup>36</sup> Ibid 527.

<sup>37</sup> Ibid 529.

disjoint between the eligibility requirements of the Victorian scheme and the needs of victims.

## **11. ALTERNATIVES TO STATUTORY COMPENSATION SCHEMES**

### **Civil proceedings**

- 11.1 Victims of human trafficking are able to initiate a claim in tort for actions such as false imprisonment, rape, trespass and assault; however, there are no reported cases in which this has occurred.<sup>38</sup> This may be because of the danger of a costs order being awarded against the victim. Further, the respondent must have the ability to pay.
- 11.2 Under the Fair Work Act 2009 (Cth), the Fair Work Ombudsman may institute proceedings against employers who are in breach of their obligations under the Act in order to recover wages entitled to exploited employees.

### **Criminal proceedings**

- 11.3 Section 21B of the Crimes Act 1914 (Cth) provides for reparation orders. However, no reparation orders have been awarded in the 17 cases where traffickers have been convicted. Therefore, at present, such orders do not provide a viable alternative to the Victorian compensation scheme. Hopefully this will change in the future, as the Commonwealth Government has identified the need to ensure that the Commonwealth Director of Public Prosecutions informs victims of the availability of reparation orders.<sup>39</sup> However, even if a reparation order is imposed, the offender may be unable to pay. Unlike the statutory compensation scheme, a conviction must be secured before reparation is possible.

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<sup>38</sup> Ibid 534.

<sup>39</sup> Commonwealth of Australia, above n 26.

# BELGIUM

## 1. EXECUTIVE SUMMARY

- 1.1 Belgium is primarily a destination and transit country for trafficking and only a limited source country.<sup>1</sup> In 2013, the Government prosecuted 432 defendants which resulted in convictions of at least 70 offenders for offences of labour and sex trafficking and economic exploitation.<sup>2</sup>
- 1.2 Whilst there is no specific compensation system available to victims of human trafficking, Belgium has an administrative court, the Financial Aid Commission, which provides any victim of intentional acts of violence with financial assistance. The Financial Aid Commission does not seek to grant compensation for damages but rather grant financial aid to victims and to occasional rescuers. It covers all injuries as long as they are major physical or psychological injuries directly resulting from an intentional act of violence. However, as the applicant has to prove a prior attempt to seek compensation before a civil or criminal court in order to request financial aid from the Financial Aid Commission, civil and/or criminal proceedings are mandatory first steps. This can be difficult and time consuming for the applicant. Further, the applicant must have major physical or psychological injuries directly resulting from an intentional act of violence, which means that the Financial Aid Commission can determine that the physical or psychological injuries of a victim are not major and therefore deny financial aid.

## 2. PRELIMINARY ISSUES

### Framework for anti-trafficking in the jurisdiction

- 2.1 International conventions/treaties the State has ratified:

Treaty	Signed/Ratified? (S, R or No)
UN Convention against Transnational Organised Crime (Transnational Organised Crime Convention)	R
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)	R
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	No
Forced Labour Convention 1930 (ILO No 29)	R
Abolition of Forced Labour Convention 1957 (ILO No 105)	R

<sup>1</sup> United States of America State Department, "Trafficking in Persons Report July 2015' (2015), <<http://www.state.gov/j/tip/rls/tiprpt/2015/>>

<sup>2</sup> Ibid.



Worst Forms of Child Labour Convention 1999 (ILO No 182)	R
Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956	R
UN Convention on the Rights of the Child	R
UN Convention on the Elimination of all forms of Discrimination against Women	R
UN Covenant on Civil and Political Rights	R
Other regional instruments (please specify) <ul style="list-style-type: none"> <li>- Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005</li> <li>- European Directive 2011/36/UE of 5 April 2011 preventing and combating trafficking in human beings</li> </ul>	R

## 2.2 Domestic legislation on human trafficking, including:

2.2.1 Human trafficking in Belgium is punishable under article 433 quinquies to 433 novies of the Belgian Criminal Code.<sup>3</sup> Article 433 quinquies defines human trafficking as "the act of recruiting, transporting, transferring, harbouring or receiving a person, or passing or transferring control over that person, in order to exploit this person". Exploitation under the definition includes:

2.2.1.1 exploitation by prostitution or other forms of sexual exploitation;

2.2.1.2 exploitation by forced begging;

2.2.1.3 economic exploitation through labour in conditions contrary to human dignity;

2.2.1.4 organ removal; and

2.2.1.5 exploitation in order to get a person to commit a crime or an offence against his or her will.

2.2.2 Such offences are punishable by imprisonment for 1 to 5 years and fines from 500€ to 50,000€. An attempt to commit this offence is punished by a prison sentence from 1 to 3 years and a fine from 100€ to 10,000€. The fine is multiplied by the number of victims.

2.2.3 The definition of human trafficking in article 433 quinquies of the Belgian Criminal Code accords with the definition in the Palermo Protocol.

2.2.4 Article 77bis of the Law of 15 December 1980 on Access to the Territory, Residence, Establishment and Removal of Foreigners (the "**Foreigners**

<sup>3</sup> *Code Penal* (1867) [Criminal Code] (Belgium).

**Act**") also defines human trafficking as "to contribute in any manner whatsoever, either directly or through an intermediary, to permit the entry, transit or stay of a non-national person of a Member State of the European Union, in order to obtain, directly or indirectly, a financial advantage".<sup>4</sup> This is punishable by 1 to 5 years imprisonment and fines from 100€ to 10,000€. The fine is multiplied by the number of victims.

2.2.5 There are also aggravated forms of human trafficking and article 77quater of the Foreigners Act provides harsher penalties when an offender has:

- 2.2.5.1 abused a minor;
- 2.2.5.2 abused the particular vulnerability of the victim (e.g. illegal administrative situation, pregnancy, illness, infirmity or physical or mental disability);
- 2.2.5.3 used, directly or indirectly, fraudulent manipulations, violence, threats or coercion;
- 2.2.5.4 put the life of the victim in danger deliberately or through gross negligence; or
- 2.2.5.5 caused a permanent physical or mental disability, an inability to work for four months or more, loss of an organ or the use of an organ, or serious mutilation.

2.2.6 Such offences are punishable by prison sentences from 10 to 15 years and fines from 1,000€ to 100,000€. The fine is multiplied by the number of victims.

### 3. BASIS OF STATUTORY COMPENSATION

3.1 The Law of 1 August 1985 on Fiscal and Other Measures has created the Commission pour l'aide financière aux victimes d'actes intentionnels de violence et aux sauveteurs occasionnels (Commission on financial aid to victims of intentional acts of violence and rescuers) (the "**Financial Aid Commission**").<sup>5</sup> The Financial Aid Commission can grant financial aid to victims of injuries resulting from intentional acts of violence. The Royal Decree of 18 December 1986 on the Commission on Financial Aid to Victims of Intentional Acts of Violence and Rescuers regulates the functioning of the Financial Aid Commission.<sup>6</sup>

### 4. TYPE OF SCHEME

4.1 The Financial Aid Commission is an administrative court. The Financial Aid Commission does not seek to grant compensation for damages but rather grants

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<sup>4</sup> *Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers* (1980) [Law on the access to the territory, residence, establishment and removal of foreigners] (Belgium).

<sup>5</sup> *Loi portant des mesures fiscales et autres* (1985) [Law on Fiscal and Other Matters] (Belgium) section II.

<sup>6</sup> *Arrêté royal relatif à la commission pour l'aide financière aux victimes d'actes intentionnels de violence et aux sauveteurs occasionnels* (1986) [Royal Decree Relating to the Commission on Financial Aid for Victims of Intentional Acts of Violence and Rescuers] (Belgium).

financial aid to victims. The underlying principle is that the State is not liable to victims; it simply implements a principle of solidarity with victims of violent crimes.

- 4.2 Financial aid from the Financial Aid Commission (the "**Scheme**") is not specific to victims of trafficking but is available for victims of crime generally. It covers all injuries as long as they are major physical or psychological injuries directly resulting from an intentional act of violence.<sup>7</sup>

## 5. ELIGIBILITY

- 5.1 The following people are eligible for financial aid under the Scheme:

- 5.1.1 a victim of an intentional act of violence;
- 5.1.2 if the victim is minor or legally incapacitated, a parent, legal guardian or legal representative;
- 5.1.3 if the victim dies after the intentional act of violence, members of the family up to the second degree (parents, children, brothers, sisters, grandparents and grandchildren), or people who were living in a lasting family relationship with the victim;
- 5.1.4 the parents of the victim minor at the time of the intentional act of violence or people who were responsible for the minor at that time; and
- 5.1.5 the members of the victim's family up to the second degree (parents, children, brothers, sisters, grandparents and grandchildren) or people who were living in a lasting family relationship with the victim, if the victim is missing for over a year and if it is accepted that the disappearance is due in all probability to an intentional act of violence.<sup>8</sup>

- 5.2 'Major' physical or psychological injuries directly resulting from an intentional act of violence are recognised under the Scheme.<sup>9</sup>

- 5.3 An intentional act of violence is not defined in the legislation however it must have been committed in Belgium.<sup>10</sup>

- 5.4 Financial aid under the Scheme is also subject to the following conditions:<sup>11</sup>

- 5.4.1 the request can only be submitted following the closing of the judicial proceedings (either civil or criminal);
- 5.4.2 the victim has to prove a prior attempt to seek compensation before a civil or criminal court;

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<sup>7</sup> *Loi portant des mesures fiscales et autres* (1985) [Law on Fiscal and Other Matters] (Belgium) art 31.

<sup>8</sup> *Ibid* art 31.

<sup>9</sup> *Ibid*.

<sup>10</sup> *Ibid* art 31 bis.

<sup>11</sup> *Ibid*.

- 5.4.3 the victim must not have another means of obtaining sufficient compensation, such as private insurance or partial payment from the offender; and
- 5.4.4 the damage suffered is proven and evaluated between 500€ and 62,000€.
- 5.5 If, however, a victim makes an emergency aid request, a final decision in judicial proceedings is not required. Rather, the emergency aid request can be submitted from the moment the applicant launches a civil action or files a complaint.<sup>12</sup>
- 5.6 A request for compensation must also be filed with the Financial Aid Commission within three years of:
- 5.6.1 the first decision to discontinue criminal proceedings without further prosecution;
- 5.6.2 the final decision of the judicial investigation magistrate; or
- 5.6.3 the final decision of the criminal court on the liability of the defendant or, if it occurs later, the civil action.<sup>13</sup>
- 5.7 Any additional aid (i.e. aid that is granted after an initial grant of aid following a victim's injury deterioration) must be requested within ten years from the day the initial aid was paid.
- 5.8 If all the above legal requirements are met, the Financial Aid Commission will rule on the award and the amount of the aid. When making a ruling, the Financial Aid Commission may consider whether the conduct of the victim has contributed to or aggravated the damage, either directly or indirectly. It may also take into account the relationship between the victim and the offender.<sup>14</sup> This requirement may have negative implications for victims of human trafficking who cooperated with their traffickers out of fear.
- 5.9 When making the application, the applicant must provide details of when the complaint was made and, if applicable, the date that the civil case was initiated. If the victim has been unable to make a complaint or initiate an action, the Commission will consider their reasons for not doing so.<sup>15</sup>
- 5.10 The Financial Aid Commission is bound by the final judgment of the criminal court: if a defendant is acquitted, the Financial Aid Commission cannot grant any aid.<sup>16</sup>

## 6. APPLICATION PROCESS

- 6.1 The request must be filed at the Secretariat of the Financial Aid Commission (the "**Secretariat**") or sent to the Financial Aid Commission by registered mail.<sup>17</sup> It is

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid art 33.

<sup>15</sup> Ibid art 34.

<sup>16</sup> Ibid art 31 bis.

<sup>17</sup> Ibid art 34.

possible to obtain a printed application form from the Secretariat. It is also available online but it cannot be submitted online.<sup>18</sup> The application form is available in French or Dutch and is free of charge.

- 6.2 The request must contain a description of the act of violence, a list of the damage and the applicant's prior efforts to obtain compensation (i.e. through civil or criminal proceedings). It must also state the total amount being claimed. A copy of the court decisions and supporting documents (such as certificates and medical reports) are to be attached to the request.<sup>19</sup>
- 6.3 When the request is received, the Secretariat will open a file and complete a report for each case. This report contains a brief statement of the factual elements and the existing court decisions. It indicates, where applicable, which elements are missing and which legal conditions do not appear to have been fulfilled. The applicant and the Minister of Justice's delegate have the opportunity to provide their comments in writing. The Minister of Justice's delegate must ensure the legal conditions are satisfied.<sup>20</sup>
- 6.4 The applicant can be heard by the Financial Aid Commission if the applicant requests an oral hearing in writing or if the Financial Aid Commission considers a hearing necessary. The applicant may be assisted or represented by his or her lawyer for this purpose and free legal assistance is available. The applicant may also be assisted, free of charge, by an association approved for this purpose by the King.<sup>21</sup>
- 6.5 As part of the review process, the Financial Aid Commission may request the case file or other information it considers useful, including closed criminal files from the public prosecutor, information regarding employment status and financial and social information on both the applicant and the perpetrator. It can also order a medical report on the injury/ies. These investigations are at the Commission's expense.<sup>22</sup>
- 6.6 Each chamber of the Financial Aid Commission is composed of three members: a judge who presides over the chamber, a lawyer or an official of the Federal Public Service in Finance or Public Health and other persons appointed by the King for their particular expertise. A chamber of the Financial Aid Commission is responsible for the final determination of each application for aid.<sup>23</sup>
- 6.7 The decision of the Financial Aid Commission is communicated to an applicant by post within eight days of the decision.<sup>24</sup> It is not clear how long this process takes. Nor is it clear what standard of proof the Commission requires.
- 6.8 If an applicant is unsuccessful, they may lodge an appeal with the Council of State within 30 days from the date of such notification for a violation of the law.<sup>25</sup>

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<sup>18</sup> The application form is available here:

[http://justice.belgium.be/fr/service\\_public\\_federal\\_justice/organisation/services\\_et\\_commissions\\_independants/commission\\_pour\\_l\\_aide\\_financiere/infos\\_et\\_documents](http://justice.belgium.be/fr/service_public_federal_justice/organisation/services_et_commissions_independants/commission_pour_l_aide_financiere/infos_et_documents).

<sup>19</sup> *Loi portant des mesures fiscales et autres* (1985) [Law on Fiscal and Other Matters] (Belgium) art 34.

<sup>20</sup> *Ibid* arts 34 bis, 34 ter and 31 bis.

<sup>21</sup> *Ibid* art 34 ter.

<sup>22</sup> *Ibid* art 34 bis.

<sup>23</sup> *Ibid* art 31.

<sup>24</sup> *Ibid* art 31 quinquies.

## 7. ASSESSMENT OF COMPENSATION

- 7.1 There are three types of financial aid available:
- 7.1.1 Emergency aid: this is the aid that is granted without waiting for the end of the investigation and the judicial proceedings. It arises where any delay in the granting of the aid could severely harm the applicant's financial situation; for example, when the victim has low income and faces significant medical expenses following the act of violence. When the victim claims that his/her medical expenses are due, the urgency is assumed. The emergency aid is granted for damage exceeding 500€ and for an amount up to 15,000€. <sup>26</sup>
  - 7.1.2 Main aid: this is the general financial aid that the Financial Aid Commission can provide for the whole injuries suffered. The main aid can be granted to the victim or a relative and is limited to 62,000€. For the financial aid to be granted, the damage has to exceed 500€. <sup>27</sup>
  - 7.1.3 Additional aid: this is the aid that can be requested by a victim where the injury has deteriorated significantly after the primary grant of aid. This must be applied for within 10 years of receipt of the primary grant of aid. <sup>28</sup>
- 7.2 The Financial Aid Commission will assess the amount of financial aid to be given based exclusively on the following elements:
- 7.2.1 moral damage, taking into account temporary or permanent disability;
  - 7.2.2 medical and hospitalisation expenses, including prosthesis expenses;
  - 7.2.3 temporary or permanent disability;
  - 7.2.4 loss or reduction of earnings resulting from temporary or permanent inability to work;
  - 7.2.5 aesthetic damage;
  - 7.2.6 legal costs (not including lawyer's fees) for a maximum amount of 4,000€;
  - 7.2.7 material expenses for a maximum amount of 1,250€;
  - 7.2.8 damage arising from the loss of one or more years of school education;
  - 7.2.9 the loss of maintenance payments for people who, upon the death of the victim, were dependent on him or her;
  - 7.2.10 funeral expenses for a maximum amount of 2,000€; and
  - 7.2.11 costs of proceedings. <sup>29</sup>

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<sup>25</sup> Ibid art 34 quarter.

<sup>26</sup> Ibid art 36.

<sup>27</sup> Ibid art 33.

<sup>28</sup> Ibid art 37.

- 7.3 When assessing the total amount of aid, the Financial Aid Commission will also take into account the solvency of the perpetrator, any payments already made by the perpetrator to the victim, the availability of mutual insurance or occupational accident insurance, and any possible compensation based on private insurance.<sup>30</sup>
- 7.4 A fund for financial aid for victims of intentional acts of violence has been created at the federal level (the "**Fund**"). The scheme is funded by the Government but is augmented by a 25€ fine imposed on each person convicted of a crime.<sup>31</sup>

## 8. BARRIERS / OBSTACLES

- 8.1 There are a number of barriers for victims of trafficking in accessing aid under the Scheme.
- 8.2 Before applying to the Financial Aid Commission, an applicant must prove a prior attempt has been made to seek compensation before a civil or criminal court. This means that a victim must have made an application for compensation in a civil action or in the course of criminal proceedings. Such proceedings can be time consuming and lengthy. In a case where no perpetrator has been identified, aid can only be awarded after a decision has been made to discontinue proceedings without further prosecution, a decision of the judicial investigation magistrate or one year after launching a civil action.
- 8.3 The Scheme requires there to be an 'intentional act of violence'. The Financial Commission has held (see for example in decision n° M3778 of 2005 of the Financial Aid Commission) that labour trafficking does not amount to an intentional act of violence and financial aid has been refused. This is a significant barrier to victims who are trafficked into forced labour in Belgium. It is unclear whether the Financial Aid Commission would also deny financial aid to victims who are trafficked for economic exploitation on the basis that such trafficking does not involve an 'intentional act of violence.'
- 8.4 Under the Scheme, the applicant must have suffered major physical or psychological injuries directly resulting from an intentional act of violence. Where a victim of trafficking experiences psychological shock or trauma (as it usually the case), the Financial Aid Commission may determine that such injuries are not 'major' and on that basis, deny financial aid.
- 8.5 The application form and all other information about the Financial Aid Commission are only available in French and Dutch. This creates a barrier for victims who do not speak, read or write French or Dutch.
- 8.6 Although free legal aid is available for victims during a hearing before the Financial Aid Commission, it is not available for the entirety of the procedure and little other support is available to assist with completing the application form etc. Moreover, a victim will most likely require legal aid to assist in seeking compensation before a civil or criminal court prior to making and application under the Scheme.

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<sup>29</sup> Ibid art 32.

<sup>30</sup> Ibid art 31 bis.

<sup>31</sup> Ibid art 29.

## 9. EXAMPLES IN PRACTICE

- 9.1 According to a report on human trafficking from the Belgian Government spanning 2011 and 2012<sup>32</sup>, the Financial Aid Commission awarded financial aid in the context of a human trafficking in one case in 2011 and two in 2012 (note that the two files of 2012 were related files so only one financial aid was granted).
- 9.2 One case where aid was granted involved a victim, originating from an Eastern European country, who was abused by her partner in 2003 and 2004. Her partner had brought her into Belgium and forced her into sex work. In the final judgment, the perpetrator was convicted by the Criminal Court to a conditional sentence of imprisonment of 5 years and to the payment of 12,500€ for moral and material damages. Based on the moral and material damages of the applicant, the Financial Aid Commission awarded 6,125€ in financial aid to the applicant.<sup>33</sup>
- 9.3 Unfortunately, there are several examples of cases where the Financial Aid Commission found that the applicant had not suffered major physical or psychological injuries. There are also cases where the court found the perpetrator not guilty and the Financial Aid Commission was bound by this decision.
- 9.4 For example, in a decision number M3778 of 2005 of the Financial Aid Commission, a woman who was a victim of sexual servitude was refused financial aid because the perpetrator was not convicted by the First Instance Tribunal of Liège for molestation and rape against the applicant (as the applicant alleged). In that case, the perpetrator was convicted by the Tribunal of exploitation of illegal workers and was sentenced to six months imprisonment and to pay the applicant, (plaintiff in this case) the sum of 7,355.54€ as property damage. The Financial Aid Commission was bound by the final judicial decision of the Tribunal that did not find enough evidence of the intentional act of violence against the applicant (alleged to have been rape, molestation with violence or threats). According to the Financial Aid Commission, the fact that the applicant was subject to labour exploitation was not sufficient to establish the existence of a deliberate act of violence within the meaning of Article 31 of the law of 1 August 1985.<sup>34</sup>

## 10. SUGGESTIONS FOR IMPROVEMENT

- 10.1 The key suggestions for improvement to better address the needs of victims of trafficking are to:
- 10.1.1 remove the requirement that there must be an 'intentional act of violence' to reflect the fact that trafficking does not always involve physical violence but rather coercion and deception, and results in forced labour and economic exploitation.
- 10.1.2 remove the requirement that victims must suffer 'major' injuries, recognising that trafficking victims usually incur significant psychological injuries; and

<sup>32</sup> The Belgian Government, *Rapport Bisannuel du Gouvernement Traite des êtres humains 2011-2012* (2012) <[http://www.dsb-spc.be/doc/pdf/RAPPORT\\_TEH\\_2011-2012\\_FR.pdf](http://www.dsb-spc.be/doc/pdf/RAPPORT_TEH_2011-2012_FR.pdf)>.

<sup>33</sup> Ibid 73.

<sup>34</sup> *Loi portant des mesures fiscales et autres* (1985) [Law on Fiscal and Other Matters] (Belgium).



- 10.1.3 remove the requirement that a victim must first attempt to gain compensation through a civil or criminal proceeding which is a burdensome and time consuming process and delays the ultimate payment of aid under the Scheme.

## **11. ALTERNATIVES TO STATUTORY COMPENSATION SCHEMES**

- 11.1 As the applicant has to prove a prior attempt to seek compensation before a civil or criminal court, the civil and/or tort actions are not alternative methods but rather a mandatory first step.
- 11.2 The victim of a criminal offence has a civil cause of action equivalent to a tort action against the perpetrator of the criminal act. A fundamental principle of civil law is that the person who caused another person damage as a result of an unlawful act, which may be a criminal offence, is liable to that other person (art. 1382 of the Belgian Civil Code). A victim of human trafficking therefore has a right to commence civil proceedings against a perpetrator to seek compensation.
- 11.3 If a criminal prosecution is commenced, a victim may file an application to "join" their civil proceedings with the criminal proceedings to seek reparation. In other words, the victim may bring a civil action before the criminal court, which will decide on reparation after it has decided on the defendant's criminal liability (art. 3 of the Belgian Code of Criminal Procedure). The advantage of joining a civil action to a criminal action is that a civil judge would otherwise be forced to suspend the civil proceedings until the separate criminal proceedings have been completed. Furthermore, joining a civil action with the criminal proceedings gives a victim access to part of the criminal case file which may be useful to proving the victim's own case in the civil proceedings.
- 11.4 The benefit of a procedure before a civil or criminal court is that greater amounts in damages can be awarded to the victim. There can be an actual compensation for all the damage and not simply a financial aid as with the Financial Aid Commission. The key disadvantage however is the time and length of such proceedings (even though a victim may be able to access free legal aid).

# CANADA - BRITISH COLUMBIA

## 1. EXECUTIVE SUMMARY

- 1.1 Canada is a source, destination and transit country for human trafficking. The most prevalent forms of trafficking are sex trafficking and forced labour, with women and children being most at risk.<sup>1</sup> British Columbia has recognised human trafficking as a form of modern-day slavery and created the Office to Combat Trafficking in Persons ("**OCTIP**") to coordinate the government's response to human trafficking. The OCTIP is focused on prevention of human trafficking, protection of victims, prosecution of offenders, and partnering with key agencies and organisations. Victims of human trafficking in British Columbia are trafficked for sexual exploitation, forced labour and domestic servitude. OCTIP focuses specifically on preventing and addressing the trafficking of youth for sexual exploitation, vulnerable workers for forced labour (including temporary foreign workers, live-in caregivers, domestic workers and seasonal agricultural workers) and Aboriginal youth and women.<sup>2</sup>
- 1.2 Despite this active engagement with prevention, protection and prosecution, in British Columbia there are no statutory compensation regimes available specifically for victims of the offence of human trafficking (as set out in section 279.01 of the Criminal Code). Victims of human trafficking, where the crime included other violent offences, however, have access to the Crime Victim Assistance Program ("**CVAP**") established pursuant to the statutory compensation scheme set out in the Crime Victim Assistance Act.<sup>3</sup> This scheme provides compensation for medical expenses and mental health expenses and other specified losses for victims, immediate family members of victims and certain classes of witnesses. Victims of human trafficking who have suffered injuries as a result of other violent offences are thus not precluded from seeking state-funded compensation.

## 2. PRELIMINARY ISSUES

### International Law

- 2.1 Below is a summary of the international treaties relating to human trafficking that are applicable in British Columbia, as a result of being ratified by Canada:

Treaty	Signed/Ratified? (S, R or No)
UN Convention against Transnational Organised Crime (Transnational Organised Crime Convention)	R
Protocol to Prevent, Suppress and Punish Trafficking in Persons,	R

<sup>1</sup> United States of America State Department, 'Trafficking in Persons Report July 2015' (2015) 114 <<http://www.state.gov/j/tip/rls/tiprpt/2015/>>.

<sup>2</sup> See generally, British Columbia Ministry of Justice, *BC's Action Plan to Combat Human Trafficking* (March 2013), <<http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/victims-of-crime/human-trafficking/about-us/action-plan.pdf>>.

<sup>3</sup> *Crime Victim Assistance Act*, SBC 2001, c 38.

Especially Women and Children (Palermo Protocol)	
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	No
Forced Labour Convention 1930 (ILO No 29)	R
Abolition of Forced Labour Convention 1957 (ILO No 105)	R
Worst Forms of Child Labour Convention 1999 (ILO No 182)	R
Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956	R
UN Convention on the Rights of the Child	R
UN Convention on the Elimination of all forms of Discrimination against Women	R
UN Covenant on Civil and Political Rights	Accession
Rome Statute of the International Criminal Court	R
The Optional Protocol to the Convention on the Rights of the Child (CRC) on the Sale of Children, Child Prostitution, and Child Pornography	R

- 2.2 It should be noted that while the abovementioned international law is relevant as a guidance tool, these treaties and covenants are not legally binding in Canada unless they have been incorporated into legislation. However, there may be instances where the judiciary will apply a "presumption of conformity" between international and Canadian domestic law. The presumption of conformity means that domestic legislation is interpreted in a manner that accords with Canada's international treaty obligations.<sup>4</sup>

### Domestic Law

- 2.3 Both federal and ratified international laws are applicable in British Columbia. The federal Criminal Code contains six offences that specifically address human trafficking.<sup>5</sup> Section 279.01 of the Code states:

"(1) *Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable*

*(a) to imprisonment for life and to a minimum punishment of imprisonment for a term of five years if they kidnap, commit an aggravated assault or*

<sup>4</sup> *Baker v Canada* [1999] 2 SCR 817.

<sup>5</sup> *Criminal Code*, RSC 1985, c 46.

*aggravated sexual assault against, or cause death to, the victim during the commission of the offence; or*

(b) *to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of four years in any other case."*

2.4 Consent to the above is not valid.<sup>6</sup> Trafficking of persons under the age of 18 is an aggravated offence.<sup>7</sup> Knowingly obtaining material benefit from a trafficking offence is an indictable offence, with a sentence of up to 10 years.<sup>8</sup>

2.5 Exploitation is prohibited by section 279.04:

"(1) *A person exploits another person if they cause them to provide, or offer to provide, labour or a service in engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide the labour or service."*

2.6 Additionally, the federal Immigration and Refugee Protection Act prohibits "knowingly organising the coming into Canada of one or more persons by means of abduction, fraud, deception, or use or threat of force or coercion."<sup>9</sup> Persons convicted of this offence are liable for life imprisonment or a one million dollar fine.

2.7 The definitions of human trafficking provided by the abovementioned legislation accords with the definition of human trafficking in the Palermo Protocol.

### 3. BASIS OF STATUTORY COMPENSATION

3.1 In British Columbia, the Crime Victim Assistance Act ("**the Act**"),<sup>10</sup> establishes a publicly-funded compensation program to provide assistance to victims of crime, and other persons who come within defined categories, who have sustained consequential injuries and certain types of losses as a direct result of prescribed offences. The Act and its accompanying regulations set out the eligibility requirements as well as the compensation available to eligible individuals.

3.2 The underlying premises of the Act have been described as including the notion that easing the financial hardship created by violent crime will help victims recover from the effects of crime and therefore should be shared by society as a whole, and that assisting and protecting victims of crime who cooperate with the justice system will encourage greater public cooperation in the apprehension and prosecution of offenders.<sup>11</sup>

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<sup>6</sup> Ibid s 279.01(2).

<sup>7</sup> Ibid s 279.011(1).

<sup>8</sup> Ibid s 279.02(1).

<sup>9</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27, s 118.

<sup>10</sup> *Crime Victim Assistance Act*, SBC 2001, c 38.

<sup>11</sup> *Laursen v. British Columbia (Director of Crime Victim Assistance)* [2015] BCSC 1413, [33].

## 4. TYPE OF SCHEME

- 4.1 The Act does not provide compensation specifically to victims of human trafficking; the Act only provides compensation to victims injured as a direct result of a prescribed offence committed in British Columbia. The offence of trafficking in persons under section 279.01 of the Criminal Code is not a "prescribed offence".<sup>12</sup> Prescribed Criminal Code offences are generally violent offences and include:
- 4.1.1 uttering threats s 264.1;
  - 4.1.2 assault s 266;
  - 4.1.3 sexual assault s 271;
  - 4.1.4 kidnapping s 279;
  - 4.1.5 abduction related offences ss 280 and 281;
  - 4.1.6 extortion s 346; and
  - 4.1.7 intimidation s 423.<sup>13</sup>
- 4.2 However, notwithstanding that trafficking in persons is not a prescribed offence under the Act, compensation may be provided if the victim has also suffered injuries (physical or psychological) from other offences under the Criminal Code, provided the applicant otherwise meets the eligibility criteria.

## 5. ELIGIBILITY

### Eligible Victims

- 5.1 For a person to be eligible for compensation under the Act, they must be a victim, an immediate family member of the victim at the time of the prescribed offence, or a witness to the offence. It does not appear that eligible applicants have to reside in the jurisdiction to claim compensation.
- 5.2 A "victim" is defined as a person injured as a direct result of a prescribed offence committed in British Columbia, or a person injured as a direct result of an event in British Columbia in which the person was lawfully arresting or attempting to arrest a person or preventing or attempting to prevent a criminal offence.<sup>14</sup>
- 5.3 An "immediate family member" of the victim refers to the spouse, child, sibling, step-sibling, half-sibling, or parent of the victim at the time of the offence who experiences economic loss or psychological harm as a result of the death or injury of the victim.<sup>15</sup>

<sup>12</sup> It is worthwhile to note that the *Crime Victim Assistance (General) Regulation*, BC Reg 161/2002, came into force on 30 June, 2002, and Schedule 1 (the list of prescribed offences) has not been amended since its original enactment. Trafficking in persons did not become an offence under the *Criminal Code* until 2005 (SC 2005, c 43, s 3).

<sup>13</sup> For a full list of the prescribed offences, see *Crime Victim Assistance (General) Regulation*, BC Reg 161/2002, Schedule 1.

<sup>14</sup> *Crime Victim Assistance Act*, SC 2001, ss 1 and 3(1)(a).

<sup>15</sup> *Ibid* ss 1 and 3(1)(b).

- 5.4 A "witness" under the Act means a person with a strong emotional attachment to the victim who witnesses the prescribed offence or the immediate aftermath of the prescribed offence and suffers psychological harm as a result.<sup>16</sup> To be eligible for compensation, the psychological harm suffered by a witness must be diagnosed as a recognised psychological or psychiatric condition by a medical practitioner resulting from the events witnessed by that person.<sup>17</sup>

### **Types of Injuries Recognised**

- 5.5 An "injury" under the Act refers to bodily harm, including psychological harm, or pregnancy. Psychological harm is defined as a psychological condition that interferes with the health or comfort of a person and is more than merely transient or trifling in nature.<sup>18</sup>
- 5.6 The Act will not compensate for pain and suffering, and does not apply to losses due to property-related offences, injuries or loss resulting from a motor vehicle accident, work-related injuries otherwise compensated under workers compensation legislation, or losses resulting from the death or injury of a victim that occurred on or before 1 July 1972.

### **Jurisdictional Requirements**

- 5.7 The prescribed offence or eligible event must have occurred in British Columbia for an applicant to be eligible for compensation under the Act.

### **Exclusions for illegal or immoral behaviour**

- 5.8 Applicants are expressly excluded from receiving compensation under the Act if the applicant (or in the case of an applicant who is an immediate family member, the victim) was a party to the prescribed offence underlying the claim for compensation.<sup>19</sup>
- 5.9 Additionally, the Director of Crime Victim Assistance ("**the Director**") may refuse, reduce, limit, suspend or terminate compensation if, in the opinion of the Director, the recipient of the compensation directly or indirectly contributed to the victim's death or injury, or if the recipient of the compensation engages in conduct or activity that is detrimental to the recipient's health or safety, undermines the purpose of the compensation or is contrary to a condition imposed on the receipt of the compensation.<sup>20</sup>

### **Time limits for application**

- 5.10 Victims, immediate family members or witnesses must apply for compensation under the Act within one year from the date of the prescribed offence or the event to which it relates.<sup>21</sup> If the victim, immediate family member or witness is under 19 years of

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<sup>16</sup> Ibid ss 1 and 3(1)(c).

<sup>17</sup> Ibid.

<sup>18</sup> Ibid s 1.

<sup>19</sup> Ibid s 9(1)

<sup>20</sup> Ibid s 9(2).

<sup>21</sup> Ibid s 3(2).

age, the time limit for applying is extended until the date that is one year after the victim, immediate family member or witness turns 19.<sup>22</sup>

- 5.11 If the Director is satisfied that an application could not reasonably have been made within the period specified in the Act, the Director has the discretion to extend the time period.<sup>23</sup>
- 5.12 There is no time limit if the application relates to a prescribed offence that is based on sexual misconduct while the victim was under 19 years of age, or includes a sexual assault.<sup>24</sup>

### **Requirements for referral, reporting and cooperation**

- 5.13 There is no referral requirement to apply or be eligible for compensation under the Act, and compensation may be awarded whether or not any person is prosecuted for an offence in relation to the victim's death or injury.<sup>25</sup> However, the Director may postpone a decision with respect to an award of compensation until a prosecution or intended prosecution of an accused is determined and no appeal or further appeal is available.<sup>26</sup>
- 5.14 Additionally, though there is no requirement for an applicant to report the prescribed offence to law enforcement authorities in order to be eligible for compensation, the Director may refuse, reduce, limit, suspend or terminate compensation awarded to the victim if the victim did not report the prescribed offence or event resulting in the injury.<sup>27</sup> The Director may similarly refuse, reduce, limit, suspend or terminate compensation awarded to a victim, immediate family member or witness if they have not cooperated with law enforcement in the investigation, apprehension or prosecution of a person whose act or omission resulted in the victim's death or injury.<sup>28</sup>

## **6. APPLICATION PROCESS**

- 6.1 An application must be completed in hard copy and mailed to the Crime Victim Assistance Program in Vancouver, British Columbia. The application forms appear only to be available in English, however, through the CVAP applicants can be connected to a victim service worker or victim service program to assist them in completing the application forms. There does not appear to be an application fee.
- 6.2 The Office to Combat Trafficking in Persons, the branch of the British Columbia Ministry of Justice responsible for developing and coordinating British Columbia's strategy to address human trafficking, might be a further resource for victims of human trafficking to find appropriate victim service programs to assist them in applying for compensation.

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<sup>22</sup> Ibid s 3(3)

<sup>23</sup> Ibid s 3(5).

<sup>24</sup> Ibid s 3(4)

<sup>25</sup> Ibid s 5(1)

<sup>26</sup> Ibid s 5(3)

<sup>27</sup> Ibid s 9(3)(a)

<sup>28</sup> Ibid s 9(3)(b)

## Evidence

- 6.3 The applicant must be able to show that they are eligible for compensation under the Act and regulations; accordingly, he or she must provide some evidence to show that a prescribed offence occurred in British Columbia and that he or she suffered an injury as a result. It appears that decisions are made on a balance of probabilities, however this standard is not mandated by legislation.<sup>29</sup> Additionally, depending on the type of compensation sought, various documents should be provided to support the application. For example, original receipts are required for compensation for medical expenses resulting from the applicant's injuries.
- 6.4 Under the Act, the Director is given broad powers to compel disclosure of information from both the applicant and third parties, including medical professionals. The Director can also require an applicant to undergo an examination or assessment by a medical professional as part of the adjudication of the application for compensation.<sup>30</sup>
- 6.5 An applicant must also provide a blanket authorisation permitting the CVAP to contact various persons and organisations to assist in the adjudication of the applicant's claim; for example, any doctors or health care professionals who treated the applicant's injuries or any law enforcement agency that may have information in relation to the prescribed offence.

## Hearing

- 6.6 A determination regarding compensation may be made based solely on the documents provided by the applicant; however, the Director can require a person to attend before the Director and answer questions under oath. Failure to comply with such a request can result in an application to the Supreme Court of British Columbia for committal for contempt.<sup>31</sup>
- 6.7 The Director must deliver to the applicant written notice of a decision in respect of an award of compensation as well as the reasons for that decision.<sup>32</sup> Within 60 days, an applicant may request in writing that a decision be reconsidered, but only on the basis of the material that was available to the original decision maker.<sup>33</sup> Failure to request a reconsideration within the time limit, or any extension granted thereto, is deemed to be acceptance of the decision by the applicant.<sup>34</sup>
- 6.8 At any time an applicant may provide the Director with new information that may affect the applicant's eligibility for compensation and request a reassessment of their eligibility on the basis of the new information provided. The Director must notify the applicant in writing of the result of the reassessment.<sup>35</sup>

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<sup>29</sup> *Stehlik v. British Columbia (Ministry of Public Safety and Solicitor General)* [2013] BCSC 801.

<sup>30</sup> *Crime Victim Assistance Act*, SC 2001, s 6.

<sup>31</sup> *Ibid* s 6.1.

<sup>32</sup> *Ibid* s 11.

<sup>33</sup> *Ibid* s 13.

<sup>34</sup> *Ibid* s 13(4).

<sup>35</sup> *Ibid* s 12.



- 6.9 A person receiving compensation under the Act must notify the Director in writing as soon as practicable if the person's circumstances change in a manner that affects or may affect the person's eligibility for compensation. The Director may, on his or her own initiative or on receipt of information, reassess a person's eligibility for compensation.<sup>36</sup> It is not clear how long the process takes.

## 7. ASSESSMENT OF COMPENSATION

- 7.1 Generally, the Director may only award compensation where satisfied that it is necessary and reasonable, and the cost of providing the compensation is "economically reasonable", defined in the Crime Victim Assistance (General) Regulations as the most economical alternative that is appropriate in the circumstances. Applicants are not eligible to receive compensation in relation to compensation or expenses that are otherwise covered under other health, dental or insurance plans.
- 7.2 The greatest variety of compensation is available for victims of prescribed offences. Eligible victims may receive compensation relating to:
- 7.2.1 medical or dental services or expenses;
  - 7.2.2 counselling services or expenses;
  - 7.2.3 repair or replacement of damaged or destroyed personal property;
  - 7.2.4 homemaker, childcare or personal care services or expenses;
  - 7.2.5 income support if the victim was employed at the time of the prescribed offence and subsequently suffered a loss of employability, meaning the physical and mental capability of being employed or self-employed; and
  - 7.2.6 lost earning capacity if the victim was not employed at the time of the offence but was employable, defined as physically and mentally capable of being employed or self-employed.<sup>37</sup>

However, compensation is not unlimited and the majority of categories come with specific monetary caps. For example, income support is limited to the minimum wage per hour for up to a maximum of 40 hours per week, and both the amount paid for counselling services and the number of sessions available to victims are limited to \$40 to \$105 per hour (depending on the practitioner's experience) for a total of 48 one hour sessions.<sup>38</sup>

- 7.3 Immediate family members have more limited compensation available to them, which nonetheless includes counselling services or expenses; vocational services or expenses; funeral expenses; income support for spouses and children of the victim and other immediate family members who are financially dependent on the victim; loss of parental guidance for a minor child; and earnings loss due to bereavement

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<sup>36</sup> Ibid s 12(1) and (3).

<sup>37</sup> *Crime Victim Assistance Act*, SC 2001, s 4(1); see also *Crime Victim Assistance (General) Regulation*, Part 2 and *Crime Victim Assistance (Income Support and Vocational Services or Expenses Compensation) Regulation*, BC Reg. 362/2012.

<sup>38</sup> *Crime Victim Assistance (General) Regulation*, s 11.

leave.<sup>39</sup> The compensation available for immediate family members is also capped. For example, the number of counselling sessions that immediate family members may be entitled to are capped at 36 one hour sessions.<sup>40</sup>

- 7.4 Finally, a witness may be eligible for compensation including counselling services or expenses; prescription drug expenses; and transportation and related expenses.<sup>41</sup> Witness compensation is also capped, for example witnesses are limited to 12 one hour counselling sessions.<sup>42</sup>

## 8. BARRIERS / OBSTACLES

- 8.1 The main barrier for victims of trafficking is that, as trafficking victims, they are not entitled to compensation under the Act. Rather, they must have been the victim of another crime in order to obtain compensation. By virtue of the insidious nature of the offence of trafficking in persons, a victim of human trafficking will often, be a victim of other prescribed offences and will thus be able to access the victim compensation regime.
- 8.2 An additional barrier to compensation under the Act is that the compensation scheme applies only where the applicant has suffered a loss and compensation from other sources are not available; for example, medical compensation are only provided when not already covered by an applicant's health, dental or other insurance plans. Additionally, compensation for loss of earning capacity are only available to victims who were unemployed at the time of the prescribed offence but are found to have been employable at the time, meaning they were physically and mentally capable of being employed.<sup>43</sup> It is unclear how this criteria may be applied to a victim of human trafficking who was not legally capable of working in Canada at the time of the offence, or a victim who, as a result of their victimisation, suffered from addictions that may have hindered their physical or mental capacity to work.<sup>44</sup>
- 8.3 Although the organisation "VictimLinkBC" aids victims of crime, it is not clear whether they, or any other organisations, assist victims with making applications for compensation. If no assistance is available, vulnerable trafficking victims may struggle with the application process. Further, trafficking victims may not be aware that they may be eligible to apply for compensation.
- 8.4 The de facto requirement that the victim report the crime to the police may be prohibitive for victims of human trafficking as they may fear the consequences of doing so. In addition, victims may have been seen to be complicit in the crimes committed and so be excluded from compensation under s 9 of the Act.
- 8.5 Victims of trafficking are eligible for cost free short or long term Temporary Residency Permits of up to three years' duration, which include access to health care and the

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<sup>39</sup> *Crime Victim Assistance Act*, SC 2001, s 4(2); see also *Crime Victim Assistance (General) Regulation*, Part 3.

<sup>40</sup> *Crime Victim Assistance (General) Regulation*, s 20.

<sup>41</sup> *Crime Victim Assistance Act*, SC 2001, s 4(3); see also *Crime Victim Assistance (General) Regulation*, Part 4.

<sup>42</sup> *Crime Victim Assistance (General) Regulation*, s 29.

<sup>43</sup> See generally, *Laursen v. British Columbia (Director of Crime Victim Assistance)* [2015] BCSC 1413,[61-62]; *Crime Victim Assistance (Income Support and Vocational Services or Expenses Compensation) Regulation*, BC Reg. 362/2012.

<sup>44</sup> See generally, *Laursen v. British Columbia (Director of Crime Victim Assistance)* [2015] BCSC 1413.

right to apply for a work permit. On the expiry of the permit, victims, are then able to seek permanent residency.<sup>45</sup>

## 9. SUGGESTIONS FOR IMPROVEMENT

- 9.1 The most important improvement that could be made to the current legislative scheme for victim compensation in British Columbia would be to amend the Crime Victim Assistance (General) Regulation to include section 279.01 'Trafficking in Persons' as a prescribed offence under the Act, which would permit victims of human trafficking to apply for compensation under the Act.
- 9.2 The level of support provided to victims of human trafficking when applying for compensation is not clear. If support is not readily available, this should be rectified.
- 9.3 Application information and applications forms should be made available in different languages to cater for foreign victims of human trafficking.
- 9.4 Finally, the fact that human trafficking victims have not reported the crime or assisted in prosecutions, or were seen to be complicit in the crime should not be a reason for refusing them compensation. A carve out clause to this effect should be included in the legislation.

## 10. ALTERNATIVES TO STATUTORY COMPENSATION SCHEMES

- 10.1 Victims of human trafficking may be able to initiate civil proceedings for damages in tort against perpetrators of human trafficking, for example in battery, assault, and false imprisonment. If such a claim is initiated, a copy of the claim must be served on the Director of Crime Victim Assistance.<sup>46</sup> Initiating a civil action against the trafficking perpetrator may be too costly and traumatic for the victim, although if damages were to be awarded, they would potentially be higher than compensation.
- 10.2 Interestingly, under the Act, the Director may bring an action against "any person" arising out of the prescribed offence if compensation has been provided to or for a victim, immediate family member or witness under the Act, and the victim, immediate family member or the witness have not commenced an action, or have settled an action without the concurrence of the Director.<sup>47</sup> Where the Director initiates a civil claim, the Director is deemed to be the assignee of and subrogated to the rights of the victim, immediate family member or witness for damages equal to the cost or value of the compensation provided. The victim, immediate family member or witness must cooperate with the Director in the Director's pursuit of the claim or risk losing compensation previously received.<sup>48</sup> Any amounts recovered by the Director will be applied first to the costs of bringing the action, then to repayment of the amounts of compensation provided, and lastly the remainder will be provided to the victim, immediate family member, or witness.<sup>49</sup>

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<sup>45</sup> Government of Canada, Immigration, Refugees and Citizenship Canada, *Temporary Resident Permits (TRPs): Considerations specific to victims of human trafficking* <<http://www.cic.gc.ca/english/resources/tools/temp/permits/victim.asp>>.

<sup>46</sup> *Crime Victim Assistance Act*, SC 2001, s 15.

<sup>47</sup> Note, the Act does not expressly prohibit the Director of Crime Victim Assistance from bringing a civil claim under section 16 against the recipient of compensation.

<sup>48</sup> See generally, *Crime Victim Assistance Act*, SC 2001, s 16.

<sup>49</sup> *Ibid* s 17

# CANADA - ONTARIO

## 1. EXECUTIVE SUMMARY

- 1.1 Toronto, Ontario is a significant trafficking point and hub for many human trafficking routes. According to a report released by the Toronto based Alliance Against Modern Slavery, between 1 January 2011 and 31 December 2013 there were a total of 551 cases of human trafficking that involved Ontario as either a source, transit or destination point.<sup>50</sup> It identified the major purposes of human trafficking in Ontario as being sexual exploitation and forced labour. Forced marriage and petty crime were also recorded as common purposes. According to the report, the vast majority of victims of human trafficking in Ontario are female.
- 1.2 Ontario does not currently have a statutory compensation scheme that is specific to victims of the offence of human trafficking. However, there is a statutory scheme that provides compensation to victims of a "crime of violence" that occurred in Ontario, as well as to dependents of victims who died because of a "crime of violence" committed in Ontario. This scheme is provided pursuant to the Compensation for victims of Crime Act ("**the Act**").<sup>51</sup> The Criminal Injuries Compensation Board ("**the Board**") is responsible for administering the Act, and awarding eligible victims with compensation. The Board has the stated mission of easing the financial burden that is experienced by victims of violent crime in a fair, accessible and respectful manner.<sup>52</sup>
- 1.3 Compensation that is awarded by the Board is intended to cover various financial issues associated with the injury or death of a victim as a result of a "crime of violence". While the scheme appears straightforward, there may be obstacles for victims of human trafficking to obtain compensation under the Act. This is because it is unknown whether the offence of human trafficking itself would constitute a "violent offence" under the Act.<sup>53</sup> If not, victims may still be able to obtain compensation under the Act if they suffered a violent offence while being trafficked.

## 2. PRELIMINARY ISSUES

- 2.1 Below is a summary of the international treaties relating to human trafficking that are applicable in Ontario as a result of being ratified by Canada:

Treaty	Signed/Ratified? (S, R or No)
UN Convention against Transnational Organised Crime (Transnational Organised Crime Convention)	R
Protocol to Prevent, Suppress and Punish Trafficking in Persons,	R

<sup>50</sup> Alliance Against Modern Slavery, *The Incidence of Human Trafficking in Ontario* (2014) <<http://www.allianceagainstmodernslavery.org/sites/default/files/AAMS+-+Research+Report+-+2014.compressed.pdf>>

<sup>51</sup> *Compensation for victims of Crime Act*, RSO 1990, c 24

<sup>52</sup> The Mission Statement of the Board can be found here: <http://www.cicb.gov.on.ca/resources/Mission.pdf>.

Especially Women and Children (Palermo Protocol)	
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	No
Forced Labour Convention 1930 (ILO No 29)	R
Abolition of Forced Labour Convention 1957 (ILO No 105)	R
Worst Forms of Child Labour Convention 1999 (ILO No 182)	R
Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956	R
UN Convention on the Rights of the Child	R
UN Convention on the Elimination of all forms of Discrimination against Women	R
UN Covenant on Civil and Political Rights	Accession

- 2.2 It should be noted that while the abovementioned international law is relevant as a guidance tool, these treaties and covenants are not legally binding in Canada, unless incorporated in legislation. However, there may be instances where the judiciary will apply a "presumption of conformity" between international and Canadian domestic law. The presumption of conformity means that domestic legislation is interpreted in a manner that accords with Canada's international treaty obligations.<sup>54</sup>

### Domestic legislation

- 2.3 Ontario does not have any legislation that specifically addresses human trafficking. However, both federal and accepted international law is applicable in Ontario. The federal Criminal Code contains six offences that specifically address human trafficking.<sup>55</sup> Section 279.01 of the Code states:

- "(1) *Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable*
- (a) *to imprisonment for life and to a minimum punishment of imprisonment for a term of five years if they kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offence; or*
- (b) *to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of four years in any other case."*

<sup>54</sup> *Baker v Canada* [1999] 2 SCR 817.

<sup>55</sup> *Criminal Code*, RSC 1985, c 46, s 279

- 2.4 Consent to the above is not valid.<sup>56</sup> Trafficking of persons under the age of 18 is an aggravated offence.<sup>57</sup> Knowingly obtaining material benefit from a trafficking offence is in indictable offence, with a sentence of up to 10 years.<sup>58</sup>
- 2.5 Exploitation is prohibited by section 279.04:
- "(1) *A person exploits another person if they cause them to provide, or offer to provide, labour or a service en engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety opt the safety of a person known to them would be threatened if they failed to provide, or offer to provide , the labour or service.*"
- 2.6 Additionally, the federal Immigration and Refugee Protection Act prohibits "knowingly organising the coming into Canada of one or more persons by means of abduction, fraud, deception, or use or threat of force or coercion."<sup>59</sup> Persons convicted of this offence are liable for life imprisonment or a one million dollar fine.
- 2.7 The definitions of human trafficking provided by the abovementioned legislation accords with the definition of human trafficking in the Palermo Protocol.

### 3. BASIS OF STATUTORY COMPENSATION

- 3.1 In Ontario, the Compensation for Victims of Crime Act provides benefits to victims who were injured as a result of a "crime of violence" that occurred in Ontario, or dependents of a victim who died as a result of a crime of violence that occurred in Ontario. The "crime of violence" must be one that contravenes Canada's Criminal Code.<sup>60</sup> The underlying premises of the Act are as follows:
- 3.1.1 compassion for innocent victims and a desire to help those who have been harmed by a violent crime;
- 3.1.2 compensation for victims of violent crime is a reasonable extension of government welfare programs; and
- 3.1.3 providing compensation will assist victims in meeting their financial, physical and emotional needs and provide practical assistance to them with the recovery process.<sup>61</sup>

### 4. TYPE OF SCHEME

- 4.1 The Act is not specific to victims of human trafficking. It is a broad piece of legislation that is focused on providing benefits to victims/dependents of victims who are suffering because of a "crime of violence" that was committed in Ontario. The term "crime of violence" is not defined in either the Act or the Criminal Code. As a result,

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<sup>56</sup> *Criminal Code*, RSC 1985, s 279.01(2).

<sup>57</sup> *Ibid* s 279.011(1).

<sup>58</sup> *Ibid* s 279.02(1).

<sup>59</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27, s 118.

<sup>60</sup> *Compensation for victims of Crime Act*, RSO 1990, c 24, s 5.

<sup>61</sup> The statement by the Ministry of Attorney General describing the underlying premises of the Act can be found here: [http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/mcmurtry/section\\_4.asp](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/mcmurtry/section_4.asp)

there is some uncertainty as to which crimes are compensable under the Act. This issue was addressed in the Ontario Divisional Court's decision in *Pitters v Ontario (Criminal Injuries Compensation Board)*.<sup>62</sup> In that decision, the court determined that it is up to the Board to decide whether a "crime of violence" has occurred, based on the evidence before it, and the proper construction of the Board's statutory mandate. In addition to the decision in *Pitters*, the Supreme Court of Canada has provided guidance on this matter: a violent offence (in the context of the Youth Criminal Justice Act) occurs when in the commission of an offence a person causes, attempts to cause or threatens to cause bodily harm.

- 4.2 In summary, the Board determines whether a particular event constitutes a "crime of violence" on a case-by-case basis. A compelling argument in favour of human trafficking being considered a "crime of violence" is found in the report referenced earlier in this memorandum. That report noted that 96.5 per cent of human traffic victims in Ontario suffered from some form of violence while being trafficked. It could be concluded that human trafficking is a violent offence in and of itself. Notwithstanding this potential argument, it should be noted that other provinces (such as British Columbia) have not classified human trafficking as a crime of violence under their respective victim compensation legislation.<sup>63</sup>

## 5. ELIGIBILITY

- 5.1 The following are the requirements that a person must satisfy to be eligible for compensation under the Act:
- 5.1.1 a victim of a crime of violence that occurred in Ontario, or, in cases where the victim has died, the dependents or estate of the victim; if the victim is under the age of 18, a legal guardian must make the application on the victim's behalf;
  - 5.1.2 there is no requirement for the victim to be a resident of Ontario in order to claim compensation under the Act; and
  - 5.1.3 there is no requirement for a conviction to have been made/charges laid against an offender/alleged offender in order for the victim to be eligible for compensation. Applicants do not seem to be excluded on grounds of illegal or immoral behaviour.
- 5.2 The following are various limitations that victims or the estate/dependents of victims will face when proceeding through the application process.<sup>64</sup>

### **The "crime of violence" must have taken place in Ontario**<sup>65</sup>

- 5.2.1 In cases of human trafficking, there is usually a pattern of abuse that may have happened both within Ontario and outside of Ontario. Regardless of

<sup>62</sup> *Pitters v Ontario (Criminal Injuries Compensation Board)* [1996] O.J No 4339

<sup>63</sup> *Crime Victim Assistance Act*, SBC 2001, c 38.

<sup>64</sup> It should be noted that decisions of the Board are given orally. The Applicant does have the option to request written reasons within fourteen days of the decision being rendered. However, the vast majority of Applicants do not request written reasons. As a result, the only substantive recording of most proceedings are in the form of the Board Members' hearing notes.

<sup>65</sup> *Compensation for Victims of Crime Act*, RSO 1990, s 5.



this pattern, only incidents that occurred in Ontario can be considered when assessing compensation.

**Compensation for the victim is only available for certain physical and psychological injuries<sup>66</sup>**

5.2.2 While there does not appear to be a threshold for physical injuries to be considered for compensation, psychological injuries will be considered for compensation only if they are more than merely transient or trifling in nature.<sup>67</sup>

**Claims must be made within a two-year period<sup>68</sup>**

5.2.3 There is a two-year limitation period that begins to run from the date that the injury or death occurred. Notwithstanding this limitation period, the Board has discretion to extend this time period before or after its expiration.

**Failure of the victim to promptly report the incident to law enforcement<sup>69</sup>**

5.2.4 The Board has authority to refuse to make an order for compensation, or reduce the amount of compensation awarded, if it concludes that a victim failed to promptly report the incident to a law enforcement agency.<sup>70</sup> The Board will also consider whether the behaviour of the victim contributed to his or her injuries.<sup>71</sup>

**Failure of the victim to reasonably cooperate with law enforcement<sup>72</sup>**

5.2.5 The Board has authority to refuse to make an order for compensation, or reduce the amount of compensation awarded, if it concludes that a victim refused to reasonably cooperate with a law enforcement agency.<sup>73</sup>

**Informing the Perpetrator<sup>74</sup>**

5.2.6 The offender/alleged offender is notified of the victim's claim, and is given a platform through which to participate in the compensation award process.

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<sup>66</sup> Ibid s 1 & 5.

<sup>67</sup> Criminal Injuries Compensation Board, *Manual of Practice for Board Members - Actual Bodily Harm* (2012) 48 <<http://www.cicb.gov.on.ca/resources/Manual.pdf>>.

<sup>68</sup> *Compensation for Victims of Crime Act*, RSO 1990, s 6.

<sup>69</sup> Ibid s 17(2).

<sup>70</sup> Ibid s 17(2).

<sup>71</sup> Criminal Injuries Compensation Board, *Frequently Asked Questions* <<http://www.cicb.gov.on.ca/en/resources3.htm#Q11>>.

<sup>72</sup> *Compensation for Victims of Crime Act*, RSO 1990, s 17(2).

<sup>73</sup> Ibid.

<sup>74</sup> Ibid s 9(1)(c) & 9(2).

