



**Reconsideration of visas intended to provide protection and support to
people who have experienced human trafficking, slavery and
slavery-like practices**

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Human Trafficking and Slavery Senior Officials Meeting

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The problem

The trafficking visa framework is designed to provide visa support and protection to victims and survivors of human trafficking, slavery and slavery-like practices.¹ While amendments to the Migration Regulations in 2009 addressed some shortcomings in the 2004 scheme, further experience and evaluation of the effectiveness of the framework has revealed a number of emerging gaps in the protection framework with the unintended consequence that the complex needs of some of this vulnerable group of people remain unmet.

Identified gaps include a lack of visa supports for people:

- who experienced human trafficking, forced labour and forced marriage prior to amendments to the Commonwealth Criminal Code in 2005 & 2013 introducing relevant criminal offences;
- unable to participate in the criminal justice process due to physical and mental difficulties, or fear for their own lives or the lives of their families;
- unable to participate in the criminal justice system and where there are compassionate and compelling circumstances in their circumstances;
- who have made a contribution but are no longer able or required to assist due to situations outside of their control, including a lack of corroborating evidence, or the trafficker has left the jurisdiction or cannot be identified. This may disqualify them for the CJSV and the subsequent access to social security supports;
- who are minors, trafficked to Australia and who are unable to participate in the criminal justice process; and
- who need access to social security payments - the visa framework is linked to access to social security payments and some visa holders are disadvantaged because of their visa status.

Additionally, the classification of the names of visas within the framework, ‘Criminal Justice Visa’ and ‘Witness Protection (Trafficking) (Permanent) Visa’, stigmatise visa holders.

Recommendations

Permanent visa

1. Renaming and reclassification of the of the Witness Protection (Trafficking) (Permanent) visa to facilitate access to social security payments where required.
2. Establishment of an alternate visa pathway for people, including minors, who cannot contribute to an on-going police investigation. This visa pathway would include consideration of a permanent visa on compassionate grounds.

¹ In this document the term “human trafficking and slavery” will be used to describe all forms of human trafficking, slavery, servitude, forced labour and forced marriage.

3. Currently witnesses who have made a contribution to the criminal justice process and who would be in danger if they return to their home country may be offered a permanent visa. We recommend that the currently operating policy about the timing of a recommendation to consider offering a permanent visa, (within three months of a decision to charge or not to charge a person with a criminal offence) be reviewed.

Introduction of new visa for period of criminal investigation and prosecution

4. The introduction of a new visa to replace the Criminal Justice Stay Visa, to be granted to victim-witnesses who are participating in a criminal trial or investigation, to address significant disadvantages associated with the Criminal Justice Stay visa.

Initial visa

5. It is strongly recommended that government adopt a minimum 90 day reflection and recovery period, instead of the current 45 days, after identification as a suspected victim of human trafficking and slavery. This period allows access to visa and support, and would be available to the person regardless of whether or not they can or will assist in an investigation.
6. Currently law enforcement bodies are gatekeepers for the assessment of human trafficking and slavery, and provision of support available through the Bridging F Visa. We recommend that bodies authorised to make initial referrals be broadened to include any agency that has been given authority to identify victims of trafficking. 'Authorised agencies' could include the Australian Federal Police, state police, and other agencies with relevant experience.
7. We recommend that the authorised agencies make a secondary referral to an assessment agency that is constituted of law enforcement, non-government organisations and anti-trafficking organisations. This assessment agency refers suspected victims to the Support Program run by the Australian Red Cross.

Background

The Australian government established a system of visa support for victims of human trafficking in January 2004. Following an extensive evaluation of the visa framework in 2008-2009 by the Department of Immigration, the visa system was amended with effect from 1 July 2009.²

Current Visa Framework

The framework includes three different visas.

Bridging F Visa (Class WF)

The first, the Bridging F Visa (Class WF) is available to a person identified as a victim of trafficking or to a member of their immediate family.³ This visa may be granted regardless of whether the person will assist in police investigations,⁴ and holders of a Bridging F Visa can access the Victim Support Program.