## 6. APPLICATION PROCESS

- 6.1 The entire application process takes approximately one year. The process begins when the victim, or their representative, downloads the application form from the Board's website.<sup>75</sup> Once this form is filled out, it must be mailed to the Board (there is not currently an option to file the form electronically). The form requires the victim to describe their injuries, the involvement of law enforcement, a description of the medical treatments received, sources of alternative compensation, and expense/loss of income information.
- 6.2 If an application is approved by the Board, it will go forward to a hearing.<sup>76</sup> The hearing will usually be conducted orally, however there is an option for a written<sup>77</sup> or electronic<sup>78</sup> hearing. At this hearing, the victim will have to establish compensability under the Act on a "balance of probabilities".<sup>79</sup> When establishing whether a crime of violence has occurred, the Board will look to the following types of evidence:
- 6.2.1 police/court records;
  - 6.2.2 victim's description of the incident;
  - 6.2.3 proof that the offender was convicted of the crime;
  - 6.2.4 medical or treatment reports; and
  - 6.2.5 letters or testimony of friends or relatives of the victim.
- 6.3 Typically, there are no costs associated with the application and review process. Any costs associated with the production of evidence, such as police/court records or medical/treatment reports, will be covered by the Board during the review stage.
- 6.4 Applicants are able to have legal representatives apply on their behalf and be legally represented at the hearing before the Board.<sup>80</sup> It is not clear whether applicants have access to legal aid for this. If at any time during the process the victim needs support, they can be referred by the Board to various government agencies/programs. These include:
- 6.4.1 victim Witness Services;
  - 6.4.2 bereaved Families of Ontario;
  - 6.4.3 recommendation of a therapist; and

<sup>75</sup> The application form can be found here: [http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/004-0310E~1/\\$File/0310E\\_Application.pdf](http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/004-0310E~1/$File/0310E_Application.pdf)

<sup>76</sup> *Compensation for Victims of Crime Act*, RSO 1990, s 8 and 9.

<sup>77</sup> *Statutory Powers Procedure Act*, RSO 1990, s 5.1; Criminal Injuries Compensation Board, *Rules of Procedure* (at May 2014) r 7.1.

<sup>78</sup> *Statutory Powers Procedure Act*, RSO 1990, s 5.2; Criminal Injuries Compensation Board, *Rules of Procedure* (at May 2014) r 7.2

<sup>79</sup> Criminal Injuries Compensation Board, *Manual of Practice for Board Members - Actual Bodily Harm* (2012) 51 - 59 <<http://www.cicb.gov.on.ca/resources/Manual.pdf>>. ; *F.H. v. McDougall* [2008] 3 SCR 41.

<sup>80</sup> Criminal Injuries Compensation Board, *Rules of Procedure* (at May 2014) r 4.3.

6.4.4 support Helpline.

## 7. ASSESSMENT OF COMPENSATION

- 7.1 Compensation granted under the Act may be delivered to the victim in a lump sum or through periodic payments.<sup>81</sup> Regardless of the method by which the compensation is granted, a victim is limited to a maximum award of \$25,000.<sup>82</sup>
- 7.2 An award can include compensation for treatment expenses; loss of income; pain and suffering; and support of a child that was born as a result of rape. Compensation is not available for property damage and punitive damages are not available under the scheme.
- 7.3 The assessment for how these forms of compensation are determined is distinct. With regard to treatment expenses, only amounts not covered by another source (for instance, health insurance<sup>83</sup>) are compensated. Travel to treatment expenses will be covered where the applicant is required to travel more than 40km each way from their residence to the treatment facility. Loss of income is awarded if the applicant can demonstrate they are unable to work due to their injuries from the incident. As for pain and suffering compensation, there are a number of factors that the Board considers, which include the following:
- 7.3.1 nature of the crime/abuse;
  - 7.3.2 any breach of trust or abuse of power;
  - 7.3.3 degree of violence involved;
  - 7.3.4 seriousness of the injuries sustained/extent of harm caused;
  - 7.3.5 recovery period;
  - 7.3.6 age and vulnerability of victim;
  - 7.3.7 possibility of an on-going disability; and
  - 7.3.8 impact of the crime/abuse on the victim's life.
- 7.4 In the event of an emergency, interim compensation for medical/treatment expenses, funeral expenses and support is available. This is awarded at the Board's discretion in exceptional circumstances where the victim has demonstrated an urgent need for funds prior to a formal hearing.<sup>84</sup>
- 7.5 The compensation scheme provided by the Act is funded entirely by the provincial government. However, the Board does have the discretion to pursue reimbursement

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<sup>81</sup> *Compensation for Victims of Crime Act*, RSO 1990, s 18.

<sup>82</sup> *Ibid*, s 19.

<sup>83</sup> It should be noted that the Ontario Health Insurance Plan provides extensive health care coverage to all citizens, permanent residents, and some newcomer to Canada groups.

<sup>84</sup> *Compensation for Victims of Crime Act*, RSO 1990, s 14

from an offender for financial compensation that has been awarded to a victim - although this is not a common practice.<sup>85</sup>

## 8. BARRIERS/OBSTACLES

- 8.1 First, the main barrier that this Act presents for victims of trafficking is that there is no guarantee they will receive benefits under it. As described earlier, the victim would have to convince the Board that their incident of human trafficking constitutes that type of violent offence for which the Act was designed to compensate victims.
- 8.2 Second, the victim will only be compensated for violent offences that were committed in Ontario. Given the fact that human trafficking tends to be very transient, and a victim might not always be aware of their current location, it may be difficult for a victim to demonstrate that the alleged violent incident occurred in Ontario.
- 8.3 Third, the offender/alleged offender is notified of the victim's claim, and is given a platform through which to participate in the compensation award process. This may deter victims, who may be hesitant to confront their abuser. It should be noted, however, that written or electronic hearings, as opposed to oral hearings, may be available in such circumstances.
- 8.4 Fourth, as the hearing is public, trafficking victims may be hesitant about engaging in the process out of fear or embarrassment. Hearings may be closed if the Board decides it is in the interest of a victim who has suffered from an alleged sexual offence.<sup>86</sup> This means that a forced labour victim is precluded from a closed hearing.
- 8.5 When deciding whether to award compensation, the Board takes into account any conduct on the part of the applicant that may have contributed to or caused the injury. This may be prohibitive for some trafficking victims who have, for example, not sought help at an early stage out of fear. The Board also takes into account whether the victim has reported the crime to police. Similarly, this may be prohibitive for victims who have not reported the crime to police because of fear of authorities, although the Board is able to consider the applicant's reasons for not reporting the crime if this is the case.
- 8.6 The Ontario Government has not yet devised an anti-trafficking strategy. There is therefore no co-ordinated approach within the province towards dealing with trafficking and helping trafficking victims. Without co-ordination between different services, such as law enforcement and health services, victims may be unaware of the compensation scheme.
- 8.7 Victims of trafficking are eligible for cost free short or long term Temporary Residency Permits of up to three years' duration, which include access to health care and the right to apply for a work permit. On the expiry of the permit, victims, are then able to seek permanent residency.<sup>87</sup>

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<sup>85</sup> Ibid s 26(2).

<sup>86</sup> Ibid s 12.

<sup>87</sup> Government of Canada, Immigration, Refugees and Citizenship Canada, *Temporary Resident Permits (TRPs): Considerations specific to victims of human trafficking* <<http://www.cic.gc.ca/english/resources/tools/temp/permits/victim.asp>>

## 9. SUGGESTIONS FOR IMPROVEMENT OF THE ACT

- 9.1 An improvement to the current system for compensation in Ontario would be to amend the Act and enumerate human trafficking as an offence that can be compensated for under the Act. This will reduce the level of uncertainty that human traffic victims currently face when contemplating seeking compensation under the Act. Changes that target the above barriers should include:
- 9.1.1 removing the requirement to report the matter to the police and cooperate in cases where the victim may have reason not to do so;
  - 9.1.2 removing the requirement to notify and include the perpetrator in the proceedings; and
  - 9.1.3 ensuring that the Board, when taking into account any conduct by the applicant that may have contributed to the crime, the Board is aware of the specific issues surrounding human trafficking victims.

## 10. ALTERNATIVES TO COMPENSATION UNDER THE ACT

- 10.1 A victim is not precluded by the Act from seeking compensation for their injuries directly from the defendant under traditional civil proceedings.<sup>88</sup> However, a victim is obliged to notify the Board of the commencement of any proceeding they may launch against an alleged offender/offender.<sup>89</sup>
- 10.2 There are some drawbacks for victims in seeking compensation through a civil proceeding:
- 10.2.1 if the victim is successful in the civil proceeding, they will have to reimburse the Board for any compensation that they received;<sup>90</sup>
  - 10.2.2 a civil proceeding will likely take more time and cost more money than pursuing compensation under the Act; and
  - 10.2.3 even if the victim is awarded higher damages in a civil proceeding than they would have received under the Act, it may be difficult for the victim to recover those damages from the defendant.

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<sup>88</sup> *Compensation for Victims of Crime Act*, RSO 1990, s 26(1).

<sup>89</sup> *Ibid* s 26(5).

<sup>90</sup> *Ibid* s 26(5.1).

# CHINA - HONG KONG, SAR

## 1. EXECUTIVE SUMMARY

- 1.1 The Hong Kong Special Administrative Region of the People's Republic of China ("**Hong Kong**") is considered to be a destination, transit and source territory for human trafficking and forced labour.<sup>1</sup>
- 1.2 More than 320,000 foreign domestic workers from Indonesia, the Philippines, Burma and Bangladesh work in the territory. Certain high-profile cases of abuse in recent years have raised concern about the potential for ill-treatment and exploitation of domestic workers, who can find themselves subject to debt bondage, thereby reducing their ability to report abuse by employers for fear of losing their income.
- 1.3 The Trafficking in Persons Report released by the US State Department in July 2015, also cited Hong Kong as a destination for sex-trafficking with crime syndicates encouraging women to come to the territory on the promise of employment before forcing them into sex work.<sup>2</sup>
- 1.4 Although the Hong Kong Government partially funds six NGO-run shelters for victims of abuse and trafficking and distributes anti-trafficking information leaflets to domestic workers, the territory does not have a comprehensive legal framework specific to anti human trafficking as defined under the Palermo Protocol.<sup>3</sup> The Palermo Protocol and its Convention have been ratified by the People's Republic of China ("PRC") and are applicable in both the PRC and the Macau Special Administrative Region. Its application does not, however, extend to Hong Kong.
- 1.5 Hong Kong does have legislation specific to human trafficking under section 129 of the Crimes Ordinance,<sup>4</sup> but this utilises a more limited definition for human trafficking than that included in the Palermo Protocol. Beyond this, other legislation has more general criminal offences that would capture certain situations involving human-trafficking related abuses. There is, however, no comprehensive single anti-trafficking law which prohibits all forms of trafficking (per the Palermo Protocol definition).
- 1.6 Avenues of compensation for victims of trafficking in Hong Kong from perpetrators are limited to common law claims for damages against traffickers, specific statutory compensation mechanisms under employment law (to the extent the circumstances are employment related) and compensation orders made by the criminal courts against offenders as part of sentencing. The only statutory compensation scheme available beyond these (where the compensation comes not from the perpetrator but from public funds) is the Criminal and Law Enforcement Injuries Compensation Scheme ("CLEIC Scheme"), but there are a number of eligibility criteria to fulfil before access to this scheme can be gained (not least being, the right to remain in Hong Kong), which inhibits its effectiveness.
- 1.7 Recently, an application for judicial review in the Hong Kong courts has been filed, challenging the Hong Kong Government's failure to protect victims of forced labour and human trafficking. The applicant is, among other things, seeking a declaration that the Hong Kong Government's failure to enact legislation specifically targeting all

<sup>1</sup> United States of America State Department, "Trafficking in Persons Report July 2015' (2015), 179 <<http://www.state.gov/j/tip/rls/tiprpt/2015/>>.

<sup>2</sup> Ibid 180.

<sup>3</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, art 3.

<sup>4</sup> *Crimes Ordinance* (Hong Kong) Cap 200, reg 129.

forms of human trafficking is a breach of the applicant's rights under Article 4 of the Bill of Rights. Damages are also being claimed for the breach.<sup>5</sup>

## 2. PRELIMINARY ISSUES

### Framework for anti-trafficking in the jurisdiction

2.1 International conventions/treaties the State has ratified:

2.1.1 Hong Kong is not itself a separate nation-state; it is a special administrative region within the People's Republic of China. The application of international treaties in Hong Kong is governed by Article 153 of Hong Kong's Basic Law (the territory's mini-constitution).<sup>6</sup> Article 153 provides that the application of international agreements to Hong Kong to which the PRC is or becomes a party, shall be decided by the Central People's Government in accordance with the circumstances and needs of Hong Kong and after seeking the views of the Hong Kong government. The only exception to this is any treaty which Hong Kong implemented prior to being handed back to the PRC on 1 July 1997 which, according to Article 153, continue to apply post 1 July 1997.

2.1.2 Accordingly, whether an international treaty applies in Hong Kong, depends on:

2.1.2.1 whether Hong Kong implemented it before July 1997;<sup>1</sup> or if not,

2.1.2.2 whether the PRC has signed or ratified the treaty; and if so

2.1.2.3 whether the Central People's Government has decided that the treaty should specifically apply in Hong Kong.

Based on this, the below table denotes whether the stated treaties apply in Hong Kong or not.

Treaty	Application in Hong Kong (Y/N)
UN Convention against Transnational Organised Crime (Transnational Organised Crime Convention)	Y
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)	N
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	Y
Forced Labour Convention 1930 (ILO No 29)	Y
Abolition of Forced Labour Convention 1957 (ILO No 105)	Y
Worst Forms of Child Labour Convention 1999 (ILO No 182)	Y

<sup>5</sup> *ZN v Secretary for Justice & Ors* [2015] HKCFI 2078.

<sup>6</sup> *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (Hong Kong).



Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956	Y
UN Convention on the Rights of the Child	Y
UN Convention on the Elimination of all forms of Discrimination against Women	Y
UN Covenant on Civil and Political Rights	Y
Other regional instruments (please specify) Bangkok Declaration on Irregular Migration	Y

## 2.2 Domestic legislation on human trafficking:

2.2.1 The law in Hong Kong which most directly addresses human trafficking is section 129 of the Crimes Ordinance. This makes it a criminal offence to "*take part in bringing another person into, or taking another person out of, Hong Kong for the purposes of prostitution.*". The offence carries a maximum penalty of 10 years imprisonment.<sup>7</sup>

2.2.2 For the offence to be made out, two key elements need to be established: (i) movement of persons into or out of Hong Kong and; (ii) sexual exploitation. In contrast, the definition of "*trafficking in persons*" under the Palermo Protocol captures more forms of trafficking activity within its ambit. Whereas section 129 is limited to trafficking involving cross-border movement, the Palermo Protocol extends to "*recruitment, transportation, transfer, harbouring or receipt of persons*".<sup>8</sup> Further, where section 129 is limited to sexual exploitation, the Palermo Protocol is more broadly focused on all forms of "*exploitation*". Accordingly, Hong Kong law adopts a very narrow definition of human trafficking compared with the Palermo Protocol by only recognising a person as a victim of human trafficking if he/she is moved into or out of Hong Kong for the purposes of sexual exploitation.

2.2.3 Certain other activities which would constitute human trafficking under the Palermo Protocol are criminalised under other general offences in Hong Kong legislation. For example:

2.2.3.1 Part VIIA of the Immigration Ordinance contains criminal offences for crew members of ships bringing unauthorised entrants into Hong Kong (section 37C) and for persons who arrange for passage to Hong Kong of unauthorised entrants (section 37D).<sup>9</sup> The maximum penalty for these offences is a fine of \$5 million and imprisonment for 14 years.

2.2.3.2 Section 42 of the Offences against the Person Ordinance provides that "any person who, by force or fraud, takes away or detains against his or her will any man or boy, woman or female child, with intent to sell him or her, or to procure a ransom or benefit for his or her liberation, shall be guilty of an

<sup>7</sup> Crimes Ordinance, see above n 4.

<sup>8</sup> Palermo Protocol, art 3.

<sup>9</sup> Immigration Ordinance (Hong Kong) Cap 115.

Hong Kong  
offence triable upon indictment, and shall be liable to  
imprisonment for life."<sup>10</sup>

- 2.2.4 However, the coverage is not as comprehensive as required by the Palermo Protocol. The focus of Part VIIA of the Immigration Ordinance, for example, is on illegal immigration, rather than trafficking per se, and the offences do not extend to activities involving the arrangement of passage out of Hong Kong (which trafficking would also involve). The focus of section 42 of the Offences Against the Person Ordinance is abduction and kidnapping for ransom, which is again more limited than human trafficking.
- 2.2.5 The Prosecution Code issued by the Department of Justice in September 2013 (Prosecution Code) did include a definition of "human exploitation" which follows the internationally recognised definition.<sup>11</sup> It also guides prosecutors to make reference to international standards and practices concerning human trafficking. However, the Prosecution Code is a code of practice/guidelines for prosecutors and carries no force of law. It is therefore of limited practical effect without legislation addressing human trafficking by reference to the Palermo Protocol definition.
- 2.2.6 An interesting recent development at the time of writing is a judicial review application filed in January 2015 by an unnamed trafficking victim challenging the Hong Kong Government's failure to protect victims of forced labour and human trafficking. The applicant is, inter alia, seeking a declaration that the Hong Kong Government's failure to enact legislation specifically targeting human trafficking, including both adult and child trafficking and general labour trafficking as well as trafficking for sexual purposes, is a breach of the applicant's rights under Article 4 of the Bill of Rights. Damages are also being claimed for the breach. The leave application was heard on 2 June 2015 and judgment has been reserved at the time of writing.<sup>12</sup>

### 3. BASIS OF STATUTORY COMPENSATION

- 3.1 In Hong Kong, a criminal injuries compensation scheme, the CLEIC Scheme, has been established. The aim of the CLEIC Scheme is to provide financial assistance to persons (or their dependants in cases of death) who are injured as a result of a crime of violence, or by a law enforcement officer using a weapon in the execution of his duty.<sup>13</sup>
- 3.2 The part of the CLEIC Scheme which focuses on compensation claims for crimes of violence is administered by the Criminal Injuries Compensation Board ("**the Board**"). The Chairman and members of the Board which administer the CLEIC Scheme are appointed by the Chief Executive of Hong Kong. The Social Welfare Department provides the staff for the Secretariat which prepares assessments and arranges payments of compensation under the scheme.

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<sup>10</sup> *Offences Against the Person Ordinance* (Hong Kong) Cap 212.

<sup>11</sup> Department of Justice, Hong Kong Special Administrative Region, *Prosecution Code*, para 18.2: "Human exploitation includes activities that demean the value of human life such as sexual exploitation, enforced labour, domestic servitude, debt bondage and organ harvesting. Human exploitation is a domestic and international concern which should be handled by prosecutors with an appropriate level of understanding, skill and sensitivity. In appropriate cases, a prosecutor should consider a credible claim that a defendant or intended defendant is a victim of trafficking."

<sup>12</sup> ZN[2015] HKCFI 2078.

<sup>13</sup> *Criminal and Law Enforcement Injuries Compensation Scheme, the Administrative Document* <[http://www.swd.gov.hk/doc/social-sec/CLEIC\\_Adm\\_doc\\_Eng\\_042013.pdf](http://www.swd.gov.hk/doc/social-sec/CLEIC_Adm_doc_Eng_042013.pdf)>.

- 3.3 The CLEIC Scheme is non-contributory and non-means tested. Payments under the scheme come from public funds.

#### 4. TYPE OF SCHEME

- 4.1 The CLEIC Scheme is not in any way specific to victims of human trafficking. However, if during trafficking activities a victim sustains personal injury which is directly attributable to and arises out of a crime of violence in Hong Kong, compensation may be available from the CLEIC Scheme where certain eligibility criteria are met (see Section 5 below).

#### 5. ELIGIBILITY

- 5.1 The eligibility criteria which must be satisfied for the victim, or the spouse or dependent of a deceased, to be able to bring a claim are as follows:<sup>14</sup>

##### **Only crimes of violence**

- 5.2 The CLEIC Scheme covers crimes of violence only. There is no coverage for property damage. The majority of crimes that are dealt with by the scheme, therefore, fall within the following categories:

- 5.2.1 assault/wounding;
- 5.2.2 robbery/theft/burglary;
- 5.2.3 homicide/murder/manslaughter;
- 5.2.4 rape/sexual assault.

##### **Only crimes which are the subject of criminal proceedings or have been reported to the police**

- 5.3 The circumstances of the victim's injury must have been the subject of criminal proceedings, or reported to the police without unreasonable delay.

##### **Injury must have been sustained in Hong Kong**

- 5.4 The victim must have sustained their injury in Hong Kong from the crime of violence.

##### **Victim must have right to stay in Hong Kong**

- 5.5 The victim must be a person who has the right to remain in Hong Kong and who is not in contravention of a limit of stay (if any) in force against him or her at the time of the incident. Where permission is granted subsequently after the victim arrived in Hong Kong or that permission was granted to extend the victim's stay after he had been overstaying in Hong Kong, payment of compensation may be granted if the incident occurs on or after the effective date of such permission.<sup>15</sup>

##### **Only "serious" injury covered**

- 5.6 The CLEIC Scheme only covers "serious" injury. To qualify as a "serious" injury, the victim must have either died from the incident; or the injury must give rise to at least three days loss of earnings or earning capacity. This will be deemed to be the case if the

<sup>14</sup> Ibid.

<sup>15</sup> Ibid para 6(g).

person is on sick leave as certified by a registered medical practitioner or registered Chinese medical practitioner, or is in hospital for three days. This criteria applies irrespective of whether the person is a wage earner or not. It is not clear whether psychological injuries as well as physical injuries are recognised however, it appears that if the injury causes the victim to lose earning capacity for at least three days it will be acceptable.

### **Three year time limit for application**

- 5.7 The application must be made within three years of the date of the incident.<sup>16</sup>
- 5.8 If the application is withdrawn or there is a loss of contact with the victim leading to the case being closed, a second application may be made provided it is made within the later of three years from the date of the incident or one year from the date of loss of contact.<sup>17</sup>
- 5.9 The time-limit tends to be strictly enforced.

### **Requirements for cooperation**

- 5.10 As indicated above, the circumstances of the injury must be the subject of criminal proceedings, or must have been reported to the police without unreasonable delay. The applicant must also give the Board all related information and reasonable assistance, particularly in relation to any medical reports which it might require.

### **Exclusions on grounds of illegal or immoral behaviour**

- 5.11 The Board has discretion to reduce the amount of compensation, or reject the application altogether if, having regard to the conduct of the victim (including his/her conduct before and after the events giving rise to the claim) and his/her character and way of life, it is inappropriate that he/she should be granted a full award or any award at all.<sup>18</sup>

### **Specific approach for sexual offences**

- 5.12 The Board will scrutinise with particular care any application in respect of sexual offences in order to determine whether there was any responsibility, either because of provocation or otherwise on the part of the victim and it will especially have regard to any delay which has occurred in submitting the application.<sup>19</sup> This may disadvantage some victims of human trafficking. For example, if a woman agreed to come to Hong Kong to work in the sex industry yet she was deceived about the conditions of work, she may be seen to have contributed to her injuries.

### **Specific approach for offences involving domestic violence**

- 5.13 Where the victim who suffered injuries and the offender who inflicted them were living together at the time as members of the same family, no compensation will be paid. This rule may not apply however if (1) the offender has been prosecuted in connection with the offence (except where the Board considers that there are practical, technical or other grounds for not prosecuting the offender); and (2) the Board is satisfied that it is in the interests of the applicant, or the minor or other

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<sup>16</sup> Ibid para 6e.

<sup>17</sup> Ibid para 6f.

<sup>18</sup> Ibid para 12.

<sup>19</sup> Ibid para 9.

person on whose behalf the application is made, as the case may be, to make an award.<sup>20</sup>

## 6. APPLICATION PROCESS

### Application and procedure adopted by the Board for determining applications

- 6.1 An application must be made in writing using the prescribed application form which is available at police stations, District Offices of the Home Affairs Department, or Medical Social Services Units, Social Security Field Units and the CLEIC Section of the Social Welfare Department. Application forms can also be downloaded from the homepage of the Social Welfare Department's website. The completed application form can be submitted by hand, post, fax or e-mail to the CLEIC Section of the Social Welfare Department.<sup>21</sup> Information regarding the Scheme and how to make an application is available in several languages, including Thai, Indonesian and Hindi.
- 6.2 After the application has been submitted to the Board, the Board will confirm the criminal incident with the police. A member of the Secretariat staff from the Board will seek further information on the relevant circumstances and ask for medical advice.
- 6.3 The initial decision as to whether the application should be allowed and, if so, what amount of compensation should be offered, or rejected, will normally be made without a hearing. This decision will be made by two members of the Board, who communicate the decision to the victim. Either of these members can, however, refer the application to three other members of the Board appointed by the Board's Chairman for a hearing.<sup>22</sup>
- 6.4 If there is a hearing, the applicant may appear personally before the Board hearing the claim if the Board approves. It does not appear that the victim can be legally represented in a hearing. The applicant should also provide his or her own interpreter in the event that neither of the official languages of the Board, being Chinese and English, is comprehensible to him or her. However, the Social Welfare Department will, as far as practical, render assistance where the applicant has genuine difficulties in finding an interpreter.<sup>23</sup>
- 6.5 There is nothing stated in the CLEIC Scheme's rules regarding the standard of proof. However, the other part of the Scheme, which relates to the injuries sustained by a law enforcement officer, follows the common damages assessment approach<sup>24</sup>. Accordingly, it is inferred from this that the same "balance of probabilities" standard of proof would be followed for all matters dealt with by the CLEIC Scheme.
- 6.6 Whenever the amount of compensation is reduced or an application rejected, the grounds for such reduction or rejection must be given in writing to the applicant.<sup>25</sup>
- 6.7 The Secretariat aims to complete the investigation of an application within 14 working days upon receipt of all relevant supporting documents. According to its 41st Annual

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<sup>20</sup> Ibid para 7.

<sup>21</sup> Hong Kong Police Force, *Compensation to Victims of Crime* <[http://www.police.gov.hk/ppp\\_en/04\\_crime\\_matters/cvc.html](http://www.police.gov.hk/ppp_en/04_crime_matters/cvc.html)>; Social Welfare Department The Government of the Hong Kong Special Administrative Region, *Criminal and Law Enforcement Injuries Compensation Scheme* <[http://www.swd.gov.hk/en/index/site\\_pubsvc/page\\_socsecu/sub\\_criminalan/](http://www.swd.gov.hk/en/index/site_pubsvc/page_socsecu/sub_criminalan/)>.

<sup>22</sup> *Criminal and Law Enforcement Injuries Compensation Scheme, the Administrative Document*, above n 12, para 29.

<sup>23</sup> Ibid para 27.

<sup>24</sup> Ibid para 18.

<sup>25</sup> Ibid para 30.

Report for the year to 31 March 2014, the Secretariat's achievement rate for the year was 100 percent.<sup>26</sup>

- 6.8 There do not appear to be any costs associated with making an application.

### **Appeal<sup>27</sup>**

- 6.9 If an applicant is not satisfied with the decision of the Board, either because no compensation is offered or because he or she considers the amount offered to be inadequate, he or she is entitled to appeal to be heard by an Appeal Board. The Appeal Board consists of three persons appointed by the Chairman of the Board from Board members who did not participate in the original decision.
- 6.10 The Appeal must be commenced by the filing of a notice within one month from the date notice of the initial decision was given, although the Appeal Board can extend this time on application. The Notice must state the grounds of the appeal.
- 6.11 The appellant (unless prevented by incapacity) presents the case him or herself at the hearing, but may be assisted by a friend or relative as permitted by the Appeal Board. In exceptional cases, and subject to the approval of the Appeal Board, the appellant may be legally represented at his or her own cost. The appellant should, if needed, provide his or her own interpreter. However, if the appellant has genuine difficulties in finding an interpreter, the Social Welfare Department will assist.
- 6.12 The appellant, Appeal Board or Board staff can call, examine or cross-examine witnesses. The Appeal Board may receive any relevant evidence irrespective of whether such evidence would be admissible in a court of law. The decision of an Appeal Board is final.

## **7. ASSESSMENT OF COMPENSATION**

- 7.1 The levels of compensation for criminal injuries under the CLEIC Scheme are based on a set tariff scale called the Emergency Relief scale which encompasses the following types of payment: Burial Grant, Death Grant, Disability Grant, Injury Grant and Interim maintenance grant. The scale for each of these types of grants and conditions of grants are set out in the Appendix hereto.
- 7.2 The award of compensation will usually take the form of a lump sum payment. More than one payment may be made in circumstances where, for example, only a provisional medical assessment can be given in the first instance. For the assessment of the degree of disability, mental impairment of victims of sexual offences should be taken into account. Other victims can also be similarly assessed if found necessary by a medical practitioner.<sup>28</sup>
- 7.3 The Board may, on compassionate grounds, increase the Disability Grant, the Injury Grant and the Interim Maintenance Grant payable by up to 100 percent to a victim of rape.<sup>29</sup> As indicated above, however, compensation may be reduced or refused if the conduct, character and way of life of the victim were considered to be contributory factors to the incident.

<sup>26</sup> Eric Kwok Tung-ming, *Criminal and Law Enforcement Injuries Compensation Boards, 41st Annual Report*, (2014), para 28.

<sup>27</sup> *Criminal and Law Enforcement Injuries Compensation Scheme, the Administrative Document*,, above n 12, Appendix B.

<sup>28</sup> *Ibid* para 10.

<sup>29</sup> *Ibid* para 14(d).

## 8. BARRIERS / OBSTACLES

8.1 There are several obvious barriers to victims of human trafficking accessing the CLEIC Scheme, most of which stem from the fact that the CLEIC Scheme is not specifically aimed at crimes related to human trafficking, but at Hong Kong residents and tourists who are the victims of violent crime in Hong Kong. The limitations are outlined below:

8.1.1 Primarily, the CLEIC Scheme is limited to compensating victims of crimes of violence. This means that the scheme will only be applicable to victims of human trafficking who have also incidentally been the victim of violent crime during trafficking (and who satisfy the other eligibility criteria). This excludes trafficking victims who have suffered psychological distress from their ordeals albeit in the absence of violence.

8.1.2 Second, an obvious limitation of the CLEIC Scheme with respect to victims of human trafficking is the eligibility requirement for the victim to be a person having the right to remain in Hong Kong and who is not in contravention of a limit of stay (if any) at the time of the incident. For trafficking victims who were in Hong Kong illegally at the time they were the subject of violent crime, compensation would simply not be available under the CLEIC Scheme. This particular eligibility requirement may therefore serve further to exclude a large section of trafficking victims.

8.1.3 Third, the eligibility requirement for the crime to have been reported to the police without unreasonable delay may present obstacles for trafficking victims. Although this requirement is thought to serve as a safeguard against fraudulent claims, a victim who, for example, depends on their continued work to pay debt (a situation of "debt bondage") or who fears reprisals, may be deterred from reporting violent abuse to the police.

8.1.4 Fourth, the Board has discretion to reduce or disallow compensation based on the victim's character and way of life and, in particular for sexual offences, in order to determine whether there was any responsibility either because of provocation or otherwise on the part of the victim. This discretion may disadvantage some victims of human trafficking, particularly those forced into the sex industry. Indeed, given that the only trafficking specific offence in Hong Kong (section 129 of the Crimes Ordinance) is specific to trafficking for sex work, it is hard to see how a victim of a person found guilty under section 129 could receive compensation under the CLEIC Scheme.

8.1.5 Fifth, the specific additional limitations placed by the CLEIC Scheme on violent crimes where the victim has been living with the perpetrator, may limit access to the scheme for victims of "forced marriage". A victim in this situation may also fall foul of the requirement to report the crime to the police without unreasonable delay.

8.1.6 Sixth, in general the CLEIC Scheme has itself been criticised for not offering a sufficient mechanism of compensation for victims of violent crimes which do fall in its scope. In 2013/14 a total of 6,412 crimes of violence were reported to the police. There were, however, only 237 applications for compensation made to the CLEIC Scheme (i.e. 3.7 percent). The Board made initial decisions on 215 of these applications and compensation was only awarded in 166 cases<sup>30</sup>. Statistics such as

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<sup>30</sup> Eric Kwok Tung-ming, above n 26, ss 9-17.



these support the following observation made in "Understanding Criminal Justice in Hong Kong":

*"Rather than focussing on a victim's needs, the Boards tend to support the notion that only those "deserving" or "innocent" victims warrant the government's sympathy. The end result is that the Scheme is more of a symbolic gesture of pity for selected victims, rather than a panel which awards remuneration to all those who may be deserving."<sup>31</sup>*

- 8.2 The above barriers essentially mean that the CLEIC Scheme is likely to exclude a large number of trafficking victims from its ambit. In short, such victims will go uncompensated.
- 8.3 Despite the numerous barriers for victims, the CLEIC Scheme does have certain positive aspects which are worthy of note, for example, the scheme's pamphlets are available in numerous languages and the application process is not overly complex. Accordingly, the framework of the CLEIC Scheme may serve as a basis for any remedial action to address the current lack of accessible compensation for human trafficking victims.

## 9. EXAMPLES IN PRACTICE

- 9.1 We are not aware of any trafficking related cases compensated by the CLEIC Scheme. The only human trafficking related case we have identified in which compensation is being claimed is the current judicial review application, case number HCAL 15/2015.<sup>32</sup> The applicant is, inter alia, seeking a declaration that the Hong Kong government's failure to enact legislation specifically targeting human trafficking, including both adult and child trafficking and general labour trafficking as well as trafficking for sexual purposes is a breach of the applicant's rights under Article 4 of the Bill of Rights. Damages are also being claimed for the breach. The leave application was heard on 2 June 2015 and judgment has been reserved.
- 9.2 According to the the Trafficking in Persons Report released by the US State Department in July 2015, there were no prosecutions in Hong Kong under Section 129 of the Crimes Ordinance in 2014 (albeit four trafficking investigations had been initiated during the year).<sup>33</sup>

## 10. SUGGESTIONS FOR IMPROVEMENT

- 10.1 The eligibility criteria for the CLEIC Scheme essentially prohibits the vast majority of victims of trafficking from accessing it. The following, therefore, serve as suggestions for improvement.

### Short term

- 10.2 In the short-term, a key solution would be for the Chief Executive to widen the operation of the CLEIC Scheme to provide compensation for human trafficking victims. For this purpose (and pending the adoption of legislation criminalising human trafficking in line with the Palermo Protocol definition) reference may be made in

<sup>31</sup> E Wing Hong Chui and T Wing Lo, *Understanding Criminal Justice in Hong Kong* (Willan, 2008) p 76.

<sup>32</sup> ZN [2015] HKCFI 2078.

<sup>33</sup> US State Department, above n 1, p 80.



Paragraph 18.2 of the Prosecution Code<sup>34</sup> by the Board to determine whether a person is a victim of human trafficking.

- 10.3 As part of this solution, the CLEIC Scheme must also alter its eligibility criteria. In particular, the requirement for the victim to have the right to stay in Hong Kong and the requirement for the incident to have been reported to the police, should specifically not be applied for human trafficking compensation claims.

### **Long term**

- 10.4 In the longer term, it is hoped the Hong Kong Government introduces legislation adopting the Palermo Protocol definition of human trafficking, which would enable the above changes to the compensation scheme to be completely aligned with global anti-trafficking standards. In addition, it is hoped that the CLEIC Scheme (in so far as it applies to trafficking victims) extends its compensation to include a separate category of compensation for psychological effects of human trafficking on victims.

## **11. ALTERNATIVES TO STATUTORY COMPENSATION SCHEMES**

### **Civil proceedings**

- 11.1 Victims of human trafficking are able to initiate an action in tort claiming damages against the person/s who cause them harm. Such actions may be for trespass to the person (assault), battery, false imprisonment, intentional infliction of emotional distress, sexual harassment or intimidation. The tortious acts themselves are often unlikely to be committed by persons of means (hence such claims may not be worth pursuing). However, there may be scope to consider whether vicarious liability can be established against the tortfeasor's employer or principal (who may be of means).
- 11.2 However the only example we have identified where civil proceedings were commenced by a victim of exploitation, is a damages claim filed by Erwiana Sulustyaningsih, the former domestic helper from Indonesia who is suing her former employer (now in jail). Erwiana's case made global headlines and raised awareness in Hong Kong about the potential for ill-treatment and exploitation of domestic workers.<sup>35</sup>

### **Criminal proceedings**

- 11.3 Pursuant to section 73 of the Criminal Procedure Ordinance, a criminal court has the power to order a convicted defendant to pay compensation to the victim, which shall be deemed a judgment debt due to the victim. The compensation must be for personal injury and/or damage to property. It is possible, therefore, for a Court to make such an award against a party found guilty of trafficking to or from Hong Kong for sexual purposes under section 129 of the Crimes Ordinance, or any other criminal offence commissioned in the course of being trafficked. We have not, however, found any such examples of criminal proceedings where this has happened.
- 11.4 Section 98 of the Magistrates Ordinance gives magistrates a similar power to make compensation orders up to HK\$100,000. Although offences under section 129 of the Crimes Ordinance are not triable in the Magistrates Courts (as it is an indictable offence), lesser charges of common assault (which may be commissioned during human trafficking) can come before magistrates.

<sup>34</sup> See Section 2.1.2 of this Document.

<sup>35</sup> AP "Employer in Hong Kong maid abuse case is sentenced to six years in jail" in *The Guardian* 27 February 2015.

- 11.5 Section 84 of the Criminal Procedure Ordinance gives a Court the power to make restitution orders against a person convicted of an indictable offence, requiring him/her to restore property found in his/her possession to the person entitled to them. This may be applicable where the trafficker convicted, is in possession of the victim's identity documents or money.

### **Employees' Compensation Ordinance**

- 11.6 To the extent that the victim of trafficking is involved in an employee/ employer relationship with the trafficker, employment compensation legislation in Hong Kong may be utilised.
- 11.7 The Employees' Compensation Ordinance establishes a compensation system for employees for injuries sustained at work. Even if the victim was an illegal worker, the tribunal will treat the matter as if the person had been working under a valid contract of employment provided the work itself was lawful and not morally or criminally culpable.<sup>36</sup>

### **Pros and cons of alternatives**

- 11.8 The disadvantages of recovering loss through a civil action are the time taken, the possibility of a costs order, as well as the possibility of needing to bring another action to enforce the judgment. The disadvantages of recovering loss through a criminal action are the need to secure a conviction and the fact that in the cases where convictions have been imposed, no reparation orders have been made. An advantage of these avenues is that the amount recoverable is not capped and the amount recoverable in damages is potentially higher than the compensation limit under the CLEIC Scheme.

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<sup>36</sup> *Employee's Compensation Ordinance* (Hong Kong) Cap 282, reg 2(2).

## APPENDIX

### Criminal and Law Enforcement Injuries Compensation Scheme Payment Schedule (For incidents occurring on or after 1.4.2015)

<i>Type of payment grant in respect of death or personal injury</i>	<i>Level of grant (HKD)</i>	<i>Condition of grant</i>
1. <b>Burial grant</b>	<b>\$13,940</b> per person.	If the burial expenses were paid, whether in full or in part, by Government (such as under the Comprehensive Social Security Assistance Scheme) or by one of the charitable funds, the amount of grant shall be reduced by the amount of such payment.
2. <b>Death grant</b>		
(a) Loss of sole wage earner where there are dependants.	<b>\$143,700</b> for one surviving dependent family member plus <b>\$11,980</b> for each additional surviving dependent family member, up to a maximum of <b>\$203,600</b> .	If the beneficiary is an adult who is mentally unsound or found unconscious or is a minor without surviving parent/legal guardian, payments will be made on the advice of the Social Welfare Department.
(b) Loss of a wage earner but there are dependants and another wage earner(s) remaining in the family.	<b>\$71,850</b> for one surviving dependent family member plus <b>\$11,980</b> for each additional surviving dependent family member, up to a maximum of <b>\$131,750</b> .	
(c) Loss of a parent who was not a wage earner but there are children under 15 years of age.	<b>\$71,850</b> for one surviving child under 15 plus <b>\$11,980</b> for each additional surviving child under 15, up to a maximum of <b>\$131,750</b> .	
3. <b>Disability grant</b>	From <b>\$172</b> up to a maximum of <b>\$172,440</b> based on the First Schedule or Section 9(1)(b) of Employees' Compensation Ordinance, Cap. 282 of the Laws of Hong Kong; abated to 2/3 for persons aged 60 and over.	
4. <b>Injury grant</b>	From <b>\$667</b> up to a maximum of <b>\$55,540</b> depending on gravity of injury.	<p>The amount is assessed according to the number of days of sick leave/hospitalization. The maximum is 180 days.</p> <p>Injury grant is payable where the injury period is 7 days or more before death.</p> <p>Injury grant should cease from the date on which the victim becomes eligible for the disability grant, or upon the death of the victim.</p>

5. <b>Interim maintenance grant</b>	From <b>\$399</b> up to a maximum of <b>\$71,880</b> .	The amount is assessed according to the number of days of sick leave/hospitalization. The maximum is 180 days. Interim maintenance grant is payable to a wage earner suffering loss of earnings as a result of incapacity to work, or to a non-wage-earning parent with a child under 15 years of age. Payment of interim maintenance grant should cease upon the death of the victim.
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# FRANCE

## 1. EXECUTIVE SUMMARY

- 1.1 France is a destination for victims of human trafficking and recently also became an important transit destination. Most victims are trafficked for sexual exploitation with the number of sex workers in France estimated to be between 20,000 to 40,000, 90% of whom come from foreign countries.<sup>1</sup> The number of minors trafficked in France has increased in recent years through sex work, forced begging and theft.<sup>2</sup>
- 1.2 The Trafficking in Persons Report prepared by the US Department of State concludes that France is fully compliant with the minimum standards for the elimination of trafficking.<sup>3</sup> Human trafficking was introduced as a specific criminal infringement in the French legal framework in 2003 and France continually works on strengthening the relevant provisions in order to ensure compliance with subsequent international treaties and European directives.
- 1.3 Several organizations specialise in the protection and care of trafficking victims. Through the "Office Central pour la Répression de la Traite des Êtres Humains" ("**Central Office for Fighting against Human Trafficking**") ("**OCRTEH**"), France has an efficient and specialised service in the fight against trafficking. In 2014, the French government adopted a national plan to address the human trafficking issue through better identification of, and assistance to, victims and the dismantling of human trafficking networks.
- 1.4 In France, trafficking victims have a civil cause of action equivalent to a tort action. In other words, the victim may bring a civil action before the criminal court, which will decide on reparation after it has decided on the defendant's criminal liability.<sup>4</sup> A case law review suggests that this is the most common approach. One explanation for the prevalence of this approach is that the alternative, a civil action introduced separately from related, on-going criminal proceedings, would force the civil judge to suspend the civil proceedings until the criminal court issues its judgment. Furthermore, by filing a civil action as part of the criminal proceedings, the victim has access to at least part of the criminal case file, which may be useful in proving the victim's own case.
- 1.5 However, a civil action before ordinary courts (civil or criminal) can sometimes be an insufficient remedy for victims in cases where alleged offenders have not been arrested, identified or are insolvent. Indeed, whether the victim goes before civil or criminal courts, an action in damages will often require the defendant to be found guilty or liable, as the case may be.
- 1.6 To address this inadequacy, France set up the Commission d'indemnisation des victimes d'infractions (Commission for the Compensation for Damages of Victims of

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<sup>1</sup> Plan d'action national contre la traite des êtres humains, 2014-2016, Ministère des Droits des Femmes, de la Ville, de la Jeunesse et des Sports.

<sup>2</sup> United States of State Department, 'Trafficking in Persons Report July 2015' (2015) <http://www.state.gov/j/tip/rls/tiprpt/2015/>.

<sup>3</sup> Ibid.

<sup>4</sup> *Code de procédure pénale* [Code of Criminal Procedure] (France) art 2.

Criminal Offences) (the "**CIVI**"), which may, under certain conditions, award compensation in circumstances where the offender is not identified or is insolvent.

## 2. PRELIMINARY ISSUES

### Framework for anti-trafficking in the jurisdiction

#### 2.1 International conventions/treaties the State has ratified:

Treaty	Signed/Ratified? (S, R or No)
UN Convention against Transnational Organised Crime (Transnational Organised Crime Convention)	R
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)	R
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	R
Forced Labour Convention 1930 (ILO No 29)	R
Abolition of Forced Labour Convention 1957 (ILO No 105)	R
Worst Forms of Child Labour Convention 1999 (ILO No 182)	R
Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956	R
UN Convention on the Rights of the Child	R
UN Convention on the Elimination of all forms of Discrimination against Women	R
UN Covenant on Civil and Political Rights	R
Other regional instruments <ul style="list-style-type: none"> <li>- Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005</li> <li>- European Directive 2011/36/UE of 5 April 2011 preventing and combating trafficking in human beings</li> </ul>	R

#### 2.2 Domestic legislation on human trafficking:

2.2.1 The general offence of trafficking in persons is primarily regulated by Articles 225-4-1 to 225-4-9 of the French Criminal Code. Articles 225-4-1 and 225-4-2 prohibit all forms of trafficking in persons: it is an offence to hire, transport, transfer or host a person for a purpose of exploitation by means of threat, violence, abuse of a situation of vulnerability, or for remuneration.

- 2.2.2 The term exploitation is defined as putting at one's disposal the victim in order to permit the commission against the victim of offences of procurement, aggression or sexual abuse, enslavement, submission to forced work or begging, or impose working conditions inconsistent with human dignity or force the victim to commit offences.
- 2.2.3 Through Law no. 2013-711<sup>5</sup>, which implements the European directive of 5 April 2011,<sup>6</sup> the French Criminal Code now specifically prohibits:
- 2.2.3.1 slavery (meaning the act of exercising ownership rights against a person) and the exploitation of persons subject to slavery, be it sexual assault, forced labour/service or sequestration,<sup>7</sup> both crimes being punishable by 20 to 30 years imprisonment (if committed against specific persons such as minors or the vulnerable);
  - 2.2.3.2 forced labour, that is, forcing a person, by means of violence or threat, to work without salary or with a salary which is patently disproportionate compared to the importance of the work;<sup>8</sup> and
  - 2.2.3.3 servitude, which prohibits forced labour committed habitually against vulnerable persons specifically.<sup>9</sup>
- 2.2.4 The French Criminal Code also includes specific provisions relating to:
- 2.2.4.1 pimping and related offences (pimping of minors or vulnerable persons);<sup>10</sup>
  - 2.2.4.2 the exploitation of begging;<sup>11</sup> and
  - 2.2.4.3 subjecting a vulnerable person to work or living conditions which are contrary to the human dignity of that person.<sup>12</sup>
- 2.2.5 The penalty for human trafficking offences ranges from 5 years to life imprisonment and fines from 150,000€ to 4,500,000€, depending on the presence of aggravating factors (for instance, if the victim is minor, or if acts of torture or barbarism were committed).
- 2.2.6 If the offender offence is punished by a longer imprisonment sentence than the one provided under the general offence of trafficking in articles 225-4-1 to 225-4-3 of the Criminal Code, the longer sentence applies.

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<sup>5</sup> Passed 5 August 2013

<sup>6</sup> European directive 2011/36 of 5 April 2011 relating to human trafficking

<sup>7</sup> *Code pénale* [Criminal Code] (France) art 224-1A to 224-1C.

<sup>8</sup> *Ibid* art 225-14-1.

<sup>9</sup> *Ibid* art 225-14-2.

<sup>10</sup> *Ibid* art 225-5 to 225-12-4.

<sup>11</sup> *Ibid* art 225-12-5 to 225-12-7.

<sup>12</sup> *Ibid* art 225-13 to 2.25-16.

- 2.2.7 This law also provides that the general offence of human trafficking set out in articles 225-4-1 and 225-4-2 of the French Criminal Code applies to French residents when the offence is perpetrated in a foreign country whether or not the local foreign law prohibits the relevant behaviour or the victim has filed complaint.<sup>13</sup>

### Alignment with international definitions

- 2.3 As a consequence of Law no. 2013-711 which introduced a definition for the offence of enslavement and provided that pressure, vulnerability or abuse of authority constitute offences, the French legal framework now complies with all current international and European definitions.

## 3. BASIS OF STATUTORY COMPENSATION

- 3.1 Victims of human trafficking offences set out in Articles 224-1 A to 224-1 C (reduction to slavery and exploitation), 225-4-1 to 225-4-5, 225-14-1 and 225-14-2 (forced labour and reduction to servitude) of the French Criminal Code may have a right to statutory compensation by the Commission for the Compensation for Damages of Victims of Criminal Offences ("**CIVI**").
- 3.2 The CIVI was established in 1977 and was significantly amended in 1990. Relevant provisions are set out in *the Code of Criminal Procedure*, at Articles 706-3 *et seq.*
- 3.3 The CIVI is a commission located within each Civil Court ("*Tribunal de Grande Instance*") with the purpose of compensating the damage suffered by the victims of certain criminal offences when sufficient compensation cannot be provided by the perpetrator of the offence, the insurance company or social security. This commission comprises two judges of the Civil Court and a French national, all instructed by the general assembly of the judges of the Civil Court for a three-year period. Compensation is supported by the Guarantee Fund of Victims of Terrorism and Other Offences ("**Guarantee Fund**"), which is funded by contributions levied on property insurances subscribed by French nationals.
- 3.4 An application can be submitted to the CIVI by the victim during, after or in conjunction with any other legal proceedings. However, if the criminal court reaches a final determination before the CIVI, the decision of the criminal court will be binding upon the CIVI.

## 4. TYPE OF SCHEME

- 4.1 The compensation scheme is not specific to victims of human trafficking, although it does specifically include human trafficking offences within its scope. It covers all forms of injuries resulting from an infringement, subject to the following requirements:
- 4.1.1 the cause of the damage may not be an offence related to a car accident, hunting accidents, or terrorism, which are all subject to special indemnification regimes;
- 4.1.2 the offence must be a criminal offence against persons (as opposed to offences against property, subject to some exceptions) which either:

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<sup>13</sup> Ibid art 225-4-8.



- 4.1.2.1 resulted in death, permanent impairment, or a total incapacity to work for a period of at least one month;
  - 4.1.2.2 is a sexual offence punished by arts. 222-22 to 222-30 or 227-25 to 227-27 of the Penal Code (rape, sexual aggression, or sexual assault on a minor of 15 years); or
  - 4.1.2.3 is a human trafficking offence punished by arts. 224-1 A to 224-1 C, 225-4-1 to 225-4-5, 225-14-1 and 225-14-2 of the Penal Code.
- 4.1.3 the offence must have been committed:
- 4.1.3.1 in France, in which case the following persons may submit an application:
    - (a) a French national;
    - (b) a national of an EU Member State; or
    - (c) a legal resident in France (at the time the offence was committed or on the date of the application); or
    - (d) abroad, in which case only a French national may seek compensation before the CIVI.
- 4.1.4 the victim must not already have been compensated for his or her damage: amounts that may have been received by the victim from social security or private insurance or other sources may reduce the compensation the CIVI grants;
- 4.1.5 the victim must not have contributed to the damage suffered, in which case the CIVI may reduce or even exclude compensation; and
- 4.1.6 the victim may seek complete reparation, which means there is no legal cap on the amount the CIVI may grant.

## 5. ELIGIBILITY

### Eligible victims

- 5.1 Both the primary victim, and any other person who has suffered personal damage resulting from the damage suffered by the primary victim, are eligible to file a compensation claim. The French notion of indirect victim ("*victime par Ricochet*") covers persons who have a strong emotional bond with the primary victim as well as those who have relations of interest with him or her (creditors, for instance). The primary victim is the party who personally and directly<sup>14</sup> suffered damage that is certain and legitimate.

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<sup>14</sup> *Code de procédure pénale* [Code of Criminal Procedure] (France) art 2.

- 5.2 Indirect victims are able to apply in two situations:
- 5.2.1 where the primary victim is still alive and the damage directly suffered by the primary victim has caused psychological injury to near relations (for example, the injury consists of sexual abuse which has caused moral damage to the family of the victim); and
  - 5.2.2 where the death of the primary victim has caused physical damage to one of his or her near relations.
- 5.3 It does not appear that indirect victims must reside in the jurisdiction to claim compensation.
- 5.4 Individuals residing outside France, if they have legal capacity according to their national law, are able to conduct an action in compensation before a French Court,<sup>15</sup> provided the offence occurred on French territory.<sup>16</sup>

### **Types of injuries recognised**

- 5.5 Both physical and psychological injuries are recognised. The existence of an injury supposes that the victim finds him or herself worsened as a result of the event that generated the damage.
- 5.6 Victims of offences set out and punished by articles 225-4-1 to 225-4-5 (trafficking in human beings), 224-1 A to 224-1 C (abduction and illegal restraint) and 225-14-1 and 225-14-2 (work and living conditions which infringe human dignity) of the Criminal Code are eligible for statutory compensation regardless of any further condition relating to the level of damage/injury sustained.

### **Jurisdictional requirements**

- 5.7 As set out above, the offence must have been committed:<sup>17</sup>
- 5.7.1 in France, in which case the following persons may submit an application:
    - 5.7.1.1 a French national;
    - 5.7.1.2 a national of an EU Member State; or
    - 5.7.1.3 a legal resident in France (at the time the offence was committed or on the date of the application); or
  - 5.7.2 abroad, in which case only a French national may seek compensation before the CIVI.
- 5.8 Article 225-4-8 of the French Criminal Code provides that when the offences of human trafficking are committed or suffered outside the French territory by a French individual, French law is applicable.

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<sup>15</sup> Giudicelli et al, *Responsabilité civile et infraction pénale* Œuvre collective sous la direction de Philippe le Tourneau – 2014).

<sup>16</sup> *Code de procédure pénale* [Code of Criminal Procedure] (France) art 706-3.

<sup>17</sup> *Ibid* art 706-3 3°.

### **Exclusions on grounds of illegal or immoral behaviour**

- 5.9 There are certain exclusions to entitlement associated with the victim's conduct.
- 5.10 First, the damage must be legitimate. This means that the victim will not be compensated when the damage in question does not deserve compensation under the law. For instance, the damage will not be considered as legitimate where the victim seeks compensation for the loss of illicit revenues.<sup>18</sup> French courts adopt a case by case approach.
- 5.11 Compensation can also be rejected, or its amount reduced proportionally, if the victim is at fault.<sup>19</sup> The commission of the offence and the fault of the victim do not have to be simultaneous but a causal link must be established between the two.

### **Time-limit for application**

- 5.12 An application to the CIVI must be submitted within three years from the date of the offence. This limit is subject to a one-year extension after the date of the last final ruling of the criminal court on the public prosecution or on the civil action for compensation.
- 5.13 The CIVI is entitled to extend this time limit where the applicant was not in a position to enforce his or her rights within the time limit, or when the harm he or she suffered has become worse, or for other legitimate reasons.

### **Requirements for referral, reporting and cooperation**

- 5.14 The victim is required to provide relevant evidence to establish his or her case within the application filed to the CIVI. It is not compulsory for the victim to have previously reported the offence, but highly recommended. The application must include:
- 5.14.1 the name, date and place of birth and residence of the applicant;
  - 5.14.2 the date, place and circumstances of the offence that caused the injury;
  - 5.14.3 the injuries sustained by the victim and/or applicant or the damage caused to his or her property;
  - 5.14.4 the criminal court before which the offence may be brought;
  - 5.14.5 the family relationship or factual or legal relationship between the applicant and the person who personally suffered injury if they are not the same person;
  - 5.14.6 any other source of insurance or compensation that the applicant is eligible for that will provide partial or full compensation for injuries suffered;
  - 5.14.7 any previous claims for compensation or damages already submitted and, if successful, money received;

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<sup>18</sup> Civ. 2ème 24 January 2002.

<sup>19</sup> *Code de procédure pénale* [Code of Criminal Procedure] (France) art 706-3. .

- 5.14.8 the amount of the damages claimed before the CIVI; and
  - 5.14.9 the applicant's address for notifications.
- 5.15 It is in the interest of the victim to fully cooperate with the CIVI by providing all the documents required.

## 6. APPLICATION PROCESS

- 6.1 The application begins with the submission by the injured party, or his or her legal representative or counsel, of a signed application. It should be submitted to the secretary of the territorially competent commission (the CIVI of the civil court of the defendant's place of residence or the criminal court responsible for investigating or judging the offender) who issues a receipt. The application must include the details set out above, as well as all information relevant to the investigation and any evidence. The victim must calculate the claim amount or request for an expert to assess it.
- 6.2 A form is available on the website of the Ministry of justice and can be used to submit an application for compensation.<sup>20</sup>
- 6.3 Out-of-court phase: once submitted to the CIVI, the application is transmitted to the Guarantee Fund. The Fund must then, if the applicant is eligible, present an offer of compensation to the victim within two months after the filing of the application. Any refusal of the CIVI to present an offer must be justified. The compensation offer is ratified if the CIVI and the applicant reach an agreement. It is then enforceable.
- 6.4 Adversarial procedure: if no agreement can be reached on the amount of compensation, the victim and the Guarantee Fund submit their respective positions to the CIVI. The CIVI issues a final decision. This decision is subject to appeal before ordinary courts of appeal within one month of notification.<sup>21</sup> The president of the commission may grant one or more interim payments at any stage of the proceedings, the ruling has to be made within one month of the application for an interim payment.
- 6.5 The commission or its president may:<sup>22</sup>
- 6.5.1 carry out or oversee the carrying out of any appropriate hearings and investigation; professional secrecy may not be raised against them;
  - 6.5.2 request any person or administration to communicate information about the professional, financial, fiscal or social situation of the persons liable to answer for the damage caused by the offence or of the applicant; and
  - 6.5.3 request any state service, public body, social security institution, benefit agency or insurance company liable to indemnify all or part of the damage, to communicate information in respect of their eventual obligations.

<sup>20</sup> Forms can be found here: [https://www.formulaires.modernisation.gouv.fr/gf/cerfa\\_12825.do](https://www.formulaires.modernisation.gouv.fr/gf/cerfa_12825.do).

<sup>21</sup> French Ministry of Justice, *The commission on compensation for damages of victims of criminal offences*, t <<http://www.vos-droits.justice.gouv.fr/indemnisation-du-prejudice-11940/indemnisation-par-le-tribunal-11949/la-commission-dindemnisation-des-victimes-dinfraction-20242.html>>.

<sup>22</sup> *Code de procédure pénale* [Code of Criminal Procedure] (France) art 706-6. .

## Evidence

- 6.6 The applicant must be able to show that they are a victim of a relevant offence and that they have sustained a physical or psychological injury. All supporting documents are filed together with the initial application. The case will be investigated by CIVI.

## Hearing and representation

- 6.7 The victim has the choice of whether or not to be represented by a lawyer. Where the "adversarial procedure" is applied, the hearing takes place and the decision is made in chambers. During the hearing, the judge responsible for the investigation provides his or her report. The applicant and the Fund, if they are present or represented, are then heard by the public prosecutor who presides over the hearing.

## Standard of proof

- 6.8 Offences may be proved by any mode of evidence and the judge decides according to his or her innermost conviction. The judge may only base his or her decision on evidence which was submitted in the course of the hearing and discussed between the parties before the judge.<sup>23</sup>

## Costs

- 6.9 There are no costs imposed upon applicants by CIVI, although there may be costs involved in collecting evidence.

## 7. ASSESSMENT OF COMPENSATION

- 7.1 Primary victims are able to access compensation for economic loss, physical and psychological injuries. The fault of the victim is taken into account and may reduce the final amount of the compensation. If the victim is French, or if the facts were committed on French territory, the principle of integral compensation<sup>24</sup> applies: the victim must be compensated for the whole damage, but no more.
- 7.2 The victim may also be awarded damages in addition to compensation for loss. The amount of damages is determined by the judge by application of the principle of sovereign discretion (*Principe de l'appréciation souveraine des juges du fond*)<sup>25</sup>. In practice, the judge regularly refers to the "Dintilhac" nomenclature, which is an unofficial document prepared by a specific Commission to the request of the Cour de cassation (which is the higher Court in France) and which assesses the cost of each head of damage. Otherwise, various elements are taken into account in the assessment of the compensation. They range from the victim's medical costs, to his or her loss of revenues and the *pretium doloris* (reparation for the victim's suffering). For instance, the compensation of victims of forced work ranges, on average, from €10 000 to €70 000.<sup>26</sup>

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<sup>23</sup> Ibid art 427.

<sup>24</sup> Ibid art 706-3.

<sup>25</sup> Civ. 23 May 1911

<sup>26</sup> Rapport concernant la mise en œuvre de la Convention du Conseil de l'Europe sur la lutte contre la traite des êtres humains en France, GRETA, 28 January 2013.

- 7.3 A non-overlapping of damages rule must be observed by the judge as he or she calculates the amount of damages.<sup>27</sup> Thus he or she must take into account the following:
- 7.3.1 any allowances paid by organisations, institutions and services managing a compulsory social security regime and by those mentioned in articles 1106-9, 1234-8 and 1234-20 of the Rural Code;
  - 7.3.2 any allowance listed under point II of article 1 of legislative order n° 59-76 of 7 January 1959 governing actions for civil indemnification against the State and certain other public bodies;
  - 7.3.3 any sums paid out for the refund of medical treatment and rehabilitation expenses;
  - 7.3.4 any salaries or benefits paid by the employer during the period of inactivity following the event which caused the damage; and
  - 7.3.5 any daily allowances for illness and invalidity benefits paid by mutual associations governed by the Mutual Insurance System Code.
- 7.4 The judge also takes into account indemnities of any kind received or to be received from other persons responsible for the damage.
- 7.5 There is potential for review of the damages granted where the court ruling on the civil claims has granted higher compensation than the one granted by the commission. In this case the victim can apply for further compensation within one year from the day when the decision of the court became final.
- 7.6 The president of the commission may grant one or more interim payments at any stage of the proceedings if:
- 7.6.1 the right of the applicant to compensation is not challenged; and
  - 7.6.2 the damage of the applicant cannot yet be determined because the entire sum cannot be calculated or because the social institutions have not yet disclosed the amount that will be allocated to the victim.
- 7.7 The ruling has to be made within one month of the application for an interim payment. Due to the principle of integral compensation, there is no cap on the amount of compensation, other than the damage suffered.

## **8. BARRIERS / OBSTACLES**

- 8.1 According to Article 15 of the Council of Europe Convention on Action against Trafficking in Human Beings, the compensation of victims must be effective. As traffickers are often insolvent, this implies that states must guarantee that compensation. CIVI has been set up for that purpose. Despite this, there remain a number of barriers and obstacles for victims of human trafficking to obtain compensation

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<sup>27</sup> *Code de procédure pénale* [Code of Criminal Procedure] (France) art 706-9.

- 8.2 In 2014, French authorities conducted 204 criminal investigations for sex trafficking. In 2013, they obtained convictions for 127 offenders under article 225-4-2 of the French Criminal Code, a significant increase compared to 17 in 2012.<sup>28</sup> However, at the time of writing it was not possible to discover whether compensation had been granted to victims of human trafficking.

### **Accessibility**

- 8.3 Various factors may limit the accessibility of the compensation scheme to trafficking victims. First, victims must be aware of the existence of a compensation procedure and, more importantly, of the way to access it. While websites provide explanations of the different steps required to bring an action to court, these websites are only in French, limiting the accessibility of the scheme to non-French speakers.
- 8.4 Some effort has been made to remedy this: when victims contact the police, the police are under an obligation to inform the victim of their rights to compensation and to be supported by an association.<sup>29</sup> The court also has to notify the victim of the option to refer the case for compensation of the victims of crime.
- 8.5 Access to the scheme is also limited in time. These timeframes may sometimes be difficult to meet for someone who has suffered trauma, which is often the case with trafficking victims. The risk of immediate deportation of foreign victims is, however, addressed as suspected victims have a 30-day reflection period to decide whether to cooperate with the police and enjoy a residence permit.<sup>30</sup>
- 8.6 For a number of reasons, including fear, stigma, lack of awareness, victims may not enforce their rights. The requirement to report the crime to the police may be dissuasive for victims as most come from foreign countries and may not be in possession of a valid visa. In its national plan, the French government outlines proposed measures to encourage trafficking victims to lodge complaints. The support and assistance of NGOs can be critical.
- 8.7 As trafficking victims may seek compensation through a general civil action or the CIVI, accessing the scheme is not dependent on the identification of the alleged offender.

### **Awareness**

- 8.8 The national anti-trafficking action plan recently adopted by France against human trafficking involves increasing the awareness of both the general public and potential targets, such as soldiers. Awareness of human trafficking in France is currently low, which limits the ability to identify and assist victims of trafficking. The national action plan includes the launch of a national information campaign aimed at raising awareness of the various forms of human trafficking. It also outlines a collaboration

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<sup>28</sup> United States of America State Department, above, n 2.

<sup>29</sup> *Code de procédure pénale* [Code of Criminal Procedure] (France) art 75.

<sup>30</sup> *Dècret n° 2007-1352 du 13 Septembre 2007* [Decree No 2007-1352 of 13 September 2007] (France) art R 316-2.

with airports and train stations to inform individuals entering the national territory of the French fundamental rights.<sup>31</sup>

### Legal aid

- 8.9 In France, trafficking victims are entitled to legal aid. Such aid is granted to individuals whose resources do not allow them to enforce their rights and who satisfy the criteria of nationality or lawful residency.<sup>32</sup> Non-governmental organizations or associations also assist or support trafficking victims during legal proceedings.<sup>33</sup>

### Protection of victim's identity

- 8.10 French law provides a framework that helps protect the victim's identity before, during and after the legal proceedings.<sup>34</sup> Hearings before the CIVI are not public.

### Access to services

- 8.11 The Ministry of Social Affairs, the Ministry of Health and the City of Paris fund the Ac-Se system. Ac-Se is an NGO-managed network of fifty NGO-run shelters assisting trafficking victims. It assisted 70 trafficking victims in 2014, providing them with shelter, legal, medical and psychological services.<sup>35</sup> It also operates a hotline for victims. In 2014 it received approximately 900 calls.<sup>36</sup> Local governments also offer victims French language classes as well as job training programs.

### Legal

- 8.12 Foreign victims must also be lawfully present in the country in order to make a compensation claim, which may preclude many undocumented trafficked victims from being able to apply. Under Article L. 316-1 of the Code of Entry and Residence of Aliens and Right of Asylum (CESEDA), a temporary residency permit is granted to foreigners taking action or testifying in legal proceedings involving human trafficking. Foreign trafficking victims are also eligible for a Temporary Waiting Allocation (TWA).<sup>37</sup> Finally, victims are, on request, welcomed in accommodation and social rehabilitation centres.<sup>38</sup>
- 8.13 Victims of human trafficking are not, however, immune from prosecution for illegal acts.

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<sup>31</sup> Mme Najat Vallaud-Belkacem, Minister for Women's Rights, Cities, Youth and Sport, *National Plan of Action against Trafficking in Human Beings 2014 – 2016* (Presented at the National Day of Commemoration of the Abolition of Trafficking and Slavery, 14 May 2014) <[http://contrelatraitement.org/spip.php?page=article&id\\_article=543](http://contrelatraitement.org/spip.php?page=article&id_article=543)>.

<sup>32</sup> Rapport concernant la mise en œuvre de la Convention du Conseil de l'Europe sur la lutte contre la traite des êtres humains en France, GRETA, 28 January 2013.

<sup>33</sup> Ministry of Justice, Criminal policy circular dated 22 January 2015 on the fight against human trafficking.

<sup>34</sup> Ministry of Justice, Criminal policy circular dated 22 January 2015 on the fight against human trafficking.

<sup>35</sup> United States of America State Department, above, n 2.

<sup>36</sup> United States of America State Department, above, n 2.

<sup>37</sup> *Code du Travail* [Labour Code] (France) art R. 5423-19.

<sup>38</sup> *Code de l'action sociale et des familles* [Family and Social Action Code] (France) art L. 345-1.



## 9. EXAMPLES IN PRACTICE

- 9.1 Decisions rendered by the CIVI are not public. Accordingly, examples are not readily available.

## 10. SUGGESTIONS FOR IMPROVEMENT

- 10.1 In terms of compensation, a number of the barriers outlined above could be addressed to ensure the specific circumstances faced by trafficking victims do not prevent them from accessing compensation. This includes:
- 10.1.1 removing the requirement to contact and cooperate with police;
  - 10.1.2 providing information in a variety of languages and providing interpreters to assist with completing application;
  - 10.1.3 removing the requirement that victims be lawfully within the country;
  - 10.1.4 ensuring trafficking victims are not automatically precluded from compensation on the basis that they committed crimes or colluded with their traffickers in any way.
- 10.2 Implementation of the national action plan has been slow. One of the elements of the plan that seems to be critical to achieving progress in the fight against human trafficking is the establishment of a national rapporteur. Following this, France should keep on improving victims' access to compensation and increase investigations, prosecutions and convictions for human trafficking.<sup>39</sup> According to the US Department of State's Trafficking in Persons Report 2015, increasing prison terms against offenders should be prioritized. Finally, regarding victims' assistance, efforts should be made to increase Ac-Se's capacity to provide rapid responses to victim noting that in 2014, victims had to wait seven days to access a shelter.<sup>40</sup>

## 11. ALTERNATIVES TO STATUTORY COMPENSATION SCHEMES

- 11.1 Judicial actions are an alternative to the statutory compensation schemes. The victim of a criminal offence has a civil cause of action equivalent to a tort action. A fundamental principle of civil law is that a person who causes another person damage as a result of an unlawful act, which may be a criminal offence, is liable to that other person<sup>41</sup>.
- 11.2 However, a civil action introduced separately from related, on-going criminal proceedings would force the civil judge to suspend the civil proceedings until the criminal court issues its judgment.
- 11.3 Therefore, in the context of human trafficking, if criminal prosecution is commenced, the victim will usually file an application to "join" the criminal proceedings to seek reparation. In other words, the victim may bring a civil action before the criminal court, which will decide on reparation after it has decided on the defendants' criminal

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<sup>39</sup> United States of America State Department, above, n 2.

<sup>40</sup> United States of America State Department, above, n 2.

<sup>41</sup> *Code Civil* [Civil Code] (France) art 1382.

liability<sup>42</sup>. From a review of the cases this appears to be the most common approach. Furthermore, by filing a civil claim as part of the criminal proceedings, the victim gains access to at least part of the criminal case file, which may be useful in proving the victim's own case.

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<sup>42</sup> *Code de procédure pénale* [Code of Criminal Procedure] (France) art 2.

# GERMANY

## 1. EXECUTIVE SUMMARY

- 1.1 Germany is a source, destination and transit country for human trafficking.<sup>1</sup> Victims are trafficked for sex work and forced labour.<sup>2</sup> In 2013, a total of 603 persons were identified as victims of human trafficking. Around 90% (542) of victims were trafficked for sex work,<sup>3</sup> and around 10% (61) for forced labour.<sup>4</sup> The majority of sex work victims come from Eastern Europe (70%) and are predominately female (96%),<sup>5</sup> whereas forced labour victims originate primarily from Southern Asia (60%) and Eastern Europe (20%).<sup>6</sup>
- 1.2 Germany organises, focuses and partially funds the work of non-profit NGOs that counsel victims and help to enforce their rights. In Germany, there is no scheme specifically designed for human trafficking victims; however, trafficking victims are able to apply for compensation under a general federal crime compensation scheme.<sup>7</sup> Under the crime compensation scheme victims must demonstrate that they were injured as a result of a "physical assault" (tätlicher Angriff) against themselves or any other person, within the territory of Germany or onboard a German vessel or aircraft.<sup>8</sup> Although, there are no statutes of limitation under the scheme, compensation might be denied if the victim did not report the offence immediately or did not fully cooperate with authorities.<sup>9</sup> Alternatively, victims might seek restitution in civil or criminal proceedings instead of claiming under the crime compensation scheme.
- 1.3 Victims of human trafficking may also be protected under the witness protection program. In practice, however, not many human trafficking victims are accepted under this program and there is an argument that the program is not well suited to human trafficking victims.<sup>10</sup> Some states, therefore, have adopted protection

<sup>1</sup> Bundesministerium für Familie, Senioren, Frauen und Jugend, *Human Trafficking* (12 October 2014) <<http://www.bmfsfj.de/BMFSFJ/gleichstellung,did=73022.html>>.

<sup>2</sup> Bundeskriminalamt, *Trafficking in Human Beings - National Situation Report 2013*, (2013) <[http://www.bka.de/nr\\_192960/EN/Publications/AnnualReportsAndSituationAssessments/TraffickingInHumanBeings/traffickingInHumanBeings\\_node.html?\\_nnn=true](http://www.bka.de/nr_192960/EN/Publications/AnnualReportsAndSituationAssessments/TraffickingInHumanBeings/traffickingInHumanBeings_node.html?_nnn=true)>; The statistics only encompass offences according to Section 232 and 233 of the German Criminal Code. Section 233 covers forced labour as well as domestic servitude and is not documented separately. Forced marriage is not included in these offences and therefore not included in these statistics as well.

<sup>3</sup> Bundeskriminalamt, *Trafficking in Human Beings - National Situation Report 2013*, (2013) 5 <[http://www.bka.de/nr\\_192960/EN/Publications/AnnualReportsAndSituationAssessments/TraffickingInHumanBeings/traffickingInHumanBeings\\_node.html?\\_nnn=true](http://www.bka.de/nr_192960/EN/Publications/AnnualReportsAndSituationAssessments/TraffickingInHumanBeings/traffickingInHumanBeings_node.html?_nnn=true)>

<sup>4</sup> Ibid 7.

<sup>5</sup> Ibid 5.

<sup>6</sup> Ibid 7.

<sup>7</sup> *Opferentschädigungsgesetz* [Act on compensation to victims of violent crimes (Crime Victims Compensation Act)] (Germany) 7 January 1985, 2009, OEG (Hereafter **OEG**).

<sup>8</sup> Ibid s 1.

<sup>9</sup> Ibid s 2.

<sup>10</sup> The last known numbers from 2004 show that only 2,1% of victims were protected under the witness protection program, see Bundeskriminalamt, *Trafficking in Human Beings - National Situation Report 2004*, (2004) 17 <[http://www.bka.de/nr\\_192960/EN/Publications/AnnualReportsAndSituationAssessments/TraffickingInHumanBeings/traffickingInHumanBeings\\_node.html?\\_nnn=true](http://www.bka.de/nr_192960/EN/Publications/AnnualReportsAndSituationAssessments/TraffickingInHumanBeings/traffickingInHumanBeings_node.html?_nnn=true)>

schemes specifically for human trafficking victims.<sup>11</sup> Unfortunately these protection schemes are not aimed at the regularisation of the victims' visa status, an inherent problem for victims from non-EU countries.<sup>12</sup>

## 2. PRELIMINARY ISSUES

### Framework for anti- trafficking in the jurisdiction

#### 2.1 International conventions/treaties the State has ratified:

Treaty	Signed/Ratified? (S, R or No)
UN Convention against Transnational Organised Crime (Transnational Organised Crime Convention)	R
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)	R
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	No
Forced Labour Convention 1930 (ILO No 29)	R
Abolition of Forced Labour Convention 1957 (ILO No 105)	R
Worst Forms of Child Labour Convention 1999 (ILO No 182)	R
Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956	R
UN Convention on the Rights of the Child	R
UN Convention on the Elimination of all forms of Discrimination against Women	R
UN Covenant on Civil and Political Rights	R
Other regional instruments <ul style="list-style-type: none"> <li>- Council of Europe Convention on Action against Trafficking in Human Beings 2008</li> <li>- Council Directive 2004/81/EC 29 April 2004 on the residence permit to third-country nationals who are victims of trafficking in human beings or who have</li> </ul>	R

<sup>11</sup> Solidarity with women in distress, *Trafficking & Law: 5.2 ways of witness protection*, <<http://www.solwodi.de/430.0.html>>.

<sup>12</sup> See *Aufenthaltsgesetz* [Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory] (Germany) 25 February 2008, BGBl. I S. 3556, 2013, s 25(4a) which allows victims of human trafficking a temporary stay in Germany. However, a reform is planned to enhance victims rights., see; *des Bundesministeriums des Innern, Entwurf eines Gesetzes zur Neubestimmung des Bleiberechts und der Aufenthaltsbeendigung* [Draft law on the new definition of the right of remain and the Termination of residence] (7 April 2014) <[http://www.gqua.de/fileadmin/downloads/gesetze/140407\\_Referentenentwurf\\_Gesetz\\_Neubestimmung\\_Bleiberecht\\_Aufenthaltsbeendigung-1.pdf](http://www.gqua.de/fileadmin/downloads/gesetze/140407_Referentenentwurf_Gesetz_Neubestimmung_Bleiberecht_Aufenthaltsbeendigung-1.pdf)>.

been subject to an action to facilitate illegal immigration, who cooperate with the competent authorities	
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## 2.2 Domestic legislation on human trafficking, including:

- 2.2.1 Human trafficking is primarily regulated by Chapter Eighteen of the German Criminal Code, particularly sections 232 to 237. Chapter Eighteen only applies to acts that occur after a person has been brought to Germany. A prerequisite of sections 232 and 233 is the exploitation by the perpetrator of the victim's predicament or helplessness arising from being in a foreign country. Penalties range from three months to ten years depending on aggravation. However, many convictions do not lead to prison sentences; most perpetrators are not sent to prison as it is established practice to suspend sentences of up to two years regardless of the nature of the offence.<sup>13</sup>
- 2.2.2 Other criminal offences relate to human trafficking charges, including chapter thirteen of the German Criminal Code which addresses offences against sexual self-determination. Furthermore, sections 95 and 96 of the Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory (Residence Act) include a penalty for the facilitation of illegal immigration.
- 2.2.3 There is no definition of human trafficking in the German Criminal Code. However, the criminal offences contained in Chapter 18 (particularly sections 232 to 237) were amended in 2005 to reflect the definition in the Palermo Protocol.

## 3. BASIS OF STATUTORY COMPENSATION

- 3.1 The statutory basis for compensation is the Crime Victims' Compensation Act ("OEG") and the Federal War Victims Relief Act ("BVG"). The compensation scheme is provided by the OEG while provisions from the BVG supply the legal framework for calculation of the compensation.
- 3.2 The scheme allows primary, secondary and related victims of a physical assault to access compensation for injuries suffered as a direct result of the crime.

## 4. TYPE OF SCHEME

- 4.1 The compensation scheme under the OEG applies generally to victims of particular criminal offences. It is not specific for victims of human trafficking and does not cover all victims of human trafficking. The scheme is limited as to who it seeks to protect. Persons from non-EU states are covered; however, they receive only a limited amount of compensation and are not eligible for certain categories of compensation.
- 4.2 To be eligible for compensation the applicant has to be the victim (primary, secondary or related) of an intentional, unlawful physical assault ("tätlicher Angriff"). "Physical assault" in this context means a forcible act upon the body of another

<sup>13</sup> Bundeskriminalamt, *Trafficking in Human Beings - National Situation Report 2010* (2010) <<http://www.state.gov/j/tip/rls/tiprpt/2010/142760.htm>>.

person.<sup>14</sup> Direct contact or a criminal conviction is not a prerequisite of a physical assault; the definition does not extend to victims exposed to psychological force.<sup>15</sup>

## 5. ELIGIBILITY

### Eligible victims

- 5.1 Primary, secondary and related victims are able to apply for compensation. A primary victim is a person who is directly injured by an act of violence committed against him or her. A secondary victim is a person who is present at the scene of an act of violence and is injured as a result of witnessing the act.<sup>16</sup> A related family member is a person who, at the time of the act of violence, was a close family member, or a dependent of, or had an intimate relationship with, a primary victim, who has died as a direct result of the violent act.<sup>17</sup> Therefore, only the family of deceased victims are able to apply. A victim does not have to reside in Germany to claim compensation.

### Personal Requirements

- 5.2 Generally, a victim needs to be:
- 5.2.1 a German citizen;
  - 5.2.2 a citizen of a member state of the European Union; or
  - 5.2.3 a foreign national legally residing in Germany,
- to be eligible for compensation.
- 5.3 For victims of human trafficking, it has been acknowledged that strict application of this regulation would lead to inequitable results. Therefore, with regard to victims of human trafficking, the status at the time of application is used as a fictional basis.<sup>18</sup> According to section 1(5) of the OEG, legal residence also includes cases where deportation has been suspended for legal or factual reasons or for reasons of important public interests. Therefore, victims of human trafficking from non EU member states can apply for compensation as long as they meet the requirements in section 25(4)(a) of the German Residence Act.
- 5.4 Depending on the residential status of the victim, compensation might vary according to section 1 (4)-(6) of the OEG.

<sup>14</sup> Prof. Dr. Olaf Deinert und Prof. Dr. FelixWelti, *StichwortKommentar Behindertenrecht*, (Dienert und Welti, 2014) recital 3.

<sup>15</sup> Bundessozialgericht [German Federal Social Court], B 9 VG 2/10 R, 7 April 2011; Bundessozialgericht [German Federal Social Court], B 9 VG 4/00 R, 14 February 2001; Bundessozialgericht [German Federal Social Court], B 9 VG 2/02 R, 2 February 2003. With the exception of an immediate and believable threat of force: Sabine Knickrehm, *Gesamtes Soziales Entschädigungsrecht*, (Nomos Kommentar, 2012); OEG s 1.

<sup>16</sup> Bundessozialgericht [German Federal Social Court], B 9 VG 1/00 R, 8 August 2001.

<sup>17</sup> Bundessozialgericht [German Federal Social Court], B 9 VG 8/01 R, 12 June 2003; und Bundessozialgericht [German Federal Social Court], B 9 VG 1/02 R, 12 June 2003; Bundessozialgericht [German Federal Social Court], B 9 VG 1/00 R, 8 August 2001; for recognition of 'shock damage', see also: circular from the Federal Ministry of Health, IV c 2-62039, 26 November 2002.

<sup>18</sup> Instruction by the Ministry for Labour and Social Order regarding inclusion of violence in connection with offences of human trafficking in women; see: Federal Ministry of Labour and Social Order, *Implementing the Law on the Compensation of Victims of Violent Crimes (OEG) (2001)* <[http://www.kok-gegen-menschenhandel.de/fileadmin/user\\_upload/OEG.pdf](http://www.kok-gegen-menschenhandel.de/fileadmin/user_upload/OEG.pdf)>.

### **Types of injuries recognised**

- 5.5 Under the OEG, physical as well as psychological injuries as a result of intentional, unlawful physical assault are recognised. The prerequisite for compensation (exceeding just expenses for medical care) is an ongoing medical condition which meets the minimum requirement set out in sections 31 and 32 BVG or loss of income caused by injury to health.

### **Jurisdictional requirements**

- 5.6 In general, the act of violence must have occurred in Germany. However, according to section 3(a) of the OEG, victims of crimes outside Germany can also be eligible if they are German nationals or legally residing foreigners living in German territory. They must not have spent more than six months outside of Germany at the time of the crime.

### **Exclusions on grounds of illegal or immoral behaviour**

- 5.7 Persons are not excluded on grounds of immoral behaviour. However, section 2(1) OEG excludes persons with certain risk associated behaviour or where the behaviour of the victim was the main cause or contributed to the injury.

- 5.8 Grounds for exclusion are:

- 5.8.1 participation in political fights, if the injury is related to these fights; or
- 5.8.2 participation in a war, if it is likely that the injury is related to the participation; or
- 5.8.3 being part of or having been part of an organised crime group or being part of an organisation that commits acts of violence, unless he can prove that the injury is not related to his participation.

### **Time limit for application**

- 5.9 There is no time limit for applications. However, if the application is not filed within one year after the crime, compensation will only be paid from the time the application was lodged, unless the applicant was not responsible for the delay.<sup>19</sup>

### **Requirements for referral, reporting and cooperation**

- 5.10 There is no requirement that the person be referred/officially identified as a victim of human trafficking. The authorities will determine whether the person has suffered an injury as a result of an act of violence.
- 5.11 The authorities can deny the application if the applicant fails to cooperate or report the crime without delay.<sup>20</sup>

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<sup>19</sup> Bundesversorgungsgesetz [Federal War Victims Relief Act] (Germany), 27 June 1960, BGBl. I S. 21, s 60(1). (Hereafter **BVG**).

<sup>20</sup> OEG s 2(2).

## 6. APPLICATION PROCESS

- 6.1 Applications are made to the competent local compensation offices in writing or orally. The use of a specific form is not necessary. However, the proceedings take place in German and the authorities can ask for a translation of any documents supplied in different languages.<sup>21</sup> Participation in the proceeding therefore might require an interpreter or other assistance for people who don't speak German.
- 6.2 The assessment of the application is on the papers, although may include a hearing in complex cases.
- 6.3 Given that compensation offices usually suspend the application process until a criminal proceeding has been finished, the process can take up to two years.

### Evidence

- 6.4 The compensation office is responsible for investigating the case meaning the applicant is not required to supply evidence. The standard of proof is the objective burden of proof,<sup>22</sup> meaning that the person making a claim has to prove that all prerequisites are met. Although, the compensation offices have to investigate the case, any failure to assist in the investigation may be detrimental to the applicant.
- 6.5 Compensation authorities can demand an affidavit affirming the truthfulness of the victims statement according to section 13 *KOVVfG* (Act on the administrative procedure for the War Victims relief).

### Assistance

- 6.6 The application procedure is free of charge; the state will, in some cases, provide financial assistance to consult a lawyer (Act on Advisory Assistance and Representation for Citizens with a Low Income). Assistance can also be obtained from non-profit organisations such as the *Weißer Ring e.v.* or the *DAV-Stiftung contra rechtsextremismus und Gewalt*.
- 6.7 State-funded legal aid is obtainable in court proceedings.

## 7. ASSESSMENT OF COMPENSATION

- 7.1 Under the *OEG*, compensation is not paid for damage to property, financial loss or damages for pain and suffering. The compensation scheme focuses on assisting crime victims beyond the scope of the general social security and social assistance schemes. Compensation benefits are granted according to the *BVG* and includes, but is not limited to:
- 7.1.1 medical and curative treatment including aids and appliances and rehabilitation measures according to sections 10 et seq. *BVG*.

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<sup>21</sup> *Verwaltungsverfahrensgesetz* [Administrative Procedure Act] (Germany) 25 May 1976, *VwVfG*, 2003, 23.

<sup>22</sup> *Bundessozialgericht* [German Federal Social Court], 10 RV 945/55, 24 October 1957.



- 7.1.2 entitlement to monthly pension payments in case of permanent health damage; Payments range from €132 to €693 per month depending on the degree of health damage.<sup>23</sup>
- 7.1.3 entitlement to supplementary monthly pension payments if the health damage has an adverse effect on income. The amount is calculated according to section 30(3) *BVG* and amounts to 42.5 % of the income lost as an effect of the injury suffered.
- 7.2 In general, the compensation is not capped for crimes occurring within Germany. Under section 3(a) *OEG*, there are limitations on compensation in cases of crimes outside of Germany. Medical aid is not capped but no other compensation types mentioned above are available; instead victims are granted a one-time payment.
- 7.3 For victims with a right of residence (with a right of compensation according to section 1(4)- (6) *OEG*), compensation is calculated and capped according to section 1(7) *OEG* if they:
- 7.3.1 are expelled or deported;
- 7.3.2 have left Germany and their title of residence has expired; or
- 7.3.3 left Germany and did not enter Germany legally again within six months.
- 7.4 The amount of compensation is then calculated as a lump-sum payment. For every year of legal residence,<sup>24</sup> the victim receives three times the basic monthly pension for which he/she is eligible. The minimum amount is ten times the monthly basic pension and the maximum is 30 times the basic monthly pension regardless of the time spent in Germany.

## 8. BARRIERS / OBSTACLES

- 8.1 Compensation under the *OEG* is only available for victims or witnesses of a physical assault. Trafficking does not necessarily involve physical assault, although it may include psychological assault and trauma, meaning many victims may not qualify for compensation.
- 8.2 Second, the competent administrative bodies, lawyers and courts have little experience with *OEG* proceedings in relation to victims of human trafficking and the problems thereof.<sup>25</sup>
- 8.3 Depending on the compensation sought and factual basis of the case, the procedure for obtaining compensation can become complicated and may include court proceedings.<sup>26</sup> State funded legal aid can only be obtained for court proceedings.<sup>27</sup>

<sup>23</sup> These pensions can be modified according to; *BVG* s 31..

<sup>24</sup> Expanded on victims of human trafficking if they have a residence permit at the time of application as discussed above.

<sup>25</sup> Petra Follmar-Otto and Heike Rabe, *Menschenhandel in Deutschland: Die Menschenrechte der Betroffenen stärken 2009*, (2009) <[http://www.kok-gegen-menschenhandel.de/fileadmin/user\\_upload/medien/studien/studie\\_menschenhandel\\_in\\_deutschland.pdf](http://www.kok-gegen-menschenhandel.de/fileadmin/user_upload/medien/studien/studie_menschenhandel_in_deutschland.pdf)>

<sup>26</sup> Stiftung Erinnerung Verantwortung Zukunft & Deutsches Institut for Menschenrechte, *Entschädigung nach dem Opferentschädigungsgesetz und der gesetzlichen Unfallversicherung* (2013) 73 <[http://www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/Entschaedigung\\_nach\\_dem\\_Opferentschaedigungsgesetz\\_u\\_der\\_gesetzlichen\\_Unfallversicherung\\_Handreichung\\_fuer\\_Beratungsstellen.pdf](http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Entschaedigung_nach_dem_Opferentschaedigungsgesetz_u_der_gesetzlichen_Unfallversicherung_Handreichung_fuer_Beratungsstellen.pdf)>.

Legal advice outside of court proceedings may, in certain circumstances, be covered under the Advisory Assistance Act. However, both programs have narrow eligibility criteria. Although there are no administrative fees for applications under the scheme, costs may arise for copies or translations. These costs will sometimes be covered by non-profit NGOs supporting women and victims of human trafficking such as the KOK or the Weißer Ring e.V.<sup>28</sup>

- 8.4 Cases can also take a significant amount of time to resolve,<sup>29</sup> however, victims can obtain some interim services under the compensation scheme.<sup>30</sup>
- 8.5 In terms of privacy, although there are measures to identity protection within administrative procedures,<sup>31</sup> victims must participate in the prosecution of the perpetrators. Victim and witness protection in the course of criminal proceedings is possible, however, it is hard to obtain and generally not suited for victims of human trafficking.<sup>32</sup> For this reason some states have adopted special protection programs for victims of human trafficking.<sup>33</sup>

### Immigration and immunity

- 8.6 There are no provisions in the German Residence Act to legalise the residence of trafficking victims. Trafficked victims are granted a temporary residence permit for the duration of criminal proceedings provided the victims:
- 8.6.1 are willing to participate;<sup>34</sup>
  - 8.6.2 face an imminent danger to their life and limb; or
  - 8.6.3 face an imminent danger to their liberty in their country of origin.<sup>35</sup>
- 8.7 Victims of human trafficking are not generally immune from criminal acts that they have committed, such as illegally entering the country or illegal prostitution.
- 8.8 Pursuant to section 154(c) of the German Code of Criminal Procedure, the prosecution office can disregard misdemeanours committed while being under the influence of coercion or extortion.
- 8.9 Other defences under the German Criminal Code, such as duress and necessity under sections 34 or 35, are only available where the victim was unable to seek

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<sup>27</sup> Ibid66.

<sup>28</sup> See: KOK Bundesweiter Koordinierungskreis gegen Menschenhandel, Federal coordination group combating trafficking <<http://www.kok-gegen-menschenhandel.de/startseite.html>>; Weißer Ring, National Institute of Victim Protection Organisation in Germany, <<https://www.weisser-ring.de/internet/>>.

<sup>29</sup> Weisser Ring, *State Victim Compensation in Germany in 2013*, (2013) 2 <[https://www.weisser-ring.de/fileadmin/content/OEG-Statistik/OEG\\_Statistik\\_2013.pdf](https://www.weisser-ring.de/fileadmin/content/OEG-Statistik/OEG_Statistik_2013.pdf)>

<sup>30</sup> BVG, s 10(8).

<sup>31</sup> Stiftung Erinnerung Verantwortung Zukunft & Deutsches Institut for Menschenrechte, above n 26.

<sup>32</sup> Solidarity with Women in Distress, above n 11. '

<sup>33</sup> Ibid.

<sup>34</sup> *Aufenthaltsgesetz* [Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory] (Germany) 25 February 2008, BGBl. I S. 3556, 2013, s 25(4a)

<sup>35</sup> Ibid s 25(3).

assistance from state authorities and will therefore not be applicable in every case. Furthermore, both options rely on the victim's participation in persecution of the perpetrators. However, victims that are subject to deportation following prosecution may not have sufficient incentive to participate due to fear of retribution upon returning to their states of origin.

- 8.10 The narrow immunity regulation, as well as the strict regulations on residency, have been criticised for limiting victim's rights and hindering prosecution.<sup>36</sup>

## 9. EXAMPLES IN PRACTICE

- 9.1 It is difficult to source specific case studies. The OEG does not disaggregate data according to crimes.<sup>37</sup> NGOs that were consulted state that compensation is rarely sought and, in cases that have been supported by the NGOs, compensation was infrequently granted by the authorities.<sup>38</sup>

## 10. SUGGESTIONS FOR IMPROVEMENT

### Improvements to compensation scheme

- 10.1 One of the main barriers for victims of human trafficking regarding the current compensation scheme is the restriction of compensation to victims of an unlawful physical assault, thus excluding many trafficked victims. The scope of application should be broadened and should include all forms of human trafficking recognised under the Palermo Protocol.<sup>39</sup>
- 10.2 To combat the lack of information provided to persons involved, relevant groups need specialised instructions to promote awareness of the problems encountered by victims of human trafficking and the available compensation.<sup>40</sup>

### Improvements to the general system

- 10.3 There are several suggestions for improvements to the current system. The suggestions include reforms of the immunity statute for victims,<sup>41</sup> and a reform of the Residence Act to help victims legalise their residence and assist with their integration.<sup>42</sup> These reforms are necessary to enhance the compensation scheme as it makes access to compensation more likely.

<sup>36</sup> For immunity see: Solidarity with Women in Distress *Trafficking & Law: 5.4 Refraining from prosecution* <<http://www.solwodi.de/905.0.html?&L=1%252F>>; For residency see: Solidarity with Women in Distress *Trafficking & Law: 5.1 Victims of Trafficking in Immigration Law* <<http://www.solwodi.de/903.0.html?&L=1%252F>>.

<sup>37</sup> Petra Follmar-Otto and Heike Rabe, above n 25, 80.

<sup>38</sup> Petra Follmar-Otto and Heike Rabe, above n 25, 80. ; Solidarity with Women in Distress, above n 36.

<sup>39</sup> Ibid 81.

<sup>40</sup> Ibid; Federal State Working Group, *Working Paper on the standardization of training from and the offence of human trafficking for the purpose of sexual exploitation* (2007) <<http://www.kok-gegen-menschenhandel.de/uploads/media/StandardisierungvonAus-undFortbildungimBereichMenschenhandel.pdf>>

<sup>41</sup> Solidarity with Women in Distress, above n 36.

<sup>42</sup> Solidarity with Women in Distress, *Trafficking and Law: 5.1: Victims of Trafficking in Immigration Law*, <<http://www.solwodi.de/903.0.html?&L=1%252F>>; Petra Follmar-Otto and Heike Rabe, above n 25.

## Immunity

- 10.4 To further enhance cooperation of human trafficking victims SOLWODI, one of the NGOs engaged in helping victims of human trafficking, has recommended amending section 154(c) Code of Criminal Procedure. SOLWODI has recommended that the Prosecution be required to withdraw its prosecution if there is a reasonable suspicion that the person in question is a victim of human trafficking. Currently the decision not to prosecute or cease a prosecution is at the discretion of the Prosecution.<sup>43</sup>

## Residence status

- 10.5 As outlined above, victims are faced with deportation after prosecution has ended. Although pursuant to section 25(4)(a) of the Residence Act, it is possible to grant a residence permit on humanitarian grounds, the high standard of the prerequisites are rarely met. Further reform of the Residence Act is needed for victims of human trafficking, similar to the Italian T-Visa.<sup>44</sup> Amendments should include:
- 10.5.1 a temporary residence permit not linked to criminal proceedings and participation therein;
  - 10.5.2 a State controlled integration program for victims; and
  - 10.5.3 the possibility of a permanent residence permit.

## Stronger and more specific support for victims

- 10.6 NGOs such as SOLWODI also demand stronger and more specific support for victims of human trafficking.<sup>45</sup> This includes:
- 10.6.1 support for victims independent of participation in criminal proceedings;
  - 10.6.2 covering the cost for translations and interpreters; and
  - 10.6.3 reasonably secure and suited accommodations for victims.<sup>46</sup>

## 11. ALTERNATIVES TO STATUTORY COMPENSATION SCHEMES

### Civil Proceedings

- 11.1 A victim of human trafficking can initiate an action in tort according to the general provision sections 823(1) and 823(2) of the German Civil Code in connection with a criminal offence (for example false imprisonment, rape, and assault).

<sup>43</sup> Solidarity with Women in Distress, above n 36.

<sup>44</sup> Solidarity with Women in Distress, above n 42.; similar critic of the last reform see: KOK - Federal coordination group combating trafficking, *Short opinion of the COCs to Bill the federal government for the redefinition of the right to stay and the termination of residence* (2015) <[http://www.kok-gegen-menschenhandel.de/fileadmin/user\\_upload/medien/stellungnahmen/Kurzstellungnahme\\_zum\\_Gesetzesentwurf\\_zu\\_Bleiberecht\\_und\\_Aufenthaltsbeendigung\\_BR-Drs. 642\\_14\\_.pdf](http://www.kok-gegen-menschenhandel.de/fileadmin/user_upload/medien/stellungnahmen/Kurzstellungnahme_zum_Gesetzesentwurf_zu_Bleiberecht_und_Aufenthaltsbeendigung_BR-Drs. 642_14_.pdf)>.

<sup>45</sup> Solidarity with Women in Distress, *Trafficking and Law: 5.3 Services for Victims of Trafficking* <<http://www.solwodi.de/474.0.html?&L=1%252F>>.

<sup>46</sup> Which is a problem for victims eligible only for social services under the *German social welfare Law for asylum seekers*, see *Asylbewerberleistungsgesetz* [German social welfare law for asylum seekers] 30 June 1993, AsylbLG, 2006.

- 11.2 Victims can also bring an action for owed wages.

### **Criminal Proceedings**

- 11.3 A victim of human trafficking can also bring an action against an accused during criminal proceedings pursuant to section 403 and the following sections of the German Code of Criminal Procedure.

### **Pros and cons of alternatives**

- 11.4 There are several advantages to bringing actions either in civil or criminal proceedings rather than the statutory scheme. The amount of damages that are recoverable through these actions is not capped and unpaid wages as well as damages within the broad scope of section 249 and the following sections of the *German Civil Code* can be claimed. A primary advantage is that the scope of the action is not limited to cases of forcible acts on the victim's body, as it follows the general tort provisions. Furthermore, victims can apply for legal aid to finance the action and legal advice.
- 11.5 Disadvantages include the fact that they rely on the defendant having assets and a judgement against the perpetrator. Additionally, for victims from non-EU States court proceedings can be difficult. At present, Germany has no provisions for victims of human trafficking aimed at legalising their visa status. For persons willing to participate in criminal proceedings against the perpetrators section 25(4)(a) of the German Residence Act can allow these persons to remain in Germany for the duration of the proceedings. This is not the case in general civil and criminal proceedings.<sup>47</sup> The only exception is litigation to claim wages according to section 25(4)(b) of the German Residence Act.

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<sup>47</sup> Petra Follmar-Otto and Heike Rabe, above n 25, 75 ; However, a recent decision of a regional court could enhance the situation, see: Landgericht Bielefeld [9th district Criminal Court] 9 KL - 16/14, 8 May 2015, reported in (2015).

# GREECE

## 1. EXECUTIVE SUMMARY

- 1.1 Greece is both a transit and destination country for human trafficking, particularly in the areas of sexual exploitation and forced labour.<sup>1</sup> Victims of trafficking form part of the large number of undocumented migrants that enter the country each year.<sup>2</sup>
- 1.2 The Trafficking in Persons Report prepared by the US Department of State has concluded that Greece does not yet fully comply with the minimum standards for the elimination of trafficking; despite this it considers that Government is making progress towards doing so, despite the fact that in 2015, there was a decrease in the number of trafficking convictions compared to the previous year.<sup>3</sup>
- 1.3 Greece provides residency permits, psychological support, medical care and legal aid to human trafficking victims. Greece has also provided training to the law enforcement sector on the issues surrounding human trafficking, how to identify trafficking victims and how to respond. Through the anti-trafficking unit, the Government has also run an anti-trafficking public awareness campaign on national television, radio stations, and social media, targeting female victims of violence including human trafficking.<sup>4</sup>
- 1.4 Despite these efforts, many of the government funded or approved victim services are not readily accessible to trafficking victims. Limited government support was given to NGOs providing services and shelter for victims of trafficking but, generally speaking, state funding has ceased due to budgetary constraints, rendering these services inconsistent. Alarming, it has also been found that some officials have been complicit in the trafficking.<sup>5</sup>
- 1.5 According to official statistics, in 2014, police investigated 36 cases of human trafficking (30 for sexual exploitation, 2 for forced begging, 4 for forced labour), one less than in 2013. In 2014, 125 defendants were prosecuted by the government, down from 142 in 2013. Of the 64 victims, 54 were women. The Greek Police Anti-Trafficking Unit has noted a decline in the number of female victims of trafficking for sexual exploitation originating from Eastern Europe, along with an attendant rise in the number of male victims of labour exploitation originating from Bangladesh. In 2013 there were 35 of these victims, making them the largest group of victims.<sup>6</sup> In 2014, 30 recognised trafficking victims received government assistance.<sup>7</sup>
- 1.6 The scale of the human trafficking problem in Greece appears to have increased due to the global financial crisis. Widespread unemployment can lead to a rise in

<sup>1</sup> United States of America State Department, 'Trafficking in Persons Report July 2015' (2015), 169 <http://www.state.gov/documents/organization/245365.pdf>.

<sup>2</sup> European Commission, *Together Against Trafficking in Human Beings: Greece* (14 April 2016) <[https://ec.europa.eu/anti-trafficking/content/nip/greece\\_en](https://ec.europa.eu/anti-trafficking/content/nip/greece_en)>.

<sup>3</sup> Office to Monitor and Combat Trafficking in Persons, above n 1, 169.

<sup>4</sup> Ibid 170.

<sup>5</sup> Ibid 169.

<sup>6</sup> European Commission, above n 2.

<sup>7</sup> United States of America State Department, above n 1, 170.

trafficking, both in Greece and countries of origin. Recognising this, Greece has engaged in efforts to combat trafficking through victim services, legislation and inter-agency initiatives.<sup>8</sup>

## 2. PRELIMINARY ISSUES

### Framework for anti- trafficking in the jurisdiction and domestic law

Treaty	Signed/Ratified? (S, R or No)
UN Convention against Transnational Organised Crime (Transnational Organised Crime Convention)	R
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)	R
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	N
Forced Labour Convention 1930 (ILO No 29)	R
Abolition of Forced Labour Convention 1957 (ILO No 105)	R
Worst Forms of Child Labour Convention 1999 (ILO No 182)	R
Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956	R
UN Convention on the Rights of the Child	R
UN Convention on the Elimination of all forms of Discrimination against Women	R
UN Covenant on Civil and Political Rights	Accession
The Council of Europe Convention on Action against Trafficking in Human Beings	R

#### 2.1 Domestic legislation on human trafficking:

2.1.1 Greece works with the European Commission's Coordinator to ensure implementation of the European Union's strategy on human trafficking. The strategy is based on the four 'P' approach (Prevention, Protection, Prosecution, Partnership). This approach aims to protect victims through more inclusive identification, preventing trafficking by organised crime gangs, promoting international cooperation and increasing awareness.<sup>9</sup>

<sup>8</sup> European Commission, above n 2.

<sup>9</sup> Ibid.

2.1.2 The Greek enacted a specific offence of human trafficking in 2002 under Law 3064/2002.<sup>10</sup> A series of laws have followed since, implementing relevant EU Directives to bring Greece in line with its European and international obligations. Law 4198/2013<sup>11</sup> implemented European Directive 2011/36/EU<sup>12</sup> establishing the Office of the National Rapporteur and providing for specific accountabilities and roles for the informal Coordination Mechanism of competent Ministries, International Organisations and accredited NGOs. The law introduced further amendments to the Criminal Code and the Criminal Proceedings Code, as well as the possibility of immunity and suspension of deportation proceedings for victims that report the crimes committed against them.

### **Criminal law**

- 2.2 Articles 323A and 351 of the Greek Criminal Code together criminalise human trafficking. Article 351 prohibits human trafficking for sexual exploitation and article 323A prohibits other forms of trafficking, such as trafficking for the removal of organs,<sup>13</sup> labour exploitation<sup>14</sup> and child soldiers.<sup>15</sup>
- 2.3 The human trafficking offences are classified as felonies, with penalties of up to 10 years imprisonment, as well as a fine of 10,000 to 50,000 Euros.<sup>16</sup> These penalties are similar to those attached to other serious crimes. If there are aggravating circumstances, such as victims under the age of 18, trafficking for profit or abuse of a position of power, the penalty is at least 10 years imprisonment and a fine of 50-100,000 Euros.<sup>17</sup> The law also provides for imprisonment of at least six months for those who intentionally use the services of victims of human trafficking.<sup>18</sup>
- 2.4 Article 323B of the Criminal Code prohibits sexual tourism against children. Specifically, it prohibits organising or funding ventures involving sexual intercourse with children. This offence is punishable by up to 10 years imprisonment and a fine. Participation in such a venture incurs up to one year imprisonment, even if no acts punishable at law transpired.
- 2.5 If a victim reports a human trafficking crime, the law grants the prosecution the discretion, if the report appears valid, to suspend any potential prosecution of the victim temporarily until a final verdict is issued. If the report is proven to be valid, the prosecution ceases completely. Deportation for a victim reporting a crime can also be temporarily suspended until a final verdict is issued.

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<sup>10</sup> Combating trafficking in human beings, crimes against sexual freedom, pornography of minors and in general the financial exploitation of sexual life and providing assistance to victims of such acts, Law 3064/2002.

<sup>11</sup> Compensation of Victims of Intentional Crimes of Violence, Law 3811/2009 (Greece).

<sup>12</sup> *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1 ('Directive 2011/36/EU').*

<sup>13</sup> Prevention of and Combat Against Human Trafficking and other Provisions, Law 4198/2013 (Greece) art 323A.1.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid arts 323A.1, 351.1.

<sup>17</sup> Ibid arts 323A.4, 351.4.

<sup>18</sup> Ibid arts 323A.3, 351.3.



- 2.6 Special residence permit provisions were put in place in 2014 through Ministerial Decision 30651/3.6.2014. The provisions are intended to cover cases subject to special treatment for humanitarian reasons. Victims of human trafficking are covered by the provisions, provided they have been characterised as such by the prosecutor.<sup>19</sup> The initial permit lasts for a year and also constitutes a work permit. It can be renewed provided that the investigation of the criminal case is still ongoing. If no such investigation is under way, it can only be renewed for one year. After the completion of the criminal proceedings, or the renewal period if proceedings are not on foot, the residence permit can be renewed subject to the general applicable provisions.<sup>20</sup>

### 3. BASIS OF STATUTORY COMPENSATION

- 3.1 European Union Directive 2004/80/EC,<sup>21</sup> which was implemented in Greece by Law 3811/2009,<sup>22</sup> established the "Hellenic Compensation Authority" ("**Authority**").<sup>23</sup> This Authority operates under the Ministry of Justice, Transparency and Human Rights<sup>24</sup> and is responsible for determining compensation applications submitted by victims of violent crimes committed deliberately,<sup>25</sup> as well as human trafficking victims, following amendment by Law 4198/2013.
- 3.2 The scheme can be accessed in situations where the victim cannot obtain compensation from the offender. This may be because the offender lacks the means to satisfy a judgment for damages or because the offender cannot be identified or prosecuted.<sup>26</sup> The legislation clearly states that the judicial authorities (prosecutors, judges etc) are under an obligation to inform victims of their right to seek compensation from the state fund, as well as the relevant application process they would need to follow.<sup>27</sup>

### 4. TYPE OF SCHEME

- 4.1 The compensation scheme is available to all victims of violent crimes, subject to the conditions set out in the legislation, and is not limited to victims of human trafficking.<sup>28</sup> The scheme is only available in respect of violent crimes that were committed after 1 January 2006.<sup>29</sup>
- 4.2 "Violent crimes" are defined, for these purposes, as any criminal act committed deliberately with the use of bodily violence or threat of such violence, which results in

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<sup>19</sup> Ministerial Decision 30651/3.6.2014, art 1

<sup>20</sup> United States of America State Department, above n 1.

<sup>21</sup> *Council Directive 2004/80/EC of 29 April 2004 Relating to Compensation to Crime Victims* [2004] OJ L 261/15.

<sup>22</sup> Compensation of Victims of Intentional Crimes of Violence, Law 3811/2009 (Greece).

<sup>23</sup> *Ibid* art 1.

<sup>24</sup> *Ibid* art 1 para 1.

<sup>25</sup> *Ibid* art 3 para 1.

<sup>26</sup> *Ibid* art 3 para 3.

<sup>27</sup> *Ibid* art 4 para 3.

<sup>28</sup> *Ibid* art 3 para 2.

<sup>29</sup> *Ibid* art 18 para 1.

death or serious bodily or mental harm of the victim.<sup>30</sup> The law previously limited the scope of the scheme to this definition with no reference to human trafficking. As noted by the Parliament's legislative committee in its accompanying report at the time, human trafficking offences did not fall under the scheme unless there was violence or the threat of violence and they had resulted in death or bodily or mental injury. However, the law was amended in 2013<sup>31</sup> to include in articles 1 and 3, an express reference to victims of human trafficking offences, extending the scope of the scheme. The scheme now covers injuries resulting from all forms of human trafficking.

## 5. ELIGIBILITY

5.1 As discussed, victims of violent crime who suffer serious physical or psychological injury may apply for compensation. A proxy, usually a lawyer, may apply on behalf of the victim.<sup>32</sup> If the victim dies, his or her heirs may apply. A victim of human trafficking will be eligible for compensation if the following conditions are satisfied:<sup>33</sup>

5.1.1 the crime has been committed in Greece; and

5.1.2 the victim is a resident or currently lives in Greece or another member state of the European Union;

AND

5.1.3 the offender does not have adequate assets against which an irrevocable court ruling can be executed; or

5.1.4 the identity of the perpetrator is impossible to determine, as evidenced by the placing of the case on the unknown perpetrators file; or

5.1.5 where the perpetrator cannot be prosecuted or sentenced and the prosecutor has archived the case or the perpetrator has been acquitted; or

5.1.6 the inability of the victim to in any way satisfy his/her claim against the perpetrator, which has been determined by a final court decision.

5.2 A victim is not eligible for compensation in the following cases:<sup>34</sup>

5.2.1 if the act was committed among members of a criminal organisation, gang or terrorist organisation;

5.2.2 if the victim deliberately failed to inform or delayed informing the police within five days of the act committed against them if this results in difficulties in establishing the identity of the offender. If this failure or delay

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<sup>30</sup> Ibid art 3 para 4.

<sup>31</sup> Prevention of and Combat against Human Trafficking and other Provisions, Law 4198/2013 (Greece) art 5.

<sup>32</sup> Compensation of Victims of Intentional Crimes of Violence, Law 3811/2009 (Greece) art 4 para 2.

<sup>33</sup> Ibid art 3.

<sup>34</sup> Ibid, art 9.

were due to *force majeure*, the five days period starts after the *force majeure* ceases to exist;

- 5.2.3 if, during the criminal proceedings, the victim refused to cooperate with authorities without good reason, especially if he or she refused to testify or concealed or failed to submit material evidence, which resulted in difficulties identifying the perpetrator; or
- 5.2.4 in any other case where the specific circumstances indicate that the application of compensation by the victim constitutes an abuse of right.

## 6. APPLICATION PROCESS

- 6.1 An application for compensation is submitted to the Hellenic Compensation Authority.<sup>35</sup> It does not appear possible to submit the application form online, although it is available online. If the claimant resides in another EU member state, he or she can submit the application to the equivalent authority of that member state. The law (4198/2013) includes a detailed description of the information exchange between the two authorities to facilitate their co-operation.<sup>36</sup>
- 6.2 The application must be submitted within one year from the time the above eligibility conditions are met.<sup>37</sup> A fee of 100 Euros is required for the application to be processed.<sup>38</sup> The law allows for the fee to be adjusted at the discretion of the Minister of Justice, Transparency and Human Rights. It is clearly stated that no further cost should be incurred by the applicant throughout the process until a decision on compensation is issued.<sup>39</sup> The application must be submitted to Vlassis Rigopoulos, Secretary of the Authority ([vrigopoulos@justice.gov.gr](mailto:vrigopoulos@justice.gov.gr)) at the following address: Ministry of Justice, Transparency and Human Rights, Mesogeion 96, Office 208.
- 6.3 The official and only language for the application and the information exchange process is Greek.<sup>40</sup> After the application is submitted, the Authority asks the applicant to file, within a reasonable time, all the accompanying information and documents that it deems necessary.<sup>41</sup> The Authority may ask the applicant, the offender or other parties such as witnesses or experts to testify before it.<sup>42</sup> If the applicant, offender or other parties reside in another EU member State, the Authority may make the necessary arrangements with the cooperation of the equivalent authority of that member state, including hearings by teleconference or videoconference. However, the Authority cannot compel the individual to appear before it in that case.<sup>43</sup>
- 6.4 The Authority can seek information from other public bodies in order to establish the financial condition of an offender who prima facie appears to have insufficient assets

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<sup>35</sup> Ibid art 4 para 1.

<sup>36</sup> Prevention of and Combat against Human Trafficking and other Provisions, Law 4198/2013 (Greece) art 4 para 2.

<sup>37</sup> Compensation of Victims of Intentional Crimes of Violence, Law 3811/2009 (Greece), art 4 para 2.

<sup>38</sup> Ibid art 13.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid art 7.

<sup>41</sup> Ibid art 5.

<sup>42</sup> Ibid art 6 para 1.

<sup>43</sup> Ibid art 6 para 2.

to compensate the victim.<sup>44</sup> The law makes no reference to the standard of proof and thus provides significant discretion to the Authority. The decision of the Authority can be appealed to the administrative courts.<sup>45</sup>

- 6.5 The law does not provide a timeframe for the application process. The law does not expressly provide for any assistance to be provided to the victim during the compensation process, although according to the US State Department 2015 Trafficking in Persons Report, victims are eligible for legal aid.<sup>46</sup> It is unclear whether legal aid can be used for compensation applications.

## 7. ASSESSMENT OF COMPENSATION

- 7.1 Compensation is provided and assessed in accordance with the general provisions of Greek law subject to the limitations stipulated in the specific legislation, which states that compensation is only provided for:<sup>47</sup>

7.1.1 medical expenses and hospitalisation expenses;

7.1.2 loss of income for a reasonable period of time; and

7.1.3 funeral costs.

- 7.2 Compensation does not include potential ransom payments. Moral damages are not provided for and the prevailing interpretation, including that of the Parliament's legislative committee at the time of discussion of the law, is that they are excluded. The law makes reference to reasonable and appropriate compensation and does not impose caps, therefore the amount of compensation is determined on a case by case basis.<sup>48</sup>

- 7.3 It is expressly provided that any culpability of the victim will be taken into account when assessing the compensation application. Compensation will be reduced by any amounts that the victim might have received from the offender, social security or any other source, including any medical expenses that may have been paid by the state.<sup>49</sup>

- 7.4 The compensation scheme is funded by the state but the law grants the state subrogation rights.<sup>50</sup>

## 8. BARRIERS / OBSTACLES AND SUPPORT PROVIDED

- 8.1 The Government of Greece appears to be making significant efforts to improve the legislative framework addressing human trafficking. The most recent law enacted in 2013 brought Greece in line with the requirements of the relevant EU Directive

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<sup>44</sup> Ibid art 4 para 4.

<sup>45</sup> Ibid art 12.

<sup>46</sup> United States of America State Department, above n 1, 170.

<sup>47</sup> Compensation of Victims of Intentional Crimes of Violence, Law 3811/2009 (Greece) art 8.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid art 10.

regarding human trafficking.<sup>51</sup> However, there remain significant barriers for victims of human trafficking, primarily:

- 8.1.1 the requirement that victims cooperate with the police may prevent trafficking victims from coming forward or qualifying for compensation. Fear of authority, or fear of retaliation by the perpetrator is common for trafficking victims and can create a very real barrier to working with police and prosecutors;
  - 8.1.2 a filing fee of €100 can be prohibitive for victims of trafficking, particularly if they are unable to work at the time they are making the application;
  - 8.1.3 the application form is only available in Greek, meaning individuals who cannot read or write in Greek may be unable to apply for compensation; and
  - 8.1.4 finally, the requirement that individuals first attempt to obtain compensation through other means can raise significant barriers for vulnerable individuals. Civil and criminal processes can take a significant amount of time, energy and money and may not be accessible to victims of trafficking.
- 8.2 As outlined below there is a lack of funding and awareness among support services and police, meaning victims are not provided with the support and services that they need.

### **Assistance and support provided**

- 8.3 During the investigation phase, police provide victims of trafficking with an information sheet, available in fourteen languages, explaining what human trafficking is, the various forms that it takes, and the protection and assistance available to them. Information is also provided to victims regarding available assistance such as accommodation and medical support.
- 8.4 Victims of human trafficking are able to access support, independent of any legal action or compensation application. According to the US State Department's 2015 report, victims may have access to accommodation, psychological support, medical assistance and legal services. Trafficking victims could access one state-run emergency shelter for victims of violence prior to their referral to one of 21 state-run shelters for victims of violence, although there is some indication that they are only available to EU nationals. NGOs also administer shelters funded by government and private funding (note there is no legislation governing such funding) where children, including victims of trafficking, are referred to for shelter and support services.<sup>52</sup> The Ministry of Health's National Center for Social Solidarity ("**EKKA**") operated non-trafficking specific shelters for 80 persons (including minors) and in cooperation with NGOs had access to another 120 beds.
- 8.5 According to the representative of the NGO A21 Campaign ("**A21**") in Greece, which is an NGO focusing on human trafficking, A21 helped and sheltered 115 persons between 2008 and 2013. A21 also has lawyers to represent the victims and have had

<sup>51</sup> Directive 2011/36/EU; Prevention of and Combat against Human Trafficking and other provisions, Law 4198/2013 (Greece).