A second Bridging F visa is available in circumstances where ‘a person is willing but not able to assist police because of their current mental, physical or emotional state’.⁵ However, the UN Special Rapporteur on trafficking in persons, especially women in children noted in her report to Australia in 2011 that an additional bridging visa is usually only granted in circumstances where the applicant can evidence extreme trauma.⁶

Criminal Justice Stay Visa

The second stage of the Framework is the Criminal Justice Stay Visa (CJSV). A Commonwealth Criminal Justice Stay Certificate may be issued if the Attorney-General considers that it should be issued for the purposes of ‘the administration of criminal justice in relation to an offence against a law of the Commonwealth’. If a Criminal Justice Stay Certificate is in force, a CJSV may be provided to the non-citizen⁷ at the absolute discretion of the Minister for Immigration.⁸

Witness Protection (Trafficking) (Permanent) Visa

A Witness Protection (Trafficking) (Permanent) visa (WPTPV) may be offered to a trafficked person if the Attorney General certifies they have made a contribution to and cooperated

² Jennifer Burn and Frances Simmons (2009) ‘Prioritising protection: A new visa framework for Trafficked People’ *Immigration Review* 41(3) 10.

³ Migration Regulations 1994, Schedule 1, item 1306(3)(d)(i)(ii).

⁴ DIAC, PAM3:Act – Compliance and Case Resolution – Program Visa – Bridging F visas ‘There is no requirement that they be willing to assist with an investigation’, para 2.2.

⁵ DIAC, PAM3:Act – Compliance and Case Resolution – Program Visa – Bridging F visas, para 2.2.

⁶ Report of the Special Rapporteur in Trafficking in Persons, especially women and children, Joy Ngozi Ezeilo Report to Human Rights Council on the Mission to Australia, 18 May 2012 A/HRC/20/18/Add.1, [54].

⁷ Migration Act 1958 (Cth), Section 157.

⁸ Migration Act, 1958 (Cth), Section 158.

with a prosecution, or an investigation which may not have gone to trial. The grant of this visa is at the Minister’s discretion, and the Minister must also be satisfied that there is danger to the person if they were to return home.

Explanation of the gaps in the Trafficking Visa Framework

Link between visas, support and the criminal justice process

The Special Rapporteur on her visit to Australia expressed concern that “all on-going support services are dependent on a contribution to the criminal justice process or investigation.”⁹ The linking of support to the criminal justice process undermines a human rights based approach to the protection of trafficked victims, and as the Special Rapporteur notes, it “does not represent an adequate acknowledgment of their status as victims.”¹⁰

The Australian Government’s Support for Trafficked People Program (Support Program) provides support along four assessment streams which address the minimum requirements of Article 6.3(a)-(d) of the Trafficking Protocol, which includes accommodation, financial assistance, access to health care and counselling, access to interpreters, and access to legal services, with increased support in all areas dependent on the stage of the program and visa status.¹¹ Entry into the program requires identification by the Australian Federal Police that the person is a ‘suspected victim of human trafficking’ or is required to stay in Australia for ‘the administration of justice’.¹² A suspected victim may access the Support Program regardless of the visa type that they hold. Continuing support for those not on a valid visa is linked to the trafficking visa framework and ongoing contribution to police investigations.

Reflection and recovery period

In addition to the gaps in support created by its link to the criminal justice process, the ‘reflection and recovery’ period afforded to victims of trafficking is only 45 days; the length of the Bridging F Visa. During this time victims have access to emergency accommodation, support funds, physical and psychological support services, and legal assistance.

The Special Rapporteur notes that appropriate consideration of compassionate and humanitarian factors under Article 7 of the Trafficking Protocol should be reflected in States providing, at minimum, a ‘reflection and recovery’ period that allows “trafficking persons to

⁹ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 13 April 2011 (A/HRC/17/35) 53.

¹⁰ Ibid.

¹¹ See Department of Families, Housing, Community Services and Indigenous Affairs, *Anti-People Trafficking Strategy* (4 July 2012) <<http://www.fahcsia.gov.au/our-esponsibilities/women/programsservices/reducing-violence/anti-people-trafficking-strategy>>.