<sup>52</sup> United States of America State Department, above n 1, 170.

some success in doing so, however, a civil or compensation case is difficult to put together.<sup>53</sup> The cases that will be referred by the police are normally confirmed cases of human trafficking which, as a rule, A21 will take to court and win unless the victim was in some way complicit. It is indicative that A21 won 93% of the cases they represented. The difficulty rests with identifying the victim. According to A21, the police are not acting proactively but rather reactively once a victim makes a complaint or reports the crime. Therefore, until the time where the prosecutor confirms the person as the victim of trafficking, it is not deemed to be a civil or compensation case.

- 8.6 It is worth noting, however, that the government was unable to determine how much funding was dedicated exclusively to victim assistance, and NGOs expressed concerns regarding government funding shortfalls caused by Greece's economic crisis. Further, there is concern that services provided for by law are not actually being provided due to budgetary constraints. The Government has, however, offered concessions in the form of rent-free buildings for four NGO shelters that assisted victims of violence.<sup>54</sup>
- 8.7 Police operate a 24/7 support line (number 197), which provides psychological support and guidance to victims and starts the process of extracting them from the situation. In this context, it is working closely with National Centre of Social Solidarity, a number of NGOs, the General Secretariat of Gender Equality and the International Migration Organisation for the safe repatriation of victims.
- 8.8 As discussed above, recognised foreign victims of trafficking may be granted a one year residency permit if there is legal action against the perpetrator, which may be renewed. However, no permits were issued in 2014 and authorities renewed the temporary residence permits of 32 female trafficking victims, compared with 42 renewed permits in 2013.<sup>55</sup> The Greek authorities have stated this is due to many of the victims being EU nationals (from Bulgaria and Romania) thus impacting on the number of permits. In order to obtain a residency permit, applicants must supply all necessary documents. Although victims of human trafficking are exempt from prosecution for offences committed as a result of their trafficked status, there are reports of Greek authorities arresting women for sex work without considering whether they were victims of trafficking.<sup>56</sup>
- 8.9 According to the European NGOs Observatory on Trafficking, Exploitation and Slavery, it is difficult to prove all the elements of the crime of trafficking. Another obstacle to conviction is the unwillingness of victims to testify because of fear and the protection and support offered by the state is not sufficient. The support provided is basic and short-lived and often does not include free legal assistance.<sup>57</sup> In some of the successful trafficking prosecutions, NGOs played a key role in victim support, including legal and psychological assistance and payment of court fees.

<sup>53</sup> Παναγιώτα Κοντοδήμα, 'Άρης Καρδασιλάρης: «Η εμπορία ανθρώπων τον 21ο αιώνα "σπάει" κάθε ιστορικό ρεκόρ»' [Trafficking in Human Beings in the 21st Century Breaks Every Historical Record] (Greek) *Popaganda* (online newspaper), 13 April 2014 <<http://popaganda.gr/aris-kardasilaris-emporias-anthropon-ton-21o-eona-spai-kathe-istoriko-rekor/>>.

<sup>54</sup> United States of America State Department, above n 1, 169-170.

<sup>55</sup> United States of America State Department, above n 1, 170.

<sup>56</sup> *Ibid.*

<sup>57</sup> European NGOs Observatory on Trafficking, Exploitation and Slavery, *e-notes: Greece* (29 January 2011) <<http://www.e-notes-observatory.org/legislation/greece/4/>>.

- 8.10 The Hellenic Police incorporates anti-trafficking training in all its police academies. The Anti-Trafficking Unit ensures continuous training for police officers on duty and also provides training to first responders on trafficking, including all 160 first responders in the Attica region. Although police have made considerable efforts towards tackling trafficking, especially through their Anti-Trafficking Units, prosecutors and the judiciary are criticised for not having sufficient awareness or knowledge about trafficking and its victims.<sup>58</sup>
- 8.11 Victims of human trafficking are also entitled to protection when participating in judicial proceedings as witnesses. The law follows the standards of the Council of Europe Convention i.e. physical protection, possibility to testify via video link, omission of name and other personal data in court proceedings, change of identity etc. However, in practice full witness protection privileges are not provided.<sup>59</sup> Further, the provisions on protection of a victim's or witness' identity only apply to criminal proceedings and there is no reference of the protections being applicable to administrative proceedings such as that of the state compensation fund.
- 8.12 Compensation granted to the victim by the Greek Compensation Authority is funded by the state but subrogation rights for recovery by the State are applied by law.

## 9. EXAMPLES IN PRACTICE

- 9.1 The decisions of the Greek Compensation Authority are not made public nor are statistics available of the number of successful compensation claims and amounts granted.

## 10. SUGGESTIONS FOR IMPROVEMENT

- 10.1 The following reforms may improve access to compensation for victims of human trafficking in Greece:
- 10.1.1 a compensation scheme specific to victims of human trafficking should be created, taking into account the special needs of such victims, such as their need for efficient access to compensation to help them transition out of their trafficked situation;
  - 10.1.2 greater training of law enforcement personnel, prosecutors and the judiciary on human trafficking so that they are aware of its specific qualities and how to recognise it and assist victims;
  - 10.1.3 increase the use of witness protection provisions so that victims are less fearful of participating in criminal proceedings against their traffickers;
  - 10.1.4 provide victims with greater access to free legal assistance, and increase funding to services which assist victims; and
  - 10.1.5 remove the filing fee, the need to exhaust other remedies, and the need to provide the application in a number of languages.

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<sup>58</sup> Ibid.

<sup>59</sup> United States of America State Department, above n 1, 170.

## 11. ALTERNATIVES TO STATUTORY COMPENSATION SCHEMES

- 11.1 A victim of trafficking has access to the Greek justice system and can seek civil compensation and/or a criminal conviction in accordance with the applicable general provisions. It should be noted that the exhaustion of these remedies is generally a prerequisite for application for compensation by the state as opposed to an alternative. Measures have been enacted aimed at providing support to the victim during the criminal proceedings. However, given the need for legal representation and the practical difficulties of the operation of legal aid in Greece, it is questionable how easy it is for the victims to trafficking to seek compensation through the courts, not to mention the years it normally takes for a judgement to become final. Legal aid is a problem area, with trafficking victims having the right to free legal aid under the same conditions and prerequisites set by general domestic law, which are quite restrictive.<sup>60</sup> The application of this law introduced in 2002 appears to have resulted in only few instances where free representation is provided. Free legal aid and representation in court is provided by some NGOs, but on an ad hoc manner due to scarce resources.
- 11.2 The effectiveness of the criminal justice system is inhibited because many prosecutors and judges lack knowledge and awareness of trafficking. This lack of awareness sometimes results in trafficking cases being wrongly classified. Even if a criminal case does succeed, the compensation awarded is minimal. Greater compensation is available through civil proceedings launched by the victim; however, this involves costs and lengthy delay. It may also be traumatic for the victim to confront his or her trafficker.<sup>61</sup>

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<sup>60</sup> European NGOs Observatory on Trafficking, Exploitation and Slavery, above n 56.

<sup>61</sup> Ibid.



# ITALY

## 1. EXECUTIVE SUMMARY

- 1.1 Italy is a natural transit country for migration flows due to its geographical position. Such migration flows stem from the Mediterranean Sea and from Eastern Europe. For this reason, Italy is primarily a destination and transit country for human trafficking: victims are trafficked for sex work, forced labour and domestic servitude.<sup>1</sup> The victims, predominantly women and children, are trafficked mainly from Nigeria, Romania, Morocco and China. Other countries of origin included the Republic of Moldova, Albania, Ukraine, Egypt, Ghana, Brazil, Tunisia, Bangladesh and Senegal.<sup>2</sup> The main form of trafficking is sex work (1,359 victims in 2011, 1,067 in 2012 and 570 in 2013), followed by forced labour (377 victims in 2011, 296 in 2012, 163 in 2013).<sup>3</sup>
- 1.2 On 28 March 2014, Legislative Decree no. 24/2014 implementing European Directive 2011/36/EU entered into force. This Decree amended articles 600 and 601 of the Italian Penal Code ("**IPC**") and introduced a domestic anti-trafficking action plan which included a state compensation fund for victims of human trafficking. The amendments expanded the definitions of human trafficking to include abuse of situations of power or vulnerability, and included specific instances of trafficking such as organ removal. Such amendments are aimed at reinforcing the punitive approach of the articles, ensuring that none of the possible manifestations of human trafficking can escape criminal prosecution, and at providing a definition of the crime of reduction to slavery and of people trafficking in accordance with that given by Directive 2011/36/EU.
- 1.3 Compensation for victims of human trafficking is provided through a statutory scheme that is particular to victims of human trafficking. The scheme runs in conjunction with the criminal investigation and prosecution of perpetrators of human trafficking. Compensation is paid upon either the conviction of the perpetrator or the closing of unsolved cases. There is no assessment of damages; rather, each victim is entitled to a lump sum of €1,500.00.

## 2. PRELIMINARY ISSUES

International conventions/treaties Italy has ratified:Treaty	Signed/Ratified? (S, R or No)
UN Convention against Transnational Organised Crime (Transnational Organised Crime Convention)	R

<sup>1</sup> United States of America State Department, 'Trafficking in Persons Report July 2015' (2015), 195 <<http://www.state.gov/documents/organization/245365.pdf>>; Group of Experts on Action against Trafficking in Human Beings ("**GRETA**"), 'Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Italy, First evaluation round' (Country Report, adopted on 4 July 2014, published on 22 September 2014) 11 <[http://www.marinacastellaneta.it/blog/wp-content/uploads/2014/09/GRETA\\_2014\\_18\\_FGR\\_ITA\\_w\\_cmnts\\_en.pdf](http://www.marinacastellaneta.it/blog/wp-content/uploads/2014/09/GRETA_2014_18_FGR_ITA_w_cmnts_en.pdf)> ("**GRETA Report**").

<sup>2</sup> GRETA Report, above n 1, 11.

<sup>3</sup> Ibid.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)	R
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	R
Forced Labour Convention 1930 (ILO No 29)	R
Abolition of Forced Labour Convention 1957 (ILO No 105)	R
Worst Forms of Child Labour Convention 1999 (ILO No 182)	R
Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956	R
UN Convention on the Rights of the Child	R
UN Convention on the Elimination of all forms of Discrimination against Women	R
UN Covenant on Civil and Political Rights	R
Other regional instruments <ul style="list-style-type: none"> <li>- Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005</li> <li>- European Directive 2011/36/UE of 5 April 2011 preventing and combating trafficking in human beings</li> </ul>	R  Accepted

## 2.1 Domestic legislation on human trafficking:

2.1.1 Human trafficking is defined as a criminal offence under article 601 of the IPC.

2.1.2 Article 600 makes it illegal to exercise any powers towards a person, such as the right of ownership or reducing a person to a state of continuous subjection, forcing them to work, provide sexual services, beg or perform unlawful activities entailing exploitation, or forces a person to undergo organ removal. The penalty is imprisonment for 8 to 20 years.

2.1.3 The reduction to, or maintenance of, the state of slavery occurs when such conduct includes the use of violence, threats, deceit, abuse of authority or exploitation of physical or psychological inferiority or a situation of need or vulnerability, or by promising or giving sums of money or other advantages to whoever has authority over the person.

2.1.4 Article 601 introduces the concept of trafficking by stating:

*"Whoever recruits, introduces into the territory of the State, transfers outside of such territory, transports, gives the authority over a person, hosts one or more people who are in the conditions described by article 600, or performs the same conduct (provided by article 600) towards one or more people - with violence, threat, abuse of authority or with the*

*exploitation of a situation of physical or psychological inferiority or of a situation of need - in order to induce or force them to provide work or sexual performances or to beg or nevertheless to carry out illegal activities that involve the exploitation or undergo the removal of organs shall be punished with imprisonment from eight to twenty years.*

*The same punishment is applied to whoever realizes such conducts with regard to a minor, even outside of the manners provided by the first paragraph."*<sup>4</sup>

- 2.2 If the captain or an official of a ship carries out or contributes to carrying out human trafficking, the penalties under in the IPC are increased by one-third in accordance with article 1152 of the Italian Navigation Code.
- 2.3 The definition of human trafficking in the IPC accords with the definition in the Palermo Protocol. Under Articles 600 and 602 of the IPC, there are also related offences relating to reduction or maintenance in slavery or servitude and the purchase and sale of slaves respectively.

### **3. BASIS OF STATUTORY COMPENSATION**

- 3.1 Article 6 of Legislative Decree 24/2014 (amending article 12 of Law no. 228/2003) establishes a specific compensation fund for victims of human trafficking in Italy. The specific requirements for obtaining compensation under this fund, including eligibility, the application procedure and the rules are set out in article 12 of Law no. 228/2003 and explained in more detail below. The scheme is administered by the Office of the Minister for Equal Opportunities of the Italian Presidency of the Council of Ministers.

### **4. TYPE OF SCHEME**

- 4.1 Only human trafficking victims can apply for compensation under article 12 of Law no. 228/2003. For a person to be eligible for compensation, a crime under articles 600, 601 or 602 of the Italian Penal Code must be established.
- 4.2 The scheme does not restrict the types of injuries recognised or compensated. It covers both physical and psychological injuries that arise from any form of trafficking including sex, forced labour, domestic servitude and so forth. An injury is defined as any wrong or harm done by one individual to another individual's body, rights or reputation.<sup>5</sup>

### **5. ELIGIBILITY**

- 5.1 In order to access the statutory compensation scheme, the following requirements must be met:
  - 5.1.1 an offence must have been committed under article 600, 601 or 602 of the Italian Penal Code;
  - 5.1.2 there must be a final judgment by an Italian Court convicting the offender of the human trafficking offence and declaring that the victim has a right to

<sup>4</sup> Italian Penal Code art 601 [unofficial trans].

<sup>5</sup> National Law against Trafficking in Human, Law no. 228/2003 (Italy) art 12 paras 12-13.

- compensation or a non-definitive judgment declaring an interim compensation precept;
- 5.1.3 the above judgment must be pronounced after the date Law no. 228/2003 came into effect;
- 5.1.4 the request in order to access the statutory compensation scheme must be submitted within five years from the date the judgment convicting the offender became final or from the date of pronouncement of the non-definitive judgment declaring an interim compensation precept;
- 5.1.5 the victim must not already have received compensation from the offender; and
- 5.1.6 the victim must not have been found guilty of murder, robbery, extortion and/or kidnapping.
- 5.2 Only the primary victim is entitled to apply for compensation. The remedy is not available to the family of the victim.

### **Jurisdictional requirements**

- 5.3 There is no requirement that the victim suffered the injury in Italy. Rather, article 604 of the IPC states that the victim can be compensated even where he or she has been injured from a trafficking offence committed in another State, provided that either the perpetrator or victim is an Italian citizen.

### **Exclusions based on immoral or illegal behaviour**

- 5.4 Person who have been convicted with definitive judgment, or submitted to criminal investigation, for a crime contained in article 407(2)(a) of the Criminal Procedure Code (murder, robbery, extortion and kidnapping) cannot claim compensation under the statutory scheme.<sup>6</sup>

### **Time limits**

- 5.5 The victim must file their compensation claim with the President of the Council of Ministers within 5 years from the date that the court convicted the offender. The court must also, at the same time, declare that the victim has a right to compensation or from the date that an Italian Court pronounced a non-definitive judgment declaring an interim compensation precept.
- 5.6 If the offender is unknown, the victim must make a claim for compensation within one year from the closure of the relevant criminal investigation. According to article 415 of the Italian Code of Penal Procedure, when the offender is unknown the Public Prosecutor, within six months from the date of registration of the crime, might present a request to the courts to have the case dismissed. Accordingly, compensation is dependent upon the existence of a criminal case or investigation but not necessarily a finding of guilt.<sup>7</sup>

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<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

## 6. APPLICATION PROCESS

- 6.1 At the time of writing, according to the anti-trafficking coordinator of the Office of the Minister for Equal Opportunities, a working group is drafting a directorial decree in order to clarify and specify the practical issues associated with the application process.<sup>8</sup>
- 6.2 According to the legislation, the victim must prove that he or she suffered injury as a direct result of a criminal act. In particular, the victim must give evidence that there has been a judgement recognising the right to compensation and that he or she has not already received compensation from the offender. As far as evidence of the judgement is concerned, the directorial decree will likely require that the victim attach a certified copy of the judgement to the application request. With regard to the evidence of the lack of any other kind of compensation from the offender, it will be sufficient to attach a declaration of the victim attesting that he or she has not received any compensation from the offender.<sup>9</sup>
- 6.3 Accordingly, to make an application for compensation, a victim must complete and submit the following documents:
- 6.3.1 the application form;
  - 6.3.2 a certified copy of the judgement recognising the right to compensation; and
  - 6.3.3 the victim's declaration attesting that he/she has not already received compensation from the offender.
- 6.4 The documents must be submitted to the Office of the Minister for Equal Opportunities of the Italian Presidency of the Council of Ministers ("**Office of the Minister for Equal Opportunities**"). The Office would then ascertain the victim's criminal record.
- 6.5 Currently there is no online application form available for victims applying for compensation. The application need only comply with the above requirements and include the relevant attachments. However, the working group is drafting an application form that should be available on the Office of the Minister for Equal Opportunities' website in future. The draft of the application form is understood to be a very simple questionnaire to be completed by the victims by simply answering a number of multiple-choice questions. This application form should permit victims to independently manage the application request.<sup>10</sup>

### Hearing and legal assistance

- 6.6 Following the victim's submission of the relevant documents, the documents are assessed by the Office of the Minister for Equal Opportunities.

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<sup>8</sup> Personal communication between DLA Piper and the Coordinator for the Office for Equal Opportunities, responsible for the implementation of the Legislative Decree 24/2014

<sup>9</sup> Article 12 of Law no. 228/2003

<sup>10</sup> Personal communication between DLA Piper and the Coordinator for the Office for Equal Opportunities, responsible for the implementation of the Legislative Decree 24/2014

- 6.7 There is no need for the victim to be represented by a lawyer; indeed, the decision process is undertaken solely on the documentary evidence provided by the victim with the victim not being required to provide verbal testimony.

### **Assistance**

- 6.8 The abovementioned laws and the respective regulations provide for a coordinated series of interventions to assist victims of human trafficking with social, health and legal assistance, such as protection and accommodation in specialized shelters. It is unclear whether there is any specific legal assistance for victims during the compensation application process.
- 6.9 Crimes related to human trafficking pursuant to article 51 paragraph 3, and article 371 of the Italian Penal Procedure Code are investigated and prosecuted by the National Anti-Mafia Prosecutor. However, the National Anti-Mafia Prosecutor does not provide any assistance to victims when applying for compensation.

### **Timelines**

- 6.10 It is unclear how long the process takes from when the application form is first lodged by a victim to when there is a determination and compensation paid. However it is important to note that criminal or civil proceedings, which must be concluded before an application is made for statutory compensation, can take between 2 and 3 years.

### **Costs**

- 6.11 Article 6 of legislative decree 24/2014 does not specify whether any costs are involved in making an application to the statutory compensation fund.

## **7. ASSESSMENT OF COMPENSATION**

- 7.1 Each victim is compensated a fixed amount of 1,500 Euros. There is no variance for the extent of the injuries suffered or the nature of the trafficking.<sup>11</sup>
- 7.2 The compensation scheme is funded centrally by the Italian Government.

## **8. BARRIERS / OBSTACLES**

- 8.1 The GRETA Report recently identified that the key obstacles for victims in accessing compensation in Italy (not specific to the statutory compensation scheme) were "incomplete information about their rights... difficulties in obtaining free legal aid and length of legal proceedings" which all dissuade victims from claiming compensation.<sup>12</sup>
- 8.2 The regulations or directorial decree will hopefully provide further clarification and efficiency regarding the compensation scheme. Although the eligibility requirements are clear on the face of the law, certain practical aspects, such as the drafting of the application form, should be established.

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<sup>11</sup> Legislative Decree 24/2014 art 6.

<sup>12</sup> GRETA Report, above n 1, 43.

### **Awareness**

- 8.3 The last nationwide information campaign advertising the toll-free anti-trafficking help took place in 2008. Victim assistance programmes took place at a local/regional level, through advertisement of the national anti-trafficking toll-free helpline (which employs several cultural mediators speaking different languages) and distribution of awareness raising materials.<sup>13</sup> No national information campaign has been conducted recently to increase awareness of the statutory compensation scheme and we understand that victims are not sufficiently aware of the scheme.

### **Assistance**

- 8.4 Under article 13 of Law no. 228/2003, human trafficking victims are entitled to a programme of assistance and social integration. In particular, they have the right to social, health, psychological and legal assistance, accommodation, literacy courses and vocational training, job and social inclusion; cultural mediation and information on victims' rights and services. It is unclear whether legal assistance is provided.

### **Privacy**

- 8.5 There is no provision guaranteeing the confidentiality of the statutory compensation application process, nor does the reform project considering the directorial decree seem to be considering confidentiality. Victims may have a legitimate fear that if they cooperate with law enforcement through, for example, testifying in court, they may be subject to retaliation from the offender. The risk to physical safety is higher when the offender knows the victim personally or when the offender is part of a criminal organisation. In these cases, more effective protection by the public security forces is required.
- 8.6 Some effort is made to protect victims. During criminal proceedings against an offender, human trafficking victims obtain accommodation in premises managed by local authorities as a means of protecting victims against acts of revenge or violence from perpetrators. Further, during the investigation and trial of an offence, it is also open to the Anti-Mafia public prosecutor to also invoke specific victim protections including, armed escort against every kind of threat, hearing of witnesses from another place through a video conference link or a closed trial (where the victim is a minor).
- 8.7 Victims of trafficking are provided with accommodation in shelters managed by Non-Governmental Organisations or local authorities. The aim is to protect them against acts of revenge by perpetrators.

### **Immunity from Prosecution**

- 8.8 Article 54 of the IPC provides that if the victim is obliged or compelled to do something illegal during the exploitation phase, he or she could be under a "state of necessity" and for this reason he or she cannot be punished. If a person has been forced to commit a criminal offence they will not be considered criminally liable.

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<sup>13</sup> Ibid.

- 8.9 Despite this, in circumstances where the victim has been found guilty of a crime contained in article 407(2)(a) of the Criminal Procedure Code, being murder, robbery, extortion or kidnapping, the victim cannot claim compensation under the statutory scheme.<sup>14</sup>

### Immigration / Deportation

- 8.10 Victims who take part in the social protection programmes and cooperate with law enforcement can qualify for a special residence permit. The residence permit has a minimum duration of 6 months, renewable for a further 6 months upon meeting certain conditions.<sup>15</sup>

## 9. EXAMPLES IN PRACTICE

- 9.1 At the time of writing only one application had been made for compensation and a decision was still pending.<sup>16</sup> A recent survey showed that victims rarely succeed in obtaining compensation from traffickers. Italian authorities have been invited to adopt measures to facilitate and guarantee access to compensation for human trafficking victims, by ensuring (inter alia) actual access to legal aid.<sup>17</sup> It is noted, however, that this relates more generally to victims obtaining damages through criminal or civil proceedings, rather than barriers to accessing compensation under the statutory compensation scheme which is still relatively new.
- 9.2 Outside the statutory scheme, on 25 May 2012, the Court of Assise in L'Aquila rendered a judgment in favor of 17 Nigerian women being forced into prostitution and in a severe state of exploitation. The Court found the 19 defendants guilty of serious crimes, including criminal association with the purpose of trafficking, slavery and illegal immigration. The perpetrators were sentenced to a total of around 100 years of imprisonment and were ordered to pay €50,000 to each of the 17 Nigerian women.<sup>18</sup>

## 10. SUGGESTIONS FOR IMPROVEMENT

- 10.1 In light of the barriers for victims identified in the GRETA Report, GRETA urged that the Italian government adopt measures to facilitate and guarantee access to compensation for victims of trafficking and more specifically:
- 10.1.1 ensure victims of trafficking are systematically informed in a language that they can understand of the right to seek compensation and the procedures to be followed;
  - 10.1.2 ensure that victims have effective access to legal assistance;
  - 10.1.3 enable victims of trafficking to exercise their right to compensation by ensuring their effective access to legal aid by derogation from the income limit.

<sup>14</sup> National Law against Trafficking in Human, Law no. 228/2003 (Italy) art 12.

<sup>15</sup> Legislative Decree no. 286/1998 art 18.

<sup>16</sup> Personal communication between DLA Piper and the Coordinator for the Office for Equal Opportunities, responsible for the implementation of the Legislative Decree 24/2014

<sup>17</sup> GRETA report, above n 1, 43-44.

<sup>18</sup> Judgement rendered on 25 May 2012 by the Court of Assise in L'Aquila. See V Castelli, *Punto e a capo sulla tratta. Uno studio sulle forme di sfruttamento di esseri umani in Italia e sul sistema di interventi a tutela delle vittime* (FrancoAngeli s.r.l, 2014) 122.



- 10.1.4 reconsider whether the envisaged maximum amount of €1500 compensation from the state fund corresponds to the severe human rights violations victims suffer and the cumbersome procedural path they must follow until they are granted compensation.<sup>19</sup>

## 11. ALTERNATIVES TO STATUTORY COMPENSATION SCHEMES

- 11.1 An alternative to the statutory compensation is for a victim to bring a civil action during the pending criminal proceeding seeking damages. Additionally, victims may benefit from other social assistance, such as the social protection programme. This programme, provided by article 18 of Legislative Decree no. 286/98, is a 12 month project which guarantees trafficked people access to a range of services and activities, such as residential care, psychological counselling, legal aid, cultural and language mediation, social and health services, vocational training, work placements and support finding a job placement.
- 11.2 As noted above, an alternative to the statutory compensation scheme is for a victim to bring a civil action (either in the criminal proceedings or separately before the civil courts) seeking damages arising from the human trafficking. It is noted however that this option must be exhausted before an application for compensation can be lodged with the statutory scheme.
- 11.3 In a civil context, a victim must bring their own civil action against the perpetrator of the human trafficking to seek damages. Where there are criminal proceedings against an offender, a victim may file an application for damages within the same criminal proceedings (article 74 of the Italian Code of Criminal Procedure). Where a victim makes such an application, the judge in the criminal proceeding can determine:
- 11.3.1 the amount of compensation;
  - 11.3.2 that the victim has a right to compensation without fixing the precise amount; or
  - 11.3.3 the amount of an advance payment to be made to the victim.
- 11.4 Unfortunately in the latter two cases the victim must still bring a civil action to obtain a decision on the final amount. The advance payment (being (c)) is immediately enforceable under a civil action as the victim is not required to wait until the criminal trial is completed.
- 11.5 For decades, the standard of proof in both civil and criminal case law was the balance of probabilities. After decision no. 11755 of 19 May 2006 rendered by the criminal division of the Italian Supreme Court ("**Corte di Cassazione**"), the Supreme Court introduced the concept of 'beyond reasonable doubt' for criminal trials, meaning compensation through a criminal trial requires a higher standard of proof.
- 11.6 There are a number of disadvantages to recovering loss through a civil action, including the length of the proceeding, the burden of proof lying with the victim, and the possibility that two actions are required to enforce the judgement. Enforcement is particularly difficult because often the perpetrator's assets are not in Italy.

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<sup>19</sup> GRETA report, above n 1, 43-44.

- 11.7 In terms of criminal proceedings, the victim cannot recover without a criminal conviction which can take some time. However, if the offender does not pay the victim the damages ordered by the court, the victim can obtain compensation through an executive proceeding on the trafficker's assets to enforce the judgment. The same enforcement option exists for a victim taking action through a civil court.
- 11.8 For people who are not able to sustain the legal costs of a proceeding, D.P.R. no. 115/2002, in accordance with article 24 of the Italian Constitution, provides free legal aid ("**Patrocinio a spese dello Stato**"). All persons have the right to be assisted by a lawyer, free of any legal fees or costs, in all criminal, civil, administrative, accounting or fiscal proceeding and "voluntary jurisdiction" and whenever the presence of a lawyer is required by law.
- 11.9 A key advantage of these alternative methods over the statutory compensation scheme is that the amount of damages recoverable is not capped at €1500 and therefore more damages may be awarded to adequately compensate the injuries suffered by victims of human trafficking.

# JAPAN

## 1. EXECUTIVE SUMMARY

- 1.1 Japan is a destination country for human trafficking, with the majority of victims trafficked for forced labour, particularly sexual exploitation. The main human trafficking victims in the sex industry are women, children and foreigners. They are forced to engage in sex work at bars, brothels, hotels, massage salons and private residences. An aspect of forced labour can be seen in the poor working conditions of foreigners who enter Japan under the Industrial Trainee and Technical Internship Program. Trainees and interns employed under this scheme are often forced to work very long hours due to their employers disregarding labour laws, may have their passports confiscated and be subject to large fines if they leave.<sup>1</sup>
- 1.2 Human trafficking is a crime, but unfortunately the definition of trafficking under the Japanese Criminal Code does not completely accord with the international definition provided by the Palermo Protocol.
- 1.3 In Japan, there is no compensation system available specific to victims of human trafficking. Rather, Japan has established a compensation system for the victims of certain violent crimes under which victims of human trafficking can be compensated if the human traffickers commit a violent act towards them, and they suffer a serious injury as a result.

## 2. PRELIMINARY ISSUES

### Framework for anti- trafficking in the jurisdiction

#### 2.1.1 International conventions/treaties the State has ratified:

Treaty	Signed/Ratified ? (S, R or No)
UN Convention against Transnational Organised Crime (Transnational Organised Crime Convention)	S
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)	S
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	Accession
Forced Labour Convention 1930 (ILO No 29)	R
Abolition of Forced Labour Convention 1957 (ILO No 105)	No
Worst Forms of Child Labour Convention 1999 (ILO No 182)	R

<sup>1</sup> United States of America State Department, 'Trafficking in Persons Report July 2015' (2015) 198 <<http://www.state.gov/documents/organization/245365.pdf>>.

Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956	No
UN Convention on the Rights of the Child	R
UN Convention on the Elimination of all forms of Discrimination against Women	R
UN Covenant on Civil and Political Rights	R

## 2.2 Domestic legislation on human trafficking:

- 2.2.1 The offences relating to human trafficking enumerated in the Japanese Penal Code are kidnapping for profit;<sup>2</sup> kidnapping a person for transportation out of a country;<sup>3</sup> buying or selling a human being;<sup>4</sup> transportation of kidnapped persons out of a country;<sup>5</sup> and delivery of kidnapped persons.<sup>6</sup> The penalty for human trafficking offences is up to 10 years imprisonment, depending on the purpose of the trafficking and the age of the victims.
- 2.2.2 The Penal Code does not provide comprehensive prohibition on human trafficking. Therefore, it is also necessary to examine laws relating to prostitution, child welfare, and employment. The Prostitution Prevention Law (Anti-Prostitution Act) prohibits forced prostitution.<sup>7</sup> The Employment Security Act prohibits labour recruitment "by means of violence, intimidation, confinement or other unjust restraint on mental or physical freedom."<sup>8</sup>
- 2.2.3 The definition of trafficking in persons under the Japanese Penal Code does not completely accord with the international definition. The narrow focus on the transfer or illegal control of humans or their bodies for one's profit is contrary to the broader ground of exploitation in the Palermo Protocol definition.

## 3. BASIS OF STATUTORY COMPENSATION

- 3.1 Japan has established a compensation system for victims of violent crimes who suffer serious injuries (or death) under the Scheme for Providing Compensation to Innocent Victims of Crimes in Japan, provided for by the Support of Crime Victims by Payment of Benefits for Crime Victims<sup>9</sup>.

<sup>2</sup> *Penal Code* (Act No 45 of 1907) art 225.

<sup>3</sup> *Ibid* art 226.

<sup>4</sup> *Ibid* art 226 para 2.

<sup>5</sup> *Ibid* art 226 para 3.

<sup>6</sup> *Ibid* art 227.

<sup>7</sup> *Anti-Prostitution Act* (Act No. 118 of 1956) art 12.

<sup>8</sup> *Employment Security Act* (Act No. 141 of November 30, 1947) art 63.

<sup>9</sup> (Act No 36 of 1980).

- 3.2 This compensation system is available to victims of violent crimes such as murder, manslaughter, assault and robbery. Human trafficking is not directly covered by this compensation system as human trafficking is categorised as a crime against freedom under the Japanese Penal Code. However, victims of human trafficking can be compensated under this system if the human traffickers commit any violent act towards them and they suffer a serious injury as a result of the violence.

#### 4. TYPE OF SCHEME

- 4.1 This compensation system is available to victims who suffered injuries as a direct result from certain violent crimes under the Penal Code in Japan.

#### 5. ELIGIBILITY

##### Eligible applicants

- 5.1 Victims or, where the victim dies owing to the criminal act, their survivors, can apply for compensation.<sup>10</sup> Victims must have suffered severe injury or disease or sustain a disability as a result of the criminal act. Survivor benefits are available to the spouse or partner of the victim, or, if there is no spouse, to the dependents followed by any person of non-dependent status. Japanese laws require that an applicant be a Japanese national and/or a Japanese resident.<sup>11</sup>

##### Time limit and process

- 5.2 To receive compensation, the victims or their survivors must apply to their local Prefectural Public Safety Commission within 7 years from the day on which the crime occurs or within 2 years from the day when the victim becomes aware of their injuries, whichever ends earlier.<sup>12</sup> It is not necessary for the offender (trafficker) to have been criminally convicted for the relevant crime in order for the victim to apply for compensation.

##### Requirements

- 5.3 To receive compensation, the victims must have suffered serious physical injuries. Under very limited circumstances, the victims can be compensated for their medical expenses incurred as a result of psychological injuries. If the victim, or the victim's relative, was in part the cause of his or her death or injury, compensation could be denied or reduced.<sup>13</sup> Also, an application may be rejected if the victim does not cooperate with the National Public Safety Commission during its investigation.<sup>14</sup>

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<sup>10</sup> Ibid art 4.

<sup>11</sup> Ibid art 3.

<sup>12</sup> Ibid art 10.

<sup>13</sup> Ibid art 6.

<sup>14</sup> Ibid art 13.

## 6. APPLICATION PROCESS

- 6.1 Applications must be filed with the local Prefectural Public Safety Commission (being the prefectural police station).<sup>15</sup> The form asks for the applicant's name, address and citizenship, date of the crime, extent of damage and documents evidencing any issue that must be established, such as death or physical injury. Accessibility is an issue for those who cannot read and write in Japanese, as the application materials are available in Japanese only, and there are no translation services.

### Evidence

- 6.2 The necessary documents to be submitted as evidence are listed under the Regulations for Providing Compensation to Innocent Victims of Crimes in Japan. They include medical reports of injuries and receipts of medical fees, death certificates, evidence that the survivor is related to the victim, certificates of residence, proof of insurance, daily income evidence for individuals who have suffered a disability and so forth.

### Hearing

- 6.3 The National Public Safety Commission will usually conduct interviews with the victims to better understand their cases. The National Public Safety Commission has the authority to request that the applicants submit evidence and appear for hearings.<sup>16</sup> Whether such requests are made will depend on the nature of the case and the condition of the victim.

### Assistance

- 6.4 The police assist victims in their applications for compensation. In particular, they advise and counsel the victims and help the victims select appropriate evidence for the case. A representative of the Metropolitan Police Department informed the writers of this report that police officers occasionally request information from courts or government entities.
- 6.5 In the application process, victims can choose to be represented by a lawyer. A number of private associations have been appointed by the National Public Safety Commission to assist the victims of crime.<sup>17</sup> These private associations provide consultation services to applicants for free.
- 6.6 The application process is free of charge, and it takes about half a year for the application to be processed.

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<sup>15</sup> Ibid art 10.

<sup>16</sup> Ibid art 13.

<sup>17</sup> National Police Agency. *Overview of the Main Crime Victims Support* [unofficial trans] <<http://www8.cao.go.jp/hanzai/soudan/gaiyou.html>>.

## 7. ASSESSMENT OF COMPENSATION

### Type of compensation

- 7.1 The scheme is funded directly by the Japanese government.
- 7.2 There are three types of compensation under Japanese laws.<sup>18</sup> Compensation will be paid to victims (or their survivors) who fall under the following categories:
- 7.2.1 the victim passes away, and the victim's immediate survivors will receive compensation;
  - 7.2.2 the victim is injured: compensation is available to a victim if the victim requires at least one month of treatment and three days of admission to a hospital (for psychiatric injuries, the latter requirement does not apply); or
  - 7.2.3 the victim suffers a permanent physical disability: the victim receives compensation. Compensation will vary based on the level of permanent physical disability (e.g., the cases categorised as the lowest level of disability are a lack of a finger or toe, unsightly scars of a certain size).<sup>19</sup>

### Compensation amount

- 7.3 The compensation amount will be assessed by the National Public Safety Commission. The actual compensation amount will be calculated by specific formulae provided under the law. For each, the amount is based on the victim's basic income and then increases based on number of factors. For deceased victims it will depend on the number of family members and their ages. For victims with a permanent disability it increases with respect to the level of injury. It is slightly different for severe injury and disease it consists of medical expenses and any income lost due to suspension from work following the criminal act. The maximum compensation amounts are:<sup>20</sup>
- 7.3.1 for type I compensation above: up to JPY 30 million;
  - 7.3.2 for type II compensation above: up to JPY 1.2 million;
  - 7.3.3 for type III compensation above: up to JPY 40 million.
- 7.4 If the victim received any other benefits or compensation, that amount will be deducted from the compensation amount.

## 8. BARRIERS / OBSTACLES

- 8.1 Japanese laws provide remedies for victims who suffer violence during the course of trafficking. However, injuries serious enough to be covered under Japanese laws

<sup>18</sup> *Support of the Crime Victims by Payment of Benefits for Crime Victims* (Act No. 36 of 1980) art 4..

<sup>19</sup> *Support of Crime Victims by Payment of Benefits for Crime Victims*(Act No 36 of 1980 art 13

<sup>20</sup> National Police Agency, above n 17.

don't often occur during the course of trafficking, and if they do, it may be difficult to demonstrate that the injuries are caused due to trafficking.

- 8.2 Compensation is also largely based on lost income due to injury. Many victims of human trafficking receive little or no income and so the methods of calculating compensation do not cater to their circumstances.

### **Immigration**

- 8.3 For victims who are in Japan illegally, it is very hard to seek compensation due to issues around immigration. First, applicants must be citizens or ordinarily resident in Japan in order to apply. Even if they were eligible to apply, there is no immigration protection for trafficking victims and they risk deportation if they contact the police. Given the application for compensation must be made to the prefectural police commission, this is problematic. There is practically no opportunity for international victims to seek compensation in a Japanese court.<sup>21</sup>

### **Previous criminal behaviour or complicity in the crime**

- 8.4 As noted above, compensation may be denied in circumstances where the crime was committed by a relative of the victim or where the victim partly caused his or her injury. It may also be denied if it would be considered inappropriate under social conventions judging from the relationship between the victims and the perpetrators. This may be prohibitive for some victims of trafficking who have cooperated with their traffickers out of fear or who have been trafficked by family members, or are engaged in sex work.
- 8.5 While the law apparently prohibits punishing trafficking victims for crimes committed while being trafficked, there have been reports of arrested sex workers and arrested migrant workers who were detained and deported without being screened to determine trafficking victim status.<sup>22</sup>

### **Support services**

- 8.6 There are very few support services in Japan for victims of human trafficking. According to the US State Department's 2015 trafficking report, Japan lacks trafficking victim specific services but has funded some women's shelters which helps victims by providing food, basic needs, psychological care and covers medical expenses. There are no clearly defined services for men.<sup>23</sup>

## **9. EXAMPLES IN PRACTICE**

- 9.1 We have not located any information indicating that any human trafficking victims have received this type of compensation. Information regarding individuals who have failed to obtain compensation under this scheme is not publicly disclosed and, therefore we could not locate any relevant information.

<sup>21</sup> Ministry of Justice Immigration Bureau,, *The Number of Victims of Trafficking who were Afforded Protection or Support to Return*,(27 March 2014) <[http://www.moj.go.jp/nyuukokukanri/kouhou/nyuukokukanri08\\_00020.html](http://www.moj.go.jp/nyuukokukanri/kouhou/nyuukokukanri08_00020.html)>.

<sup>22</sup> Office to Monitor and Combat Trafficking in Persons, United States Department of State, above n 1, 200.

<sup>23</sup> Ibid.



## 10. SUGGESTIONS FOR IMPROVEMENT

- 10.1 Since the system is not designed to cover victims of trafficking, a new compensation scheme specific to victims of trafficking should be introduced which takes account of the nature of the crime and injuries faced by victims. The laws criminalising human trafficking should be amended to ensure they accord with the Palermo protocol. There should be legal protection for victims from prosecution and deportation and training for police officers to ensure they can easily identify potential trafficking victims. It is also strongly recommended that law enforcement authorities provide translation services for foreign victims and protection for victims of trafficking from deportation and prosecution.
- 10.2 Support services specific to victims of human trafficking should be established, including legal support to make a compensation claim.

## 11. ALTERNATIVES TO STATUTORY COMPENSATION SCHEMES

### Civil proceedings

- 11.1 Victims may claim for damages against offenders through civil proceedings under Japanese tort laws.<sup>24</sup> There is a published judicial precedent granting compensation for a girl who worked in the sex industry. The victim was a 17-year-old sex worker who provided sexual services to 30 customers and subsequently brought an action against her employer to obtain compensation for her pain and suffering. The court granted JPY 1 million to the victim as compensation for her pain and suffering.<sup>25</sup> There is no indication, however, that the individual was a victim of trafficking.
- 11.2 However, examples such as this are very uncommon due to the following:
- 11.2.1 Sex work carries a negative social stigma in Japan. If the victims disclose their situation, whether to the police or to their family and friends, they may risk discrimination. Therefore, victims generally find it difficult to consult with lawyers or other support organisations to seek help.
- 11.2.2 As mentioned above, the lack of financial resources and knowledge is a key barrier to obtaining compensation. There are no free legal services available for victims to bring civil action against those exploiting them, and victims often hesitate to consult lawyers due to the high legal fees. Relative to legal fees, the compensation amount in a civil case for these issues is considered to be low, hence it is as a key barrier to accessing compensation.
- 11.2.3 The issue of having to publicly disclose and re-live the experience is another key barrier. In a civil case within the Japanese legal system, the victim has to prove their experiences of sexual exploitation. This takes place at a public court in front of a number of people. Victims may hesitate to seek compensation through the legal system due to the fear of discussing their experiences in public and the possible psychological damage this could cause. For these reasons, the rate of cases that go to

<sup>24</sup> *Civil Code* (Act No. 89 of April 27, 1896) art 709..

<sup>25</sup> Case Number (Wa) 35473, Tokyo district court, 2010.

civil litigation is very low, and most of the cases are either resolved by settlement outside of court or without prosecution. However, as out-of-court settlements are not made public, we have not been able to gather any published statistics in this regard.<sup>26</sup>

### **Criminal proceedings**

- 11.3 Victims may seek restitution from a defendant in a criminal case by making a request to the court in the trial. The court will consider the request if the defendant is convicted. If the application is successful, the defendant is ordered to compensate the victim for damages suffered.<sup>27</sup> According to the US State Report, no victim has ever sought restitution.<sup>28</sup>

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<sup>26</sup> Ministry of Justice, Government of Japan, *White Paper on Crime* (1999), <[http://hakusyo1.moj.go.jp/jp/40/nfm/n\\_40\\_2\\_5\\_3\\_2\\_4.html](http://hakusyo1.moj.go.jp/jp/40/nfm/n_40_2_5_3_2_4.html)>; Government of Japan, Cabinet Office, *Measures for Crime Victims*, (25 March 2013) <[http://www8.cao.go.jp/hanzai/whitepaper/w-2013/html/zenbun/part2/s2\\_4\\_2c06.html](http://www8.cao.go.jp/hanzai/whitepaper/w-2013/html/zenbun/part2/s2_4_2c06.html)>.

<sup>27</sup> Thomson Reuters Foundation, Acid Survivors Trust International and J. Sagar Associates, 'Compensation Schemes: Comparative Report on National State Compensation Schemes' (Report, Thomas Reuters Foundation, 16 September 2015) 76 <<http://www.trust.org/contentAsset/raw-data/038ad26c-b7c2-4ce1-8e22-d57dad736f9c/file>>.

<sup>28</sup> Office to Monitor and Combat Trafficking in Persons, United States Department of State, above n 1, 200.

# NETHERLANDS

## 1. EXECUTIVE SUMMARY

- 1.1 The Netherlands is a destination country for human trafficking. In 2014, 1,561 possible victims of human trafficking were registered.<sup>1</sup> The primary industry for trafficking in the Netherlands is the sex industry, which forms approximately two-thirds of the human trafficking population. However, the country is seeing an increase in trafficking in a number of other areas, namely hospitality, domestic services, (inland) shipping, agriculture and horticulture. Of the suspected trafficking victims who were registered in 2014, 84% are women and 20% are younger than 18 years. In terms of nationality, 30% of the suspected victims are Dutch, 14% are Romanian, 10% are Bulgarian and 6% are Polish and Hungarian. According to the National Rapporteur on trafficking of human beings, the number of suspected human trafficking victims coming from Africa has declined. The reason for the decline is not clear.
- 1.2 In the past few years the number of human traffickers receiving convictions increased from 61% of cases in 2010 to 76% in 2014. However, average sentence lengths decreased between 2013 and 2014. The same report indicated that more victims of human trafficking are receiving compensation than previously, with compensation being either ordered by courts or provided by the Criminal Injuries Compensation Fund (*Schadefonds Geweldsmisdrijven*) ("**Fund**").<sup>2</sup>
- 1.3 Claims to the Fund are a commonly used method for compensating victims. Victims of violent crimes who have suffered an injury may apply for compensation. The Fund specifically lists human trafficking as a violent crime.
- 1.4 The Fund does have some limitations including that:
- 1.4.1 it awards only for damages that are a direct result of any injury;
  - 1.4.2 the total compensation for victims is limited to 35,000€ for both material and immaterial damages (the so-called "*all-in sum*"); and
  - 1.4.3 the total compensation for the family of deceased victims is limited to 30,000€.
- 1.5 The total compensation awarded by the Fund is often much lower than compensation awarded in a criminal or civil proceedings, as the objective of the Fund is to repair confidence and to help the victims or the family of deceased victims.

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<sup>1</sup> National Rapporteur on Trafficking in Human Being and Sexual Violence against Children, *New Figures on Identification and Protection of Victims of Human Trafficking and Prosecution of Traffickers* (16 June 2015), <<http://www.dutchrapporteur.nl/current/news/archief/new-figures-on-identification-and-protection-of-victims-of-human-trafficking-and-prosecution-of-traffickers.aspx?cp=64&cs=16855>>.

<sup>2</sup> Ibid.

## 2. PRELIMINARY ISSUES

### 2.1 International conventions/treaties the State has ratified:

Treaty	Signed/Ratified? (S, R or No)
UN Convention against Transnational Organised Crime (Transnational Organised Crime Convention)	R
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)	R
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	No
Forced Labour Convention 1930 (ILO No 29)	R
Abolition of Forced Labour Convention 1957 (ILO No 105)	R
Worst Forms of Child Labour Convention 1999 (ILO No 182)	R
Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956	R
UN Convention on the Rights of the Child	Accession
UN Convention on the Elimination of all forms of Discrimination against Women	R
UN Covenant on Civil and Political Rights	R
European Convention on Action against Trafficking in Human Beings	R

### 2.2 Domestic legislation on human trafficking:

2.2.1 Human trafficking is a criminal offence in the Netherlands pursuant to article 273f of the Dutch Penal Code (*Wetboek van Strafrecht*). The definition of human trafficking in the Netherlands appears to accord with international definitions. It criminalises the recruitment, transportation, transfer, accommodating or sheltering, including the exchange or transfer of control over a person by means of threat or violence, extortion, fraud, deception, abuse of power or vulnerability or by giving or receiving payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation or removing a persons' organs. The maximum punishment for human trafficking is imprisonment for 12 years or a fine of 81,000€. Aggravating circumstances can lead to a higher maximum term of imprisonment, even up to 30 years if the victim has died as a result of the human trafficking.

### 3. BASIS OF STATUTORY COMPENSATION

- 3.1 Statutory compensation is awarded through the Fund, established under the Criminal Injuries Compensation Fund Act 1975 (*Wet Schadefonds Geweldsmisdrijven*) ("**CICF Act**"). Additional rules and policy can be found in the Regulation Maximum Amounts Criminal Injuries Compensation Fund (*Regeling maximumbedragen uitkeringen schadefonds geweldsmisdrijven*) ("**Regulation**") and the Policy Bundle Criminal Injuries Compensation Fund of 2 June 2015 (*Beleidsbundel Schadefonds Geweldsmisdrijven*) ("**Policy Bundle**").
- 3.2 The details of the request for the compensation and the procedure are set out in the CICF Act. This Act contains rules in relation to the eligibility for the Fund and in relation to the application for compensation and the procedure that needs to be followed by the Commission in making a decision. This procedure is an administrative procedure.<sup>3</sup> Additional rules can be found in the Regulation which stipulates the maximum amount of compensation that can be awarded in individual cases and the Policy Bundle which provides additional rules and guidance in relation to (among other things) the application process and eligibility.

### 4. TYPE OF SCHEME

- 4.1 The Fund is available not only for victims of human trafficking but for victims of violent crimes generally. Injuries that relate to human trafficking may be eligible for compensation if the requirements of the Fund are met. This means that victims or the family of deceased victims are able to apply for compensation for serious physical or mental injuries relating to an intentional crime committed in the Netherlands.

### 5. ELIGIBILITY

- 5.1 Both victims and family of deceased victims may apply for compensation. Victims and family are only able to apply for compensation if the injuries relate directly to a violent crime committed intentionally within the Dutch jurisdiction. Human trafficking has been explicitly included by the Fund as a violent crime.
- 5.2 Victims that have serious physical or psychological injuries relating to an intentional violent crime committed (completely or partially) in the Netherlands or committed on board of a Dutch vessel or a Dutch aircraft outside of the Netherlands can apply for compensation.<sup>4</sup> Families of victims can also apply for compensation if the victim dies as a consequence of a criminal injury.<sup>5</sup> Family is defined in article 3 paragraph 2 of the CICF Act as:
- 5.2.1 the married and not judicially separated or cohabitant spouse and the registered partner of the deceased victim;
  - 5.2.2 relatives by blood or marriage, provided that this person at the time of death either wholly or partly supported the living-expenses of the victim or was obliged to do so pursuant to a court decision;

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<sup>3</sup> General Administrative Law Act applies to this procedure.

<sup>4</sup> CICF Act article 3 paras 1a,-b.

<sup>5</sup> *Ibid* art 3 para 1c.

- 5.2.3 people who lived with the deceased as a family unit and where the deceased contributed to common household duties;
  - 5.2.4 people who lived as a family with the deceased and to whose living-expenses the deceased wholly or partly contributed; or
  - 5.2.5 blood relatives of the deceased victim in the first degree and in the second degree of the collateral line
- 5.3 A person who paid for funeral arrangements following the death of a victim can also apply for compensation.<sup>6</sup>

### **Jurisdictional requirements**

- 5.4 It is not necessary for the victim or the family of the deceased victim to reside in the Netherlands or the Dutch jurisdiction, it is only necessary that the criminal injury is committed in the Netherlands or on board a Dutch vessel or aircraft outside of the Netherlands.

### **Types of injuries recognised**

- 5.5 Both physical and psychological injuries are recognised as injuries that qualify for an award of damages. The Fund has compiled an Injury List (*Letsellijst*), in which the possible injuries and the corresponding compensation are divided into 6 categories. Depending on the severity of the injury of the victim, compensation may be awarded up to a maximum amount of 35,000€. The maximum amount of compensation available for the family of deceased victims is 30,000€. Compensation for the family of a deceased victim always includes a fixed payment of 5,000€ and may be complemented by an allowance for funeral arrangements and an allowance for the loss of income of the deceased up to a maximum of 25,000€.

### **Exclusion on the grounds of illegal or immoral behaviour**

- 5.6 If a victim has contributed in any way to their physical or psychological injuries, compensation may, depending on the age of the victim and the level of his/her contribution, be omitted or decreased by 25%, 50% or 75% of the original amount of compensation.

### **Time limit for application**

- 5.7 Victims or the family of deceased victims are required to file a request for compensation within three years after the violent crime has occurred.<sup>7</sup> If the request is filed more than three years after the violent crime a "good reason" for this delay must be provided.

### **Requirements for referral, reporting and cooperation**

- 5.8 In order to be eligible for compensation the crime and injuries must be sufficiently proven. This is done by filing a report of the crime to the police. In principle, the

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<sup>6</sup> Ibid art 3 para 1d.

<sup>7</sup> Ibid art 7.

report to the police will outline the crime and the injury; however, the Fund may request additional information regarding the crime or injury. Under the scheme medical information cannot sufficiently demonstrate the cause, the circumstances and the reason for the violent crime. Therefore, it will only provide limited contribution to the statement of the victim. If there is no report filed to the police, the criminal injuries can only be demonstrated accurately via other relevant information in certain limited cases.

- 5.9 If the perpetrator is known, the victim is expected to attempt to recover the damages from the perpetrator before accessing the Fund either through criminal or civil proceedings. The Fund acknowledges, however, that in some cases the perpetrator is not known or the victim has other "good reasons" for not trying to recover the damages from the perpetrator. It is not indicated by the Fund what circumstances could constitute a "good reason" for not trying to recover the damages from the perpetrator.

## 6. APPLICATION PROCESS

- 6.1 The Fund's application forms can be downloaded from the Fund's website ([www.schadefonds.nl](http://www.schadefonds.nl)). Both the website and the application forms are available in Dutch and English. It is also possible to request the form by telephone (0031-70-4142000). In order to process the application, the form must be completed in as much detail as possible and personal details and details regarding the criminal offences and the injuries are required. Once completed, the application must be sent by post as the original signature of the victim is required.

### Evidence

- 6.2 The application should include at least (i) a copy of the passport or identification card of the victim/family of the deceased victim, (ii) a copy of the report to the local authorities (if available) and (iii) medical information relating to the injury (if available).

### Hearing

- 6.3 A hearing is not required, but if a hearing is requested by the Fund, this will be done by telephone. However, if the person concerned filed an appeal against the initial decision of the Fund, a hearing may be done in person. During the process the victim may be represented by a lawyer or a representative.
- 6.4 The statutory period in which the Fund must make a decision is 26 weeks. This period may be extended another 12 weeks (or longer), if the information requested has not been received by the Fund in time.
- 6.5 The Fund does not charge fees. Additional costs may arise, for example if a victim chooses to be represented by a lawyer.

### Assistance

- 6.6 The Fund itself does not provide any assistance during the process. If assistance is required during the process, victims and the family of deceased victims may turn to Victim Support Netherlands (Slachtofferhulp Nederland). Another organisation that may provide help to a victim in this process is the Foundation Procedure Mediation

for Ethnic Minorities (Stichting Trajectbemiddeling Allochtonen). This foundation advises non-Western ethnic minorities about their rights and duties, often in their own language. There are other organisations that also offer assistance to victims of human trafficking. They may also be able to assist in the process.

## 7. ASSESSMENT OF COMPENSATION

- 7.1 Victims of human trafficking are able to apply for compensation for a physical injury, a psychological injury or a combination of both which relates to an intentional crime committed in the Dutch jurisdiction. By using the Injury List, the Fund determines the category of injury and the associated compensation. The amount of compensation is divided into six categories: 1,000€, 2,500€, 5,000€, 10,000€, 20,000€ and 35,000€.<sup>8</sup> This is an all-in sum for both physical and psychological injuries and therefore no allocation of expenses is needed.
- 7.2 In relation to the psychological consequences of violent crimes, certain types of human trafficking have been explicitly mentioned as crimes in which severe psychological injuries are presupposed. In these types of cases, the Fund does not need to review medical information in order to determine that these psychological consequences exist. This applies to the following types of human trafficking:<sup>9</sup>

Type of human trafficking	Compensation
Human trafficking, including sexual exploitation without sexual penetration and/or frequent physical violence or threats of violence for a longer period of time.	2,500€ (category 2)
Human trafficking, including sexual exploitation without sexual penetration and/or frequent physical violence or threats of violence for a longer period of time, but more severe considering the nature of the violent crime and the consequences.	5,000€ (category 3)
Human trafficking, including sexual exploitation with sexual penetration.	10,000€ (category 4)
Human trafficking, including sexual exploitation with sexual penetration under aggravating circumstances or the removal of one or more organs.	20,000€ (category 5)

- 7.3 The family of a deceased victim receives a fixed amount of 5,000€ for pain and suffering and loss of enjoyment of life (hedonic damages) and economic loss (for example therapy costs or decrease in income). Additional compensation may be awarded for funeral arrangements up to a maximum of 7,500€ and an allowance for the loss of income of the deceased up to a maximum of 25,000€. However, the family

<sup>8</sup> Policy Bundle s 2.3.1.

<sup>9</sup> See Criminal Injuries Compensation Fund, *Injury List Criminal Injuries Compensation Fund* (25 January 2016) <[https://translate.googleusercontent.com/translate\\_c?depth=1&hl=en&prev=search&rurl=translate.google.com.au&sl=nl&u=http://schadefonds.nl/aanvraag-indieneren/alles-over-de-uitkering-aanvraag/lichamelijk-letsel&usq=ALkJrhj8EzHeUGqWsk\\_InJl-uOKAZH-6KA](https://translate.googleusercontent.com/translate_c?depth=1&hl=en&prev=search&rurl=translate.google.com.au&sl=nl&u=http://schadefonds.nl/aanvraag-indieneren/alles-over-de-uitkering-aanvraag/lichamelijk-letsel&usq=ALkJrhj8EzHeUGqWsk_InJl-uOKAZH-6KA)>.



of the deceased will not receive more than 25,000€ in total for the loss of income of the deceased and funeral arrangements.<sup>10</sup>

- 7.4 Compensation is assessed on the basis of the severity of the victim's injuries, which is determined by the limitations and dependence of the victim as a result of the injury based on medical information.
- 7.5 The scheme is centrally funded by the Government.

## 8. BARRIERS / OBSTACLES

- 8.1 Victims of human trafficking and other violent crimes face various obstacles when seeking compensation.

### Awareness

- 8.2 The Fund is not known to many victims. This barrier was acknowledged in the Fund's 2014 annual report. It stated that in 2014 the number of applications for compensation had decreased by 6%. It also indicated that only one-third of the victims of violent crimes eligible to apply for compensation are actually aware of the Fund.<sup>11</sup> The Fund is taking several measures to improve this awareness, such as making sure that other government agencies refer victims to the Fund. This includes Police, the Public Prosecutor's Office, municipalities and Youth Care (*Jeugdzorg*).

### Language barriers

- 8.3 Language barriers may stand in the way of victims of human trafficking. The Fund's website is in Dutch. However, the homepage is available in English and contains a contact form and a PDF with information. Language will therefore be a barrier for the victims of human trafficking who do not speak Dutch and/or English.

### Time limitations

- 8.4 Another barrier is the limited time in which victims of violent crimes can apply for compensation. This is now three years, although the Fund indicates that it shows leniency to applicants that have a good reason for filing the application after more than three years. In a pending legislative proposal, the time period has been extended to ten years.