¹² Ibid.

regain physical and psychological stability and to reflect on available options.”¹³ The Special Rapporteur notes that there is empirical evidence to suggest that this period should be a minimum of 90 days to ensure recovery of victims to a level where they may thoughtfully make these decisions, and provide more reliable information to police investigations.¹⁴

Visa Classification

There is concern that the names attached to the visas within the Framework, particularly the Criminal Justice Stay visa and the Witness Protection (Trafficking) Permanent visa can cause stigma towards the holders of these visas. CJSV holders often feel anxious and express shame when asked by employers about their visas. The Special Rapporteur noted in her report that this stigmatisation negatively affects the visa holder’s ability to find employment and their integration into the Australian community, which in turn has a significant impact on a victims’ right to recovery and rehabilitation.¹⁵

Gaps associated with the Criminal Justice Stay Visa

A suspected victim may be granted a CJSV at the expiry of the Bridging F Visa, if the person is willing and able to contribute to a prosecution or investigation. A CJSV allows the holder to remain in Australia for the duration of criminal investigations or court proceedings. The holder will have continued access to the Support Program.

The CJSV is the only visa on the Trafficking Visa Framework that has not been created specifically for victims of trafficking. Yet it is also the visa that victim-witnesses are often on for the longest period of time. Investigations of complex crimes can be time-consuming, involve multiple jurisdictions and require translation and interpretation of foreign language material. An unforeseen consequence is that victims may experience uncertainty about their long-term security and face continued separation from their family members, often young children, for long periods of time. The CJSV also does not provide victim-witnesses who are afraid of the consequences of giving evidence against their traffickers with any guarantee that they will receive further visa protection after the prosecution has been completed.

Compounding this adverse effect on the victim-witness is the anxiety and uncertainty created if the holder of a CJSV has family or children who remain in their country of origin. There is no mechanism for the visa holder to be reunited with his or her family in Australia. This has contributed to the ongoing trauma experienced by trafficked people assisting police.

¹³ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 13 April 2011 (A/HRC/17/35) 50.

¹⁴ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 13 April 2011 (A/HRC/17/35) 27; Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 18 May 2012 (A/HRC/20/18) 54.

¹⁵ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo. Submission to the UN Human Rights Council 18 May 2012 (A/HRC/20/18) 58.

In addition to the disadvantages already noted, in further support of this proposal, we note that there are unintended consequences for victim/witnesses victims being placed on the CJSV such as the statutory requirement that the victim become unlawful before being granted the CJSV. This can adversely affect later applications for Australian citizenship because of the way that the citizenship residency requirement is calculated.

Impact on Social Security and Compensation

In light of the link between visa status and social security entitlement, we observe that while victim-witnesses who hold a CJSV or who are granted a WPTPV are eligible to access Medicare and limited social security payments, the WPTPV is subject to a two year waiting period for more favourable social security payments.

Holders of these two types of visas are disadvantaged in comparison with holders of other visas granted on refugee or protection grounds. By comparison, when a Protection visa is granted to an asylum seeker, he or she is not subject to the 2 year wait period. A better framework would be to reclassify the WPTPV visa for social security payments, in the same way that a Protection visa is classified.

Additionally, if a victim-witness holds a WPTPV and is in receipt of Special Benefit social security payments, then any compensation that they receive, for example, through a statutory victims' compensation scheme, will be treated as income and the Special Benefit will cease during the time that the compensation award is exhausted through day to day living expenses.

Not all victims access the trafficking visa framework in a linear progression – for example from BVF to CJSV to WPTV. Some victims do not choose to go onto the CJSV whilst they await an offer of a WPTV or whilst they take up other options to obtain permanent resident status (eg those who are on a NZ Citizen Family Relationship Visa, BVA or BVE). Where these individuals are assessed as victims of trafficking, slavery or slavery-like practices they should be afforded access to social security benefits, especially in the instance where they are or have cooperated with the AFP and other law enforcement agencies.