### Limited or failing aftercare for victims receiving compensation

- 8.5 The National Rapporteur on Trafficking in Human Beings (*Nationaal Rapporteur Mensenhandel*) has indicated that there is limited aftercare for victims of human trafficking who have received large amounts of compensation.<sup>12</sup> There is a concern

<sup>10</sup> Policy Bundle s 2.4.4.

<sup>11</sup> Schadefonds Geweldsmisdrijven, 2014 Annual Report (16 February 2015) <[https://www.youtube.com/watch?v=Yq\\_ekKSEL5k](https://www.youtube.com/watch?v=Yq_ekKSEL5k)>.

<sup>12</sup> C.E. Dettmeijer-Vermeulen, 'Factsheet on Trafficking in Human Beings: Visible and Invisible II' (Quantitative Report, National Rapporteur on Trafficking in Human Being and Sexual Violence against Children, 17 June 2014) 5 <https://www.dutchrapporteur.nl/current/news/archief/rapporteur-generate-more-insight-into-networks-facilitators-and-money.aspx>.

that victims may be victimised again as others may attempt to gain access to their compensation.

### **Evidence**

- 8.6 During a symposium in October 2013,<sup>13</sup> a lawyer of the Fund indicated that many victims of human trafficking struggle with providing evidence that they are indeed a victim of human trafficking. In particular, if the perpetrator has not been convicted for human trafficking, supporting evidence is often required. The Fund currently considers a statement of the police or a Public Prosecutor compelling supporting evidence; in 2014, the Fund further widened its policy such that a criminal investigation is no longer required. It is unclear whether this will have a positive effect on the number of applications of human trafficking victims.<sup>14</sup>

### **Only injuries suffered in the Netherlands can be compensated**

- 8.7 The Policy Bundle explicitly indicates that human trafficking has cross-border components. To determine whether human trafficking has occurred, the Fund looks at what happened in the Netherlands and beyond. However, for the assessment of the injuries, acts that occur outside of the Netherlands will not be taken into account. This may impose an extra barrier for victims of human trafficking as they will need to demonstrate which specific (including psychological) injuries they suffered in the Netherlands.

### **Potential for prosecution of illegal activities**

- 8.8 A further barrier to compensation is the fear or prosecution for illegal activities undertaken as a consequence of being a victim of human trafficking. At present, it would appear that there are no formal immunity provisions in the Netherlands relating to unlawful acts committed by trafficking victims as a direct result of having been trafficked.<sup>15</sup> While it is understood that the Council of Procurators General was to include being a victim human trafficking as grounds for non-prosecution in the PPS' Instructions, it is not known whether this has occurred.<sup>16</sup>

### **Temporary Visas**

- 8.9 It appears that foreign victims are entitled to a reflection period of up to three months and may be able to obtain a temporary residence visa if they cooperate with criminal investigations. This requirement to cooperate is waived if they are unable to cooperate due to serious threats or for medical or psychological reasons under the Aliens Act Implementation Guidelines.

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<sup>13</sup>Symposium 'Compensatie voor Slachtoffers van Mensenhandel' 10 October 2016 <http://www.mensenhandelweb.nl/document/symposium-%E2%80%98compensatie-voor-slachtoffers-van-mensenhandel%C2%B4>

<sup>14</sup> C.E. Dettmeijer-Vermeulen, above n 12, 3..

<sup>15</sup> C.E. Dettmeijer-Vermeulen, 'Trafficking in Human Beings: Ninth Report of the Dutch National Rapporteur' (Report, National Rapporteur on Trafficking in Human Being and Sexual Violence against Children, 17 September 2014) 120 <https://www.dutchrapporteur.nl/reports/ninth/>.

<sup>16</sup> Ibid 121.

## COSM

- 8.10 In the period 2010 to 2014, the Netherlands ran trial shelters for victims of trafficking referred to as "Categorical shelter for victims of human trafficking" or "COSM". These shelters provided victims with access to medical assistance, psychologists, language classes and other activities.<sup>17</sup> It is unclear whether the trials have continued.

## 9. EXAMPLES IN PRACTICE

- 9.1 The decisions made by the Fund are not publicly available. Only the general statistics for applications filed are published, for example, the number of applications for compensation or the amount of compensation that has been paid to victims of violent crimes. If a victim is not satisfied with the decision of the Fund, the victim can appeal this decision. The Courts will then review the decision of the Fund. Some of these decisions of the Courts are published.
- 9.2 The 2014 National Rapporteur on Trafficking in Human Beings<sup>18</sup> stated that in 2013 and 2014, the Fund processed applications in 58 and 61 cases of victims of human trafficking respectively. In 2014, more than 75% of requests for compensation were granted. According to the National Rapporteur, this is a significant increase compared to the years preceding 2014. This increase may be due to the Fund officially recognising human trafficking as a violent crime where compensation can be awarded and accepting applications where a criminal investigation has not commenced.

## 10. SUGGESTIONS FOR IMPROVEMENT

- 10.1 The Fund has undergone a number of changes in recent years. There are, however, a number of areas in which improvements could be made to ensure better access for victims of human trafficking.

### More awareness for the Fund

- 10.2 As noted above, awareness of the fund is low and should be improved to ensure victims can access it. The Director of the Fund has indicated that she wants to focus on creating more awareness of the Fund's work.<sup>19</sup>

### Longer period of time for requesting compensation

- 10.3 At present, applications must be made within three years of the crime and injury occurring, a time limit which can be prohibitive, particularly for vulnerable victims. There is now a new legislative proposal pending that extends this period to ten years.

### Special training for lawyers

<sup>17</sup> Group of Experts on Action against Trafficking in Human Beings, 'Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Netherlands, First evaluation round' (Country Report, adopted on 21 March 2014, published on 18 June 2014) 7 <[https://www.coe.int/t/dghl/monitoring/trafficking/docs/Reports/GRETA\\_2014\\_10\\_FGR\\_NLD\\_w\\_cmnts\\_en.pdf](https://www.coe.int/t/dghl/monitoring/trafficking/docs/Reports/GRETA_2014_10_FGR_NLD_w_cmnts_en.pdf)>.

<sup>18</sup> C.E. Dettmeijer-Vermeulen, above n 12, 3..

<sup>19</sup> Monique de Groot, 'Beter Bereiken' on Director of the Fund for Compensation of Violent Offences, *Fund For Compensation Of Violent Offences* (15 March 2016) <<http://schadefonds.blogspot.de/>>.

- 10.4 It has been suggested that more victims of human trafficking may be reached if lawyers receive special training about the compensation that victims of human trafficking can request from the Fund.<sup>20</sup>

### **Aftercare for victims of human trafficking that receive compensation**

- 10.5 More aftercare is needed for victims of human trafficking that have received compensation, in order to prevent them from becoming victimised again.<sup>21</sup>

### **Immunity from Prosecution**

- 10.6 The 2014 National Rapporteur on Trafficking in Human Beings suggested that there are various ways in which non-prosecution and non-punishment provisions may be enforced including through means of a judicial pardon, including grounds that preclude the application of criminal sanctions or by mitigating sentences.<sup>22</sup> It is thought that such immunity would mean that victims of human trafficking will be more inclined to cooperate with an investigation against the perpetrator.

### **Suggestions from the Group of Experts on Action against Trafficking in Human Beings ("GRETA")<sup>23</sup>**

- 10.7 GRETA has evaluated the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Netherlands. The recommendations following this evaluation included:

- 10.7.1 strengthening multi-agency involvement in the decision-making process leading to the identification of victims of trafficking;
- 10.7.2 placing the assistance to and protection of possible victims at the heart of the identification procedure and not linking identification to the prospects of the investigation and prosecution; and
- 10.7.3 improving the identification of victims of trafficking for the purpose of labour exploitation and the detection of victims among asylum seekers, particular unaccompanied foreign minors.

## **11. ALTERNATIVES TO STATUTORY COMPENSATION SCHEMES**

- 11.1 In the Netherlands, possible victims of human trafficking have two other options to seek compensation.

### **Criminal proceedings with a civil claim**

- 11.2 The most common method of seeking compensation is to commence criminal proceedings seeking damages. In criminal proceedings, a victim has two options to

<sup>20</sup> Violent Offences Compensation Fund, *Inhousebijeekomst mensenhandelorganisaties*, (4 September 2015) <<https://schadefonds.nl/nieuws/314-inhousebijeekomst-mensenhandelorganisaties>>.

<sup>21</sup> C.E. Dettmeijer-Vermeulen, above n 12, 3..

<sup>22</sup> C.E. Dettmeijer-Vermeulen, above n 15, 121.

<sup>23</sup> Group of Experts on Action against Trafficking in Human Beings, above n 17, 6.

seek compensation: (a) a victim can join the criminal proceedings against the perpetrator and institute a civil claim within this process or (b) the court can make an order for damages.

- 11.3 Joining criminal proceedings for a victim is relatively easy. A victim fills out a form indicating which damages the victim has suffered. Victims can also become a party in the criminal proceedings by orally (or in writing) informing the Court about the damages during the hearing. This avenue is only available for simple claims; if the claim is too complex, for example because damages are difficult to calculate, the claim will be dismissed. No court fee is payable for the victim if he or she wishes to join the criminal proceedings.
- 11.4 Alternatively, the court can make an order for damages, either on its own initiative or at the public prosecutor's request. An order for damages can be imposed on a perpetrator irrespective of whether the victim has joined the criminal proceedings. The State will be responsible for executing the ruling and subsequently collecting the compensation (for the victim). The victim will not incur any further costs.

### **Civil proceedings**

- 11.5 A human trafficking victim can also institute a civil claim against the perpetrator. The civil claim is based on a "wrongful act" (onrechtmatige daad).<sup>24</sup> In order to successfully institute a wrongful act-claim, the aggrieved party will need to prove the following five criteria:
- 11.5.1 wrongful behaviour (active or passive);
  - 11.5.2 accountability;
  - 11.5.3 damage (material or immaterial);
  - 11.5.4 causal connection between the wrongful act and the damage; and
  - 11.5.5 relativity.
- 11.6 In civil proceedings, victims are responsible for executing a ruling and subsequently collecting compensation.
- 11.7 The civil proceedings option is rarely pursued as proceedings are often lengthy and expensive, the victim is frequently competing against a (legal) entity who is in a stronger financial position than itself and the victim has the burden of proving all five wrongful act-criteria.
- 11.8 Despite these difficulties, there are instances in which these claims have proven to be successful, and it is not recommended that victims immediately dismiss this option. A criminal conviction requires a higher threshold of "certainty" than a claim in a civil lawsuit. Therefore, it is possible a court will dismiss a charge from the Public Prosecution Service for human trafficking, while allowing a civil law claim for compensation. Furthermore, in civil proceedings the emphasis will be on the damages awarded, not whether human trafficking is a criminal offence.

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<sup>24</sup> Dutch Civil Code (*Burgerlijk Wetboek*) art 6:162.

# PHILIPPINES

## 1. EXECUTIVE SUMMARY

- 1.1 The Republic of the Philippines ("**the Philippines**") is primarily a source country for human trafficking where Filipinos, commonly women and children, are trafficked for sex work and forced labour in industries such as fishing, construction, agriculture and domestic work.<sup>1</sup> Filipino children are also forcibly trafficked and recruited into militias.<sup>2</sup>
- 1.2 To a lesser extent, the Philippines is also a destination and transit country for human trafficking.<sup>3</sup>
- 1.3 The Philippines has recently taken steps to better support victims including enacting Republic Act No. 9208, otherwise known as The Anti-Trafficking in Persons Act of 2003 (later amended by Republic Act No. 10 364, or the Expanded Anti-Trafficking in Persons Act of 2012) which created, among other things the Inter-Agency Council Against Trafficking ("**IACAT**"). Since the introduction of these laws, investigation of suspected incidences of human trafficking and prosecution of perpetrators has increased.<sup>4</sup> Republic Act No. 9208 also mandated the provision of certain victim support services by government agencies namely emergency housing, counselling, free legal services, medical or psychological services, livelihood and skills training and educational assistance to trafficked children.<sup>5</sup>
- 1.4 Although there is no compensation scheme specific to victims of human trafficking, such people may access the general victims of crime compensation scheme under Republic Act No. 7309.<sup>6</sup> Under this scheme, victims of "violent crime" are able to access compensation up to 10 000 Philippine pesos. Accordingly, if victims of human trafficking can establish that they are also victims of violent crime, they may apply for compensation.

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<sup>1</sup> United States of America State Department, "Trafficking in Persons Report July 2015' (2015), 279, <<http://www.state.gov/documents/organization/245365.pdf>>.

<sup>2</sup> Ibid, 280.

<sup>3</sup> Ibid, 279.

<sup>4</sup> Republic of the Philippines Inter-Agency Council Against Trafficking (IACAT), *Tier 1 Ranking in Anti-Human Trafficking Drive Remains The Goal, Says De Lima* (1 July 2013) <<https://iacat.gov.ph>>.

<sup>5</sup> *Republic Act No. 9208* (Republic of the Philippines), s 23.

<sup>6</sup> *Republic Act No. 7309, An Act Creating a Board of Claims under the Department of Justice for Victims of Unjust Imprisonment of Detention and Victims of Violent Crimes and for Other Purposes 1992* (Republic of the Philippines)

## 2. PRELIMINARY ISSUES

### Framework for anti-trafficking in the jurisdiction

#### 2.1 International conventions/treaties the Philippines has ratified:

Treaty	Signed/Ratified or no
UN Convention against Transnational Organised Crime (Transnational Organised Crime Convention)	S
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)	S
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	R
Forced Labour Convention 1930 (ILO No. 29)	R
Abolition of Forced Labour Convention 1957 (ILO No. 105)	R
Worst Forms of Child Labour Convention 1999 (ILO No. 182)	R
Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956	Accession
UN Convention on the Rights of the Child	R
UN Convention on the Elimination of all forms of Discrimination against Women	R
UN Covenant on Civil and Political Rights	S
Other regional instruments Protocol Against Smuggling of Migrants by Land Sea and Air	R

#### 2.2 Domestic legislation on human trafficking:

2.2.1 There are two key pieces of legislation relating to human trafficking in the Philippines:

2.2.1.1 The Republic Act No. 9208, or the "Anti-Trafficking in Persons Act of 2003" ("**RA 9208**"); and

2.2.1.2 Republic Act No. 10 364, the "Expanded Anti-Trafficking of Persons Act of 2012" ("**RA 10364**") (which amended **RA No 9208**).

2.2.2 RA 10 364 provides an extensive description of human trafficking offences, including attempted human trafficking. Specifically section 4(a) of RA 10 364 states that is unlawful for a person to "recruit, obtain, hire, provide, offer, transport, transfer, maintain, harbour, or receive a person

by any means, including those done under the pretext of domestic or overseas employment or training or apprenticeship, for the purpose of prostitution, pornography or sexual exploitation." RA 10 364 explicitly adopts the definition of trafficking as provided in the Palermo Protocol.

2.2.3 Section 4(a) of RA 10364 also has extra-territorial application and covers acts committed outside the Philippines provided that:

2.2.3.1 the unlawful act of trafficking was commenced in the Philippines;

2.2.3.2 the suspect or accused is a Filipino citizen or a permanent resident of the Philippines; and

2.2.3.3 the unlawful act was committed against a citizen of the Philippines.<sup>7</sup>

The penalty imposed on a person found guilty of trafficking is twenty years imprisonment and a fine of not less than 1 million pesos but no more than 2 million pesos.<sup>8</sup>

### 3. BASIS OF STATUTORY COMPENSATION

3.1 The statutory basis for compensation is Republic Act No. 7309 ("**the Act**") which provides compensation to victims of "violent crimes" ("**the Scheme**").

3.2 The Act also establishes a Board of Claims under the Department of Justice for Victims of Unjust Imprisonment or Detention and Victims of Violent Crimes ("**the Board**") who implement the Scheme.

3.3 Whilst RA 9208 and RA 10 364 do not provide a basis for statutory compensation victims of human trafficking, Republic Act 9208 stipulates that government agencies must provide victims of trafficking with the following support services:

3.3.1 emergency shelter or appropriate housing;

3.3.2 counselling;

3.3.3 free legal services (which shall include information about the victim's rights and the procedure for filing complaints, claiming compensation and such other legal remedies available to them, in a language understood by the trafficked person);

3.3.4 medical or psychological services;

3.3.5 livelihood and skills training; and

3.3.6 educational assistance to a trafficked child.<sup>9</sup>

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<sup>7</sup> Republic Act No. 10 364 s 23.

<sup>8</sup> Ibid s 10.

<sup>9</sup> Republic Act No. 9208 s 23.



## 4. TYPE OF SCHEME

- 4.1 The Scheme applies to all victims of "violent crimes": a "violent crime" is defined under the Act as rape or offences committed with malice which resulted in death or serious physical and/or psychological injuries, permanent incapacity or disability, insanity, abortion, serious trauma, or committed with torture, cruelty or barbarity.<sup>10</sup> The maximum award of compensation under the Scheme is 10 000 pesos (approx. USD 220).<sup>11</sup>
- 4.2 The Scheme is not specific to victims of trafficking however victims may apply for compensation if they have suffered injuries from a "violent crime". Given the definition of "violent crime" and that all forms of trafficking (sex, forced labour, child labour, domestic servitude and child soldiers) are arguably committed with "malice, torture or cruelty", it is possible that most victims of trafficking would be covered under the Scheme.

## 5. ELIGIBILITY

### Eligible victims

- 5.1 Primary victims are eligible to apply for compensation. Secondary victims are only able to apply in the case of death or incapacity of the primary victim and in the order of spouse, children, parents and siblings.<sup>12</sup>
- 5.2 There is no express citizenship or residency requirements.

### Types of injuries recognised

- 5.3 The Scheme covers both physical and psychological injuries.<sup>13</sup>

### Jurisdictional requirements

- 5.4 There is no requirement for the injury to have occurred in the Philippines.

### Exclusions on grounds of illegal or immoral behaviour

- 5.5 The Act is silent on the factors the Board will take into account when determining application. However under RA 9208, "trafficked persons shall be recognised as victims of the act or acts of trafficking and as such shall not be penalised for crimes directly related to the acts of trafficking".<sup>14</sup> It is unclear how RA 9208 and the Act relate to each other, but it seems that victims of human trafficking would not be rendered ineligible for compensation by virtue of illegal acts committed by them in the course of their trafficking.

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<sup>10</sup> Republic Act No. 7309 s 3 (d).

<sup>11</sup> Republic Act No. 7309 s 4.

<sup>12</sup> Republic Act No. 7309 s 6.

<sup>13</sup> Ibid s 3(d).

<sup>14</sup> Republic Act No. 9208 s 17.

### Time limit for application

- 5.6 There is a strict six month time limit for filing applications from the date when the victim suffers the injury.<sup>15</sup> If a victim does not file an application within this time, he or she is deemed to have waived his or her right to apply for compensation, unless otherwise provided for by the Act. The Act does not, however, outline the circumstances in which an out of time application would be considered.

### Requirements for referral, reporting and cooperation

- 5.7 There is no express requirement that victims must report the crime to police. However according to the application form for the Scheme, a copy of the police report must be attached to the application form<sup>16</sup>, indicating that there is a de facto requirement that the crime has been reported to police. According to the application form, applicants are also required to attach a medical certificate, a psychiatrists report (if applicable) and an autopsy report or death certificate (if applicable).<sup>17</sup>

## 6. APPLICATION PROCESS

- 6.1 An applicant must file a pro-forma application form<sup>18</sup> together with:
- 6.1.1 a photo;
  - 6.1.2 a certified copy of the police report;
  - 6.1.3 certified copy of the autopsy report and death certificate of the victim has died;
  - 6.1.4 certified copy of a medical certificate (for serious physical injuries/rape);
  - 6.1.5 certified copy of the psychiatrist certificate (if applicable); and
  - 6.1.6 medical receipts.
- 6.2 The application form and supporting documents must be filed at the Secretariat of the Board of Claims, Department of Justice, Padre Faura Street, Ermita, Manila.
- 6.3 It is not clear whether the application form is available in languages other than English and there does not appear to be any filing fee.
- 6.4 There is no formal hearing on the application once it been lodged with the Board. There is therefore no need for victims to be represented by legal counsel or to even appear before the Board. Nevertheless, RA 9208 states that government agencies should make available free legal services to trafficked persons, including information about claiming compensation.<sup>19</sup>

<sup>15</sup> Republic Act No. 7309 s 5

<sup>16</sup> Board of Claims, *Application*, Department of Justice Manila <<http://www.doj.gov.ph/files/bocform.pdf>>.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Republic Act No. 9208 s 23.

- 6.5 Under the Scheme, the Board resolves all claims within 30 working days after the application is filed.<sup>20</sup>
- 6.6 An applicant also has the right to appeal the decision of the Board within 15 days of receipt of the Board's decision. The appeal must be made to the Secretary of Justice whose decision shall be final.<sup>21</sup> It is unclear how an applicant would lodge such an appeal.

## 7. ASSESSMENT of COMPENSATION

- 7.1 Once filed, the claim is assessed and evaluated by a panel of evaluators comprised of public prosecutors.<sup>22</sup> The primary document relied upon by the evaluators is the police report which sets out the information that serves as the basis for granting or denying the claim. In most instances, victims are also interviewed by the public prosecutors as part of the evaluation process.<sup>23</sup> This is said to ensure a higher chance of success when the Board makes its decision.<sup>24</sup>
- 7.2 Under the Scheme, the Board may approve a claim not exceeding 10 000 Pesos (approx. USD 220), or the amount necessary to reimburse the claimant the expenses incurred from the hospitalisation, medical treatment, loss of wage, loss of support, or other expenses directly related to injury, whichever is lower. This is without prejudice to other remedies available to claimant under the existing law such as filing for a separate civil action for damages.<sup>25</sup>
- 7.3 The Scheme is centrally funded. An initial government contribution of 10 million pesos was drawn from the National Treasury. Subsequent funds are drawn from one per cent of the net income of the Philippine Amusement and Gaming Corporation, the proceeds of any contract relating to the depiction of crime in any medium as well as proceeds of crime. Further, five pesos are taken out of the filing fee in every civil case.<sup>26</sup>

## 8. BARRIERS/OBSTACLES

- 8.1 Whilst there is little available information on the process and operation of the Scheme, there appears to be a number of barriers to victims of trafficking in accessing compensation.
- 8.2 One, the definition of a violent crime is relatively narrow. Accordingly, victims of human trafficking who have not suffered from a "violent crime" i.e. rape or a crime committed with malice, torture, cruelty or barbarity, would be excluded from the Scheme.

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<sup>20</sup> Republic Act No. 7309 s 7.

<sup>21</sup> Republic Act No. 7309 s 8.

<sup>22</sup> Board of Claims, Department of Justice Manila, <http://www.doj.gov.ph>

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Republic Act No. 7309 s 8.

<sup>26</sup> Ibid s 9.

- 8.3 Two, the maximum amount of compensation available under the Scheme is largely insufficient to meet the victims' complex, long term, physical and psychological needs.
- 8.4 Three, the Act does not provide victims with any form of support, legal aid or otherwise, in preparing their applications. While victims are only required to complete a pro-forma application form, they undeniably need assistance when making a statement at the police station for the preparation of the police report. As discussed above, RA 9208 requires government agencies to provide victims of human trafficking with legal assistance and information regarding compensation available to them however it is not evident whether this assistance occurs and if so, whether it is satisfactory.
- 8.5 Four, given the primary evidence that appears to support a claim is a police report, a victim will be significantly disadvantaged if the police draft a poorly crafted report. This is a real risk in the Philippines, especially given the low literacy rates and high levels of corruption in the police force.
- 8.6 Five, it is not clear under the Act whether victims' identities are protected when making a claim under the Scheme. If victims' identities are not protected, this could discourage victims from applying for compensation and, given that organised crime is behind the proliferation of human trafficking with the probable aid or protection from corrupt public and law enforcement officials,<sup>27</sup> it is likely that victims fear retaliation as well (especially where their identities cannot be protected). It is noted that under RA 10 364 victims must have the privacy protected (including the name and the personal circumstances of the trafficked person or any other information tending to establish the identity of the trafficked person and his or her family)<sup>28</sup> during all investigations, rescue, prosecutions and trials however it is unclear to what extent RA 10364 applies to the Act.
- 8.7 Six, trafficking victims in the Philippines often experience social stigma, especially victims of rape. The shame felt by the victims and their family members often dissuades them from pursuing legal recourse including seeking compensation.
- 8.8 Seven, there appears to be a general lack of awareness in the Philippines, especially in the remote provinces, about trafficking victim support resources including IACAT and the possibility of seeking compensation. It could be said that this is partly a result of the lack of available public information on victim-support resources and how to access the Scheme, complicated by the traditionally low education and literacy levels of victims.

## 9. EXAMPLES IN PRACTICE

- 9.1 It is difficult to locate an example of a claim filed with the Board for compensation resulting from an act of human trafficking. However following an informal inquiry to the Board, the Board disclosed that they do receive several applications for claims from victims of human trafficking, and they have in fact make compensation payments for these claims.

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<sup>27</sup> United States of America State Department, above n 1, 280.

<sup>28</sup> Republic Act No. 10 364 s 10.

## 10. SUGGESTIONS FOR IMPROVEMENT

- 10.1 There are three key suggestions for improvement.
- 10.2 One, the Government should establish a compensation scheme that is specific to victims of human trafficking, which recognises the special circumstances of such persons. For example, the de facto requirement to report the crime to the police should be removed and a new definition of "violent crime" be included which specifically defines human trafficking offences.
- 10.3 Two, the Government should increase the maximum compensation available to victims to better reflect the severity and long lasting nature of the injuries suffered by victims of trafficking, both psychological and physical. The current cap of 10,000 pesos is not commensurate with the seriousness of the offence, the suffering endured by the victims and victims' actual medical expenses. To do this, it is recommended that the Government seek alternative sources of funding for the Scheme beyond that currently set out in the legislation.
- 10.4 Three, the Government should invest in local education about the crime of trafficking so that people are empowered to protect themselves. To achieve this, there needs to be increased funding to services that support victims of human trafficking (including targeting victims in more remote areas) and to services that raise public awareness of the crime of human trafficking to help people identify and stop it.

## 11. ALTERNATIVES TO STATUTORY COMPENSATION SCHEMES

### Civil proceedings

- 11.1 Under the Civil Code of the Philippines, "every person who, contrary to law, willfully or negligently causes damage to another shall indemnify the latter for the same."<sup>29</sup> On this basis, a victim of trafficking has a right to seek compensation by filing a civil action in the Philippines Court for damages against their perpetrator. Such proceedings can be instituted separately from any criminal proceedings against the perpetrator. In such proceedings, a victim is also exempt from filing fees.<sup>30</sup>
- 11.2 There is, however, no known case in the Philippines of a victim who has instituted a separate civil action to recover damages against the traffickers locally. It is unclear what prospects of success a victim of trafficking may have in pursuing compensation through this avenue.

### Criminal proceedings

- 11.3 Under the Revised Penal Code of the Philippines, "every person criminally liable for a felony is also civilly liable."<sup>31</sup> In a case decided by the Supreme Court of the Philippines, it was held that "regardless of whether or not a special law so provides, indemnification of the offended party may be had on account of the damage, loss or injury directly suffered as a consequence of the wrongful act of another. The

<sup>29</sup> Republic Act No. 386, *An Act to Ordain and Institute the Civil Code of the Philippines* (1949) art 20.

<sup>30</sup> Republic Act No. 9208 s 13.

<sup>31</sup> Republic Act No. 3815, *An Act Revising the Penal Code and Other Penal Laws* (1930) art 100.

indemnity which a person is sentenced to pay forms an integral part of the penalty imposed by law for the commission of the crime."<sup>32</sup>

- 11.4 On this basis, it is also open to a victim to seek damages as part of any criminal proceedings against a perpetrator. In a recent case decided by the Supreme Court of the Philippines, the accused, who was convicted of human trafficking, was ordered to pay moral damages in the amount of 500 000 pesos (approximately USD 11 111) and exemplary damages, in the amount of 100 000 pesos (approximately USD 2 222).<sup>33</sup>

### **Advantages**

- 11.5 The key advantage of the civil and criminal alternatives is that the judgment award is generally much higher than what is potentially recoverable under the Scheme from the Board. There are also several types of damages which the Court may use as the basis for awarding compensation – moral, exemplary, nominal, moderate and liquidated. The award for each type of damages is independent of the other, and the Court is given the prerogative to determine the amount, based on the facts and circumstances of a given case.

### **Disadvantage**

- 11.6 The key disadvantage of seeking damages through civil and criminal actions is that the judicial system is chronically slow in resolving matters and can take up to ten years. Further, while the victims may be afforded free legal assistance during such proceedings, there are additional costs associated with maintaining litigation (for example, transportation costs) which a victim of human trafficking is unlikely to be able to afford. Victims are also faced with the possibility of an empty judgment where the accused may have no property or resources to meet the damages award in a favorable judgment.

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<sup>32</sup> *Quemel v Court of Appeals* (1968) 22 SCRA 44.

<sup>33</sup> *People of the Philippines v Shirley Casio* (2014) GR No. 211465.

# ROMANIA

## 1. EXECUTIVE SUMMARY

- 1.1 Romania is primarily an origin country for trafficking for forced labour and sexual exploitation. A significant number of victims trafficked in Europe come from Romania.<sup>1</sup>
- 1.2 In the last year, human trafficking for the purpose of sexual exploitation has decreased, while there has been an increase in human trafficking for forced labour. According to information provided by the Directorate for Investigating Organised Crime and Terrorism, Romania is still an origin country for human trafficking. The operative modalities are still the same: the promise of working abroad, emotional and economic dependence and the chance of a better life. Romania is also, to some extent, both a destination and transit country for trafficking victims.
- 1.3 Law No. 211/2004, the Crime Victims Protection Law ("**Victim Protection Act**") regulates financial compensation for victims of crime, including human trafficking. It creates measures for protecting the victims of criminal offences, including free counselling, legal advice and information on rights, as well as compensation. The damages that are compensated under this law are:
- 1.3.1 hospital and medical expenses;
  - 1.3.2 damage to, or loss of, physical property; and
  - 1.3.3 economic loss (loss of future earnings).
- 1.4 This law has the advantage of providing an alternative avenue for securing financial compensation. Unfortunately, it imposes restrictive conditions which discourage individuals from accessing it.

## 2. PRELIMINARY ISSUES

- 2.1 International conventions/treaties that Romania has ratified:

Treaty	Signed/Ratified ? (S, R or No)
UN Convention against Transnational Organised Crime (Transnational Organised Crime Convention)	R
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, (Palermo Protocol)	R
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	Accession

<sup>1</sup> United States of America State Department *Trafficking in Persons Report 2015* (Report, July 2015) 286 <<http://www.state.gov/documents/organization/245365.pdf>>.

Forced Labour Convention 1930 (ILO No 29)	R
Abolition of Forced Labour Convention 1957 (ILO No 105)	R
Worst Forms of Child Labour Convention 1999 (ILO No 182)	R
Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956	R
UN Convention on the Rights of the Child	R
UN Convention on the Elimination of all forms of Discrimination against Women	R
UN Covenant on Civil and Political Rights	R
Other regional instruments 1) Council of Europe Convention on Action against Trafficking in Human Beings; 2) European Directive 2011/36/UE of 5 April 2011 preventing and combating trafficking in human beings	RR

## 2.2 Domestic legislation on human trafficking:

2.2.1 Human trafficking is criminalised under Chapter VII of the Romanian Criminal Code Trafficking and Exploitation of Vulnerable Persons ("**RCC**").

2.2.2 Article 210 of the RCC defines the offence of human trafficking. According to the RCC it is an offence to recruit, transport, transfer, shelter or host any human being

2.2.2.1 by means of coercion, abduction, deception, or abuse of authority;

2.2.2.2 by taking advantage of the person's inability to defend themselves or to express their will or of their blatant state of vulnerability; or

2.2.2.3 by offering, giving and receiving payments or other benefits in exchange for the consent of an individual having authority over such person for exploitation purposes.

The penalty for human trafficking offences ranges from 3 to 12 years imprisonment, depending on the level of aggravation.<sup>2</sup> The consent of the victim is not a defence.<sup>3</sup>

<sup>2</sup> Under article 210(1) the penalty ranges from 3 to 10 years. Under article 210(2) the penalty ranges from 5 to 12 years if trafficking in persons is committed by a public official in the performance of official duties.

<sup>3</sup> Criminal Code of Romania Law No. 289/2009 art 210(3).



- 2.2.3 Child trafficking is a separate offence under the RCC.<sup>4</sup> Child trafficking is defined as: "recruitment, transportation, transferring, sheltering or hosting a minor for the purpose of its exploitation" and attracts a penalty of 3 to 12 years imprisonment.<sup>5</sup>
- 2.2.4 This legislation is enforced by the General Inspectorate of Romanian Police: Specialised officers and Prosecutors with Directorate for Investigating Organised Crime and Terrorism (*Romanian*, DIICOT), and the Courts of law.
- 2.2.5 Other offences related to human trafficking regulated within the RCC are: slavery, subjection to forced labour, pimping, deprivation of freedom, exploitation of begging,<sup>6</sup> and knowingly using the services of a victim of human trafficking. The penalty for these offences ranges from 3 months to 10 years imprisonment.
- 2.2.6 Finally there are a number of laws relating to the prevention of trafficking and protection of victims. Law no. 678/2001 on Preventing and Combating Trafficking in Human Beings and Order no. 1072/2007 created a national mechanism for the identification and referral of human trafficking victims and created measures to prevent trafficking and to assist victims, including providing temporary housing.
- 2.2.7 The definition of human trafficking in the RCC accords with the definition in the Palermo Protocol, as it was enacted by Law no. 565/2002 to implement Romania's obligations under the Protocol.

### 3. BASIS OF STATUTORY COMPENSATION

- 3.1 Under the Victim Protection Act, statutory compensation is available to victims of "serious crimes". Serious crimes include attempted murder, manslaughter, aggravated murder, aggravated assault, intentional offence resulting in serious injury, rape, sexual intercourse with a minor, sexual aggression, human trafficking, child trafficking, terrorism or another intentionally violent criminal offence.
- 3.2 The objectives of the Victim Protection Act are to keep victims informed about their rights, to provide psychological counseling, free legal aid and financial compensation. The statutory compensation scheme allows directly injured victims of violent criminal offences ("**primary victims**") as well as the spouse, children or dependants of deceased victims to access compensation for the injuries suffered as a result of the crime (together referred to by the Victim Protection Act as "**victims**").<sup>7</sup>
- 3.3 Statutory compensation under the Victim Protection Act is a safety net that may only be accessed after other attempts to obtain compensation have been exhausted. Victims are expected to apply for compensation through a civil or criminal trial at first

<sup>4</sup> Criminal Code of Romania Law No. 289/2009 art 211.

<sup>5</sup> Under article 211(1) the penalty ranges from 3 to 10 years. Under article 211(2) the penalty ranges from 5 to 12 years if trafficking in persons is committed by a public official in the performance of official duties.

<sup>6</sup> Exploitation of begging involves situations where a person utilises the physical or mental disabilities of a young person to create a feeling of pity in the public and thereby obtain material or financial gain.

<sup>7</sup> Law No. 211/2004 art 21.

instance. Only when that is unsuccessful will they be able to apply for compensation under the Victim Protection Act.

### **Exhausting all other remedies**

- 3.4 In order to obtain any financial compensation, all victims must file a complaint to the competent authorities (police or prosecutor). After the complaint is filed, the prosecutor may decide to:
- 3.4.1 close the investigation file (for example, due to a lack of evidence);
  - 3.4.2 proceed with the criminal investigation;
  - 3.4.3 end the criminal investigation if there is no public interest in prosecuting (within the conditions provided by the criminal procedure legislation); or
  - 3.4.4 suspend the criminal investigation (if there are any situations provided by the law).
- 3.5 If the prosecutor decides to close the investigation file, end or to suspend the criminal investigation, the victim can make a claim for financial compensation from the perpetrator to recover the losses.

### **Civil claim**

- 3.6 The civil claim must be made by the victim in the Civil Courts and is subject to the civil liability provisions of the Civil Code. Once a victim has taken civil action against a perpetrator to recover losses, the Civil Court will make a finding as to whether compensation is available to the victim. The finding made by the Civil Court will be either:
- 3.6.1 the victim does not have a right to compensation;
  - 3.6.2 the victim has a right to compensation but no damages are recoverable; or
  - 3.6.3 the victim has a right to compensation and is entitled to recover partial or total damages for the injuries suffered.
- 3.7 If the victim's right to compensation is recognised by the Civil Court, but the victim did not recover total or partial damages (i.e. options b and c above), then the procedure provided under the Victim Protection Act can be followed.

### **Criminal proceedings**

- 3.8 Alternatively, where the prosecutor decides to proceed with the criminal investigation, criminal proceedings will be commenced on behalf of the victim in the Criminal Courts. The civil action within the criminal proceedings may be commenced only by the victim or his or her family or, if the victim lacks the necessary capacity, the victim's legal representatives or the prosecutor.
- 3.9 At the conclusion of the criminal proceedings, the Criminal Court will either acquit or convict the accused, will waive the penalty, suspend the penalty or close the trial.

With regard to the civil action within the criminal proceedings, the Criminal Court will also make a finding that either:

- 3.9.1 the victim does not have a right to compensation;
  - 3.9.2 the victim has a right to compensation but no damages are recoverable;
  - 3.9.3 the victim has a right to compensation and is entitled to recover partial or total damages for the injuries suffered; or
  - 3.9.4 the Court decides to leave the civil action unsolved, in which case the victim may file the civil claim in the Civil Court.
- 3.10 If the victim's right to compensation is recognised by the Criminal Court, but the victim did not recover total or partial damages (i.e. option b above), then the procedure provided under the Victim Protection Act can also be followed.
- 3.11 However if the victim's right to compensation is denied by either a Civil Court in civil proceedings or a Criminal Court in criminal proceedings, the victim cannot obtain any statutory compensation for damages under the Victim Protection Act.

#### **4. TYPE OF SCHEME**

- 4.1 The statutory compensation scheme is not specific to victims of human trafficking. However, it covers injuries related to all forms of trafficking, providing that the victim meets the eligibility criteria under the Victim Protection Act.

#### **5. ELIGIBILITY**

##### **Eligible victims**

- 5.1 As mentioned above, the following types of persons have the right to apply for compensation:
- 5.1.1 primary victims; and
  - 5.1.2 the spouse, children or dependants of deceased victims.
- 5.2 A primary victim is the person who was directly injured by the crime committed against him or her.
- 5.3 Dependants of the victim are other persons who, at the time of the act of violence:
- 5.3.1 were family members (such as parents, grandparents etc.); or
  - 5.3.2 had an intimate relationship with the primary victim and are dependent on the primary victim or the primary victim has the obligation to ensure their living.
- 5.4 There is no requirement that a victim must reside within Romania. However, some jurisdictional requirements should be met as provided below.

### Types of injuries recognised

- 5.5 The Victim Protection Act does not specify the types of injuries that are covered. In relation to victims of serious crimes financial compensation will be awarded to the victim for the following losses:<sup>8</sup>
- 5.5.1 hospitalisation expenses and other medical expenses incurred by the victim (**medical expenses**);
  - 5.5.2 material injury resulting from the destruction or degradation of a victim's assets or because the assets have been rendered useless or the victim has been dispossessed as a consequence of the crime (**property damage**);
  - 5.5.3 loss of earnings as the result of a crime being committed (**loss of future earnings**).
- 5.6 In the case of the spouse, children and dependants of a victim who has died as a consequence of one of the above crimes, compensation is awarded for the following:
- 5.6.1 funeral expenses;
  - 5.6.2 the support that the victim is deprived of as the result of the crime.
- 5.7 Under the Victim Protection Act the maximum compensation payable is the equivalent of 10 times the minimum wage established for the year when the victim applied for compensation. Sums paid by the offender in civil damages and the compensation obtained by the victim from an insurance company for the loss caused by the crime are deducted from the amount of the compensation awarded by the State to the victim.<sup>9</sup>

### Jurisdictional requirements

- 5.8 Article 21 of the Victim Protection Act imposes the following jurisdictional requirements that must be met in order for a victim to be eligible for compensation in Romania.
- 5.8.1 The criminal offence must have been committed on Romanian territory and the victim must be:
    - 5.8.1.1 a Romanian citizen;
    - 5.8.1.2 a foreign citizen or a stateless person residing legally in Romania;
    - 5.8.1.3 a European Union citizen found legally on Romanian territory; or
    - 5.8.1.4 a foreign citizen or a stateless citizen residing legally within any EU Member State, found legally on Romanian territory; or

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<sup>8</sup> Law No. 211/2004 arts 27(1)-(2).

<sup>9</sup> Ibid art 27(3)

5.8.2 the criminal offence was perpetrated outside Romanian territory, but the victim is a Romanian citizen or is a foreign citizen residing legally in Romania and the criminal trial process takes place in Romania.

5.9 If the abovementioned conditions are not fulfilled, there is still the option to obtain financial compensation under EU law.<sup>10</sup> The Victim Protection Act implements EU Directive 2004/80/EC relating to compensation to crime victims ("**Directive**"). The Directive establishes a mutual procedure for granting financial compensation, according to which Romanian citizens, stateless persons or foreign persons residing in Romania can submit to the Ministry of Justice a request for obtaining financial compensation from the EU Member State where the criminal offence was perpetrated.

### **Exclusion on grounds of illegal or immoral behaviour**

5.10 There are no express exclusions on the basis of immoral behaviour. However, victims may be excluded on the basis of criminal history. Article 22 of the Victim Protection Act excludes victims from the compensation scheme for the following types of illegal behaviour:<sup>11</sup>

5.10.1 if it is established that the offence was committed in self-defence against an attack by the victim;

5.10.2 if the victim is convicted for participating in a criminal organisation; or

5.10.3 if the victim is convicted of any of the following criminal offences: attempted murder, manslaughter, aggravated murder, intentional offence resulting in serious injury, rape, sexual intercourse with a minor, sexual aggression, human trafficking, child trafficking, terrorism or another intentionally violent criminal offence.

5.11 A person will also be excluded from compensation if a Court finds extenuating circumstances exceeding the limits of self-defence against the victim's attack or mitigating provocation.

### **Time limit for application**

5.12 The Victim Protection Act imposes various time limits depending on the procedure that was followed according to the circumstances of the case. The law also makes a distinction in relation to the time limit for making an application depending on whether the perpetrator is known by the victim or not.

5.13 *If the perpetrator is known*, a victim must apply for compensation within one year after the event:<sup>12</sup>

5.13.1 enforcement of the final conviction or acquittal decision in which the criminal court awarded the civil damages or acquitted the defendant or stopped the trial, or when the prosecutor ordered that charges be dropped, that the case be closed or the criminal investigation suspended;

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<sup>10</sup> Ibid art 21(3).

<sup>11</sup> Ibid art 22(1)(b)-(d).

<sup>12</sup> Ibid art 24.

- 5.13.2 the victim was a civil party in the criminal proceedings;
  - 5.13.3 it is apparent the offender is insolvent or has disappeared;
  - 5.13.4 the victim did not obtain full compensation from an insurance company.
- 5.14 If the victim is incapable of applying for compensation, the one-year period is to be calculated from the date when the incapacity ceased or when the decision to allow the civil action is declared irrevocable (if the court ordered the separation of the civil action from the criminal proceedings). Victims who are less than 18 years old or have been declared incapable of managing their own affairs are not required to bring a civil action.
- 5.15 *If the perpetrator is not known*, the application must be submitted within 3 years of the of the crime if the victim has not obtained full compensation for the injury suffered from an insurance company.
- 5.16 However, compensation will only be available where the victim notifies the criminal prosecution bodies, such as the police, within 60 days of the commission of the offence. If notification was impossible, due to physical or psychological problems, then the 60 days is counted from the cessation of those problems.<sup>13</sup>

#### **Requirement for referral or official identification as a victim of human trafficking**

- 5.17 There is no express requirement that a person claiming financial compensation be officially identified as a victim of human trafficking.
- 5.18 Victims also have the possibility under the Victim Protection Act to request an advance on the financial compensation prior to a criminal trial in which the victim may be referred to/officially identified as a victim, if the following conditions are met:<sup>14</sup>
- 5.18.1 the victim filed the complaint and notified the public prosecution service or the court within 60 days from the date when the crime was committed or from the date on which the victim recognised that the crime had been committed or from the date on which the state of incapacity ceased;
  - 5.18.2 the victim filed the request for compensation;
  - 5.18.3 the request for advance is submitted to the Commission within 30 days after the date of the submission of the application for compensation; and
  - 5.18.4 the victim is in a precarious financial situation.

#### **Requirement for reporting the criminal offence**

- 5.19 Victims are required to report the crime to the authorities. As a general rule, a complaint must be filed to the criminal investigation bodies (police or DIICOT) within 60 days of:

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<sup>13</sup> Ibid art 23(1).

<sup>14</sup> Ibid art 30.

- 5.19.1 the perpetration of the criminal offence;
  - 5.19.2 the date from which the spouse, the children or the dependants of the deceased victim recognised the perpetration of the criminal offence; or
  - 5.19.3 the date on which the victim's state of incapacity ceased.<sup>15</sup>
- 5.20 Victims who are not yet 18 years old or have been declared incapable of managing their own affairs (mental incapacity) are not required to notify the public prosecution service or the court of the crime. Their legal representative may notify the public prosecution service.

### **Requirement for cooperation**

- 5.21 Romanian legislation does not expressly require cooperation with police. Nevertheless, if the victim does not cooperate with the authorities or fails to provide details in relation to the criminal offence during the criminal investigation and criminal trial, the victim may indirectly limit his or her access to financial compensation. Further details in relation to the standard of proof and necessary evidence required to be given are included below.

## **6. APPLICATION PROCESS**

- 6.1 An application can only be completed in writing in Romanian. According to article 18 of the Civil Procedural Code and article 12 of the Criminal Procedural Code, procedures in front of the Romanian authorities or in front of Romanian courts are performed in the Romanian language. An individual who does not understand or speak Romanian has the right to be assisted by a translator free of charge. In line with the above mentioned procedure, article 4(3) of the Victim Protection Act provides that the victim shall be informed about his or her rights in a language which he or she is able to understand.<sup>16</sup>

### **Evidence and standard of proof**

- 6.2 According to the Victim Protection Act,<sup>17</sup> the application must include the following elements and be accompanied by copies of supporting documents or any other relevant documents:
- 6.2.1 the victim's surname, given name, citizenship, date and place of birth, domicile or residence;
  - 6.2.2 the date, place and circumstances of the crime that caused the injury;
  - 6.2.3 the type of injury suffered as a result of the crime;
  - 6.2.4 the criminal prosecution body or the court of law and the date on which the case was reported to them;

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<sup>15</sup> Ibid art 23.

<sup>16</sup> Ibid art 4(3).

<sup>17</sup> Ibid art 29.

- 6.2.5 the number and date of the court decision or of the criminal prosecution file;
  - 6.2.6 the status of the spouse, child or person who had been maintained by the deceased person;
  - 6.2.7 any criminal record;
  - 6.2.8 amounts paid as damages by the offender or compensation obtained by the victim from an insurance company for the injury caused by the committing of the crime; and
  - 6.2.9 the amount of compensation applied for.
- 6.3 The applicant must be able to show that they are a victim of a relevant offence and that they have sustained injuries. Depending on the type of damage claimed, various documents must be provided to the Commission as evidence to support the application, such as reports or receipts. For example, when claiming medical expenses the applicant should provide a report from a medical practitioner linking the treatment provided/proposed to the injury sustained by the applicant.
- 6.4 The standard of proof for any question of fact to be determined by the Commission is on the balance of probabilities.

### **Procedure**

- 6.5 The application for financial compensation or for an advance on financial compensation must be submitted to the competent Tribunal Court corresponding to the domicile of the victim ("**Application**"). The Application is reviewed by two judges who are members of the Commission responsible for awarding compensation to crime victims ("**Commission**") within 30 days (or more) of the date of the submission. This procedure is administrative in nature.
- 6.6 There are no fees to apply and the procedure is not public. The administrative procedure takes place within the council chamber, with the mandatory participation of the prosecutor and the subpoenaed victim.

### **Assistance provided during procedure**

- 6.7 Free legal assistance is provided to qualifying victims under Chapter IV of the Victim Protection Act. A victim must show that they are the victim of a particular violent crime (which does not include human trafficking) or earn less than the minimum wage. The legal representatives of a child or incapacitated victim can apply for free legal assistance in the name and on behalf of the victims.

### **Determination**

- 6.8 Following the endorsement of the application for financial compensation or the application for an advance on the financial compensation, the Commission will issue one of the following decisions:
- 6.8.1 acceptance of the Application, including a determination of the amount of financial compensation; or



- 6.8.2 rejection of the Application, if the conditions provided by the law are not fulfilled.
- 6.9 The Commission's Decision shall be communicated to the victim. The Decision is subject to appeal in front of the Court of Appeal within 15 days of the victim becoming aware of it. If the Application is rejected in circumstances where the victim has already received the advance, the victim is obliged to refund it. This requirement is waived if the request is rejected because the perpetrator is insolvent or missing.
- 6.10 It is not clear how long the application process takes. It may take between thirty (30) days to one year depending on the case.
- 6.11 The necessary funds for granting the financial compensation or the advance are provided by the Ministry of Justice. If there is a criminal conviction, the Ministry of Justice will attempt to recover costs from the perpetrator.

### **Assistance provided**

- 6.12 As mentioned above, assistance may be provided through legal aid to victims of human trafficking. The National Agency Against Human Trafficking (*Romanian*, "ANITP") within the Ministry of Internal Affairs ("MAI") also provides support for victims of human trafficking.<sup>18</sup> Such support may include offering guidelines to the possible victim, calling the helpline and referring the victim to the competent authorities on human trafficking matters, as well as addressing the concerns of the possible victim. They also have an obligation to conduct public information campaigns regarding to victim's rights.
- 6.13 The Victim Protection Act allows non-governmental organisations can file an application for financial compensation or for an advance, if the application is signed by the victim. There are a number of NGOs within Romania that specifically assist victims of human trafficking.

## **7. ASSESSMENT OF COMPENSATION**

- 7.1 Primary victims are able to access compensation for medical expenses (for physical injury, psychological injury), property damages and losses of future earnings (economic loss). Compensation is assessed on the basis of expenses actually and reasonably incurred by the individual, or reasonably likely to be incurred, as a direct result of the act of violence.
- 7.2 Victims must document medical expenses and loss of future earnings in order to receive compensation. For property damage, the law imposes a monetary ceiling equivalent to 10 times the minimum monthly salary of that year, being approximately €2,347.70.<sup>19</sup> The victim may apply for an advance on the financial compensation up to an amount equivalent to 10 times the minimum monthly salary.
- 7.3 Psychological counselling may also be offered by centres for the protection services for victims and social reintegration of the perpetrators within the Romanian County

<sup>18</sup> See Agenția Națională Împotriva Traficului de Persoane, Acasă (2016) <<http://www.anitp.mai.gov.ro/>>.

<sup>19</sup> Eurostat, *Monthly Minimum Wages Biannual Data* (29 January 2016) <<http://appsso.eurostat.ec.europa.eu/nui/show.do>>.

Courts. The financial compensation scheme/advance is funded from the State budget through the budget of the Ministry of Justice.<sup>20</sup>

- 7.4 The payment of compensation or advance is made by the financial departments of the Tribunal Courts, within 15 days from the date when the decision to award the financial compensation remains final.<sup>21</sup>

## **8. BARRIERS / OBSTACLES**

- 8.1 There are a number of concerns regarding the current scheme and the barriers human trafficking victims may face in accessing compensation.

### **Accessibility and eligibility**

- 8.2 The scheme as it currently exists is inaccessible in a number of ways. First, financial compensation is awarded only to a special category of victims, that is, those who are victims of serious crimes as defined under the legislation. Second, it is available only to persons who reside in Romania legally, meaning undocumented migrants are unable to access compensation.
- 8.3 The law also imposes stringent deadlines: compensation is awarded to the victim only if the victim has filed a complaint with criminal authorities within 60 days of the date of the offence. In some circumstances this deadline may be too short, considering the psychological condition of the victim.

### **Evidence**

- 8.4 Individuals are required to provide their own evidence which, if there has been no criminal conviction, may be difficult. For example, if a victim seeks compensation in circumstances where the perpetrator is known, the victim will need to provide that the perpetrator is missing or insolvent.

### **Duration of the procedure and the need to exhaust other options**

- 8.5 As set out above, the compensation procedure can be followed only after criminal or civil proceedings. Although it is a simple procedure, its subsidiary character and restrictive conditions mean that it is very unlikely to be used.
- 8.6 Criminal investigations and criminal trials generally last up to 1 - 1.5 years or more. Therefore, a victim who seeks compensation cannot obtain financial satisfaction within a short period of time. The victim may, however, be able to obtain an advance on the amount of compensation requested, provided that the victim is in a precarious financial situation.

### **Limited access to information**

- 8.7 The compensation scheme is not well known and arguably not promoted sufficiently. Victims are often unemployed or minors and do not have the financial means to

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<sup>20</sup> Law no. 211/2004 art 33.

<sup>21</sup> Ibid art 33(2).

obtain advice from lawyers as to their legal rights. Further, such victims are relying on the prosecution to protect their rights and do not seek legal advice.

### **Level of awareness / victim identification in key sectors**

- 8.8 Romania has established a National Identification and Referral Mechanism (**NIRM**)<sup>22</sup> The NIRM includes a list of indicators that will assist authorities to identify trafficking victims, as well as methods for interviewing victims and how and where to refer victims for assistance. Recognition as a victim of human trafficking by law enforcement or judicial authorities confers a legal status upon the victim which confers specific rights upon the victim. Individuals are then referred to institutions responsible for coordinating assistance and, if the person is a foreigner, to the immigration department. Other actors, such as NGOs and support services may use the identifies to make an informal assessment and then refer the individual to the police or judicial authorities. Potential victims are able to access to support programmes and assistance prior to being formally recognised as a victim.

### **Legal aid**

- 8.9 Under the Victim Protection Act, human trafficking victims can access free legal aid if their income is below the national minimum salary and if the crime occurred in Romanian territory, or if the victim is lawfully in Romania and the criminal trial takes place in Romania.
- 8.10 As with compensation, legal aid is granted only if the victim notifies the public prosecution service or the court within 60 days of the date when the crime was committed or from the date on which the victim recognised that the crime had been committed or from the date on which a state of incapacity ceased.

Free legal assistance is granted from the State budget through the budget of the Ministry of Justice, and is capped at the equivalent of twice the national minimum monthly salary.<sup>23</sup>

- 8.11 The above mentioned conditions are also applicable when requesting free legal assistance for the enforcement and execution proceedings of the decisions granting civil damages to victims. NGOs are also entitled to request free legal assistance in the name and on behalf of the victims during such trials and during the enforcement and execution of the courts' decisions awarding civil damages, if the application is signed by the victim and fulfills the conditions set out above.

### **Privacy and protection of victims' identities**

- 8.12 Under the Criminal Procedure Code,<sup>24</sup> there are grounds for the protection of victims' identities in criminal trials. Given the vulnerability that human trafficking victims face and the potential for reprisals by the perpetrator, either upon the victim or the victim's family, protection of identity is important.

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<sup>22</sup> Established under Governmental Decision No 335/2007 and Order 1072/2007.

<sup>23</sup> Approximately €469.34 according to Eurostat, above n 20.

<sup>24</sup> Romanian Official Gazette no. 486/ 15.07.2010.

- 8.13 The criminal authorities may order protection measures for the victim or other parties. Depending on the circumstances of the case, the victim may receive:
- 8.13.1 threatened witness legal status, when there is a reasonable suspicion that the life, physical integrity, freedom, assets or professional activity of the witness or a member of the victim's family could be jeopardised as a result of the information provided by them to judicial organs or of their statements; or
  - 8.13.2 vulnerable witness legal status, when there is a witness who suffered a trauma as a result of the offence or of the subsequent behaviour of a suspect or defendant or in case of under aged witnesses.
- 8.14 In case of threatened witnesses, the following measures may be ordered:
- 8.14.1 surveillance and guard of the witness' residence or providing a temporary dwelling space;
  - 8.14.2 accompanying and ensuring protection of the witness or to their family members during travel;
  - 8.14.3 protection of identity data, by issuing the victim with a pseudonym under which the witness shall sign their statement;
  - 8.14.4 hearing of a witness without the witness being physically present, through audio-video transmission devices, with their voice and image distorted, when other measures are not sufficient.
- 8.15 The prosecutor orders the application of protection measures ex officio or upon request by the witness, one of the parties or a main trial subject.
- 8.16 Where the orders outlined in paragraphs (c) or (d) above apply, witness statements will not include the witnesses real address or identity. Rather, the witness' real address or identity is recorded in a special register to which only criminal investigation bodies, the Judge for Rights and Liberties, the Preliminary Chamber Judge or the court have access, under confidentiality terms.
- 8.17 The prosecutor orders the granting of the status of threatened witness and the application of protection measures through a reasoned order, which is stored under confidentiality terms. The prosecutor checks, at reasonable time intervals, whether the protection measures continue to exist, and if not, shall order, through a reasoned order, their termination.
- 8.18 During the trial, once the status of threatened witness is granted, the court must order closed court sessions during the hearing of the witness.
- 8.19 The same measures apply in respect of both vulnerable witnesses and threatened witnesses.

**Access to services:**

## 8.19.1 Psychological assistance.

8.19.1.1 As set out above, the Victim Protection Act contains measures for the provision of psychological assistance to victims of human trafficking. Psychological assistance is offered by Protection services for victims and social reintegration of the perpetrators centres. The centres are under the coordination of the Ministry of Justice.

8.19.1.2 In order to obtain psychological assistance, the victim must file a request with the centre that provides protection services and social reintegration. The claim will be solved within 10 days from the date of its submission. The request must be submitted only after the competent authorities acknowledge the perpetration of criminal offence.

8.19.1.3 Psychological assistance is granted for a period of:

- (a) 3 months for adults; or
- (b) 6 months if the victim is a minor.

## 8.19.2 Other assistance.

8.19.2.1 Under the Victim Protection Act foreign citizens who are victims of human trafficking in Romania may be granted a temporary visa in order facilitate their testimony and participation in the criminal trial.

8.19.2.2 Victims of human trafficking can be harboured, at their request, for a maximum of 90 days, in centres providing assistance and protection for human trafficking victims or in protected dwellings. The 90 day limit may be extended at the petition of the judicial organs for a period of 6 months at the maximum or until the termination of the criminal trial. There have, however, been reports of foreign nationals being deported from Romania without proper risk assessments or identification, even where there are indications of trafficking.<sup>25</sup>

8.19.2.3 The agencies organised at the county level in Romania (i.e. at each regional district) organise special programmes for the professional training of the harboured victims and also provide employment assistance and mediation for job hunting.

8.19.2.4 Romanian citizens resident in other countries who are victims of human trafficking have the possibility to receive assistance from the diplomatic missions and the consular offices of

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<sup>25</sup> Group of Experts on Action against Trafficking in Human Beings, 'Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Netherlands, First evaluation round' (Country Report, adopted on 21 March 2014, published on 18 June 2014) 28 <[https://www.coe.int/t/dghl/monitoring/trafficking/docs/Reports/GRETA\\_2014\\_10\\_FGR\\_NLD\\_w\\_cmnts\\_en.pdf](https://www.coe.int/t/dghl/monitoring/trafficking/docs/Reports/GRETA_2014_10_FGR_NLD_w_cmnts_en.pdf)>.

Romania located in the respective countries. The Ministry of Foreign Affairs will provide transportation to repatriate the respective Romanian citizens. If the Romanian citizens have no identification documents, the Ministry of Foreign Affairs will provide such identification, within the shortest time possible, and necessary documents to return to Romania.

- 8.19.2.5 Romania also facilitates the return of foreign citizens, who are victims of human trafficking, to their country of origin without unjustified delay and ensures their transport up to the Romanian border, if there are no contrary dispositions in accordance with the bilateral agreements.

### Support structures

- 8.20 There are a number of active NGOs in Romania working with victims of human trafficking and in the prevention of trafficking. The NGO "Eliberare"<sup>26</sup> works to prevent human trafficking and sexual exploitation in Romania and organises information campaigns and other awareness raising activities. The association "Pro Refugiu"<sup>27</sup> organises campaigns for the improvement social services provided to victims of human trafficking. Other NGOs run shelters and provide services to victims.

### Stigma and discrimination

- 8.21 Stigma and negative attitudes towards victims of trafficking continue to affect the treatment of victims in Romania. The Government has organised specialised training of magistrates, police and diplomatic missions. However, NGOs have raised concerns that public officials are continuing to treat victims of trafficking as criminals. Negative attitudes towards sex workers in Romania also affect the way victims trafficked for sex are treated.<sup>28</sup>

## 9. EXAMPLES IN PRACTICE

- 9.1 The outcomes of compensation applications are not publically available. It has not been possible to locate any cases where victims of human trafficking have successfully obtained compensation.
- 9.2 A number of criminal cases, however, have led to an award of damages to children who were trafficked for sex work. The decisions span from 2005 to 2012 and have resulted in damages ranging from €1,200 to €20,000.<sup>29</sup>

<sup>26</sup> See Eliberare (2016) <[www.eliberare.com](http://www.eliberare.com)>.

<sup>27</sup> See Asociata Pro Refugiu (2015) <[www.prorefugiu.org](http://www.prorefugiu.org)>.

<sup>28</sup> Group of Experts on Action against Trafficking in Human Beings, above n 26, 20.

<sup>29</sup> Decision no. 621/27 April 2005 of the Bucharest Tribunal (damages: \$ 20,000); Decision no. 903/ 1 July 2005 of the Bucharest Tribunal (damages: EUR 1,500); Decision no. 193/R/21 May 2007 of the Bucharest Court of Appeal (damages: EUR 1,200); Decision no. 215/A/6 December 2012 of Cluj Court of Appeal (damages: EUR 6,800); and Decision no. 207/P/18 November 2009 of Bucharest Tribunal (damages: EUR 5,000 each).

## 10. SUGGESTIONS FOR IMPROVEMENT

### Awareness

- 10.1 As noted above there is limited awareness of the availability of compensation. Further efforts should be made in order to inform victims of trafficking of their rights to compensation and/or reparation. Campaigns for raising awareness regarding the procedure for obtaining compensation are undertaken by governmental entities in collaboration with NGOs including UNICEF, the International Organization for Migration, the ILO, the Romanian Orthodox Church and other domestic NGOs.
- 10.2 The aforementioned actors should continue to implement such campaigns and to develop even more effective programs regarding human trafficking. In the context of these campaigns, information regarding the procedure for obtaining compensation as a victim of human trafficking should be spread, in order to enhance the poor existing knowledge regarding this law.

### Accessibility

- 10.3 The 60 days term within which victims can seek compensation is very short. According to UNICEF, trafficked victims require a longer time to obtain behavioural stability. Given the victim must not only report to crime to the police but then also participate in the criminal trial, the individual must decide whether they can face the social stigma of being a trafficking victim, overcome distrust of state institutions and escape the psychological bond of the aggressor.<sup>30</sup> The 60 day limit should therefore be increased.
- 10.4 The requirement that the victim participate in the criminal process or attempt civil proceedings prior to seeking compensation by the state imposes a significant time, cost and psychological barrier for victims. Victims are required to face their perpetrator and potentially be cross-examined in court. A compensation scheme that can be accessed from the outset would potentially reach a much larger number of trafficking victims and impose fewer barriers.
- 10.5 An online application platform for compensation available in a number of languages should be implemented in order to facilitate effective access for a larger number of victims to this procedure.

## 11. ALTERNATIVES TO STATUTORY COMPENSATION SCHEMES

- 11.1 As outlined above, human trafficking victims can obtain compensation through a civil suit or in the context of a criminal trial.
- 11.2 An advantage offered by obtaining compensation in the context of the criminal trial is that both the perpetrator's guilt and the compensation are established and awarded in the same proceeding, saving time and effort for the victim. The evidence used for establishing the perpetrator's guilt is also used to determine the amount of the damages to be awarded. However the burden of proof is higher in a criminal trial than in a civil case or statutory compensation scheme.

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<sup>30</sup> Pierre Poupard, Gabriel Sotirescu and UNICEF Romania, 'Evaluation of Anti-trafficking Policies in Romania' (Report, UNICEF, 2006) 43 <[http://www.childtrafficking.org/pdf/user/UNICEF\\_Evaluation\\_of\\_Antitrafficking\\_Policies\\_in\\_Romania.pdf](http://www.childtrafficking.org/pdf/user/UNICEF_Evaluation_of_Antitrafficking_Policies_in_Romania.pdf)>.

- 11.3 A disadvantage in both of the aforementioned proceedings is that both courts' decisions, in order to be effective, need to be enforced by a bailiff if they are not implemented voluntarily by the perpetrator.
- 11.4 The Victim Protection Act establishes a procedure for awarding compensation to human trafficking victims without requiring a bailiff to implement the decision, given the fact that the State is the payer of the compensation. This is an advantage by comparison to the civil and criminal proceedings. On the other hand, a victim will only obtain a limited amount of compensation through the Victim Protection Act, in comparison to civil and criminal proceedings for which a limit in this sense does not exist.



# SOUTH AFRICA

## 1. EXECUTIVE SUMMARY

1.1 South Africa is a source, transit, and destination country for men, women, and children trafficked for forced labour, sexual exploitation and organ harvesting.<sup>1</sup> According to the 2003 International Organisation for Migration Report "Seduction, Sale and Slavery: Trafficking of Women and Children for Sexual Exploitation in Southern Africa", a number of distinct patterns of trafficking activity have emerged in relation to South Africa, based on data from informants in the sex industry and official migration statistics, including:<sup>2</sup>

- 1.1.1 trafficking of women from refugee-producing countries to South Africa;
- 1.1.2 trafficking of children from Lesotho to towns in the Eastern Free State of South Africa;
- 1.1.3 trafficking of women and girls from Mozambique to Gauteng and Kwa-Zulu Natal;
- 1.1.4 trafficking of women and girls from Malawi to South Africa overland;
- 1.1.5 trafficking of women from Thailand to South Africa;
- 1.1.6 trafficking of women from China to South Africa; and
- 1.1.7 trafficking of Eastern European women to South Africa

1.2 South Africa has recently passed comprehensive legislation in relation to Human Trafficking: the Prevention and Combating of Trafficking in Persons Act 2013 ("**the Act**").<sup>3</sup> While the Act is wide ranging and provides protection for victims, there is no formal state funded statutory compensation scheme. Under the Act, victim redress is available from the perpetrator. A court may on its own accord, or at the request of a victim of trafficking, order a person convicted of an offence under the above legislation to pay monetary compensation for damage to property, injury and loss of income.<sup>4</sup> A court may make additional orders under the legislation for an offender to pay compensation for expenses incurred or expected to be incurred in connection with care, accommodation, transportation, return and repatriation of the victim.<sup>5</sup> Compensation under the Act is reliant on a successful conviction. However a low conviction rate has arisen due to the following:

- 1.2.1 the victims must establish that they have suffered loss;

<sup>1</sup> United States of America State Department 'Trafficking in Persons Report' (Report, July 2015) 308 <<http://www.state.gov/documents/organization/245365.pdf>>.

<sup>2</sup> J Martens, M Pieczkowski and B van Vuuren-Smyth, 'Seduction, Sale and Slavery: Trafficking in Women & Children for Sexual Exploitation in Southern Africa' (Report, International Organization for Migration Regional Office for Southern Africa, May 2003) <<http://www.unhcr.org/4d523c689.pdf>>.

<sup>3</sup> *Prevention and Combating of Trafficking in Persons Act 2013* (South Africa).

<sup>4</sup> *Ibid* s 29.

<sup>5</sup> *Ibid* s 30.

1.2.1.1 it is difficult, if not impossible, for victims of trafficking to access compensation where they are fearful of co-operating with authorities, have not made a police report or do not understand English; and

1.2.1.2 the considerable lack of policing and prosecuting resources in South Africa.

1.3 While this legislation has been passed into law, many of its provisions only come into effect after relevant regulations have been passed by the Minister.<sup>6</sup> This is slowly being achieved.

## 2. PRELIMINARY ISSUES

### Framework for anti-trafficking in the jurisdiction

2.1 International and regional conventions/treaties the State has ratified:

Treaty	Signed/Ratified? (S, R or No)
UN Convention against Transnational Organised Crime (Transnational Organised Crime Convention)	R
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)	R
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	R
Forced Labour Convention 1930 (ILO No 29)	R
Abolition of Forced Labour Convention 1957 (ILO No 105)	R
Worst Forms of Child Labour Convention 1999 (ILO No 182)	R
Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956	No
UN Convention on the Rights of the Child	R
UN Convention on the Elimination of all forms of Discrimination against Women	R
UN Covenant on Civil and Political Rights	R
African Charter on the Rights and Welfare of the Child (1990)	R
African Charter on Human and People's Rights (1986)	R

<sup>6</sup> *Prevention and Combating of Trafficking in Persons Act 2013* (South Africa) s 40.

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (1998)	R
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## 2.2 Domestic legislation on human trafficking:

2.2.1 Trafficking in persons is primarily regulated by the Act, which outlines various offences relating to trafficking in persons. The operation of the Act is broad and covers a number of actions which constitute human trafficking. Ancillary activities relating to human trafficking also constitute offences under the Act.

### Offences

2.3 There are a broad range of trafficking offences under the Act. These can be divided into primary offences, additional offences and facilitative offences.

#### 2.3.1 Primary Offences.

2.3.1.1 Under Section 4(1) of the Act, a person is guilty of trafficking in persons if he or she "delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic of South Africa for the purposes of exploitation". This may be done through threats of harm, force or coercion; abuse of vulnerability, fraud, deception, abduction, kidnapping, abuse of power, payments to third parties.<sup>7</sup> These activities must be aimed at the victim, an immediate family member or any other person in a close relationship to that person, and the purpose must be to exploit the victim.

2.3.2 There are a number of additional offences under the Act including where a person:

2.3.2.1 adopts a child or concludes a forced marriage with another person for the purpose of exploitation;<sup>8</sup>

2.3.2.2 a person intentionally causes another person to enter into "debt bondage" (ie an agreement to work off a debt where the length, and value of the service is not defined or the penalty is excessive);<sup>9</sup>

2.3.2.3 has in possession or intentionally destroys, confiscates, conceals or tampers with the personal documentation of a victim of trafficking such as identification documents, passports or other travel documents;<sup>10</sup> or

<sup>7</sup> *Prevention and Combating of Trafficking in Persons Act 2013* (South Africa) ss 4(1) (a)- (j) .

<sup>8</sup> *Ibid* s 4(2).

<sup>9</sup> *Ibid* s 5 of the Act as read with the definition of "debt bondage".

<sup>10</sup> *Ibid* s 6.

- 2.3.2.4 intentionally benefits financially or otherwise from a victim of trafficking or enables another person to use the services of a victim of trafficking.<sup>11</sup>
- 2.3.3 Facilitating Offences. The following facilitating conduct is an offence under the Act:
- 2.3.3.1 the intentional leasing or negligent sub-leasing of premises for facilitating or promoting trafficking in persons;<sup>12</sup>
- 2.3.3.2 failure to report to the police that premises are used to facilitate or promote human trafficking;<sup>13</sup>
- 2.3.3.3 intentional advertising or promotion of information which facilitates human trafficking (including the use of the internet);<sup>14</sup>
- 2.3.3.4 failure by an internet service provider to (i) take reasonable steps to prevent the use of its services for the purposes set out in (a) above; (ii) report an electronic communication relating to (a) above to the police (including reporting the identification details relating to the origin of the communication); (iii) preserve evidence; or (iv) to take the necessary steps to prevent continued access to the communications and or information outlined in (a) above;<sup>15</sup>
- 2.3.3.5 the intentional or negligent transportation of a victim of human trafficking within or across the borders of South Africa or the failure to report a case where it is reasonable to suspect that a passenger is a victim of human trafficking;<sup>16</sup> or
- 2.3.3.6 any act aimed at participating in the commission of an offence under the Act. This also includes the incitement, instigation or promotion of another person to commit an offence under the Act.
- 2.3.4 Extra-Territorial Jurisdiction.
- 2.3.4.1 The Act aims to operate extra-territorially. That is, if a relevant offence is committed outside South Africa, a South African Court will have jurisdiction if, among other things, a person to be charged under the Act:<sup>17</sup>
- (a) is a citizen or resident of South Africa;

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<sup>11</sup> Ibid s 7.

<sup>12</sup> Ibid s 8(1)(a).

<sup>13</sup> Ibid s 8(1)(b).

<sup>14</sup> Ibid s 8(1)(c).

<sup>15</sup> Ibid s 8(2).

<sup>16</sup> Ibid s 9.

<sup>17</sup> Ibid s 12.

- (b) has committed an offence against a citizen of South Africa; or
- (c) is present in South Africa.

### 2.3.5 Penalties.

#### 2.3.5.1 If a person is found guilty of:

- (a) a primary offence under section 4 of the Act, the penalties that can be imposed are a fine not exceeding R 100 Million (approximately A\$10M) or imprisonment for life, or both;
- (b) additional offences and facilitating offences carry penalties ranging from a fine or a period in prison ranging from 5 to 15 years.

### **Accordance with the Palermo Protocol**

- 2.4 The Act accords with the definition of human trafficking provided in the Palermo Protocol. One of the stated objectives of the Act is to give effect to the country's obligations under international agreements.

## **3. BASIS OF STATUTORY COMPENSATION**

- 3.1 The compensation scheme is specifically available to victims of human trafficking. Where a person is convicted of a human trafficking offence, the court may of its own accord, or at the request of the victim, order the offender to pay the victim compensation.<sup>18</sup> The compensation is available for any human trafficking convictions under the Act, which is broad enough to cover all forms of human trafficking. As noted above, the regulations relating to the Act have not yet been drafted. The regulations may provide further information regarding the application process and forms of compensation available. The information below should therefore be read in conjunction with any regulations or policies that have been released.

## **4. ELIGIBILITY FOR COMPENSATION**

### **Who can apply for compensation?**

- 4.1 Section 29 of the Act states that the victim of trafficking is eligible to receive compensation. A victim of trafficking is a child who is found to be a victim after an assessment under section 18(6) or an adult person who has been issued with a letter of recognition under section 19(10).<sup>19</sup> Decisions as to whether a person is a victim of human trafficking lie with the provincial department of social development.<sup>20</sup> Section 4 states that the offence of trafficking in persons may be aimed at the person, an immediate family member or any other person in a close relationship with that person. Therefore, it appears that a victim eligible for compensation could be the

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<sup>18</sup> Ibid s 29.

<sup>19</sup> Ibid s 1.

<sup>20</sup> Ibid s 18(6)

trafficked person, their immediate family members or any other person with whom he or she is in close relationship.

### **Injuries recognised**

- 4.2 Both physical and psychological injuries are recognised as bases for compensation. Additionally, victims may obtain compensation for damage or loss of property, being infected with a life-threatening disease or loss of income or support.<sup>21</sup> The type or extent of injuries or loss required for compensation is not specified.

### **Jurisdictional requirements**

- 4.3 As the scheme is focused on the act of human trafficking rather than the injuries that result from it, there is no requirement that the injuries occur in South Africa. As discussed above, the Act has extra-territorial application and a court may consider an offence committed outside South Africa if the perpetrator is a citizen or resident of the Republic, or if it was against a citizen or resident of South Africa.<sup>22</sup>

### **Exclusions**

- 4.4 It is not clear whether the court will exclude any victims from obtaining compensation on the grounds of illegal or immoral behaviour.

### **Referral and cooperation requirements**

- 4.5 As mentioned above, to be eligible for compensation, victims must be identified as victims of human trafficking. For adults, this means they must be issued with a letter of recognition by the provincial department of social security.<sup>23</sup> To receive this letter, the victim must be referred to the department by a police officer, a prosecutor or the Director General of Home Affairs.<sup>24</sup>
- 4.6 Although it is not a stated requirement that victims must cooperate, presumably this is a *de facto* requirement because to be eligible for compensation a person must be a recognised victim of human trafficking. To obtain this recognition, the victim would need to cooperate with the provincial department of social security.

## **5. PROCESS FOR RECEIVING COMPENSATION**

- 5.1 Compensation may be granted to a victim on conviction of the perpetrator under the Act. Compensation is at the discretion of the court or on application by the victim or the prosecutor. The process may be lengthy and depends on how long it takes for the perpetrator to be convicted. One source cites a possible delay of 1-15 months.<sup>25</sup> It is not clear whether there are costs associated with requesting compensation.

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<sup>21</sup> Ibid s 29.

<sup>22</sup> Ibid s 12.

<sup>23</sup> Ibid s 19(10).

<sup>24</sup> Ibid ss 19(5)(b); 22(2)(b) and 33(b)(v).

<sup>25</sup> Independent Projects Trust, 'The Criminal Justice System and You: A Guide to the South African Criminal Justice System for Refugees and Migrants' (Guide Book, 2011) <[http://www.ipt.co.za/pdf/Criminal\\_justice\\_book.pdf](http://www.ipt.co.za/pdf/Criminal_justice_book.pdf)>.

## Evidence

- 5.2 When determining whether to award compensation, the court will consider the evidence given in the trial or hear further evidence orally or by affidavit.<sup>26</sup> It is not clear whether a victim can be represented by a legal representative if he or she gives evidence orally. As the process occurs in a criminal court, the standard of proof would be beyond reasonable doubt.

## Assistance provided in process

- 5.3 A police officer also has an obligation to refer a victim or potential victim of human trafficking to an accredited organisation who will provide a number of associated services to the victim. The Act has set in place a process for accreditation of organisations to provide such services to victims of human trafficking. Only accredited organisations can deal with victims of human trafficking. The services which these organisations are required to facilitate or provide include:<sup>27</sup>
- 5.3.1 accommodation;
  - 5.3.2 counselling;
  - 5.3.3 reintegration of victims with their families;
  - 5.3.4 rehabilitation and therapy; and
  - 5.3.5 education and skills.
- 5.4 A foreign victim of human trafficking is entitled to access public health care.<sup>28</sup>
- 5.5 These organisations are entitled to financial assistance from the State. It is not clear whether these organisations give advice to victims about obtaining compensation.

## 6. ASSESSMENT OF COMPENSATION

- 6.1 Compensation is available for injury and disease as well as economic loss. Specifically:<sup>29</sup>
- 6.1.1 damage to or the loss or destruction of property, including money;
  - 6.1.2 physical, psychological or other injury;
  - 6.1.3 being infected with a life threatening disease; or
  - 6.1.4 loss of income or support.
- 6.2 The scheme is funded by the perpetrator's assets. Therefore, compensation is dependent on the perpetrator being pecunious. The amount of compensation is

<sup>26</sup> *Criminal Procedure Act 51 of 1977* (South Africa), s 300(1).

<sup>27</sup> *Prevention and Combating of Trafficking in Persons Act 2013* (South Africa) ch 5.

<sup>28</sup> *Ibid* s 21.

<sup>29</sup> *Ibid* s 29.

capped at R1 million in a regional court or R300,000 in a magistrates' court. The compensation is assessed in accordance with the evidence adduced before the court during the trial or by supplementary oral or written evidence.<sup>30</sup>

## 7. BARRIERS / OBSTACLES

- 7.1 Various obstacles stand in the way of victims of human trafficking accessing justice. These include the absence of any statutory compensation mechanisms and the ineffective operation of the court system in South Africa. These, and other barriers are detailed below.

### **Lack of Statutory Compensation Schemes**

- 7.2 A major barrier to victims obtaining compensation is the nature of the scheme. Although the scheme is specific to victims of human trafficking, the fact that it is dependent on a criminal conviction is prohibitive. While the Act provides a right to recover damages against a convicted trafficker, the ability of victims to access such damages is limited. Convicted traffickers may have no assets and even if they are ordered to pay compensation, they may not do so. Further, as obtaining compensation is dependent on conviction, if the perpetrator is not apprehended, or there is insufficient evidence to convict, the victim receives no compensation.
- 7.3 Obtaining a conviction may take a long time and although the Act is quite comprehensive in its coverage of human trafficking crimes, it is not clear whether the enforcement will be equally comprehensive. Due to the extremely high levels of crime in South Africa, the criminal justice system is overtaxed. This can result in transcripts going missing, lengthy delays, overworked state-funded lawyers, poor quality or condition of evidence and unreliable police officers. A human trafficking victim in contrast to a perceived "more serious crime" may not achieve the required redress in that the offence may not be seen as that "serious" compared to say murder. Therefore while there are number of effective laws on the books in South Africa, it remains an open question as to whether they will be enforced.

### **Difficulty of identifying victims and lack of knowledge**

- 7.4 Obtaining compensation is dependent on being recognised as a victim of human trafficking, which is done by the provincial department of social development. Referral to the department depends on the victim coming into contact with law enforcement or being identified by a prosecutor. It also depends on such persons being aware of their obligation to refer victims to the department. The victim may be hesitant to contact police out of fear and the perpetrator may not provide the prosecutor with the victim's details.
- 7.5 Victims, especially those who are foreign or illiterate, may not be aware that they can request a compensation order. Further, their ability to participate in the process may be hampered by their language skills. It is not clear whether services that currently provide assistance to victims of trafficking help victims through the process of obtaining compensation.

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<sup>30</sup> *Criminal Procedure Act 51 of 1977* (South Africa) s 300.



## Victimisation and Mistrust

- 7.6 Retaliation from traffickers or negative stigma from family or society are legitimate fears for victims of human trafficking who come forward. Victims may be reluctant to appear as a witness in court and face their trafficker; it can also be traumatic or embarrassing for them to speak about their experience. Due to the legacy of Apartheid, there is also a systemic distrust of authority, including police and the court systems.

## Protection from prosecution

- 7.7 Victims are protected from criminal prosecution by the Act. If, prior to or during the prosecution of a person for a criminal offence, a prosecutor suspects that the person is a victim of human trafficking and his or her crimes were committed as a direct result of the person's position as a victim of human trafficking, the prosecution must be postponed and the victim must be referred to the provincial department for social development. If the person is recognised as a victim of human trafficking then the prosecution must be dropped.<sup>31</sup>

## Visas

- 7.8 While victims of human trafficking may be subject, as an unlawful migrant, to repatriation to their country of origin, there are a number of alternatives available which would allow a victim to remain in South Africa.
- 7.9 A foreign victim of human trafficking is entitled to remain under a visitor's visa in South Africa for up to six months for "recovery and reflection" to access a number of recovery programs in South Africa with a view to enabling the victim to make a decision as to whether he or she will co-operate with law enforcement and prosecuting authorities.<sup>32</sup> However, if the victim is unable or unwilling to cooperate in the investigation and prosecution of the trafficker the Director General of Social Development will determine whether the victim should be repatriated.<sup>33</sup> Therefore, the ability of foreign victims obtaining a visa is dependent on their cooperation with authorities.
- 7.10 Finally, a victim of human trafficking may apply for a permanent resident visa if, as a result of the victim's assistance in any criminal proceedings, he or she is at risk of being harmed or killed if repatriated to his or her country of origin or the country from which such victim was trafficked.<sup>34</sup>

## 8. SUGGESTIONS FOR IMPROVEMENT

- 8.1 As discussed above, there are many barriers posed by the nature of the compensation scheme. A victim may also access compensation if the perpetrator is convicted. Even if this occurs, the perpetrator may be impecunious or unwilling to pay. A new scheme could be created which grants recognised victims of human trafficking compensation from a central fund. Victims would be able to apply directly

<sup>31</sup> *Prevention and Combating of Trafficking in Persons Act 2013* (South Africa) s 22.

<sup>32</sup> *Ibid* s 15(1).

<sup>33</sup> *Ibid* s 15(2).

<sup>34</sup> *Ibid* s 17.

to the fund, rather than engage with the lengthy and traumatic court process. If this occurred, all victims would be eligible for compensation, rather than only those whose traffickers are convicted.

- 8.2 The enactment of comprehensive anti-trafficking legislation addressing the rights of victims is clearly a positive step; however, a lack of monitoring and evaluation mechanisms, resources and personnel makes it difficult to determine if South Africa has been successful in combatting human trafficking. Regular research must be undertaken to fully understand the dynamics of human trafficking in South Africa and the extent of the problem.
- 8.3 Community based education schemes to modify attitudes and discourage practices that encourage trafficking should be implemented. In addition, it is important that the government show a commitment to empowering and mobilising vulnerable communities such as women from poor rural communities.
- 8.4 While the establishment of accredited organisations under the Act is a welcome step to protecting victims, these organisations need to proactively engage with government and business to ensure they have adequate financing and resources, such as access to competent professionals and facilities.
- 8.5 Government needs to urgently pass the necessary regulations to establish the mechanisms to facilitate the implementation of the Act and to co-ordinate the responsibilities, duties and functions referred to in the Act. This may include establishment of government agencies and NGOs to support victims. Continual delay in this regard is not helpful in getting to grips with this problem.

## 9. ALTERNATIVES TO STATUTORY COMPENSATION SCHEMES

### Civil Proceedings

- 9.1 A civil action is possible through the tort/delict common law system in South Africa. The Act acknowledges this possibility:<sup>35</sup>

*"In cases where the amount of damage, injury or loss suffered exceeds an order for compensation which can be made by a magistrate's court...a civil action may be instituted by the victim for recovery of the excess."*

- 9.2 The disadvantages of recovering loss through a civil action are the time taken, the possibility of a costs order, as well as the possibility of needing to bring another action to enforce the judgment. These steps are commonly outside a victim's ability and resources.

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<sup>35</sup> Ibid s 29(2).

# SOUTH KOREA

## 1. EXECUTIVE SUMMARY

- 1.2 The Republic of Korea (**South Korea**) is a source, transit, and destination country for men, women, and children subjected to sex trafficking and forced labor.<sup>1</sup> South Korean women are subjected to forced prostitution in South Korea and abroad, and some South Korean men with physical and intellectual disabilities are subjected to forced labour in salt farms. Asian, Middle Eastern and South American workers are forced into labour in South Korea in industries including fishing, agriculture, livestock, restaurants, and manufacturing sectors. Further, foreign women are subjected sexual exploitation in entertainment establishments near ports and U.S. military bases in South Korea or recruited for marriage to South Korean men.
- 1.3 South Korea complies with the minimum standards for the elimination of trafficking<sup>2</sup> and is taking active steps to address the issue. Since 2008, the government has investigated 457 reported cases of human trafficking, indicted 167 cases, obtained 14 sex trafficking convictions and 53 labour trafficking convictions, and maintained victim protection efforts.
- 1.4 However, the Korean government has continued to narrowly define "trafficking". It does not include labour trafficking, lacks victim identification guidelines, and authorities continue to punish possible victims of trafficking in law enforcement operations, particularly sex workers and migrant workers.<sup>3</sup>
- 1.5 South Korea has two types of statutory compensation schemes for victims of trafficking, although they are not specific to such victims. The first one provides monetary compensation for general criminal injuries. The second one provides rehabilitation and support such as housing, education, medical treatments, assistance with employment or legal assistance for victims of prostitution (this includes prostitution related trafficking).
- 1.6 Some have criticised that the current legislation in South Korea as not being specifically directed at victims of human trafficking and it may not adequately implement comprehensive statutory compensation schemes proposed under Palermo Protocol.<sup>4</sup> Several law makers have proposed laws to specifically target human trafficking and support victims; these are under review in the National Assembly of Korea.<sup>5</sup>

<sup>1</sup> United States of America State Department, 'Trafficking in Persons Report' (Report, July 2015) <<http://www.state.gov/documents/organization/245365.pdf>>.

<sup>2</sup> Ibid. Among four tiers, South Korea is placed as Tier 1 which is placed for the governments of countries fully complying with the minimum standards for the elimination of trafficking under the Trafficking Victims Protection Act of 2000 (Pub. L. 106-386). While Tier 1 is the highest ranking, it does not mean that a country has no human trafficking problem or that it is doing enough to address the problem. Rather, a Tier 1 ranking indicates that a government has acknowledged the existence of human trafficking, has made efforts to address the problem, and meets the TVPA's minimum standards. Each year, governments need to demonstrate appreciable progress in combating trafficking to maintain a Tier 1 ranking.

<sup>3</sup> Ibid.

<sup>4</sup> 공감이, '인신매매' 와 '휴먼 트래피킹'-인신매매 관련법 재개정과 피해자 보호 법제화를 위한 토론회, 차혜령 변호사 기고문 (15 May 2014) <<http://withgonggam.tistory.com/1408>>.

<sup>5</sup> See The National Assembly of the Republic of Korea, *Legislation Regarding the Protection of Victims of Trafficking*, (2016) <[http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill\\_id=PRC\\_O1S3E0T5G1T4J1P6W0P4A2E8G5S3R9](http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill_id=PRC_O1S3E0T5G1T4J1P6W0P4A2E8G5S3R9)>.

## 2. PRELIMINARY ISSUES

### Framework for anti- trafficking in the jurisdiction

#### 2.1 International conventions/treaties the State has ratified:

Treaty	Signed/Ratified? (S, R or No)
UN Convention against Transnational Organised Crime (Transnational Organised Crime Convention)	R
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)	R
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	R
Forced Labour Convention 1930 (ILO No 29)	S
Abolition of Forced Labour Convention 1957 (ILO No 105)	S
Worst Forms of Child Labour Convention 1999 (ILO No 182)	R
Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956	No
UN Convention on the Rights of the Child	R
UN Convention on the Elimination of all forms of Discrimination against Women	R
UN Covenant on Civil and Political Rights	R

#### 2.2 Domestic legislation on human trafficking:

2.2.1 The Criminal Act is South Korea's primary domestic legislation on human trafficking. Article 289 of the Criminal Act (amended in 2013) titled 'Trafficking in Persons' provides that:

- "(a) *a person who buys or sells another shall be punished by imprisonment for not more than seven years;*
- (b) *a person who buys or sells another for the purpose of engaging in an indecent act, sexual intercourse, marriage, or for gain, shall be punished by imprisonment for at least one year up to ten years;*
- (c) *a person who buys or sells another for the purpose of labour exploitation, sex trafficking, sexual exploitation, or the*

*acquisition of organs shall be punished by imprisonment for at least two years up to fifteen years."*<sup>6</sup>

2.2.2 Article 289 also applies to a person who buys or sells another for the purpose of transporting them into South Korea, or a person who transports a purchased person out of South Korea.

2.3 Critics however have argued that the legislation does not accord with the Palermo Protocol as the Criminal Act does not provide a specific definition of "trafficking in persons"<sup>7</sup> and it is unclear whether consent of a victim is a valid defence to a charge of trafficking in persons<sup>8</sup>.

### 3. BASIS OF STATUTORY COMPENSATION

3.1 In South Korea, the Crime Victim Protection Act ("**CVPA**") and the Prevention of Prostitution and Protection of its Victims Act ("**PPA**") establish a statutory basis for compensation for victims of crime.

3.2 The objective of the CVPA is to compensate "crime victims" for the injuries they suffer as a result of a criminal offence. A "crime victim" is a victim of a crime that contravenes the Korean Criminal Act. The compensation available is monetary only.

3.3 In contrast the objective of the PPA is to provide "prostitution victims" with comprehensive protection, holistic support and long term rehabilitation. A "prostitution victim" is a person who engages in sex work (either voluntarily or forced).<sup>9</sup> Whilst "prostitution victims" are able to access limited monetary compensation under the PPA, the focus of the scheme is providing "prostitution victims" with non-monetary compensation such as housing, medical treatment, education, employment and legal assistance.

### 4. TYPE OF SCHEME

4.1 Neither the CVPA or the PPA are specific to victims of trafficking.

4.2 The CVPA is a broad compensation scheme available to any victim of crimes and by virtue of the fact that human trafficking is an offence under article 289 of Criminal Act, victims of trafficking would be included. The District Council for Relief of Criminal Injury ("**District Council**") is the statutory body that determines which victims receive compensation under the scheme.<sup>10</sup>

4.3 The PPA is a specific compensation scheme for victims of prostitution that, as set out above, is focused on non-monetary support and relief (although some limited monetary compensation is available), and specifically includes victims who have been trafficked for prostitution. The PPA indirectly supports victims; in other words, the Korean Government funds rehabilitation and support facilities operated by non-governmental organizations or central (or provincial) government authorities that in

<sup>6</sup> Criminal Act s 289.

<sup>7</sup> 공감이, above n 4.

<sup>8</sup> Ibid.

<sup>9</sup> PPA arts. 2 (4), art 3(1).

<sup>10</sup> CVPA art 24.

turn provide support services to the prostitution victims including housing, education, medical treatment etc and in some cases, small monetary amounts. The PPA-funded NGO and government authorities therefore determine which victims receive compensation under the PPA scheme and the nature of that compensation (non-monetary, monetary or both).

- 4.4 New laws that specifically focus on victims of human trafficking and include a broadening of the PPA to apply to all forms of trafficking are currently under discussion and review in the Korean National Assembly.<sup>11</sup>

## 5. ELIGIBILITY

### Eligibility criteria under the CVPA

#### 5.1 Eligible Victims.

5.1.1 For a person to be eligible under the CVPA, they must be a "crime victim", meaning a victim of another person's criminal act or a family member of such victim as defined in the CVPA.<sup>12</sup> In the CVPA this also includes primary victims of any crime and family members of deceased victims including parents, grandparents, children and spouses.<sup>13</sup>

5.1.2 A person will not be eligible for compensation however if the victim and the perpetrator:

5.1.2.1 are married or in a de-facto relationship; or

5.1.2.2 are relatives by blood or within the fourth degree of relationship or living together.<sup>14</sup>

5.1.3 A person must also be unable to obtain full or partial compensation for criminal damage to be eligible for compensation under the CVPA.<sup>15</sup> This is to prevent double compensation.

5.1.4 Further, victims who are foreign nationals will only be eligible for compensation where there is a mutual reciprocity agreement with the relevant country of the victim's nationality. Mutual reciprocity means that, if Korean victims are entitled to the same/similar right or are given the same/similar protection as stated in CVPA, in the legislation of another country, the CVPA is applied to the victims with the nationality of the aforementioned country. Whether or not there is mutual reciprocity between Korea and another country is judged on a case by case basis. Two countries where it has been determined that there is mutual reciprocity with Korea are Germany and Japan.<sup>16</sup>

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<sup>11</sup> The National Assembly of the Republic of Korea, above n 5.

<sup>12</sup> CVPA art 3(1).

<sup>13</sup> Ibid art 18.

<sup>14</sup> Ibid art 19 (1).

<sup>15</sup> Ibid art 16.

<sup>16</sup> Ibid art 23.

- 5.2 Type of injuries recognised.
- 5.2.1 Under the CVPA, compensation is only available for 'death, disability or serious injury caused by an act corresponding to a crime injuring human life or body'.<sup>17</sup> 'Disability' and 'Serious injury' are defined in detail in CVPA art 3 (1), sub-section 5 and 6 respectively.
- 5.3 Jurisdictional requirements.
- 5.3.1 The crime must have been committed in South Korea territory, on South Korean flag ships or on airplanes outside of Korea.<sup>18</sup>
- 5.4 Time limit.
- 5.4.1 The application for compensation must be filed within 3 years from the date the victim becomes aware of the death, disability or serious injury(ies) caused by the crime, or within 10 years from the date of the death, disability or serious injury occurs.<sup>19</sup> If one of these two dates lapses, the filing is time-barred.
- 5.4.2 Also, the right to receive compensation expires if it is not executed within 2 years of the claimant receiving acknowledgement of the decision after filing with the relevant authority.<sup>20</sup>
- 5.5 Other requirements.
- 5.5.1 In addition to the above, the victim must aid the investigation of the criminal matter.<sup>21</sup> Further, the crime related to compensation must be officially recognised and approved by the relevant District Prosecutors' Office and the corresponding District Council who ultimately determines the compensation application.<sup>22</sup>
- 5.5.2 Victims must also fully cooperate in the course of the investigation or review process in relation to the compensation. If not, the compensation application could be dismissed or rejected.<sup>23</sup>

### **Eligibility criteria under the PPA**

- 5.6 Eligibility under the PPA is much broader than the CVPA because the PPA is focused on non-monetary support, rehabilitation and relief options for victims. In general, provided the relevant NGO or government agency is reasonably satisfied that a victim is a 'prostitution victim', that victim is eligible for relief.

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<sup>17</sup> Ibid art 3(4).

<sup>18</sup> Ibid art 3(4).

<sup>19</sup> Ibid art. 25 (2).

<sup>20</sup> Ibid art. 31.

<sup>21</sup> Ibid art 16.

<sup>22</sup> Chairman of each District Council is Deputy Chief Prosecutor of the corresponding District Prosecutors' Office according to Presidential Decree of CVPA art. 27 (범죄피해자 보호법 시행령).

<sup>23</sup> CVPA art. 29 (2).

- 5.7 "Prostitution Victims" under the PPA scheme are defined as:
- 5.7.1 a person compelled to engage in prostitution by means of a deceptive scheme or by force, or by other means equivalent thereto; or
  - 5.7.2 a persons who has engaged in prostitution, while addicted to narcotics, psychotropic drugs or cannabis (set forth in article 2 of the Act on the Control of Narcotics) compelled by a person who is in a position to protect or instructs the victim in connection with business, employment or other similar relationships; or
  - 5.7.3 a juvenile, or a person having no ability or limited ability to make decisions (or a person with serious disabilities) who are solicited or enticed to engage in prostitution; or
  - 5.7.4 victims of human trafficking for prostitution.<sup>24</sup>
- 5.8 It is unclear how a NGO or government agency reasonably satisfies itself that a victim is a "prostitution victim" under the PPA. It is also unclear under the PPA how the relevant NGOs/government agencies determine on a case by case basis to compensate the victim including whether it is monetary or non-monetary compensation. Rather, the agencies have ultimate discretion depending on the nature of the victim's injuries and the victim's other needs e.g. urgency of housing and employment assistance. Basically, primary victims are eligible however a victim's families can also be beneficiaries for some supports such as education for children.<sup>25</sup> Foreign victims are also able to access support under the PPA scheme (monetary and non-monetary) whilst their matter is being investigated by a Prosecutor.<sup>26</sup> Once such an investigation has ended, regardless whether the case is prosecuted in the courts or not, the foreign victim faces deportation. This is unless a Prosecutor, after instituting a public prosecution case, requests the head of the immigration office to suspend the execution of an order for compulsory deportation of a foreign victim for a fixed period of time, taking into account the circumstances of the victim, including the testimony of the victim, the necessity for compensation and other circumstances.<sup>27</sup>
- 5.9 Further, there are no time limitations under the PPA nor is the scheme limited by any requirements of mutual reciprocity with a foreign country.

## 6. APPLICATION PROCESS

### CVPA scheme

- 6.1 An application must be submitted to the District Council corresponding to the relevant District Prosecutors' Office<sup>28</sup> which has jurisdiction over the victim..

<sup>24</sup> PPA art 2(4). The PPA scheme also provides protection and support for a person who is voluntarily engaged in prostitution, see art 3(1).

<sup>25</sup> Ibid art. 8.

<sup>26</sup> Ibid art. 11(3)

<sup>27</sup> *Act on the Punishment of Acts of Arranging Sexual Trafficking* art 11.

<sup>28</sup> Each District Prosecutors' Office has its District Council covering its own province/jurisdiction and Ministry of Justice has the Central Council for appeal proceedings of District Council's decisions.



- 6.2 The application forms are specified in the Enforcement Decree of the CVPA (범죄피해자보호법 시행규칙)<sup>29</sup> and can be easily accessed by picking a form up from each District Council. The forms are only available in the Korean language. Evidence supporting a claim, such as a medical certificate detailing the injuries, must also be included with the application form. Whilst the application form does not expressly state the requirement to attach a police report, in practice, it is necessary to attach a police report because recognition of the relevant crime by the Prosecutor's Office is required under the CVPA scheme.
- 6.3 Once the form has been submitted, the application is considered by the District Council which is supported by experts specialising in the administration of the compensation and the investigation of a claim. The District Council will determine whether further investigation is required to determine compensation eligibility and, where necessary, carry out such investigations with support from other experts such as medical doctors.<sup>30</sup> Such investigations may involve a hearing with the victim.<sup>31</sup>
- 6.4 Where further investigation is required, the experts arrange whatever is necessary for such investigation including further evidence collection and fact finding, and reports the results back to the District Council who then use such evidence to support its final decision.<sup>32</sup>
- 6.5 The proceedings usually take one or two months after all the requisite documents for the application are submitted and the District Council bears all the costs of the proceedings.<sup>33</sup> Due to the wide discretion of the District Council experts and the District Council itself, legal representation for the victim is not common.
- 6.6 If the District Council dismisses or rejects the application, the applicant can appeal to the Central Council for the Relief of Criminal Injury ("**Central Council**") under the Ministry of Justice. The appeal must be commenced within two weeks from the date notice of the initial decision by the District Council.<sup>34</sup> The Central Council must give its final decision within four weeks from the date the appeal was commenced.<sup>35</sup>
- 6.7 In addition to the Council, there is a non-governmental organisation called Crime Victims Support Center ("**CVSC**") in each province or district corresponding to the applicable District Prosecutor's Office. The CVSC provides victims with more holistic support during the proceedings including than consulting and economic, legal and medical support.<sup>36</sup>

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<sup>29</sup> Enforcement Decree of CVPA art.6, 7.

<sup>30</sup> CVPA art. 29.

<sup>31</sup> Presidential Decree of CVPA art. 36.

<sup>32</sup> Ibid art.8.

<sup>33</sup> Ibid arts 7, 26; Presidential Decree of CVPA art 36.

<sup>34</sup> CVPA art 27.

<sup>35</sup> Ibid art 27.

<sup>36</sup> See KVCA, *연합회소개* <<http://kcva.or.kr>>. More details and consultation for criminal victims regarding CVSC and District/Central Council are provided at call number "1577-1295".

## PPA scheme

- 6.8 The application process for the PPA is much easier. Simply, a victim approaches the relevant NGO/government rehabilitation facility and asks for support.<sup>37</sup> The rehabilitation facility will then work with the victim to understand their needs (financial and otherwise) and determine how best to support them. There may be some documentation to complete however it varies from facility to facility.
- 6.9 As explained above, although there is scope for direct monetary support from the PPA scheme,<sup>38</sup> the PPA is more focused on non-monetary relief such as education, medical treatment, housing, employment assistance and legal assistance etc.
- 6.10 As at 1 January 2014, there were 64 PPA rehabilitation facilities across the country which provide comprehensive support for prostitution victims and persons who have voluntarily engaged in prostitution. Among these include facilities focusing on and providing tailored support for foreigners and juveniles.<sup>39</sup>

## 7. ASSESSMENT OF COMPENSATION

### CVPA scheme

- 7.1 The CVPA scheme has three types of compensation available for (i) bereaved family members of deceased victims of crime; (ii) disability and (iii) serious injuries of the victims themselves.<sup>40</sup> Each is assessed differently.
- 7.2 Compensation for bereaved family members is based on the previous monthly income of the deceased, provided that it does not exceed twice the average monthly income of average workers.<sup>41</sup> The compensation payable to family members is calculated using a complicated formula set out in detail in the CVPA and its Decrees.<sup>42</sup> The maximum compensation payable is the total average monthly income for average workers for 48 months.<sup>43</sup>
- 7.3 Compensation for disability and serious injuries of victims is also based on the monthly income of the victim, provided that it does not exceed twice the average monthly income of average workers.<sup>44</sup> The compensation payable to victims for both disability and serious injuries are calculated also using a formula set out in the CVPA and its Decrees, taking into account the seriousness of the disability and required medical treatment.<sup>45</sup> Again, the maximum compensation payable is the total average

<sup>37</sup> There is also a 24-hour consolidated call centre which can be reached at call number “1366” and contact details of the facilities are also provided at the government internet webpage <[http://www.mogef.go.kr/korea/view/policyGuide/policyGuide03\\_04\\_03.jsp?viewfnc1=0&viewfnc2=0&viewfnc3=1&viewfnc4=0&viewfnc5=0&viewfnc6=0](http://www.mogef.go.kr/korea/view/policyGuide/policyGuide03_04_03.jsp?viewfnc1=0&viewfnc2=0&viewfnc3=1&viewfnc4=0&viewfnc5=0&viewfnc6=0)>.

<sup>38</sup> PPA art 14.

<sup>39</sup> 여성가족부 (Ministry of Gender Equality & Family), 2014 여성 아동권익증진사업 운영지침 (Operation Manual, February 2014) 373-374 <[www.mogef.go.kr](http://www.mogef.go.kr)>.

<sup>40</sup> CVPA art 17 (1).

<sup>41</sup> Ibid art 22

<sup>42</sup> Ibid art 22 (1); Presidential Decree of CVPA art. 22

<sup>43</sup> Ibid art 22(1).

<sup>44</sup> Ibid arts 22(2), (4).

<sup>45</sup> Ibid art 22 (2); Presidential Decree of CVPA arts 23, 24.

monthly income for average workers for 40 months.<sup>46</sup> Compensation is available for both physical and psychological disability/serious injury.<sup>47</sup>

- 7.4 The CVPA scheme is funded by a Criminal Victim Protection Fund established under the Criminal Victim Protection Fund Act ("**CVPFA**", 범죄피해자보호기금법). A large proportion of the funding is designed to come from criminal fines collected by the government.<sup>48</sup>

### PPA scheme

- 7.5 There is no formal assessment of compensation under the PPA because it is designed towards non-monetary support of victims through rehabilitation support. The support is generally determined by the relevant facility, in its discretion, based on the needs of the victim.
- 7.6 The PPA scheme is funded by the Gender Equality Fund (양성평등기금) established by the Standard Act for Gender Equality ("**SAGE**", 양성평등기본법).<sup>49</sup> The fund receives direct contributions from the government as well as other public and private funding sources<sup>50</sup> such as lottery sales revenue through the Lottery Fund.

## 8. BARRIERS / OBSTACLES

There are several key barriers to victims of human trafficking accessing the compensation under the CVPA and PPA.

### CVPA scheme

- 8.1.1 The CVPA scheme is not specifically aimed at crimes of human trafficking and only compensates victims for 'death, disability or serious injury'. Accordingly, unless a victim of trafficking receives serious injuries caused by the trafficking offence, they will be ineligible for compensation.
- 8.1.2 Whilst there is no express requirement to attach a police report with the application form, in practice, such a report is required. This is a significant barrier to victims who may be fearful of authorities or for, whatever reason, are unable to report the offence to police and they will be unable to access compensation.
- 8.1.3 The application forms are only available in Korean language which restricts the ability of foreign victims to apply without free translation support.
- 8.1.4 Foreign victims under the CVPA will only be entitled to compensation where there is a mutual reciprocity with the relevant country of the victim's nationality as explained above. This eligibility requirement therefore excludes a large number of victims who are trafficked into South Korea.

<sup>46</sup> Presidential Decree of CVPA arts 23, 24.

<sup>47</sup> Ibid.

<sup>48</sup> CVPFA art 4.

<sup>49</sup> SAGE arts 42, 43, 44.

<sup>50</sup> SAGE arts 42 (2).

- 8.2 The CVPA only applies to offences committed in South Korea. South Korean nationals who are trafficked outside their home country are not able to access compensation.

### **PPA scheme**

- 8.2.1 The PPA scheme only addresses the needs of victims of trafficking for prostitution and victims of prostitution generally. This narrow definition of trafficking is not reflective of the Palermo Protocol definition of trafficking.
- 8.2.2 The availability to monetary compensation under the PPA is very limited and completely at the discretion of the NGO or government service provider. In practice, very small amounts of monetary compensation are provided under the PPA, which do not adequately compensate victims for the abuse they have suffered or their likely long term psychological injuries.
- 8.2.3 Whilst the PPA allows foreign victims to remain in South Korea and receive compensation during their matter is being investigated by a Prosecutor, as soon as such investigation has ended, the victim will be deported unless the Prosecutor further intervenes. This significantly restricts the availability of long term rehabilitation support for victims through the scheme, as well as access to monetary compensation. Furthermore, a foreign victim is not permitted to work during the legal proceedings which makes it very difficult for foreign victims to live and sustain themselves whilst accessing the PPA funded support services. This is made even more difficult for victims by the lack of monetary compensation under the PPA.

## **9. SUGGESTIONS FOR IMPROVEMENT**

- 9.1 Given the barriers addressed above, the key solutions to better address the needs of all trafficking victims is to:
- 9.1.1 amend the CVPA to specifically provide compensation to victims of trafficking where they do not sustain serious injuries, disability or death;
- 9.1.2 remove the jurisdictional requirement under the CVPA so victims can access compensation where they have been trafficked outside;
- 9.1.3 enable victims to access the CVPA without a police report and provide the CVPA application form in languages other than Korean; and
- 9.1.4 expand the PPA to include all forms of trafficking (it is noted that such legislation is currently being considered by the Korean National Assembly).

## **10. ALTERNATIVES TO STATUTORY COMPENSATION SCHEMES**

### **Civil proceedings**

- 10.1 Victims of human trafficking are able to launch an action in tort for actions such as false imprisonment, rape, trespass and assault. If successful, a victim is able to cover

damages from the respondent only to the extent the respondent has the ability to pay. Criminal proceedings

- 10.2 Under the applicable Criminal Codes and Acts,<sup>51</sup> where a criminal conviction has been secured, a criminal court can order the convicted offender to compensate the victim for direct physical damage, medical expenses, and solatium in connection with the sexual trafficking crimes, which are enumerated and specified in the Act.<sup>52</sup> This redress is also available to foreign victims.<sup>53</sup>
- 10.3 However, even if an order is imposed, the offender may be unable to pay. In addition, a conviction must be secured before reparation is possible.

### **Advantages and disadvantages of alternatives**

- 10.4 The advantage of civil and criminal proceedings is that there is no cap to the amount of compensation a victim may receive. However there are a number of significant disadvantages:
- 10.4.1 there is usually a substantial length of time before a judgment is given and damages awarded to a victim;
- 10.4.2 a criminal conviction must be obtained against an offender before reparation can be awarded to a victim;
- 10.4.3 it is highly likely that the defendant in any civil action or an offender in a criminal action will be unable to pay the damages or restitution award; and
- 10.4.4 significant additional costs are involved in bringing an enforcement against that a person for payment of damages or restitution.

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<sup>51</sup> *Act on the Punishment of Acts of Arranging Sexual Trafficking* art. 11; *Act on Special Cases Concerning Expedition, etc. of Legal Proceedings* arts 25(1)-(2), 26.

<sup>52</sup> *Act on Special Cases Concerning Expedition, etc. of Legal Proceedings* arts 25(1)-(2).

<sup>53</sup> Under the *Act on the Punishment of Acts of Arranging Sexual Trafficking*, an investigative agency must inform foreign women as victims of sexual trafficking that they can file a claim for compensation in criminal proceedings when investigating them.

# THAILAND

## 1. EXECUTIVE SUMMARY

- 1.1 Thailand is a key destination for human trafficking in the Mekong region, and a source<sup>1</sup> and transit country for forced labour<sup>2</sup> and sexual trafficking.<sup>3</sup> The Thai Government has attempted to address this issue by implementing the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children ("**Palermo Protocol**") into its national legal framework. To comply with its obligations under the Protocol, Thailand enacted the "Prevention and Suppression of Human Trafficking Act of 2008" better known as the Anti-Trafficking in Persons Act ("**ATPA**").<sup>4</sup>
- 1.2 The ATPA details offences in accordance with the Protocol. Its main objectives are in relation to protecting, preventing and providing assistance and compensation to victims whilst prescribing penalties for traffickers. Under the ATPA, the victim has the right to initiate legal proceedings to obtain remedies, restitution and compensation. The ATPA also established the Anti-Trafficking in Persons Fund ("**ATPF**"). The ATPF is available to provide assistance and protection to trafficked persons and to support trafficking prevention programs that are already in place. Since the introduction and establishment of the ATPF, 463 victims have received financial aid directly. In addition to remedies under the ATPA, other statutory compensation schemes are available such as civil compensation,<sup>5</sup> victim compensation in criminal cases<sup>6</sup> and compensation for unpaid wages<sup>7</sup> under labour law.
- 1.3 The government approved a 2014-15 budget increase of more than 300 million baht (around USD 9.375 million) to support 17 projects and activities carried out by the private sector and NGOs to combat human trafficking.<sup>8</sup>
- 1.4 Trafficking victims can access compensation under the ATPA and the ATPF. Under the ATPA a claim for compensation may be made in connection with a criminal prosecution, and the judgment as to the claim for compensation shall be rendered as a part of the judgment in the criminal case.<sup>9</sup> The compensation is primarily sourced through the perpetrators assets but the victim is also entitled to compensation from the ATPF itself.

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<sup>1</sup> Minority groups, stateless people, and ethnic minorities living on the Thai borders are prone to becoming victims of human trafficking.

<sup>2</sup> A significant proportion of labour trafficking victims are exploited in commercial fishing and low-end garment production and some are forced to beg on the streets.

<sup>3</sup> S Kneebone and J Debeljak, *Transnational Crime and Human Rights: Responses to Human Trafficking in the Greater Mekong Subregion* (Routledge, 2012).

<sup>4</sup> *Anti-Trafficking in Persons Act 2008*, BE 2551.

<sup>5</sup> *Regulation of the Department of Social Development and Human Securities 2009*.

<sup>6</sup> Damages for the Injured Person and Compensation and Expense for the accused in the *Criminal Case Act 2001*.

<sup>7</sup> *Labour Protection Act 1998*.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Criminal Procedure Code, Chapter 2: Filing Civil case connected to a Criminal Offence*.

## 2. PRELIMINARY ISSUES

### Framework for anti-trafficking in the jurisdiction

#### 2.1 International Law and current status:

Treaty	Signed/Ratified? (S, R or No)
UN Convention against Transnational Organised Crime (UNTOC) (the Palermo Convention)	R
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol)	R
Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime	S
UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	No
UN Convention on the Rights of the Child (CRC)	Accession
UN Convention on the Elimination of all forms of Discrimination against Women	Accession
UN Covenant on Civil and Political Rights	Accession
Forced Labour Convention 1930 (ILO No 29)	R
Abolition of Forced Labour Convention 1957 (ILO No 105)	R
Worst Forms of Child Labour Convention 1999 (ILO No 182)	R
Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956	No
ASEAN Declaration Against Trafficking in Persons	S
Bilateral mutual legal assistance treaties with Australia; Belgium; Canada; PR China; France; India; Korea; Norway; Peru; Poland; Sri Lanka; United Kingdom; United States of America.	S
Anti-Trafficking Memorandum of Understanding ("MOU") on Cooperation against Trafficking in Persons in the Greater Mekong Sub-Region (GMS) with 4 GMS countries (Cambodia, Laos PDR, Myanmar and Viet Nam), migrant registration policy and bilateral employment MOUs	S

## 2.2 Domestic laws and national policies

### **The Anti-Trafficking in Persons Act 2008**

- 2.3 The ATPA is based on several UN instruments and international conventions including the UN Convention Against Transnational Organised Crime (the Palermo Convention) and the Palermo Protocol. It was introduced to protect and assist victims of trafficking. The Act establishes the crime of human trafficking, imposes severe penalties for the traffickers and provides for protection and assistance to victims of trafficking.
- 2.4 Under section 6 of the ATPA, a person is guilty of "trafficking in persons" if, for the purpose of exploitation, the person commits a particular act, such as procuring, buying, selling, bringing from or sending to, or detaining any person, by means of the threat or use of force, abduction, fraud, deception, abuse of power, or the giving of money or benefits to achieve the consent of the person having control over another person in allowing the offender to exploit the person under his control.<sup>10</sup> The maximum penalties for trafficking are ten years imprisonment and a maximum fine of 200,000 baht. The precise penalty imposed depends on the levels of aggravation involved.<sup>11</sup> If a company is the perpetrator, it can be fined up to 1 million baht.<sup>12</sup>
- 2.5 Under Section 26(3) of the ATPA, the Office of the Permanent Secretary of the Ministry of Social Development and Human Security ("**MSDHS**") requires officials to develop a system of prevention and suppression of TIP and to provide services and safety for the victims.
- 2.6 Section 14 of the ATPA states that any offence under the ATPA shall also be considered as a predicate offence under the Anti-Money Laundering Act 1999. This has facilitated the seizing, freezing and confiscating of assets of the traffickers, which has created a strong deterrence for human trafficking as traffickers work solely for money.<sup>13</sup>
- 2.7 The ATPA establishes offences for obstructing human trafficking investigations or criminal proceedings.<sup>14</sup> It also protects victims' identities by imposing imprisonment or fines for acts which improperly reveal a victim's identity.<sup>15</sup>

### **The Penal Code**

- 2.8 In addition to the ATPA, the Penal Code is used to combat sexual exploitation, which is defined as "procuring a person for sexual gratification of another person".<sup>16</sup> Procuring a person for sexual exploitation, even with the consent of the procured

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<sup>10</sup> *Anti-Trafficking in Persons Act 2008*, s 6.

<sup>11</sup> *Anti-Trafficking in Persons Act 2008*, s 52.

<sup>12</sup> *Ibid*, s 53.

<sup>13</sup> W Roujanavong, 'Human Trafficking: A Challenge to Thailand and The World Community', UNAFEI, *Resource Material Series No. 87* (2012) [http://www.unafei.or.jp/english/pdf/RS\\_No87/No87\\_11VE\\_Wanchai.pdf](http://www.unafei.or.jp/english/pdf/RS_No87/No87_11VE_Wanchai.pdf).

<sup>14</sup> *Anti-Trafficking in Persons Act 2008*, s 54.

<sup>15</sup> *Ibid*, s 56.

<sup>16</sup> *Penal Code, Sections 282-83, as amended by the Penal Code Amendment Act (No. 14) 1997*.



person, is an offence punishable by 1-10 years of imprisonment.<sup>17</sup> The penalty is 5-20 years of imprisonment if threat, force, deception or extortion is used; however, if the child is under the age of 15, the penalty can also extend to imprisonment for life or death.<sup>18</sup> A person who knowingly receives a procured person will be punished in the same way as the procurer.<sup>19</sup>

### 3. BASIS OF STATUTORY COMPENSATION

- 3.1 Trafficking victims can access compensation under the ATPA and the ATPF. The ATPA instructions with respect to the compensation application and assessment process are not explicit. The claim for compensation is submitted by the prosecutor at any point during the trial. The order for compensation is part of the judgment in the criminal case.<sup>20</sup> From 2009 victims can also receive funds for actual medical costs, expenses for recovery, compensation for lost income, repatriation expenses and funding for legal processes to claim compensation.<sup>21</sup>
- 3.2 There is also a general victims compensation fund under the Damages for the Injured Person and Compensation and Expense for the Accused in the Criminal Case Act 2001<sup>22</sup> ("**DIPCEAC**") and individuals can also seek damages through a civil action and ability to obtain compensation under the Labour Protection Act 1998. Despite a variety of compensation schemes available to the victims of human trafficking, the first scheme the victim should pursue is the ATPA. Double proceedings/recovery is prohibited by the Thai Civil Procedural Code, meaning all available avenues for compensation must be exhausted from this scheme before others are pursued.<sup>23</sup> For this reason the ATPA and ATPF are the focus of this chapter. A brief overview of the other avenues is provided at the end of this chapter.

### 4. TYPE OF SCHEME

- 4.1 The ATPA compensation scheme covers all forms of injuries relating to trafficking, provided that the victim is deemed to be a "trafficked person". Under Section 33 of the ATPA, the MSDHS will consider providing assistance, taking into account, among other things, the sex, age, nationality, race and culture of the trafficked person.<sup>24</sup>
- 4.2 The scheme is essentially a restitution scheme, whereby a victim can claim compensation from the trafficker through the prosecution of the trafficker. In addition, the ATPF will provide funds to cover medical expenses, loss of income and legal fees.

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<sup>17</sup> Ibid, s 282.

<sup>18</sup> Ibid, s 283.

<sup>19</sup> Wanchai Roujanavong, above n 13.

<sup>20</sup> The claim for compensation is a claim attached to a criminal case, therefore there will be several insert of "Filing Civil case connected to Criminal offence" taken from the Criminal Procedure Code in Thailand.

<sup>21</sup> *National Gazette No 126 Section 170* referenced in Bureau of Anti-Trafficking in Women and Children and Japan International Cooperation Agency, *MDT Operational Guideline for the Protection of Victims of Human Trafficking* (2013) JICA <[http://www.jica.go.jp/project/thailand/016/materials/ku57pq00001yw2db-att/mdt\\_guideline\\_practical\\_version.pdf](http://www.jica.go.jp/project/thailand/016/materials/ku57pq00001yw2db-att/mdt_guideline_practical_version.pdf)>, 26.

<sup>22</sup> Also known as the *Compensation and Expenses for Injured Persons and the Accused Act 2001*.

<sup>23</sup> *Civil Procedural Code*.

<sup>24</sup> *Anti-Trafficking in Persons Act 2008*, s 33.

## 5. ELIGIBILITY

### Who can apply?

- 5.1 According to the ATPA, only a "trafficked person" or persons with elements of being a trafficked victim are eligible to apply for compensation. However, according to Section 5 of the Criminal Procedure Code, a legal representative may collect compensation on behalf of an individual injured or killed as a result of a crime if the offence was committed against a minor, ascendant, descendent, husband, wife, manager or representative of a company. The victim can request a court order for the accused to pay compensation for the offence they committed, provided it is not in conflict with the indictment of the criminal case.

### Types of injury recognised

- 5.2 The ATPA is intended to aid victims who are injured physically or mentally from exploitation or forced labour. Compensation may be available even if no physical or psychological injury has occurred, but this is decided on a case-by-case basis. Loss of opportunity is not recognised as an injury, but according to the Labour Protection Act, compensation for wages and work performed is available in these cases.

### Jurisdictional requirements

- 5.3 The crime of human trafficking must be committed in Thailand, though there is no mention that the injuries resulting from the crime must occur within Thailand. If victims are repatriated to their home country, they can still receive compensation and protection through coordination with a government or private agency in such country.<sup>25</sup>

### Exclusion on grounds of illegal or immoral behavior

- 5.4 With regards to undocumented migrants, under Section 41 of the ATPA, an official is barred from initiating criminal proceedings against any trafficked person for entering, leaving or residing in Thailand without permission; giving false information; or forging or using a forged travel document. Criminal proceedings are also barred against the trafficked person for the offence of contacting, persuading, introducing and soliciting a person for the purpose of prostitution or assembling together in the place of prostitution for the purpose of sexual exploitation. This exclusion also applies to foreigners working without a work permit. However, criminal proceedings can still be initiated for any of the above if the Minister of Justice grants permission in writing.<sup>26</sup>

### Time limitation

- 5.5 The ATPA does not specify a limitation period in respect of prosecuting a suspected offender thereunder. Accordingly, the statute of limitations outlined in the Criminal Code shall also apply to any offences committed under the ATPA. Under the Criminal Code, if the offence is punishable with imprisonment of over seven years, but not exceeding 20 years, the statute of limitations is 15 years; if the offence is punishable

<sup>25</sup> *Anti-Trafficking in Persons Act 2008*, s 36.

<sup>26</sup> *Ibid*, s 41.

with imprisonment of over one year, but not exceeding seven years, the statute of limitations is 10 years.<sup>27</sup>

### Requirements for referral, reporting and cooperation

- 5.6 A person must be identified as a victim of human trafficking to have access to the compensation under the ATPA. A victim must report the crime to the police for them to launch an inquiry into a case, before referring the file, together with the officer's opinion, to the public prosecutor in order for a prosecution to be made. Under section 29 of the ATPA, where there are reasonable grounds to believe that a person is a trafficked person, the competent official may temporarily take such person into custody. The duration of custody may not exceed 24 hours and must be reported to the Royal Thai Police, Director General of Department of Investigation, Director General of Social Development and Welfare or Provincial Governor.<sup>28</sup> If an official is in need of a longer period of custody, they may apply by petition to the court. A court may not permit a period of custody longer than 7 days.
- 5.7 Victims may elect to report to an NGO, although the NGO will then have to report as above in order to seek relief. A victim must "express his intention to claim compensation", according to the ATPA, which implies that the victims are required to cooperate with the process.<sup>29</sup> If the victim fears for their safety when testifying, they are entitled to witness protection for all criminal cases, as stated in section 36 of the ATPA.<sup>30</sup>

## 6. APPLICATION PROCESS

- 6.1 Applications from trafficked victims must be completed in writing in Thai; interpreters are often required in order to deal with language barriers (where the victim is not Thai). Under section 35 of the ATPA, a claim for compensation must be brought or filed concurrently with the criminal prosecution and is decided as part of the judgment of the criminal case.<sup>31</sup> There is no separate court fee for the claim for compensation.
- 6.2 For funding from the ATPF, an individual must make an application to either the Bureau of Anti-Trafficking in Women and Children or the Provincial Social Development and Human Security Office ("**PSDHS**"). They must provide an application form, a copy of their ID card or house registration and other evidence, such as receipts.

### Gathering Evidence

- 6.3 The applicant must show that they are a victim of a relevant offence,<sup>32</sup> and have consequently sustained an injury. Documents must be provided to the court as evidence, including evidence of injury, medical expenses, other related expenses, psychiatrist's opinion and so forth. For death-related claims, a death certificate is

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<sup>27</sup> *Penal Code*, s 95(2)-(3).

<sup>28</sup> *Anti-Trafficking in Persons Act 2008*, s 29.

<sup>29</sup> *Ibid*, s 35.

<sup>30</sup> *Ibid*, s 36.

<sup>31</sup> *Ibid*, s 35.

<sup>32</sup> *Ibid*, ss 6-9.

needed as evidence. In terms of loss of income, invoices or other financial documents must be put forward as evidence.

### **Hearing**

- 6.4 An application is evaluated through both paper and oral submissions as part of the criminal hearing. The length of time will vary from case to case, especially if foreign victims have been repatriated. The hearing process usually takes approximately one year, though extenuating factors, such as victims being located in other countries can hamper the process considerably. Notwithstanding, the ATPA emphasises that the process must be acted on expeditiously. For ATPF funding the application process is much faster, application is on the papers only and it is decided by a sub-committee.

### **Assistance**

- 6.5 Under section 33 of ATPA, the MSDHS shall provide, free of charge, legal assistance in initiating legal proceedings, to seek compensation for the trafficked victims. Further, a public prosecutor or other government official must inform a trafficked individual of their right to claim compensation for ensuing harm, and also their rights in relation to legal aid.<sup>33</sup>
- 6.6 An NGO may aid a victim with obtaining compensation if it has a local office in the area where the application is filed, and employees or volunteer consultants who are knowledgeable about human trafficking. Though the ATPA does not specifically require the provision of an interpreter, it does require the provision of general assistance, i.e. legal aid is provided in legal proceedings on a claim for compensation.<sup>34</sup>

## **7. ASSESSMENT OF COMPENSATION**

- 7.1 The ATPA does not specify the types of compensation are available, though it is typically determined based on the evidence provided. Examples include compensation for physical or psychological injury, medical costs, loss of future income, property damage and punitive damages. Quantum is determined by the courts.
- 7.2 The ATPF provides that funds may be allocated for:
- 7.2.1 living expenses, up to 3,000 baht, 3 times a year;
  - 7.2.2 medical treatment up to 30,000 baht including transportation and allowance;
  - 7.2.3 physical and mental treatment expenses up to 20,00 baht;
  - 7.2.4 loss of earnings 200 baht per day up to 1 year; and
  - 7.2.5 expenses for consumer goods, accommodation, education, legal fees to support a claim for compensation, repatriation expenses or to return to

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<sup>33</sup> Ibid, s 34.

<sup>34</sup> Ibid, s 33.

Thailand and any other expenses approved by the Fund Administration Committee.<sup>35</sup>

## 8. BARRIERS / OBSTACLES

### Barriers

- 8.1 There are several barriers that victims of human trafficking may have to overcome when attempting to obtain compensation; in particular, issues with the accessibility and clarity of the Scheme, and the disconnect between the offence and the scheme for compensation.

### Accessibility/awareness and clarity of system

- 8.2 The ATPA offers compensation directly to the trafficked person, making it moderately easy to use. However, use of the compensation scheme is fairly limited, primarily because victims are not aware of its existence. This is partly due to the fact that government information about the system is in Thai, meaning foreign claimants rarely have sufficient knowledge and awareness to utilise it. Victims may also have a fear of retaliation if they were to assist with the prosecution of the trafficker, as well as the psychological debilitation they may have suffered as a result of injury or maltreatment. These factors serve to reduce the number of people that effectively utilise the system. Additionally, the criteria for the scheme is often vague and nonspecific, making it difficult to know the necessary information. The type of compensation that victims can claim and the amount they are entitled to receive are discretionary and to be considered on a case by case basis. Furthermore, the presence of various other sources of compensation causes confusion among victims who are unsure about the scheme best suited to their needs.

### Awareness and victim identification

- 8.3 At a provincial level, the MSDHS is responsible for both educating the public and developing methods for identifying victims of trafficking. Government agencies, NGOs and civil society organisations assist at a national level and a committee formed by Thai foreign missions handles proceedings internationally. The police are involved in proceedings, and interviews are conducted in order to ensure that the necessary processes take place. That said, further steps must be taken in order to raise the general awareness about trafficking crimes. These include education programs in relation to the prevalence and impact of trafficking, and targeted campaigns in rural areas, where trafficking is more common and the identification of victims has been inadequate. An increased level of education serves to heighten the responsiveness of the public as well as the government and police force.

### Protection of victim identity

- 8.4 In Thailand, there is no general law on the protection of the victim's identity. However, the government is aware of the social backlash that trafficked individuals may face if not fully protected. Thus, section 56 of the ATPA stipulates that a

<sup>35</sup> *National Gazette No 126 Section 170* referenced in Bureau of Anti-Trafficking in Women and Children and Japan International Cooperation Agency, *MDT Operational Guideline for the Protection of Victims of Human Trafficking* (2013) [http://www.jica.go.jp/project/thailand/016/materials/ku57pq00001yw2db-att/mdt\\_guideline\\_practical\\_version/pdf](http://www.jica.go.jp/project/thailand/016/materials/ku57pq00001yw2db-att/mdt_guideline_practical_version/pdf), 26.

violation of the right to privacy of a trafficked victim is punishable by up to six months of imprisonment,<sup>36</sup> which helps prevent the media from exposing the identity of victims to the public. This protection from the media does not guarantee protection from the accused because through the process of taking evidence, personal information such as the victim's gender and their health status may be revealed. Protection of the victim is further diminished by operation of Section 172 of the Criminal Procedure Code, which states, "the trial and taking of evidence needs to be conducted in open court and in the presence of the accused person". This means many victims avoid pressing charges or seeking compensation due to the threats they face by exposing themselves, which in turn prevents the court from providing adequate aid or restitution.<sup>37</sup>

### Access to services

- 8.5 Legislation in Thailand has provided trafficking victims with significant services. Section 33 of the ATPA states that the MSDHS must provide the trafficked person with food, shelter, medical treatment, physical and mental rehabilitation, education, training, legal aid, return to the country of origin or domicile, and legal proceedings required to claim compensation.<sup>38</sup> NGOs may be able to help provide services and shelter for victims if they have permission from either the Permanent Secretary of the MSDHS or the Provincial Governor. In doing so, such NGOs must comply with relevant regulations.<sup>39</sup> Under section 37 of the ATPA, an official may assist a trafficked individual in acquiring permission to stay in Thailand temporarily or a work permit if they are still in the process of claiming compensation or rehabilitation.<sup>40</sup> These measures help to ensure that a victim's need for safety and reintegration into society are met.

### Prosecution rate

- 8.6 As a claim for compensation must be submitted together with the criminal case, the process is delayed due to the backlog of criminal cases awaiting trial.<sup>41</sup> This delay is a major factor impeding the suppression of human trafficking, as many victims feel uncomfortable participating in a lengthy litigation process,<sup>42</sup> and may be required to remain in Thailand during the course of the prosecution. Despite the fact that victims are protected under the Witness Protection Act, many are not convinced that their safety, or the safety of their family, can be assured by the Thai Government. Further, threats and bribes from traffickers prior to trial and the disappearance of victims or sudden changes in their testimony results in many cases being dropped. That said, the prosecution rate for trafficking offences increased from 64 in 2010 to 386 in 2013,<sup>43</sup> suggesting that despite these issues, government action is having a positive impact on the fight against trafficking.

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<sup>36</sup> *Anti-Trafficking in Persons Act 2008*, s 56.

<sup>37</sup> *Criminal Procedure Code, Title 2: Court Trial*, s 172.

<sup>38</sup> *Anti-Trafficking in Person s Act 2008*, s 33.

<sup>39</sup> *Regulation of the Department of Social Development and Human Securities Act 2009*.

<sup>40</sup> *Anti-Trafficking in Persons Act 2008*, s 37.

<sup>41</sup> W Roujanavong, above n 13.

<sup>42</sup> *Ibid.*

<sup>43</sup> K Chongkittavorn, 'Thailand as a regional haven for human trafficking,' *The Nation* (Thailand) 12 May 2014.

## Gaps in cooperation between countries of origin and destination

- 8.7 The lack of coordination between the law enforcement agencies of the relevant countries can lead to decreased effectiveness in the prosecution of traffickers, as traffickers often operate internationally and as part of a syndicate. A lack of information about crimes committed by an individual in other jurisdictions can serve to weaken the case against them. Civil law systems like Thailand's do not allow for the extradition of their own nationals for prosecution in another country. However, Thai nationals that have committed a trafficking offence within a foreign jurisdiction may be prosecuted within Thailand at the request of another government, or an injured person. Alien offenders may also be prosecuted within Thailand when either the Thai Government or a Thai national suffers damages.<sup>44</sup>

## Immunities and current legal system

- 8.8 As discussed above, immunity is provided to victims who commit unlawful acts, e.g. illegal immigration or prostitution, as a direct result of them being trafficked.<sup>45</sup>

## Case studies

- 8.9 There are many instances where victims of human trafficking have received an award of compensation under the statutory compensation scheme.

### *Sareut Kampha and Others (2008)*<sup>46</sup>

- 8.9.1 In this case, three defendants persuaded the victims to work in Japan by promising an attractive salary and gratuities. The defendants demanded the victims each pay 40,000 baht (approximately USD \$1,260) to cover their travel expenses. Once the victims were in Japan, one victim was forced to become a sex worker and two other victims were sold to another commercial sex business. The court found the defendants guilty of breaching the Criminal Code and convicted them each to 13 years imprisonment and imposed a fine of 40,000 baht to repay the victims.

### *Wipaporn Songmeesap*<sup>47</sup>

- 8.9.2 Another example of successful compensation involved a 14 year old girl, hired from a remote rural area in Thailand for domestic work in the house of the defendant. The victim was forced to perform housework from 4:30 a.m. until midnight every day without adequate rest, food or wages. The victim had no freedom and was subject to abuse. Upon conviction, the defendant was ordered to pay 200,000 baht (approximately 5700 USD) in compensation to the victim by the Court of Appeal.<sup>48</sup>

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<sup>44</sup> *Penal Code*, s 7.

<sup>45</sup> *Anti-Trafficking in Persons Act 2008*, s 41.

<sup>46</sup> Criminal Black Case no. 1043-1044/2548, Criminal Red Case no. 2316-2317/2551, Criminal Red Case of Lomsak Provincial Court no. 78402547.

<sup>47</sup> Criminal Court of Southern Bangkok, Case No. 4994/2550, Red Case No. 12213/2552.

<sup>48</sup> *Ibid.*

### **Failure to receive compensation**

- 8.10 Despite the schemes in place, not all victims successfully obtain compensation. For example, two women were deceived into going to London to work in a Thai restaurant, but were then detained and forced to take nude photographs, including some involving sexual activities. The two victims escaped and sought help from the Thai Embassy in London, and were sent back home to Thailand with instructions to the MSDHS to receive and look after them at the airport. The two victims gave statements to the police but were not willing to cooperate further or identify the traffickers, resulting in their cases being dropped, compensation not being granted and the traffickers going free.<sup>49</sup>

## **9. SUGGESTIONS FOR IMPROVEMENT**

### **Short term**

- 9.1 The government needs to implement training programs so that government officials, members of the police and NGOs possess a sufficient understanding of the compensation process and different options available to assist trafficked persons. This is to ensure victims of trafficking receive timely advice and are able to take the necessary steps to ensure their safety. Additionally, the government should make available programs for victims of human trafficking that allows them to meet and discuss their experiences as well as keep them occupied with activities could help to alleviate some of the psychological damage they suffered during their victimisation, and encourage them to gain confidence when presenting their case in court.

### **Long Term**

Forming a committee comprised of experts on human trafficking could serve as a less confrontational advice bureau for victims and officials with queries pertaining to their cases. More stringent border security measures would be useful in preventing the entry of illegal immigrants, who are often the easiest targets for human traffickers and frequently become traffickers themselves. Moreover, the compensation measures set forth in the ATPA should be streamlined into a single, more-detailed scheme in order to limit the confusion of both the victims and officials who rely on it. Given the difficulties that can be encountered in receiving compensation payments from perpetrators, trafficking victims would benefit if compensation were to be paid out directly from a fund, which receives contributions from penalties, fines and state funding.

- 9.2 Education on human trafficking should be improved, especially towards persons in rural areas that are frequently targeted by traffickers. Such persons should be educated about the steps to take in order to reduce the risk of being trafficked, and what to do in the event that they experience or become aware of trafficking.

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<sup>49</sup> Ibid.



## 10. ALTERNATIVES TO STATUTORY COMPENSATION SCHEME

### Civil Proceedings<sup>50</sup>

- 10.1 A victim can file a civil case for any type of offence against an alleged wrongdoer. A victim may file either a civil case in connection with a criminal prosecution, or a separate case in civil court.<sup>51</sup> Although Thai law does not prevent victims from exercising claims against an imprisoned offender, the reality is that victims rarely bring a claim for damages.
- 10.2 Under section 438 of the Civil and Commercial Code, "the court shall determine the manner and the extent of restitution according to the circumstances and gravity of the wrongful act".<sup>52</sup> The reparation may include restitution for property loss and other damages caused by the wrongful act. For certain property related offences, such as theft, piracy or extortion, the public prosecutor shall apply for the recovery of the property or the value payable, on behalf of the injured person, when instituting the criminal prosecution.<sup>53</sup>
- 10.3 If an award is given by the judgment of the court, it is the sole responsibility of the victim to enter the execution of judgment proceedings under the Civil Procedure Code. Where a civil restitution claim is connected with a criminal case, the court awards civil restitution as part of the judgment in the criminal case.

### Pros and Cons

- 10.4 Filing a civil case requires payment of a court fee of 2.5 per cent of the principal amount claimed, unless the victim has successfully applied for the fee to be waived, this is in addition to lawyers' fees and other contingent expenditures. The claimant will also incur expenses during the trial proceedings, such as costs associated with filing and service of pleadings. The claimant must submit evidence showing damage or loss incurred as a result of the wrongful act, and the appropriate quantum will be determined at the discretion of the judge. Punitive damages are not available.

### Labour Protection Act (the "LPA") 1998

- 10.5 A trafficked person is deemed to be an employee under the LPA and therefore has the right to claim wages and compensation. A claim for wages under the LPA must be made within two years of service due to the operation of the statute of limitations.<sup>54</sup> While a claim for compensation must be made within 10 years.<sup>55</sup> However, in practice, victims of labour exploitation cases will only be able to collect

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<sup>50</sup> This whole section is based on an excerpt taken from: P Watanavanich, 'The Emergence of Victim's Rights in Thailand: Twenty Years after The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power', UNAFEI, Resource Material Series No. 70 (2006) [http://www.unafei.or.jp/english/pdf/RS\\_No70/No70\\_05VE\\_Watanavanich.pdf](http://www.unafei.or.jp/english/pdf/RS_No70/No70_05VE_Watanavanich.pdf).

<sup>51</sup> *Criminal Procedure Code*, s 40.

<sup>52</sup> *Civil and Commercial Code*, s 438.

<sup>53</sup> *Criminal Procedure Code*, s 43.

<sup>54</sup> *Civil and Commercial Code*, s 193/34(8),(9).

<sup>55</sup> *Ibid*, s 193/30.

unpaid wages in addition to compensation for damages under the ATPA in the Criminal Court.<sup>56</sup>

### **Damages for the Injured Person and Compensation and Expense for the Accused in the Criminal Case Act 2001("DIPCEA")**

- 10.6 The DIPCEA provides for a general victims compensation scheme, which allows victims to claim damages for injury caused by TIP. Compensation may be claimed on a number of different bases including medical expenses incurred, death and loss of earnings.. Payments are made at the discretion of the Victim Compensation and Restitution Board (the "**VCR Board**"),<sup>57</sup> and they may take into account the nature of loss, other sources of compensation and the seriousness of the injury. The standards, methods and rates of payment are specified by ministerial regulation.
- 10.7 To be eligible for compensation, the victim must be an "injured person" under sections 3 and 17 of the Act. An "injured person" is defined as a person who has suffered injury to their life, body or mind due to a criminal offence committed by another. The person must not be involved in the commission of such offence.<sup>58</sup> The compensation covers expenses necessary for medical care including physical and mental rehabilitation as well as compensation for other losses incurred upon the discretion of the VCR Board.
- 10.8 Under the DIPCEA, compensation for medical expenses is capped at 30,000 baht. Compensation for loss of earnings is available up to 200 baht per day and not over one year from the date that regular work could not be continued. Compensation for physical and mental rehabilitation is also available with a maximum of 20,000 baht. These are the same as the limits applied by the TVPF noted above. There is therefore no real advantage to applying under the DIPCEA once recognized as a victim of human-trafficking.
- 10.9 Awards of compensation for damages for instances other than those mentioned above are under the discretion of the VCR Board.<sup>59</sup> Compensation is assessed based on reasonable expenses an individual might incur.<sup>60</sup> Compensation under the ATPA is determined by the court, whereas compensation under the DIPCEA is decided by the Thai Government.

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<sup>56</sup> W Roujanavong, above n 13.

<sup>57</sup> *Criminal Case Act (DIPCEA) 2001*, s 18.

<sup>58</sup> Transitory Provision: List attached to the Damages for the Injured Person and Compensation and Expense for the accused in the *Criminal Case Act 2001*(this is the offences referred to by Section 17 of this Act).

<sup>59</sup> P Watanavanich, above n 50.

<sup>60</sup> *Ibid.*

# UNITED KINGDOM

## 1. EXECUTIVE SUMMARY

- 1.1 The UK is a destination country for human trafficking. In recent years the number of victims of human trafficking located in the UK has increased.
- 1.2 The United Kingdom Human Trafficking Centre, a division of the National Crime Agency, estimates that in 2014, 3,309 people, including 732 children, were potential victims of trafficking, an increase of 21 per cent on 2013.<sup>1</sup> The victims came from 97 different countries, with the highest percentage predicted to be natives of Romania and Albania.<sup>2</sup>
- 1.3 The British Home Office report estimates the UK is home to between 10,000 to 13,000 victims of modern slavery including women forced into prostitution and imprisoned domestic workers and labourers.<sup>3</sup>
- 1.4 In the UK, a victim of human trafficking is able to make commence a civil claim based on the common law for example, in harassment, false imprisonment, assault or breach of contract. Where an individual is a victim of trafficking for labour, they are able to bring a claim before an employment tribunal, or, seek a compensation order as part of a criminal claim.<sup>4</sup>
- 1.5 Compensation is available under the Criminal Injuries Compensation Scheme ("**CICS**"), a government-funded scheme that pays compensation awards to innocent victims of violent crime who have sustained injuries in England, Scotland or Wales. The scheme pays two types of compensation: personal injury awards to victims of crime, and, fatal injury awards to immediate family members of a victim who has died as a result of a violent crime. In certain circumstances, a victim may be able to claim compensation for past or future lost earnings or special expenses caused by such a crime. However, the scheme does not cater to the specific hardships faced by trafficking victims, requiring victims to report crimes to the police and cooperate with investigations, there are also very few organisations that can assist with a claim.

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<sup>1</sup> National Crime Agency, 'Strategic Assessment of the Nature and Scale of Human Trafficking in 2014' (9 December 2015) <<http://www.nationalcrimeagency.gov.uk/publications/656-nca-strategic-assessment-the-nature-and-scale-of-human-trafficking-in-2014/file>> 6.

<sup>2</sup> National Crime Agency, 'Strategic Assessment of the Nature and Scale of Human Trafficking in 2014' (9 December 2015) <<http://www.nationalcrimeagency.gov.uk/publications/656-nca-strategic-assessment-the-nature-and-scale-of-human-trafficking-in-2014/file>> 6.

<sup>3</sup> Bernard Silverman, 'Modern Slavery: an application of Multiple Systems Estimation' (27 November 2014) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/386841/Modern\\_Slavery\\_an\\_application\\_of\\_MS\\_E\\_revised.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/386841/Modern_Slavery_an_application_of_MS_E_revised.pdf).

<sup>4</sup> *Criminal Courts (Sentencing) Act 2000* (UK), s 130.

## 2. PRELIMINARY ISSUES

### Framework for anti- trafficking in the jurisdiction:

#### 2.1 International conventions/treaties the State has ratified:

Treaty	Signed/Ratified? (S, R or No)
UN Convention against Transnational Organised Crime (Transnational Organised Crime Convention)	R
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)	R
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	No
Forced Labour Convention 1930 (ILO No 29)	R
Abolition of Forced Labour Convention 1957 (ILO No 105)	R
Worst Forms of Child Labour Convention 1999 (ILO No 182)	R
Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956	R
UN Convention on the Rights of the Child	R
UN Convention on the Elimination of all forms of Discrimination against Women	R
UN Covenant on Civil and Political Rights	R
Other regional instruments <ul style="list-style-type: none"> <li>- Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005</li> <li>- European Directive 2011/36/UE of 5 April 2011 preventing and combating trafficking in human beings</li> </ul>	R Adopted

#### 2.2 Domestic legislation on human trafficking:

2.2.1 Human trafficking is addressed through multiple pieces of legislation in the UK pertaining to immigration, crimes, slavery and compensation.

2.2.2 The Modern Slavery Act 2015 ("**Slavery Act**") consolidates current offences relating to trafficking and slavery. The Act makes it an offence to arrange or facilitate the travel of another person with a view to that person being exploited.<sup>5</sup> "Arranging" and "facilitating" includes recruiting,

<sup>5</sup> *Modern Slavery Act 2015* (UK), s 2(1).

transporting, transferring, harbouring, receiving or exchanging control over a person.<sup>6</sup> Exploitation includes:

- 2.2.2.1 slavery, servitude and forced or compulsory labour;
  - 2.2.2.2 sexual exploitation as defined in the Protection of Children Act 1978 s1(1)(a), or under Part 1 of the Sexual Offences Act 2003;
  - 2.2.2.3 removal of organs as defined under Sections 32 and 33 of the Human Tissue Act 2004;
  - 2.2.2.4 securing services by force, threats or deception; and
  - 2.2.2.5 securing services from children and vulnerable persons.<sup>7</sup>
- 2.2.3 The Slavery Act has extraterritorial effect so UK nationals will be found to have committed the offence of trafficking regardless of where the travel or facilitating of human trafficking takes place. By comparison, a non-national will be found to have committed an offence if any part of the arranging or facilitation of trafficking takes place in the UK, or, if the travel includes the UK at any point.
- 2.2.4 Penalties for the above offences include life imprisonment and a summary conviction can be a prison term of 12 months, a fine or both.<sup>8</sup>
- 2.2.5 The Slavery Act was drafted in response to international obligations, including the Palermo Protocol, yet a number of organisations have criticised it as not according with international standards. In particular, the Act does not contain a separate child exploitation offence.<sup>9</sup>

### 3. BASIS OF STATUTORY COMPENSATION

- 3.1 The Criminal Injuries Compensation Act 1995 ("**Compensation Act**") established the Criminal Injuries Compensation Scheme ("**CICS**"), where all claims are administered and decided by the Criminal Injuries Compensation Authority ("**CICA**").

### 4. TYPE OF SCHEME

- 4.1 The CICS provides awards of compensation to victims of crimes of violence committed in the UK and is a general scheme, not limited to victims of trafficking but encompassing, all victims who have suffered physical or psychological injury as a result of a violent crime.<sup>10</sup>

<sup>6</sup> *Ibid*, s 2(3).

<sup>7</sup> *Ibid*, s 3.

<sup>8</sup> *Ibid*, s 5.

<sup>9</sup> UNICEF UK *Written evidence to the Modern Slavery Bill Committee from UNICEF UK on the Draft Modern Slavery Bill February 2014* [http://www.unicef.org.uk/Documents/Public-Affairs-Briefings/UNICEF%20UK%20written%20evidence%20on%20the%20Modern%20Slavery%20Bill\\_Feb2014.pdf](http://www.unicef.org.uk/Documents/Public-Affairs-Briefings/UNICEF%20UK%20written%20evidence%20on%20the%20Modern%20Slavery%20Bill_Feb2014.pdf), 2; Anti-Trafficking Monitoring Group, *Written Evidence submitted by the Anti-Trafficking Monitoring Group February 2014* <http://www.publications.parliament.uk/pa/cm201415/cmpublic/modernslavery/memo/modernslavery.pdf>, 61.

<sup>10</sup> *Criminal Injuries Compensation Scheme 2012* (UK), ss 4-9.

- 4.2 The CICS covers injuries relating to all forms of trafficking including sex, forced labour, child labour, domestic servitude and child soldiers who suffer physical or psychological injury. Compensation is awarded based on the category of injury suffered, its severity and reimbursement for some costs, such as funeral expenses.

## 5. ELIGIBILITY

### Eligible victims

- 5.1 Under the CICS, the following individuals are eligible for compensation:
- 5.1.1 direct victims of a crime;
  - 5.1.2 individuals who sustain an injury by taking exceptional and justified risks to apprehend an offender, prevent a crime, contain or remedy consequences of a crime or assisting a constable in the above;
  - 5.1.3 individuals who sustain an injury by being present at and witnessing an incident or the aftermath of an incident where a loved one sustains an injury as either a direct victim of a crime or in trying to prevent or stop a crime; and
  - 5.1.4 qualifying relatives of a person who has died as a result of a crime, or sustained injury as a result of a crime and died otherwise than as a direct result of the crime. Qualifying relatives include spouses, partners, parents or children of the deceased.<sup>11</sup>

### Physical and psychological injuries

- 5.2 Both physical and psychological injuries are recognised.<sup>12</sup>

### Jurisdictional requirements

- 5.3 The injury must be sustained in Great Britain. The scheme also restricts compensation to individuals who are ordinarily resident in the UK at the date of the incident giving rise to the criminal injury.<sup>13</sup> For victims of human trafficking who are not ordinarily resident, they must, at the time of making their application, either have been referred to a competent authority as a potential victim of trafficking, or made an application for asylum under the Immigration Rules. They will not be able to receive an award until they have either been conclusively identified as a victim of trafficking or been granted temporary protection, asylum or humanitarian protection.<sup>14</sup> The applicant may ask to have their compensation determination deferred until this occurs.

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<sup>11</sup> *Criminal Injuries Compensation Scheme 201*, ss 4-9.

<sup>12</sup> *Criminal Injuries Compensation Scheme 2012*, Annexes A and E.

<sup>13</sup> *Ibid*, s 10.

<sup>14</sup> *Criminal Injuries Compensation Scheme 2012 (UK)*, ss 13(a) and 15.

### **Exclusions on grounds of illegal or immoral behaviour?**

- 5.4 Under the CICS, compensation may be withheld or reduced where:
- 5.4.1 the conduct of the applicant before, during or after the violent crime, makes it inappropriate to make a full award. However conduct does not include intoxication to the extent that such intoxication made the applicant more vulnerable to becoming a victim of violence;
  - 5.4.2 the applicant has unspent convictions;<sup>15</sup> or
  - 5.4.3 the applicant's character makes it inappropriate to make a full award.

### **Time limit for application**

- 5.5 A claim should be made as soon as reasonably practicable after the crime and within two years of the incident giving rise to the injury.<sup>16</sup> For minors, the application must be submitted within two years of the victim turning 18, or, if the crime is reported when the victim is 18, within 2 years of the date of the report.<sup>17</sup> If a claim is made after two years after the date of the incident, an extension of time may be needed.
- 5.6 A claims officer may extend the period for an application which was delayed where the victim could not have applied earlier, or if the application can be determined without further extensive enquiries by a claims officer.<sup>18</sup>

### **Requirements for referral**

- 5.7 If the victim is ordinarily resident in the UK at the time of the incident then there are no requirements that they be referred as an official victim of human trafficking. However, victims who were not ordinarily resident at the time of the offence must provide evidence from a competent authority confirming they have been identified as a potential victim of human trafficking, or have applied for asylum as outlined above.

### **Reporting requirements and victims assistance**

- 5.8 Victims are required to report the crime as soon as reasonably practicable, which is determined taking into account the victim's age, capacity and whether the effect of the incident was such that it could not have been reported earlier. Victims are also required to cooperate as far as reasonably practicable in bringing the assailant to justice.<sup>19</sup>

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<sup>15</sup> Ibid, Annex D.

<sup>16</sup> Ibid, s 87.

<sup>17</sup> Ibid, s 88.

<sup>18</sup> Ibid, s 89.

<sup>19</sup> Ibid, ss 22-23.

## 6. APPLICATION PROCESS

### Outline

- 6.1 Applications to the CICA can be made online or by phone. Victims are required to comply with any directions or conditions imposed by a claims officer, provide information regarding any other claim or proceedings that may give rise to payment and assist the claims officer as far as reasonably practicable.<sup>20</sup>

### Evidence necessary

- 6.2 The claimant must provide any information in connection with the application that the claimant officer may reasonably require, including evidence that they are a resident, a human trafficking victim or asylum seeker, medical evidence of the injury, evidence for any other payments and the relevant crime reference number from the police report.<sup>21</sup>

### Oral hearing or on paper? Can a person be represented by a lawyer?

- 6.3 Determinations are made on the papers, without the need for a hearing. A review of a decision will also be made on the papers. Appeals are heard by the Tribunal which may be an oral hearing,<sup>22</sup> individuals are able to be represented by a lawyer but their legal fees will not be covered by the CICS.<sup>23</sup>

### Assistance provided

CICA has a helpline that can provide advice over the phone. There are no statutory entities funded to assist trafficking victims to apply for compensation but CICA recommends that victims contact Victim Support, an independent national charity for assistance. There are private entities and community organizations that will assist victims with compensation claims for a fee. There are also some community organisations that will assist victims for free. The Citizen's Advice Bureau also is able provide advice on how to lodge an application for compensation.<sup>24</sup>

### Timeframe

- 6.4 Once an application has been received, the CICA will send a consent form for the applicant to sign to verify the information they have provided which must be returned within 60 days. Applicants can expect to wait approximately 12 months for compensation.

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<sup>20</sup> Ibid, s 91.

<sup>21</sup> *Criminal Injuries Compensation Scheme*, s 92.

<sup>22</sup> Ibid, ss 99, 117 and 125.

<sup>23</sup> Ibid, s 93.

<sup>24</sup> Citizens Advice Bureau, 'Personal Injuries' <<https://www.citizensadvice.org.uk/law-and-rights/legal-system/personal-injury/personal-injuries/>>.



## Costs

- 6.5 There is no fee to apply for compensation but proving injuries may require expert reports that have associated costs. CICA will assist with some of the costs related to obtaining evidence.<sup>25</sup>

## 7. ASSESSMENT OF COMPENSATION

### Types of compensation

- 7.1 The types of compensation available under the CICS are:
- 7.1.1 injury payments;
  - 7.1.2 loss of earnings payments;
  - 7.1.3 special expenses payments;
  - 7.1.4 bereavement payments;
  - 7.1.5 child's payments;
  - 7.1.6 dependency payments;
  - 7.1.7 funeral payments; and
  - 7.1.8 miscellaneous payments in fatal cases (Scheme, paragraph 30)

### How is compensation assessed?

- 7.2 Injury payments are assessed based on the type of injury sustained and the severity of that injury. So, for example, a disabling mental injury lasting between 6 weeks and 28 weeks would attract a standard amount of £1,000, a pattern of repetitive frequent severe sexual abuse attracts £6,600 in compensation or £22,000 if it results in serious internal bodily injuries. These amounts are then multiplied by a factor correlating to the number of years of loss.<sup>26</sup> A victim may also be entitled to reasonably incurred special expenses payments such as adaptation of the victim's accommodation if they suffer a permanent disability, supervision and security where necessary.<sup>27</sup>

### Caps on compensation

- 7.3 The maximum award under the CICA for a person who has sustained one or more criminal injuries directly attributable to an incident is £500,000 (including fatal cases)<sup>28</sup>

<sup>25</sup> *Criminal Injuries Compensation Scheme 2012*, ss 94-95.

<sup>26</sup> *Ibid*, Annex E.

<sup>27</sup> *Ibid*, s 53.

<sup>28</sup> *Ibid*, ss 31, 60.

### **How is the Scheme funded?**

- 7.4 The Scheme is Government funded through the Ministry of Justice (with the CICA as a Ministry of Justice Agent).

## **8. BARRIERS / OBSTACLES**

- 8.1 The CICA was not drafted specifically to cater for the experiences of victims of trafficking. As such, victims face a number of barriers when attempting to access compensation, including:
- 8.1.1 requirements to report the crime to police and assist with prosecution and fear of deportation and/or arrest;
  - 8.1.2 issues of character and criminal convictions.
  - 8.1.3 uncertainty as to length of stay in the UK
  - 8.1.4 requirement that they be officially recognised as a victim of human trafficking
  - 8.1.5 the requirement that the crime be an act of violence
  - 8.1.6 lack of legal assistance and support
  - 8.1.7 inaccessible application systems
  - 8.1.8 lack of a specific category of injury, being "victim of human trafficking"

### **Requirement to report the crime and fear of deportation**

- 8.2 The CICS requires applicants to have reported the crime to the police and to assist the police with an investigation. This can negatively impact victim's access to compensation where they fear deportation or arrest for criminal offences committed while a trafficking victim and are not aware that they will not be held liable for such action if a direct consequence of being trafficked. Victims may also fear that reporting the crime may also result in negative consequences for themselves or their family back home at the hands of the perpetrator.
- 8.3 Non-British or European Economic Area Nationals will not be removed from the UK during the "recovery and reflection period", a period granted to victims of human trafficking or modern slavery by the National Referral Mechanism of at least 45 days, during which the victim can try to recover from their experiences and make an informed decision about whether or not to participate in proceedings. If a person is identified as a victim of trafficking, they may be considered for a temporary residency permit, if not they can consider seeking asylum. Critics of the scheme have pointed out that 45 days is a short amount of time, leaving victims at risk of homelessness and destitution and have recommended that leave to remain in the UK be increased

to at least one .<sup>29</sup> Early return to their country can also make it difficult to continue a claim that has started.

### **Issues of character and criminal convictions**

- 8.4 The CICA may withhold or reduce payments on the basis of a victim's actions before or after the crime, if they are of unsavoury character or if the victim has a criminal record. There are no exemptions for victims of trafficking who may have participated in illegal activities under duress, such as unlawful sex work, or may be seen to have an unsavoury character due to actions taken while a victim of trafficking. There is evidence to suggest that victims of trafficking for forced labour and sexual exploitation have had their compensation claims denied on these grounds.<sup>30</sup>

### **Requirement that the victim be officially recognised as a victim of human trafficking**

- 8.5 Eligibility criteria under the CICS specifically allows for persons that have been referred to a competent authority as a potential victim of trafficking in human beings or have made an application under Section 3(2) of the Immigration Act 1971 (UK). If a victim does not meet either of these criteria, they might struggle to apply for compensation as the other options for eligibility concern UK or EU citizens and their relations.

### **Requirement that the crime be an act of violence**

- 8.6 According to human rights group Liberty, the definition of "violent crime" under the scheme would not include certain victims of human trafficking. Offences of holding someone in slavery and servitude and human trafficking are not explicitly included in the definition of violent crime. As such, victims may be unable to benefit. Some organizations have recommended the inclusion in the Slavery Act a clause providing for compensation for victims of human trafficking and establishment of a stand-alone civil law remedy.<sup>31</sup>

### **Lack of legal assistance and support**

- 8.7 Legal Aid is available for victims of trafficking, and victims are entitled to legal aid for applications for leave to remain and seek asylum, not for compensation claims. They may only receive such aid once they have been referred into the National Referral Mechanism ("**NRM**") process and have received a positive decision (reasonable grounds or conclusive). Accordingly, a victim cannot generally obtain legal aid for advice prior the referral , although there are some exceptions.<sup>32</sup>

<sup>29</sup> Hope for Justice, *Written Evidence submitted by Liberty* <http://www.publications.parliament.uk/pa/cm201415/cmpublic/modernslavery/memo/modernslavery.pdf>, 121.

<sup>30</sup> Office for Democratic Institutions and Human Rights, *Compensation for Trafficked and Exploited Persons in the OSCE Region* (2008) <http://www.osce.org/odihr/32023?download=true>, 112.

<sup>31</sup> Public Bill Committee, 'Modern Slavery Bill' (2014) <http://www.publications.parliament.uk/pa/cm201415/cmpublic/modernslavery/memo/modernslavery.pdf>, 32.

<sup>32</sup> Focus on Labour Exploitation, *Guide to Legal Remedies for Victims of Trafficking for Labour Exploitation* (2014) <http://www.barrowcadbury.org.uk/wp-content/uploads/2014/11/flex-guide-to-legal-remedies-f.pdf> accessed 10 March 2016, 5.

- 8.8 The performance of the CICA is dependent on good quality legal representation and related support. Each application demands time and resources and costs involve obtaining medical and psychiatric reports, interpreters and accessing legal advice and assistance. Liberty have recommended that Legal Aid be available for claims of compensation.<sup>33</sup>

### **Inaccessible application systems**

- 8.9 The online form is clear, but requires a lot of detail. There are no application forms available for non-English speakers.

### **Level of awareness / victim identification in key sectors**

- 8.10 Research by the Anti-Trafficking Monitoring Group in 2012,<sup>34</sup> suggests that although effort has been put into training professionals and frontline workers it does not reach those frontline professionals that are best placed to identify trafficking, especially health professionals and housing providers.

### **Access to services**

- 8.11 The NRM is set up to refer victims of human trafficking to various support services, including the Salvation Army, Tara and Migrant Help.<sup>35</sup> There is a Victim's Information Service set up by the Government, available to victims which can help victims find support in their local area.<sup>36</sup> The UK also has a helpline and website which connects victims with various support services throughout the UK.

## **9. EXAMPLES IN PRACTICE**

- 9.1 The first successful CICS awards for trafficked people in the UK were made in July 2007 to two Romanian women who had been trafficked into the UK for sexual exploitation. The first woman, trafficked in 2002 at the age of 16, received £62,000, made up of £22,000 for the sexual abuse suffered and £40,000 for lost earnings and opportunity.<sup>37</sup>
- 9.2 The second claimant, trafficked in 2004 at the age of 13, received £36,500 comprised of £16,500 for sexual abuse and £20,000 for lost opportunity. Both women testified at the trial of their trafficker, who was subsequently convicted of rape and controlling prostitution and sentenced to 21 years imprisonment.<sup>38</sup>
- 9.3 Three additional applications have since resulted in compensation awards of £30,547 and two for £16,500 for other women trafficked for sexual exploitation. The decisions

<sup>33</sup> Liberty, *Written Evidence submitted by Liberty*, [http://www.unicef.org.uk/Documents/Public-Affairs-Briefings/UNICEF%20UK%20written%20evidence%20on%20the%20Modern%20Slavery%20Bill\\_Feb2014.pdf](http://www.unicef.org.uk/Documents/Public-Affairs-Briefings/UNICEF%20UK%20written%20evidence%20on%20the%20Modern%20Slavery%20Bill_Feb2014.pdf) , 32.

<sup>34</sup> Anti-Trafficking Monitoring Group [http://www.antislavery.org/includes/documents/cm\\_docs/2012/a/atmg\\_all\\_change\\_prevention.pdf](http://www.antislavery.org/includes/documents/cm_docs/2012/a/atmg_all_change_prevention.pdf).

<sup>35</sup> UK Government, *Help for Adult Victims of Human Trafficking* [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/253621/human-trafficking-english.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253621/human-trafficking-english.pdf).

<sup>36</sup> Victims Information Service, <https://www.victimsinformation.service.org.uk/>.

<sup>37</sup> Reported in Office for Democratic Institutions and Human Rights, *Compensation for Trafficked and Exploited Persons in the OSCE Region* (2008) <http://www.osce.org/odihr/32023?download=true>, 113.

<sup>38</sup> Ibid.

indicate that CICA is now accepting the applicants' claims of false imprisonment and forced prostitution as a basis of compensable injury, which solidifies the ability of trafficked persons to claim under the scheme.<sup>39</sup>

## 10. SUGGESTIONS FOR IMPROVEMENT

- 10.1 There are a number of ways in which the UK could improve access to compensation for victims.
  - 10.1.1 The issue of compensation should be a central part of UK anti-trafficking policy. In particular, concrete actions should be spelled out in the Action Plan to overcome obstacles that prevent trafficked persons from accessing compensation. Proceeds of crime confiscated from traffickers should be used to compensate victims of trafficking.
  - 10.1.2 For foreign victims trafficked to the UK, they should be provided with a temporary residence permit as a part of the Council of Europe Convention implementation, to enable them to initiate a claim for compensation if they choose.
  - 10.1.3 Issue guidance and training on the use of compensation orders in human trafficking cases. Provide training to police and prosecutors to ensure that compensation orders are applied for in every appropriate trafficking case where traffickers' assets are available.
  - 10.1.4 Improve assistance for victims, ensuring that trafficked persons have access, from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings regarding compensation in a language they understand.
  - 10.1.5 Include a standalone provision for compensation based on the crime of human trafficking, either in the Modern Slavery Act 2015 or in the CICA. At the very least, the requirement that victims cooperate with police must be removed. The exceptions to compensation on the basis of criminal record, character and activity should not apply to human trafficking victims.
  - 10.1.6 Awards of compensation need to take into consideration not only the physical and psychological harm to the victim but also the loss of opportunities such as employment or education and loss of earnings or earning potential.

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<sup>39</sup> Anti-Trafficking Monitoring Group, *Briefing: Compensation for Trafficked Persons* available at [http://www.antislavery.org/includes/documents/cm\\_docs/2011/c/compensation.pdf](http://www.antislavery.org/includes/documents/cm_docs/2011/c/compensation.pdf).

## 11. ALTERNATIVES TO STATUTORY COMPENSATION SCHEMES

- 11.1 There are a number of alternatives to statutory compensation schemes in the UK, as outlined below.

### **Reparations order**

- 11.2 Under the Modern Slavery Act 2015 a court, on finding a perpetrator guilty of human trafficking, may order the perpetrator to pay reparations to the victim. In every human trafficking case the court must consider whether to make a reparations order and, if they do not make one, give reasons why.<sup>40</sup> Under this provision the amount of compensation payable is what the court considers appropriate given the representations made on behalf of the person or prosecutor. The court must have regard to the perpetrator's means. Considerations of injury, loss and damage are imported from the regular Powers of the Criminal Courts (Sentencing) Act 2000. Unlike compensation orders, however, the perpetrator must be convicted for the relevant offence.

### **Employment Tribunal**

- 11.3 If the trafficking offence included a form of work, be it unpaid or underpaid, the individual may be able to seek compensation before the Employment Tribunals under the Employment Tribunals Act 2006. However, most claims require the victim to be a "worker" or "employee", as defined under the relevant legislation and generally a victim requires an UK employment contract. This creates obvious difficulties for most victims of trafficking given that their circumstances are not governed by a formal contract of employment. Claims must be brought within three months of the wrong occurring and the process usually takes about six months. There is a filing fee but it can be waived in certain cases. Unlike CACP, legal aid is available for assistance in preparing the case, although not for representation before the tribunal. In addition to recovering income, some compensation for "hurt feelings" can be awarded.

### **Civil Claim**

- 11.4 Under common law, a victim may be able to sue the perpetrator in tort. However, as with the employment claim, it relies upon the perpetrator being in the jurisdiction and having assets worth suing for. The victim must therefore face the trafficker, something they may be unwilling to do. While legal aid is available for some legal claims, it is not available for all and legal fees can be incredibly high. The claims can also take 12 – 18 months to conclude. If the perpetrator has not been found guilty of a crime it may also be difficult to prove the elements of the tort on the balance of probabilities.

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<sup>40</sup> *Modern Slavery Act 2015* s 8.

# UNITED STATES OF AMERICA - CALIFORNIA

## 1. EXECUTIVE SUMMARY

- 1.1 California's international border, major harbours and airports, large immigrant population and industries make it a prime location for human traffickers to conduct their illegal activities. A 2014 report published by the California Attorney General estimates the annual profits per forced labourer to be \$13,000 and the annual profits per sex trafficking victim to be \$100,000.<sup>1</sup>
- 1.2 In 2012 there were nine regional anti human-trafficking task forces in California made up of law enforcement and local, state, and federal prosecutors, as well as non-governmental organisations.<sup>2</sup> From 1 July 2010 to 30 June 2012, these regional task forces identified 1,277 suspected victims of human trafficking and arrested 1,798 individuals on suspicion of human trafficking. They also trained 25,591 law enforcement personnel, prosecutors, victim service providers, and other first responders focusing on a victim-centered approach.<sup>3</sup> Approximately 56% of victims were trafficked for the purpose of sexual exploitation and 21% were trafficked for forced labour.<sup>4</sup>
- 1.3 Human trafficking is an offence under both Federal and State legislation. Victims of trafficking (be it under Federal or State legislation) can access compensation through the California Victims Compensation Program ("**CalVCP**"), a general compensation fund providing compensation for expenses for all victims of violent crime. Compensation is available to all victims regardless of immigration status. There are numerous support mechanisms available to trafficking victims to help them access compensation, and legislation has ensured that the relationship between support worker and victim is protected by privilege. Compensation is capped at \$63,000 and only covers expenses incurred, it does not cover pain and suffering or pecuniary damages.
- 1.4 California's first anti-trafficking bill, the California Trafficking Victims Protection Act (Assembly Bill No. 22, Chapter 240) was enacted on 1 January 2006. The Act amended various codes to make it easier for trafficking victims to obtain compensation. It also improved access to two other avenues for compensation, being a civil action or receiving restitution through the criminal courts.<sup>5</sup>

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<sup>1</sup> K Harris, *Gangs beyond Borders: California and the Fight Against Transnational Organized Crime* (2014) [https://oag.ca.gov/sites/all/files/agweb/pdfs/toc/report\\_2014.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/toc/report_2014.pdf), 18.

<sup>2</sup> Ibid, 4.

<sup>3</sup> Ibid, 47.

<sup>4</sup> Ibid, 52.

<sup>5</sup> *California Trafficking Victims Protection Act*, California Assembly Bill No 22, Chapter 240 (2005).

## 2. PRELIMINARY ISSUES

### Framework for anti-trafficking in the jurisdiction

2.1 International conventions/treaties the State of California has ratified:

International Convention/Treaty	Signed/Ratified? (S, R or No)
UN Convention against Transnational Organized Crime (Transnational Organized Crime Convention)	R
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)	R
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	No
Forced Labor Convention 1930 (ILO No 29)	No
Abolition of Forced Labor Convention 1957 (ILO No 105)	R
Worst Forms of Child Labor Convention 1999 (ILO No 182)	R
Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956	R
UN Convention on the Rights of the Child	S
UN Convention on the Elimination of all forms of Discrimination against Women	S
UN Covenant on Civil and Political Rights	R
Inter-American Convention on International Traffic in Minors	No

2.2 Domestic legislation on human trafficking:

2.2.1 California has both Federal and State legislation on trafficking and compensation. The Federal legislation primarily covers issues of immigration and visa status, ensuring international victims of trafficking can access services without reprisal. Compensation is legislated for and implemented at the state level.

#### Federal legislation

2.3 Federal law renders trafficking a criminal offence. The Federal offences for trafficking with respect to peonage, slavery, involuntary servitude or forced labour are outlined in 18 USC § 1590. The laws cover:



- 2.3.1 slavery;
  - 2.3.2 forced Labour;
  - 2.3.3 involuntary Servitude;
  - 2.3.4 peonage; and
  - 2.3.5 maximum imprisonment is 20 years, or life where there is aggravated sexual abuse.
- 2.4 Under 18 USC § 1591 it is an offence to recruit, entice, harbour, transport, provide, obtain, advertise, maintain, patronise, or solicit by any means a person to engage in commercial sexual acts through force, threats, force, fraud or coercion. Where the person is under 18, the offence is to cause them to engage in a commercial sex act. Penalties range from 10 years to life. Under §1593 and §1595 there are specific provisions for mandatory restitution and civil remedies for trafficking victims. This legislation does not cover exploitative labour, inter-country adoption, organ harvesting or pornography.
- 2.5 Federal protection and services for trafficking victims are established through the Victims of Trafficking and Violence Protection Act of 2000 ("**HR 3244**") and the subsequent reauthorisation acts. They establish victim support programs and services and outline penalties applicable to those convicted of human trafficking. The Acts allow eligible victims to apply for T nonimmigrant status ("**T-VISA**")<sup>6</sup>. A T-VISA allows victims of human trafficking to remain in the United States to assist with the investigation and prosecution of human trafficking cases.<sup>7</sup> This system also ensures many victims of trafficking can contact authorities for assistance with applications without fear of deportation, although it is only available to victims who agree to assist with the persecution of traffickers.

### **State legislation**

- 2.6 Human trafficking in California is governed by the Government Code, Penal Code, Civil Code and Evidence Code. Thanks to the California Trafficking Victims Protection Act<sup>8</sup> ("**CTVPA**") and California Proposition 35, the "Californians Against Sexual Exploitation Act" Initiative, these codes now contain specific provisions relating to human trafficking.
- 2.7 The California Penal Code names human trafficking as a crime.
- 2.8 Human trafficking is primarily addressed under 236.1 of the Penal Code, which states that depriving or violating the personal liberty of another with the intent to obtain forced labour or services, or to effect or maintain a sexual crime, pornography or extortion, is human trafficking; punishable by a fine of up to \$500,000 and imprisonment of up to 15

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<sup>6</sup> United States Citizenship and Immigration Services, *Victims of Human Trafficking: T Nonimmigrant Status*, (2011) <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status>.

<sup>7</sup> Ibid.

<sup>8</sup> *The California Trafficking Victims Protection Act*, AB 22, Leiber, 2005.

years, based on the type of trafficking.<sup>9</sup> Additional penalties may be imposed where there is bodily harm to the victim or there are previous convictions.<sup>10</sup>

- 2.9 Proposition 35 focuses on higher penalties against human traffickers and requires sex traffickers to register as sex offenders and all registered sex offenders to disclose their internet accounts.<sup>11</sup> Individuals convicted of seeking to procure or procuring sexual services of a sex worker who is a minor must pay an additional fine of up to \$25,000 to fund programs for sexually exploited children.<sup>12</sup>
- 2.10 Authorities are also authorised to seize any property used to facilitate, or received as payment for, human trafficking involving sexual exploitation of children.<sup>13</sup> In certain circumstances, the money will be deposited in a Victim-Witness Assistance Fund to fund counseling centres for victims of child sexual abuse and exploitation.<sup>14</sup>
- 2.11 The CTVPA, similarly to federal law, also establishes support programs and benefits for victims of trafficking, as well as restitution and a basis for civil action. This is in addition to statutory compensation outlined below.

### **3. BASIS OF STATUTORY COMPENSATION**

- 3.1 Victims of crime compensation schemes are legislated for and managed at the state level; they include compensation for both federal and state crimes, including human trafficking. Federally, the legislation establishes a compensation fund, which is funneled into state schemes. This is a mechanism to ensure victims trafficked into the United States can receive assistance.

#### **Federal Legislation**

- 3.2 As described above, federal legislation provides a mechanism by which victims of trafficking who are not lawfully in the country can obtain certification and immigration status and thus receive benefits and assistance. While this is generally not necessary for compensation (depending on state requirements), it is necessary to receive other support and benefits.
- 3.3 In October 2000, the Trafficking Victims Protection Act of 2000 ("**TVPA**") was enacted to protect trafficking victims and help them rebuild their lives in the United States.
- 3.4 The TVPA provides that an alien to the US, who is a victim of a severe form of human trafficking, as well as their eligible family members, may receive federally-funded benefits and services to the same extent as refugees.<sup>15</sup> Individuals seeking access to those benefits and services must be certified as trafficking victims by the Federal Office

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<sup>9</sup> *California Penal Code*, § 236.

<sup>10</sup> *California Penal Code*, § 236.4.

<sup>11</sup> *Californians Against Sexual Exploitation Act*, Proposition 35 (2012), amending the CTVPA.

<sup>12</sup> *California Penal Code*, § 236.1.

<sup>13</sup> *California Penal Code*, § 236.7.

<sup>14</sup> *California Penal Code*, § 186.2.

<sup>15</sup> *Victims of Trafficking and Violence Protection Act 2000*, § 107(b)(1)(A).

of Refugee Resettlement ("ORR").<sup>16</sup> Minors who are victims of severe forms of trafficking in persons do not require ORR certification to be eligible for federal benefits.<sup>17</sup>

- 3.5 Federally, there also exists a Federal Victims of Crime Fund, which was established under the Victims of Crime Act 1984. It is a major source of funding for victims services and is funded from federal crimes offenders, through fines, forfeited bail bonds and penalties. Some of the funds are directed towards compensation for victims' out of pocket expenses. The funding is given to and managed by each State's own local compensation scheme (outlined below). Victims of crime therefore only need to apply to one compensation scheme.

### State Legislation

- 3.6 Each state, including California, administers its own victims of crime compensation scheme, all of which include compensation for victims of human trafficking. Each state's scheme operates slightly differently.
- 3.7 Part four of the Government Code of California establishes the state's victims of compensation scheme. The scheme is general and applies to all trafficking victims. The legislation makes clear that victims of crime include victims of human trafficking and derivative victims, such as family members. To qualify, the victim must have been injured or threatened with injury. For victims of human trafficking, this explicitly includes emotional injury.<sup>18</sup> There is no requirement that victims be in the country lawfully or have reported the crime to police.
- 3.8 While the scheme is general, the California Trafficking Victims Protection Act amended the Government code to ensure that specific issues faced by trafficking victims would not be a barrier to obtaining compensation, as outlined below. The scheme specifically covers the human trafficking sections of the Penal Code mentioned above.

## 4. ELIGIBILITY

- 4.1 Both direct victims and derivative victims of human trafficking are eligible to apply for compensation from the state of California for reimbursement of expenses that resulted from the crime, including costs of medical treatment, relocation, income loss and counseling.<sup>19</sup>
- 4.2 A "victim" is a person who sustains injury or death as a direct result of a crime (including human trafficking), and a "derivative victim" is a person who, at the time of the crime (including human trafficking), was the parent, grandparent, sibling, spouse, child, or grandchild of the victim or had a similar relationship and had lived in the victim's

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<sup>16</sup> California Department of Social Services, *Human Trafficking Victims* <http://www.cdss.ca.gov/refugeeprogram/PG1268.htm>.

<sup>17</sup> 22 USC § 7105(b)(1)(C); State of California – Health and Human Services Agency, Department of Health Care Services, 'Services to Noncitizen Victims of Human Trafficking, Domestic Violence and Other Serious Crimes under a New Program - Trafficking and Crimes Victims Assistance Program' (2015) <http://www.dhcs.ca.gov/services/medi-cal/eligibility/Documents/ACWDL2015/ACWDL15-25.pdf>.

<sup>18</sup> *California Government Code*, § 13955 (f)(3)(A).

<sup>19</sup> *California Government Code*, § 13957.

household for at least two years.<sup>20</sup> A derivative victim may also be a witness of the crime who is another family member or who had an intimate relationship with the victim such as a fiancé.<sup>21</sup> A derivative victim does not have to reside in the jurisdiction if the victim was a resident in the jurisdiction or the crime occurred in the jurisdiction.<sup>22</sup>

### **Types of injuries recognised**

- 4.3 Generally the victim must have either suffered physical injury or emotional injury where there is also a threat of physical injury. However, victims of human trafficking are also eligible where the injuries are purely emotional.<sup>23</sup>

### **Jurisdictional requirements**

- 4.4 The scheme requires crime to have occurred in the state of California or the victim to have been a resident of the state of California if the crime occurred outside of the state.<sup>24</sup>

### **Exclusions on grounds of illegal or immoral behaviour**

- 4.5 The Victims Compensation Board can deny an application if it finds that the applicant knowingly and willingly participated in the commission of the crime that resulted in the injury.<sup>25</sup> The Board may also deny an application based on the applicant's involvement in the events leading to the crime.<sup>26</sup> However, it is not an automatic exclusion and the board may take a number of factors into account including the victim's age, physical condition and psychological state. There are also exemptions for victims of human trafficking. Under the Regulations, involvement in prostitution is not considered a barrier to compensation for human trafficking victims.<sup>27</sup> Under the Code, a derivative victim of human trafficking who is under 18 years of age shall not have their application denied simply because a primary victim is denied on the basis of involvement.<sup>28</sup>
- 4.6 A person who has been convicted of a felony can apply for compensation, but the award of that compensation may not be considered until the applicant has been discharged from probation or has been released from a correctional institution.<sup>29</sup> Moreover, applications of non-felon victims receive priority in the award of compensation.<sup>30</sup>

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<sup>20</sup> *California Government Code*, § 13955(c)(3).

<sup>21</sup> *California Government Code*, § 13955 (c)(4).

<sup>22</sup> *California Government Code*, § 13955 (c).

<sup>23</sup> *California Government Code*, § 13955 (f)(3)(A).

<sup>24</sup> *California Code of Regulations*, Title 2, §§ 649.1 - 649.2; *California Government Code*, § 13955(b) and (c).

<sup>25</sup> *California Government Code*, § 13956 (a).

<sup>26</sup> *California Government Code*, § 13956 (c).

<sup>27</sup> *California Code of Regulations*, Title 2, § 649.56.

<sup>28</sup> *California Government Code*, § 13956.

<sup>29</sup> *California Government Code*, § 13956 (d)(1).

<sup>30</sup> *Ibid.*

### Time limit for application

- 4.7 The time limit to apply for compensation is the later of:
- 4.7.1 three years after the crime;
  - 4.7.2 three years after the direct victim turns 18 years of age; or
  - 4.7.3 three years from when the crime could have been discovered.<sup>31</sup>
- 4.8 If the application is based on specified crimes involving sex with a minor, a victim may file at any time prior to the victim's 28th birthday.<sup>32</sup>
- 4.9 Extensions are granted by the Board in some circumstances.<sup>33</sup> A victim filing a late application must also complete the Late Filing Consideration Form.<sup>34</sup>
- 4.10 Some of the reasons an extension may be granted include:
- 4.10.1 a recommendation from the prosecuting attorney regarding the victim's or derivative victim's cooperation with law enforcement and the prosecuting attorney in the apprehension and prosecution of the person charged with the crime.
  - 4.10.2 whether particular events occurring during the prosecution or in the punishment of the person convicted of the crime have resulted in the victim or derivative victim incurring additional pecuniary loss.
  - 4.10.3 Whether the nature of the crime is such that a delayed reporting of the crime is reasonably excusable.<sup>35</sup>
- 4.11 For crimes committed on or after 1 January 2002, a family member or other applicant may file an application at any time after the Board has accepted the application filed by or on behalf of a victim of the same qualifying crime.<sup>36</sup>
- 4.12 A parent with legal custody, guardian, conservator, or relative caregiver may sign an application filed on behalf of a minor or victim.<sup>37</sup> However, an eligible minor victim or derivative victim may sign the application on his or her own behalf in certain circumstances.<sup>38</sup>

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<sup>31</sup> CalVCP, FAQs, <http://vcgcb.ca.gov/victims/faq/default.aspx>.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup>

<sup>36</sup>

<sup>37</sup>

<sup>38</sup> Ibid.

### Requirements for referral, reporting and cooperation

- 4.13 The California Government Code provides that an application for compensation shall be denied if the Board finds that the victim or, if applicable, the derivative victim failed to cooperate reasonably with a law enforcement agency in the apprehension and conviction of a criminal who committed the crime.<sup>39</sup> In determining whether cooperation has been reasonable, the Board shall consider the victim's or derivative victim's age, physical condition, and psychological state, cultural or linguistic barriers, any compelling health and safety concerns, including, but not limited to, a reasonable fear of retaliation or harm that would jeopardise the well-being of the victim or the derivative victim or their respective families, and giving due consideration to the degree of cooperation of which the victim or derivative victim is capable in light of the presence of any of these factors.<sup>40</sup> The legislation specifically states that a victim of human trafficking will not be found to have failed to cooperate solely on the basis that they delayed in reporting the crime.<sup>41</sup>
- 4.14 Indeed, a person applying for benefits under the scheme is generally required to report or have reported the relevant crime to the police to be eligible for compensation.<sup>42</sup> However, an application based on human trafficking may not be denied by the Board solely because no police report was made by the victim.<sup>43</sup> The law requires the Board to adopt guidelines allowing it to consider and approve applications based on evidence other than a police report.<sup>44</sup> Under these guidelines a victim may, instead of a police report, provide:
- 4.14.1 law Enforcement Agency Endorsement issued pursuant to Section 236.2 of the Penal Code;
  - 4.14.2 human trafficking caseworker as identified in Section 1038.2 of the Evidence Code, attestation by affidavit that the individual was a victim of human trafficking;
  - 4.14.3 certification or eligibility letter from a government agency for a special visa as a refugee due to human trafficking or other government benefits as a result of human trafficking; or
  - 4.14.4 medical records documenting injuries consistent with human trafficking.

Medical or mental health records alone shall not be sufficient evidence that the qualifying crime of human trafficking occurred.<sup>45</sup>

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<sup>39</sup> California Government Code, § 13956 (b)(1).

<sup>40</sup> Ibid.

<sup>41</sup> California Government Code, § 13956 (b)(1).

<sup>42</sup> CalVCP, 'Who's Eligible', <http://vcgcb.ca.gov/victims/eligibility.aspx>.

<sup>43</sup> California Government Code, § 13956 (b)(3).

<sup>44</sup> Ibid.

<sup>45</sup> California Code of Regulations, Title 2, § 649.48.

## 5. APPLICATION PROCESS

- 5.1 A victim (or derivative victim) of human trafficking can apply for compensation by completing an application form. The application forms are available online in English, Spanish, Arabic, Armenian, Cambodian, Chinese, Farsi, Hmong, Lao, Korean, Russian, Tagalog and Vietnamese.<sup>46</sup> An application for compensation can be filled out by the victim or by a victim advocate, and can be submitted in person or by mail to the Victim Compensation and Government Claims Board.<sup>47</sup> Information regarding locations of victim advocate centres are available online or over the phone.<sup>48</sup>

### Evidence

- 5.2 Under the legislation, a victim seeking compensation has the burden of establishing, by preponderance of evidence, the elements of eligibility for compensation. In most cases this would include, at the least, a police report. In cases of human trafficking, factors that may be considered evidence include, but are not limited to:<sup>49</sup>
- 5.2.1 law Enforcement Agency Endorsement issued pursuant to Section 236.2 of the Penal Code;
  - 5.2.2 human trafficking caseworker (as identified in Section 1038.2 of the Evidence Code) has attested by affidavit that the individual was a victim of human trafficking;
  - 5.2.3 certification or eligibility letter from a government agency for a special visa as a refugee due to human trafficking or other government benefits as a result of human trafficking;
  - 5.2.4 medical records documenting injuries consistent with human trafficking; or
  - 5.2.5 medical or mental health records. However, these records alone may not be sufficient evidence that the qualifying crime of human trafficking occurred.
- 5.3 Evidence of expenses must also be provided, including any medical bills, relocation expenses, job training, income loss, home security improvements etc and anything else relating to the crime.

### Hearing

At the first instance, the compensation claim is decided on the papers. If an application has been submitted to the Board and compensation is denied, the victim can contest the decision by filing an appeal within 45 days of the date the Board mailed the notice to deny the claim and/or expense.<sup>50</sup> If new information is provided, the Board may

<sup>46</sup> CalVCP, 'How to Apply for Victim Compensation', <http://vcgcb.ca.gov/victims/howtoapply.aspx>.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> California Victim Compensation and Government Claims Board, Victim Compensation Program Revised Regulations, Title 2, §§ 647.4, 649.14-649.62, <http://www.vcgcb.ca.gov/docs/notices/ProposedVCPRegulationText.pdf>.

<sup>50</sup> CalVCP, 'Frequently Asked Questions' <http://vcgcb.ca.gov/victims/faq/>.

reconsider the denial immediately, otherwise the Board will schedule an appeal hearing.<sup>51</sup> The hearing may be in person or over the phone and can be conducted in an informal manner.<sup>52</sup>

## Assistance

- 5.4 Organisations throughout the state can help victims apply for compensation, guide victims through the criminal justice system, and provide for victims' needs. There is a Victim Witness Assistance Centre in each county and an additional Centre in the City of Los Angeles, which work directly with the CalVCP to assist victims.<sup>53</sup> More information can be obtained by attending a Victim Witness Assistance Centre or by calling, emailing or writing to the Board.<sup>54</sup> If the victim obtains legal assistance when making the claim, the Board will pay the attorney's fees up to 10% of the amount of the award or \$500, whichever is less.<sup>55</sup>

## 6. ASSESSMENT OF COMPENSATION

- 6.1 Direct victims of human trafficking can apply for compensation for economic loss, physical injury and psychological injury, to help cover the cost of treatment and other benefits up to \$35,00 per application, which may be increased to \$63,000 if funds are available. Expenses which may be compensated include counseling expenses, medical expenses, income loss, safety-related expenses and other qualified expenses, including relocation or even purchase of a vehicle if necessary.<sup>56</sup> There are specific limits for each type of claim, although in certain circumstances the limits may be increased with approval from the Board, for example:

6.1.1 mental health counseling: \$10,000 for a victim or derivative victim;

6.1.2 relocation expenses: \$2,000; and

6.1.3 security for the home \$1,000;

- 6.2 Compensation is assessed on the basis of expenses actually and reasonably incurred by the individual, or reasonably likely to be incurred, as a direct result of the crime.<sup>57</sup>

- 6.3 Upon request, an emergency award may be granted if the Board determines that such award is necessary to avoid or mitigate substantial hardship that may result from delaying compensation until complete and final consideration of an application.<sup>58</sup> The emergency award, if granted, will be disbursed within 30 calendar days of such an

<sup>51</sup> Ibid.

<sup>52</sup> California Code of Regulations, Title 2, § 617.4.

<sup>53</sup> CalVCP, 'Frequently Asked Questions' <http://vcgcb.ca.gov/victims/faq/>.

<sup>54</sup> CalVCP, 'Frequently Asked Questions' <http://vcgcb.ca.gov/victims/faq/>.

<sup>55</sup> California Government Code, § 13957.7; California Code of Regulations, Title 2, § 649.21.

<sup>56</sup> California Government Code, § 13957; California Code of Regulations, Title 2, §§ 649.19, 649.32. Note that the Code states the maximum is \$70,000 while the Regulations state \$63,000.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.



application being made.<sup>59</sup> If the regular application is denied after the emergency award is paid, the applicant must reimburse the state.<sup>60</sup> If the Board approves the regular application, the amount of the emergency award is deducted from the total compensation amount awarded under the regular application.<sup>61</sup> Derivative victims may access compensation for psychological expenses and economic loss.<sup>62</sup>

- 6.4 The scheme is funded jointly by the state of California and through the Federal Victims of Crime Fund. Each scheme collects funds from criminal fines, forfeited bail bonds, and penalties.

**Additional assistance and benefits**

- 6.5 In addition to compensation, international victims of human trafficking can access both federal and state assistance, including monetary assistance. Under the Californian system (the TCVAP), eligible individuals receive state-funded benefits and services comparable to those provided to refugees.<sup>63</sup> Available benefits include:

- 6.5.1 state-funded California Work Opportunity and Responsibility to Kids ("**CalWORKs**") for families with minor children, including income assistance for up to four years;
- 6.5.2 TCVAP Cash Assistance for single adults or families without children for up to eight months;
- 6.5.3 California Food Assistance Program;
- 6.5.4 Cash Assistance Program for Immigrants;
- 6.5.5 in-Home Supportive Services;
- 6.5.6 state-funded Medi-Cal, administered by the California Department of Health Care Services;
- 6.5.7 healthy Families Program, administered by the California Department of Public Health;
- 6.5.8 employment services (if applicant is work-authorized); and
- 6.5.9 supportive services (child care, transportation, and ancillary services).<sup>64</sup>

- 6.6 Once certified by the ORR as a trafficking victim, victims are transferred to an equivalent federal program that is available to refugees.<sup>65</sup>

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<sup>59</sup> California Government Code, § 13952.5.

<sup>60</sup> California Government Code, § 13957; California Code of Regulations, Title 2, §§ 649.19, 649.32.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> California Department of Social Services, 'All County Information Notice (ACIN) No. I-07-15: *Trafficking and Crime Victims Assistance Program* Guidelines', (2015) [http://www.dss.cahwnet.gov/lettersnotices/EntRes/getinfo/acin/2015/I-07\\_15.pdf](http://www.dss.cahwnet.gov/lettersnotices/EntRes/getinfo/acin/2015/I-07_15.pdf).

<sup>64</sup> Ibid, 6-7.

## 7. BARRIERS / OBSTACLES

### Language Barrier

- 7.1 There are a number of victims advocacy centres that can assist individuals who do not speak English or are illiterate. Individuals can use an interpreter when making an application and the application forms are also available in a number of languages.

### Accessibility

- 7.2 Applications for compensation can be made in person at a Victim Witness Assistance Centre or can be downloaded, printed and mailed, or requested by telephone.<sup>66</sup> There are also options for applications to be sent to victims.

### Fear and Lack of Awareness of Programs

- 7.3 Non-citizen victims may hesitate to report human-trafficking to law enforcement agencies out of fear of deportation and retaliation.<sup>67</sup> The legislation attempts to overcome this as a person does not need to be lawfully in the country to access compensation, nor does a police report have to be filed. However, as human trafficking victims are often kept secluded from others there is a risk that they may not be made aware of programs available to them.

### Exclusions Based on Past Criminal Actions

- 7.4 An application for compensation can be denied if the Board finds that the applicant knowingly and willingly participated in the commission of the crime that resulted in the injury and also if the person has been found guilty of a crime in the past. This can create an obstacle for victims who initially consented to migrating illegally and then became victims of trafficking after arrival. However, as noted above, the board must consider the circumstances of each case and there are some exemptions for victims of trafficking, such as sex workers.
- 7.5 A 2012 report noted that the "factors for denial of CalVCP benefits may be overly broad as applied to victims of human trafficking".<sup>68</sup> The report noted that the denial of benefits to a victim who was involved in the events leading to the crime may be problematic for victims of human trafficking.<sup>69</sup>

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<sup>65</sup> Ibid, 7.

<sup>66</sup> CalVCP, 'Frequently Asked Questions' <http://vcgcb.ca.gov/victims/faq/>.

<sup>67</sup> K Harris, *Gangs beyond Borders: California and the Fight Against Transnational Organized Crime* (2014) [https://oag.ca.gov/sites/all/files/agweb/pdfs/toc/report\\_2014.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/toc/report_2014.pdf), 21.

<sup>68</sup> Ibid, 10.

<sup>69</sup> Ibid, 81.

## 8. EXAMPLE IN PRACTICE / OBSTACLES

- 8.1 During the 2012-2013 fiscal year, CalVCP received over 50,000 applications and provided over \$21 million in compensation to help victims of violent crimes.<sup>70</sup> The CalVCP does not appear to have calculated how many (if any) of those applications or compensation payments arose as a specific result of human trafficking crimes.

## 9. SUGGESTIONS FOR IMPROVEMENT

- 9.1 Increasing training for law enforcement agencies, first responders and health care professionals to enable them to recognise and respond to human trafficking<sup>71</sup> may ultimately lead to more victims accessing statutory compensation. However, there are a number of other improvements that can be made to assist victims with seeking help and to improve existing services and benefits.

### Short Term

- 9.2 Short term improvements include:

- 9.2.1 collaboration between internet companies and law enforcement agencies may assist with developing online tools that increase victims' access to information regarding the available services and benefits.<sup>72</sup>
- 9.2.2 ensuring victims have access to legal practitioners who understand the assistance, benefits and immigration options available to victims may also improve victims' access to services and benefits.<sup>73</sup>
- 9.2.3 connecting victims with county health and social service agencies through human trafficking coalitions may assist with informing victims of the services available to them.<sup>74</sup>

### Long Term

- 9.3 The following long term changes may also improve the ability of victims to access statutory compensation programs and the quality of services provided through those programs:
- 9.3.1 creating safe, long term shelter for victims, in particular victims under 18 years of age and male victims, which may improve victims' access to services.<sup>75</sup>

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<sup>70</sup> CalVCP, 'Fiscal Year 2012/2013 CalVCP Statistics' ,<http://vcgcb.ca.gov/victims/statistics/fy12-13.aspx>.

<sup>71</sup> K Harris, *Gangs beyond Borders: California and the Fight Against Transnational Organized Crime* (2014) [https://oag.ca.gov/sites/all/files/agweb/pdfs/toc/report\\_2014.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/toc/report_2014.pdf), 9-10.

<sup>72</sup> Ibid, 9.

<sup>73</sup> Ibid, 10.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

- 9.3.2 allowing human trafficking victims to seal and expunge records of convictions committed during their time under forced labour or services, which may assist victims with rebuilding their lives.<sup>76</sup>
- 9.3.3 having the Board revisit the requirements for eligibility for CalVCP assistance to ensure the program fairly applies to victims of human-trafficking.<sup>77</sup>

## 10. ALTERNATIVES TO STATUTORY COMPENSATION SCHEMES

### Civil proceedings

- 10.1 A victim of human trafficking (as defined in Section 236.1 of the Penal Code) may bring a civil action for actual damages, compensatory damages, punitive damages, injunctive relief, and any combination of those, or any other appropriate relief.<sup>78</sup> Additionally, the victim may be awarded up to three times his or her actual damages or \$10,000, whichever is greater.<sup>79</sup> The civil action must be commenced within five years of the date on which the trafficking victim was freed from the trafficking situation, or within eight years after the date the minor victim turns 18 years of age.<sup>80</sup> A civil cause of action for damages is also available under section 1595 of Title 18 of the US Code.

### Criminal proceedings

- 10.2 The CTVPA established human trafficking as a felony under California Penal Code Section 236.1.<sup>81</sup> If convicted of human trafficking, the defendant is required to make restitution to the victim in an amount established by court order based on the economic loss claimed by the victim.<sup>82</sup> Since 2012, the California Attorney General has listed fighting human trafficking as a priority for the California Department of Justice, but no statistical data is available on the actual restitution paid under criminal proceedings.<sup>83</sup> Restitution is also available under section 1593 of Title 18 of the US Code. Restitution is mandatory upon the finding of guilt and includes the full amount of the victim's losses, including loss of income.

### Pros and cons of alternatives

- 10.3 The statutory compensation scheme under California law provides a process by which victims of human trafficking can seek reimbursement for the costs incurred and lost income as a result of the crime (including that of dependents of the victim). While criminal proceedings can also provide restitution for economic loss, victims can only

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<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> California Civil Code, § 52.5.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> *California Trafficking Victims Protection Act*, California Assembly Bill No 22, Chapter 240 (2005).

<sup>82</sup> California Penal Code, § 1202.4(a)(3).

<sup>83</sup> Office of the Attorney General, State of California Department of Justice, 'Human Trafficking', <https://oag.ca.gov/human-trafficking>.

obtain compensation in the form of compensatory and punitive damages by bringing a civil action. An advantage of bringing a civil action is that the amount recoverable is not capped, so the victim may be able to recover a higher amount in damages. However this must be weighed up against potentially significant costs of bringing a civil claim and the need for the victim to face the perpetrator in court.

# UNITED STATES OF AMERICA - NEW YORK

## 1. EXECUTIVE SUMMARY

- 1.1 Due to its international border, major ports of entry and diverse population, New York's human trafficking problem was considered one of the worst in the United States.<sup>1</sup> Then, in June 2007, the New York State Legislature passed comprehensive human trafficking laws.<sup>2</sup> New York's Human Trafficking Law (Chapter 74 of the Laws of 2007) recognises "that those trafficked for prostitution and labour are victims of crime, and encourages them to be treated as such and not as criminals or illegal immigrants."<sup>3</sup>
- 1.2 In 1966, New York State established the Office of Victim Services ("OVS") to support innocent crime victims, including victims of human trafficking, and compensate them for unreimbursed crime-related expenses. The OVS aims to provide this compensation in a timely, efficient and compassionate manner; to fund direct services to crime victims via a network of community-based programs; and to advocate for the rights and benefits of all innocent victims of crime.<sup>4</sup>
- 1.3 While the total number of trafficking victims in the state who have received compensation is difficult to ascertain, it is evident that there is a substantial gap between the number of trafficking victims and those who have accessed any type of state compensation or benefits. One 2011 study suggested that 11,268 trafficking survivors interacted with private service providers between 2000 and 2010 ("the Hofstra Study").<sup>5</sup> Although New York has advanced many of its anti-trafficking goals to adequately address the breadth of the trafficking problem, additional actions such as establishing a state-based private right of action and increasing awareness and commitment to the issue are required.<sup>6</sup> In particular, the release of formal statistics on referrals and applications for compensation would allow the success of the program to be assessed and areas for improvement to be identified..

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<sup>1</sup> D O'Donnell and D Hansell, *New York State Interagency Task Force on Human Trafficking: A Report by the Interagency Task Force Implementation of the 2007 law* (2008) [http://www.criminaljustice.ny.gov/pio/humantrafficking/human\\_trafficking\\_rpt\\_aug08.pdf](http://www.criminaljustice.ny.gov/pio/humantrafficking/human_trafficking_rpt_aug08.pdf).

<sup>2</sup> *Ibid.*, 7.

<sup>3</sup> *Ibid.*

<sup>4</sup> New York State Office of Victim Services, *Annual Report 2014-15* (2015) <https://ovs.ny.gov/sites/default/files/annual-report/annual-report-12-15.pdf>.

<sup>5</sup> G Maney et al. *Meeting the Service Needs of Human Trafficking Survivors in the New York City Metropolitan Area: Assessment and Recommendations* ("Hofstra Study") (2011) <http://lifewaynetwork.org/wp-content/uploads/2011/11/Hofstra-University-LifeWay-Network-Report-2011.pdf>, 16.

<sup>6</sup> M Nack, *The Next Step: The Future of New York State's Human Trafficking Law*, (2010) 18 J.L. & Pol'y 817, 832-33.

## 2. PRELIMINARY ISSUES

### 2.1 International conventions/treaties the State has ratified:

Treaty	Signed/Ratified? (S, R or No)
UN Convention against Transnational Organised Crime (Transnational Organised Crime Convention)	R (with reservations)
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)	R (with reservations)
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	No
Forced Labour Convention 1930 (ILO No 29)	No
Abolition of Forced Labour Convention 1957 (ILO No 105)	R
Worst Forms of Child Labour Convention 1999 (ILO No 182)	R
Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956	R
UN Convention on the Rights of the Child	S
UN Convention on the Elimination of all forms of Discrimination against Women	S
UN Covenant on Civil and Political Rights	R
Inter-American Convention on International Traffic in Minors	No

### 2.2 Domestic legislation on human trafficking:

2.2.1 New York has both Federal and State legislation relating to trafficking and compensation. The Federal legislation primarily covers issues of immigration and visa status, ensuring international victims of trafficking can access services without reprisal. Compensation is legislated for, and implemented at, the state level.

#### **Federal legislation**

2.3 Human trafficking is primarily regulated at the Federal level under Chapter 77 of the United States Code (the "**US Code**"). Section 1590 of US Code criminalises trafficking with respect to peonage, slavery, involuntary servitude, and forced labour. Anyone who recruits, harbours, transports, provides, or obtains any violations may be subject to up to 20 years imprisonment. The statute of limitations for such offences is 10 years. Under

Section 1591 of the US Code, anyone who recruits, entices, harbours, transports, provides, obtains, advertises, maintains, patronises, solicits, or benefits from sex trafficking individuals under the age of 18 shall be subject to imprisonment for ten years to life. These statutes are enforced by Homeland Security, the Federal Bureau of Investigations, Immigrations and Customs Enforcement, local law enforcement, the US Department of Justice, and the courts.<sup>7</sup>

- 2.4 The sections on human trafficking were introduced under the Victims of Trafficking and Violence Protection Act 2000, which also introduced protection and support for victims of human trafficking, such as certification of human trafficking victims. While the federal trafficking legislation was enacted prior to the Palermo Protocol being finalised, the two are largely consistent in terms of defining human trafficking.<sup>8</sup> However, the legislation differentiates between 'human trafficking' and 'severe forms of human trafficking'. Many of the benefits and services, such as protection from prosecution or deportation, only extend to victims of severe forms of human trafficking. Only victims who were trafficked under coercion, threats or force, or are victims of sex trafficking and are under 18, qualify as victims of severe human trafficking. As such, the legislation excludes victims who are recruited through deception, abuse of power or through the abuse of their vulnerability.<sup>9</sup>

### State legislation

- 2.4.1 At the New York state level, the only offences related to human trafficking that are considered crimes are sex trafficking and labour trafficking.
- 2.4.2 The NYS Anti-Trafficking Statute became effective on 1 November 2007. The law targets labour trafficking and sex trafficking, and establishes felonies and penalties for these crimes.<sup>10</sup> The provision covering sex trafficking asserts that a person who profits or advances from sex trafficking as defined under the law is guilty of a class B nonviolent felony. Sex trafficking occurs if a person “advances or profits from prostitution by:”
- 2.4.2.1 providing drugs;
  - 2.4.2.2 fraud;
  - 2.4.2.3 "withholding, destroying, or confiscating" papers to impair the individual's freedom";
  - 2.4.2.4 requiring prostitution to settle a real or purported debt; or

<sup>7</sup> HumanTrafficking.org, 'United States of America'  
[http://www.humantrafficking.org/countries/united\\_states\\_of\\_america/government\\_agencies](http://www.humantrafficking.org/countries/united_states_of_america/government_agencies).

<sup>8</sup> American Society of International Law., “Human Rights,” in D Amann, *Benchbook on International Law* (2014) [www.asil.org/benchbook/humanrights.pdf](http://www.asil.org/benchbook/humanrights.pdf).

<sup>9</sup> T Bien-Aime and L Rutman 'International Law and Human Trafficking' in J Goodman and D Leidholdt, *Lawyer's Manual on Human Trafficking: Pursuing Justice for Victims* (2013) <https://www.nycourts.gov/ip/womeninthecourts/pdfs/LMHT.pdf> , 69.

<sup>10</sup> NY Penal Law, §135.35, 230.34.



2.4.2.5 using force or fear to compel the individual to comply.<sup>11</sup>

- 2.5 Under New York law, labour trafficking is a class D felony<sup>12</sup> and occurs when a person compels or induces another to work or recruits, entices, harbours, or transports such other person by means of intentionally:
- 2.5.1 providing drugs;
  - 2.5.2 requiring the labour to pay a debt that the guilty party has caused;
  - 2.5.3 "withholding, destroying or confiscating" an individual's papers to impair freedom of movement; or
  - 2.5.4 using force and/or an implied threat.<sup>13</sup>
- 2.6 Under section 230.34 of New York Penal Law, one who engages in the offence of sex trafficking is subject to 20-25 years of imprisonment. Under section 135.35 of New York Penal Law, one who engages in labour trafficking may be subject to 2-7 years of imprisonment. These statutes are enforced by the New York Police Department, the New York District Attorney's Office, and courts.

### 3. BASIS OF STATUTORY COMPENSATION

- 3.1 Benefits and assistance are available at both the state and federal levels, including cash assistance. Whenever possible, benefits should be pursued through both processes to maximize the amount and duration of benefits available.<sup>14</sup> Compensation is only available at the state level and as the focus of this report is on the statutory compensation scheme, the federal provisions will be referenced only to the extent necessary to understand the state system.

#### Federal Legislation

- 3.2 The Federal statutory compensation scheme for human trafficking victims is detailed in 18 U.S.C. § 1590 and 1591. Understanding the federal scheme is especially important in comprehending New York State's benefits and services for undocumented immigrant trafficking victims. New York will "pre-certify" these trafficking victims to provide them with benefits while their federal applications are pending certification. A "'pre-certified victim of human trafficking' is a person who has a pending application for federal certification as a victim of a severe form of trafficking in persons as defined in Section 7105 of the Code (Trafficking Victims Protection), but has not yet obtained such

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> *NY Penal Law*, §135.35.

<sup>14</sup> A Sinischalchi, C Fecko and H Ahmad 'Services for Trafficking Victims: A Brief Guide for Lawyers' in J Goodman and D Leidholdt, *Lawyer's Manual on Human Trafficking: Pursuing Justice for Victims* (2013) <https://www.nycourts.gov/ip/womeninthecourts/pdfs/LMHT.pdf>, 245.

certification, or a person who has reported a crime to law enforcement and it reasonably appears to law enforcement that the person is such a victim."<sup>15</sup>

- 3.3 Federal legislation also provides certain benefits and assistance to trafficking victims. Under federal law, trafficking victims (those with immigration status or who are US citizens) are eligible for temporary assistance for needy families, Medicaid, social security, refugee cash and medical assistance, refugee social services and food stamps.<sup>16</sup> Individuals who are yet to be certified can also receive some of the services, up to a cap of \$600 per month.
- 3.4 There is a Federal Victims of Crime Fund that was established under the Victims of Crime Act 1984. The fund provides a source of funding for victims services and is funded from offenders of federal crimes, through fines, forfeited bail bonds and penalties. Some of the funds are directed towards compensation for victims' out-of-pocket expenses. The funding is given to each State's own local compensation scheme and managed by them. Therefore, crime victims only need to apply to one source of compensation.

### **State Legislation**

- 3.5 While the New York Human Trafficking Law provides benefits and services to the victims of human trafficking, the state compensation scheme for victims of crime is in article 22 of the New York Executive Law, §§ 620 et seq. The OVS is the New York State agency tasked with implementing the scheme.<sup>17</sup>

## **4. ELIGIBILITY**

- 4.1 Compensation is available for victims of crime generally through the OVS. Victims who may qualify for compensation include the following:
  - 4.1.1 victims who were physically injured as a result of a crime;
  - 4.1.2 victims of unlawful imprisonment or kidnapping under §135 of the penal law;
  - 4.1.3 victims of labour trafficking or sex trafficking under §135 and §230 of the penal law;
  - 4.1.4 victims who were not physically injured, if they are under 18, 60 and over or disabled;
  - 4.1.5 certain relatives and dependents, including a surviving spouse, child, parent, sibling and stepfamily;<sup>18</sup> and

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<sup>15</sup> *NY Social Services Law*, § 483-aa(b) (McKinney) (2007).

<sup>16</sup> A Sinischalchi, C Fecko and H Ahmad 'Services for Trafficking Victims: A Brief Guide for Lawyers' in J Goodman and D Leidholdt, *Lawyer's Manual on Human Trafficking: Pursuing Justice for Victims* (2013) <https://www.nycourts.gov/ip/womeninthecourts/pdfs/LMHT.pdf>, 246.

<sup>17</sup> *NY Executive Law*, § 622.

<sup>18</sup> *NY Executive Law*, § 621.

- 4.1.6 parents, step-parents, guardians, grandparents and siblings of a child victim of a crime.<sup>19</sup>
- 4.2 The application form for victims specifically lists 'human trafficking' as a crime.<sup>20</sup>

### **Injuries recognised**

- 4.3 Physical injury is required for most victims seeking compensation. Exceptions are available for victims in certain circumstances, such as victims under the age of 18, older than the age of 60, or who are disabled. When a claimant applies as a victim of labour trafficking, as defined in section 135.35 of the Penal Law, or sex trafficking as defined in section 230.34 of the Penal Law, there is a rebuttable presumption that such victim has suffered a physical injury for the purposes of eligibility under article 22 of the Executive Law.<sup>21</sup>

### **Jurisdictional requirements**

- 4.4 The New York State victim compensation scheme requires the crime to have occurred in the state of New York or for the victim to have been resident of the state of New York, if the crime occurred outside of the state.<sup>22</sup>

### **Exclusions on the grounds of illegal or immoral behavior**

- 4.5 Under the Executive Law, a person who is criminally responsible for the crime upon which the claim is based, or an accomplice of such a person, is not eligible to receive compensation.<sup>23</sup> However, New York Law recognises human trafficking as a form of modern-day slavery and accordingly does not preclude victims from receiving compensation on the basis of immoral or illegal behavior that derived from the trafficking. Under the Penal Code of New York, victims of labour and sex trafficking are not deemed to be accomplices.<sup>24</sup>

### **Time limit for application**

- 4.6 A general crime victim seeking compensation must report the crime within one week of its occurrence and seek compensation with the OVS within one year of the crime. They can extend the application time for persons who did not know they were eligible to apply.<sup>25</sup> However, exceptions provide human trafficking victims with a less restrictive

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<sup>19</sup> [NY Executive Law](#), § 621.

<sup>20</sup> New York State Office of Victim Services, 'Claim Application and Instructions' ("OVS Claim Form") (2013) <https://ovs.ny.gov/sites/default/files/general-form/2013ovsclaimapplication.pdf>.

<sup>21</sup> 9 NYCRR, § 525.20.

<sup>22</sup> [NY Executive Law](#), §621 and §631.

<sup>23</sup> [NY Executive Law](#) §624.

<sup>24</sup> [NY Penal Law](#), §230.36 and §135.36.

<sup>25</sup> New York State Office of Victim Services, 'Claim Application and Instructions' (2013) <https://ovs.ny.gov/sites/default/files/general-form/2013ovsclaimapplication.pdf>; [NY Executive Law](#), § 625A.

period for reporting the crime to the proper authorities. Human trafficking victims must report the crime to authorities within a "reasonable time."<sup>26</sup>

### Requirements for referral, reporting and cooperation

- 4.7 To qualify for compensation, a victim must be an innocent victim of the crime or a relative of the victim.<sup>27</sup> The victim (or derivative victim, such as a qualifying family member) must report the crime to the proper authorities within one week of the crime or within a "reasonable time" if the victim of a human trafficking crime.<sup>28</sup> The victim must submit a claim for compensation to the OVS within one year of the crime or provide a good faith reason to justify a delay.<sup>29</sup> Any applicable police reports and supporting documentation are required to be submitted with the application or as soon as practicable. The fee associated with obtaining a police report is waived for victims of crime.<sup>30</sup> It is required that the victim cooperate with police, the district attorney's office and OVS.<sup>31</sup> However, if the police suspect that a person is a victim of trafficking they must, as outlined below, refer the individual to the Division of Criminal Justice Services and the Office of Temporary and Disability Assistance

## 5. APPLICATION PROCESS

- 5.1 A victim (or derivative victim) of human trafficking can apply for compensation by completing an application form. The application form may be submitted by mail or online. The application form is available in English, Italian, Haitian-Creole, Russian, Chinese, Simple Chinese, and Korean.<sup>32</sup> Information regarding locations of victim advocate centres is available online or over the phone.<sup>33</sup>

### Evidence necessary

- 5.2 Under the legislation, a victim seeking compensation has the burden of establishing the elements of eligibility for compensation. Dependent upon the claim, the victim (or derivative victim) may need to provide copies of the following:
- 5.2.1 police reports;
  - 5.2.2 insurance cards;

<sup>26</sup> *NY Executive Law*, § 631 (1)(c); *New York State Anti-Trafficking Statute* <http://otda.ny.gov/programs/bria/documents/Human-Trafficking-Law.pdf>. When determining whether a human trafficking victim has reported the crime in a reasonable period of time, they will consider circumstances such as the victim's physical, emotional and mental condition and his or her family situation. *Id.*

<sup>27</sup> New York Office of Victim Services, *A Guide to Crime Victims' Compensation in New York State* (2015) <https://ovs.ny.gov/sites/default/files/brochure/ovs-brochure-final-web.pdf>.

<sup>28</sup> *Ibid*; *NY Penal Law*, §135.35, 230.34; *Penal Code*, §230.34, §135.35 et seq. (2007).

<sup>29</sup> New York Office of Victim Services, *A Guide to Crime Victims' Compensation in New York State*, (2015) <https://ovs.ny.gov/sites/default/files/brochure/ovs-brochure-final-web.pdf>.

<sup>30</sup> *NY Executive Law*, § 646.

<sup>31</sup> New York Office of Victim Services, *A Guide to Crime Victims' Compensation in New York State*, (2015) <https://ovs.ny.gov/sites/default/files/brochure/ovs-brochure-final-web.pdf>.

<sup>32</sup> New York Office of Victim Services, 'Help: Language Services' [https://ovs.ny.gov/language-services?qt-language\\_services=0#qt-language\\_services](https://ovs.ny.gov/language-services?qt-language_services=0#qt-language_services).

<sup>33</sup> New York Office of Victim Services, 'Help for Crime Victims' <https://ovs.ny.gov/help-crime-victims>.

- 5.2.3 receipts for essential personal property;
  - 5.2.4 victim's birth certificate;
  - 5.2.5 death certificate and funeral contract;
  - 5.2.6 itemised medical bills;
  - 5.2.7 letters from any insurers denying or authorising payment for the services listed on this form;
  - 5.2.8 proof of age (driver's license, birth certificate etc); or
  - 5.2.9 legal guardianship papers.<sup>34</sup>
- 5.3 The victim is required to submit a HIPAA authorisation form for each health care provider who supplied treatment relative to the claim.<sup>35</sup> A claimant seeking an award in excess of \$5,000, must submit additional documentation to demonstrate that they will suffer financial difficulty without the award.

### **Hearing and assistance**

- 5.4 A victim may be required to attend a hearing, however it is more common for a judgment to be made based on the application and supporting documents.<sup>36</sup> The decision to hold a hearing lies with the OVS investigator. The investigator may additionally require medical examinations of the victim.<sup>37</sup>
- 5.5 An attorney is not necessary to obtain compensation. If the victim hires an attorney to assist with an administrative appeal to the agency or the judicial review of a final decision, and the action is successful, the victim may be reimbursed by OVS for legal fees up to \$1,000.<sup>38</sup>
- 5.6 The OVS suggests that the victim contact the Victim Assistance Program for help. Through the program, the victim can obtain a "victim advocate" who may assist with the application process and provide the victim with direct services, such as counseling, emergency shelter in certain cases, and transportation to court.<sup>39</sup>
- 5.7 The OVS may provide financial assistance during the application process when an emergency award request is submitted with a claim application.<sup>40</sup> Emergency awards are capped at \$2,500 and are only provided if it appears to the OVS that the probable

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<sup>34</sup> New York Office of Victim Services, *A Guide to Crime Victims' Compensation in New York State*, (2015) <https://ovs.ny.gov/sites/default/files/brochure/ovs-brochure-final-web.pdf>.

<sup>35</sup> Ibid.

<sup>36</sup> New York Office of Victim Services, 'General FAQ' <https://ovs.ny.gov/faq>.

<sup>37</sup> New York Office of Victim Services, *A Guide to Crime Victims' Compensation in New York State*, (2015) <https://ovs.ny.gov/sites/default/files/brochure/ovs-brochure-final-web.pdf>.

<sup>38</sup> New York Office of Victim Services, 'General FAQ' <https://ovs.ny.gov/faq>.

<sup>39</sup> New York Office of Victim Services, 'Services, Victim Compensation', <https://ovs.ny.gov/victim-compensation>.

<sup>40</sup> 9 NYCRR, § 525.11.

result of the application process would support an award, and the claimant would suffer undue hardship if immediate payment is not made.<sup>41</sup>

### **Compensation timeline**

- 5.8 Within three months of receipt of an application, it is assigned to an OVS investigator.<sup>42</sup> The investigator has six months to make a determination regarding compensation.<sup>43</sup> During this time the investigator may schedule hearings or request medical examinations. When an emergency award is granted, the award is generally made within 24 to 72 hours of the application. If a criminal investigation and prosecution is currently underway, the determination may be deferred until the criminal prosecution is completed.

### **Appealing a decision**

- 5.9 A claimant may appeal the OVS decision by submitting an application for administrative review, in writing, to the OVS Director, within 30 days from the date of the decision.<sup>44</sup> The original OVS investigator who made the decision is prohibited from taking part in the review.<sup>45</sup> If the decision was based wholly upon the law under which the office operates, the review will be made without a hearing.<sup>46</sup> If the decision was made wholly or in part on the facts of the claim, the claimant will have the opportunity to request to appear on the date his or her claim is scheduled to be reviewed.<sup>47</sup> If the claimant does not appear or otherwise make him or herself available, without providing a good cause for such absence, the OVS will consider the hearing waived and a review determination will be made on the record.<sup>48</sup>

## **6. ASSESSMENT OF COMPENSATION**

- 6.1 Through the OVS, victims of human trafficking can apply for compensation for certain types of expenses. The award is assessed on either the basis of need, up to a capped amount noted below, or by a set fee schedule. Compensation is available for the following types of expenses:
- 6.1.1 medical and counselling expenses;
  - 6.1.2 loss or damage of essential personal property (up to \$500, including \$100 for cash);
  - 6.1.3 burial/funeral expenses (up to \$6,000);

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<sup>41</sup> Ibid.

<sup>42</sup> 9 NYCRR, § 525.5.

<sup>43</sup> Ibid.

<sup>44</sup> 9 NYCRR, § 525.13.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

- 6.1.4 lost wages or lost support including lost wages of parents if a child victim is hospitalised (up to \$30,000);
  - 6.1.5 transportation (necessary court appearances for prosecution);
  - 6.1.6 occupational/vocational rehabilitation;
  - 6.1.7 use of domestic violence shelters;
  - 6.1.8 crime scene clean-up (up to \$2,500);
  - 6.1.9 good Samaritan property losses (up to \$5,000); and
  - 6.1.10 moving expenses (up to \$2,500).<sup>49</sup>
- 6.2 In addition, if a victim is under 18 years of age, over 60 years of age, disabled, or was injured in the crime, they may apply for benefits to repair or replace essential (necessary for health and welfare) personal property lost, damaged or destroyed as the direct result of a crime that was not covered by any other resource.<sup>50</sup>

### **Funding scheme**

The compensation scheme is funded centrally through government funds and not by the perpetrators assets. As such, the ongoing availability of benefits for state and local services is dependent upon funding provided by the New York State budget which is determined by legislative appropriation.<sup>51</sup> Services provided for victims are reimbursed to providers according to a set schedule.<sup>52</sup> Caps are set per client based on services used and needed.<sup>53</sup>

### **Additional assistance and benefits**

- 6.3 The OVS is the New York State agency tasked with implementing the compensation scheme for victims of crime in general. Additional avenues for assistance and benefits, including cash assistance, are available for victims of human trafficking through the New York State Division of Criminal Justice Services ("**DCJS**") and the New York Office of Temporary and Disability Assistance ("**OTDA**").<sup>54</sup> When local law enforcement or a district attorney office suspects a person of being a human trafficking victim, they have a duty to refer the potential victim to both the DCJS and OTDA.<sup>55</sup> Jointly these two

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<sup>49</sup> New York Office of Victim Services, *A Guide to Crime Victims' Compensation in New York State*, (2015) <https://ovs.ny.gov/sites/default/files/brochure/ovs-brochure-final-web.pdf>.

<sup>50</sup> Ibid.

<sup>51</sup> A Sinischalchi, C Fecko and H Ahmad 'Services for Trafficking Victims: A Brief Guide for Lawyers' in J Goodman and D Leiboldt, *Lawyer's Manual on Human Trafficking: Pursuing Justice for Victims* (2013) <https://www.nycourts.gov/ip/womeninthecourts/pdfs/LMHT.pdf>, 245.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> *NY Social Services Law*, § 483-cc (a) (2007).

<sup>55</sup> Ibid.



authorities assess the victim's eligibility. If confirmed as a victim of human trafficking, the victim may then receive benefits through third-party providers under the OTDA, irrespective of the victim's immigration status.<sup>56</sup> Available services include:

- 6.3.1 case management services;
  - 6.3.2 emergency temporary housing assistance;
  - 6.3.3 health care;
  - 6.3.4 mental health counselling;
  - 6.3.5 drug addiction screening and treatment;
  - 6.3.6 language interpretation and translation services;
  - 6.3.7 English language instruction;
  - 6.3.8 job training and placement assistance;
  - 6.3.9 post-employment services to promote job retention; and
  - 6.3.10 services to assist undocumented, immigrant human trafficking victims and their family members to establish permanent residence in the U.S.<sup>57</sup>
- 6.4 There are also benefits and assistance available at the Federal level under the Department of Health and Human Services Anti-Trafficking in Persons Division.

## **7. BARRIERS AND OBSTACLES**

### **Language barrier**

- 7.1 It is New York State's policy to provide language assistance services, including interpretation and document translation, for public services and programs. The Office of Victim Services can assist individuals who do not speak English or are illiterate.

### **Level of awareness**

- 7.2 Under the law, the New York District Attorney's Office, police agencies and the OVS are required to make sure that crime victims are aware of their rights under the OVS and other local assistance and service programs. These agencies provide information cards that contain the OVS' locations, phone numbers, and website address. The OVS also distributes posters informing crime victims about services, which are posted throughout

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<sup>56</sup> NY Office of Temporary and Disability Assistance, 'BRIA Provider Directory' <http://otda.ny.gov/programs/bria/providers/?program=RHTP#result>.

<sup>57</sup> D O'Donnell and D Hansell, *New York State Interagency Task Force on Human Trafficking: A Report by the Interagency Task Force Implementation of the 2007 law* (2008) [http://www.criminaljustice.ny.gov/pio/humantrafficking/human\\_trafficking\\_rpt\\_aug08.pdf\\_2](http://www.criminaljustice.ny.gov/pio/humantrafficking/human_trafficking_rpt_aug08.pdf_2)



New York, including at police stations, hospitals and victim assistance providers, among others.<sup>58</sup>

### **Availability of legal aid / representation (criminal, civil, immigration)**

- 7.3 The OVS facilitates and participates in the coordination of public and private efforts to respond to and assist victims with legal representation. OVS funds have been used by grantees to engage community resources to provide free legal clinics and support crime victims in their communities. In November, 2015, the University of Albany partnered with OVS to create an online tool that will connect crime victims with legal assistance in civil matters.

### **Protection of victim's identity (public documents, press, proceedings)**

- 7.4 Under NY laws, victims of crimes have the right to be protected from threats, physical injury, or other kinds of intimidation. If necessary, the New York courts can issue an order of protection. If the victim receives unwanted contact while the offender is in custody, then they and their family may be entitled to relocation and may even get assistance to change their identity.<sup>59</sup> Applications that are decided on the papers are not public.

### **Restitution**

- 7.4.1 The OVS encourages victims of human trafficking to seek restitution from the perpetrator for the losses or injuries incurred as a result of the criminal offence. The victim must be able to provide evidence to the District Attorney, victim/witness/advocate or probation department that shows the extent of their injuries and out-of-pocket losses, for consideration by the court. In requesting restitution, a victim is entitled to ask for any for any of the following:
- 7.4.2 medical expenses (doctors, physical therapists, ambulance, transportation, emergency services, etc.);
  - 7.4.3 counseling expenses;
  - 7.4.4 loss of earnings;
  - 7.4.5 property expenses (replace, repair and/or clean damaged or stolen property);
  - 7.4.6 funeral expenses;
  - 7.4.7 insurance deductible;

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<sup>58</sup> NY Executive Law, §625A.

<sup>59</sup> Criminal Procedure Law, §530.12-§530.13, Penal Law §§215.15-215.17 and 9 NYCRR 6170, EXEC §837(17), as quoted in NY Office of Victims Services, *The Rights of Crime Victims in New York State* <https://ovs.ny.gov/sites/default/files/brochure/ovsrightsofcvbooklet.pdf> .

- 7.4.8 incidental expenses (changing locks, towing fees, and the cost of changing your phone number);
  - 7.4.9 any expense you incur as a result of the criminal offence
- 7.5 If the court grants the victim restitution, then the perpetrator has a right to object to the restitution payment and there may be a hearing on the perpetrator's ability to pay. In this case, the victim may have to testify in court. Also, if the victim receives restitution from the perpetrator, the OVS may place a lien on the recovery up to the amount that the OVS paid the victim for those same expenses.

### **Immunity for victims**

- 7.6 To receive compensation from OVS, it is a requirement that the claimant is an innocent victim of the crime. New York's human trafficking law provides immunity to victims of sex and labour trafficking crimes. Specifically, sections 230.36 and 135.36 of New York Penal Law preclude the liability of human trafficking victims as accomplices to their traffickers in the prosecution of human trafficking crimes.<sup>60</sup> Consequently, this alleviates the claimant from being denied compensation based on their involvement in the crime.
- 7.7 Immunity also provides an incentive for victims to cooperate with the OVS and other authorities. Cooperation is required for the claimant to receive compensation. As a consequence of the immunity provision, convictions for sex trafficking and labour trafficking may be obtained from the uncorroborated testimony of victims.<sup>61</sup>

### **Undocumented immigrants**

- 7.8 For undocumented immigrants, the immunity provision provided by New York's human trafficking law helps to alleviate fears of deportation. The New York human trafficking law provides specific procedures for undocumented immigrants to receive benefits. Undocumented immigrants who are "confirmed" as a victim of human trafficking may receive case management services, housing assistance, nutritional assistance, provisions for personal care items, health care, mental health counselling, job placement assistance, transportation assistance, language interpretation and translation services, and assistance in establishing permanent residence in the US.<sup>62</sup> Under NY Executive Order 41, police and other public service providers are only to ask about an individual's immigration status if it is required to provide the services requested. As such, victims or witnesses of crime in New York are not asked for their immigration status when reporting a crime or assisting police.<sup>63</sup> It is unclear whether immigration status would affect an OVS compensation application.

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<sup>60</sup> *NY Penal Law*, §135.35, 230.34; *Penal Code*, §230.34, §135.35 et seq. (2007).

<sup>61</sup> Joint Directive at 11.

<sup>62</sup> *Ibid.*

<sup>63</sup> NYS Executive Order 41 Bloomberg, September 2003.

## 8. EXAMPLES IN PRACTICE

- 8.1 OVS makes grants to local victim and witness assistance and service programs throughout New York. Approximately \$31.1 million in state and federal funds were appropriated to OVS for grant-making purposes in fiscal year 2014-15. During this time period, direct payments to victims totaled \$23,886,074. There is no data available detailing how these grants or payments assisted victims of human trafficking.

## 9. SUGGESTIONS FOR IMPROVEMENT

- 9.1 Increased awareness and commitment to addressing the human trafficking epidemic within the criminal court context will likely increase the volume of individuals receiving compensation. Such effort is already underway, as the New York court system launched a state-wide initiative in the Human Trafficking Intervention Court. Hon. Jonathan Lippman, Chief Judge of the New York Court of Appeals, estimates that the recent development of New York's specialised, state-wide Human Trafficking Intervention Courts program "will open the door for thousands of people to escape a life of abuse and torture."<sup>64</sup> However, there are a number of other improvements that the OVS can make to assist victims seeking compensation.

### **Increase limit on payments**

- 9.2 Compensation to victims is limited for each specific type of loss. These limited payments may not be sufficient for a victim's particular circumstances. For example, a victim is only entitled to \$2,500 for moving expenses or \$500 for loss or damage to essential personal property. In order to obtain compensation in excess of \$5,000, the victim must demonstrate they will experience financial difficulty without the award. There is a bill in the New York State Senate to increase the \$5,000 threshold to \$10,000, since the \$5,000 threshold has remained unchanged for two decades, despite the increase in the cost of medical care and living expenses.<sup>65</sup>

### **Psychological injury should be recognised**

- 9.3 Compensation is only available to victims who were physically injured as a result of the crime. The OVS will not compensate a victim for emotional trauma or pain and suffering associated with human trafficking. There are exceptions for those victims under 18 years old, over 60 years old, or disabled, but this eligibility requirement may limit the ability of victims of psychological abuse to obtain any type of compensation.

<sup>64</sup> New York State Bar Association, 'NYSBA Special Committee on Human Trafficking Report' (2013) <http://www.nysba.org/workarea/DownloadAsset.aspx?id=46041>, 20.

<sup>65</sup> The New York State Senate, 'Senate Bill S4913', <https://www.nysenate.gov/legislation/bills/2015/s4913>.

## 10. ALTERNATIVES TO STATUTORY COMPENSATION SCHEMES

### Civil proceedings

- 10.1 A victim of human trafficking may initiate an action in New York to recover monetary damages.<sup>66</sup> Victims of human trafficking have the right to commence an action under New York law up to ten years from the date of the perpetrator's conviction.<sup>67</sup> A civil cause of action for damages is also available under section 1595 of Title 18 of the US Code.
- 10.2 Civil litigation can be an empowering procedure for victims and requires a lesser burden of proof than criminal cases (preponderance of the evidence versus beyond a reasonable doubt). It can provide compensatory, punitive and/or pecuniary damages.<sup>68</sup> However, civil litigation requires money, time and resources and requires the victim to confront the perpetrator, making these types of proceedings very difficult to initiate and see through.<sup>69</sup>

### Criminal proceedings

- 10.3 Sections 60.27(1) and (2) of New York's Penal Law state that the courts shall consider restitution or reparation to the victims of a crime.<sup>70</sup> At the time of sentencing, the district attorney may advise the court that the victim seeks restitution or reparation, and the actual amount sought by the victim.<sup>71</sup> Any payment made as restitution or reparation does not restrict the victim from bringing a civil action for damages in excess of any payment acquired from a criminal proceeding.<sup>72</sup> Additionally, the OVS in New York is responsible for compensating victims for certain un-reimbursable losses incurred as a result of their victimisation.<sup>73</sup> As described above in great detail, this agency may help with medical bills and counselling expenses. If the perpetrator is convicted under Title 18 of the Federal Law for human trafficking offences, under section 1593, the courts are required to direct the defendant to pay restitution for the full amount of the victim's losses, including the value of the victim's labour when trafficked.

<sup>66</sup> *NY Executive Law*, § 623-a(3); N.Y. CVP. LAW § 213-b.

<sup>67</sup> *Ibid.*

<sup>68</sup> New York State Bar Association, 'NYSBA Special Committee on Human Trafficking Report' (2013) <http://www.nysba.org/workarea/DownloadAsset.aspx?id=46041>, 20.

<sup>69</sup> K Kim and D Werner, *Civil Litigation on Behalf of Victims of Human Trafficking*, (2005) <http://www.oas.org/atip/Reports/Civil%20Litigation%20on%20behalf%20of%20TIP%20victims.pdf>.

<sup>70</sup> *NY Penal Law*, § 60.27 (2013) (Restitution or reparation payments include "actual loss incurred by the victim, including an amount equal to the value of the time reasonably spent by the victim attempting to remediate the harm incurred by the victim from the offence, and the consequential financial losses from such action.").

<sup>71</sup> *Id.* The court must make a finding as to the dollar amount of the fruits of the offence and actual out-of-pocket loss to the victim.

<sup>72</sup> *NY Penal Law*, § 60.27 (2013).

<sup>73</sup> The New York County District Attorney's Office, 'Victims' Rights and Guidelines' <http://manhattanda.org/victims-rights-guidelines>.

**Pros and cons of alternatives**

- 10.4 The disadvantages of recovering loss through a civil action are the time taken, the expense of the lawsuit, and the risk that the respondent will not have the ability to make a payment. There is also a safety risk for the victim from bringing an action against their abuser. However, there is no cap to the amount a victim can obtain through a civil action. The disadvantages of recovering loss through a criminal action are the need to secure a conviction and the fact that in the cases where convictions have been imposed, potential payments are limited to restitution and reparation or, the extent of injury or economic loss or damage to the victim.