

Submission:
'The Criminal Justice Response to
Slavery and People Trafficking;
Reparation; and Vulnerable
Witness Protections'

Australian Catholic Religious Against
Trafficking in Humans (ACRATH)

ACRATH
261 Victoria Street
Abbotsford VIC 3067
www.acrath.org.au

Contact:
Sr Louise Cleary csb
ACRATH National Chairperson
clouise@brigidine.org.au

Christine Carolan
Program Coordinator Victoria
03 9205 4200
christine@goodshep.com.au

Table of Contents

1.	Executive summary	1
2.	About ACRATH	2
3.	Reparation orders	2
3.1	Introduction	2
3.2	Inadequacy of s21B of the <i>Crimes Act 1914</i> (Cth)	3
3.3	Potential inequity caused by discretionary nature of remedy	3
3.4	Limitations of civil actions	4
3.5	Challenges in the investigation and prosecution of people trafficking	5
3.6	A s21B order is a civil judgment requiring enforcement by the survivor of people trafficking	5
3.7	Survivors are not independently represented	5
3.8	Loss must be a 'direct result' of the offence	6
3.9	The meaning of 'loss'	6
3.10	Survivors of child sex tourism	7
4.	Support for vulnerable witnesses	7
4.1	Need for support	7
4.2	Suppression of names	7
4.3	Conduct of interviews	8
4.4	Evaluation of Current Provisions	8
5.	Victims of crime compensation schemes	8

1. Executive summary

Given its particular expertise and focus, outlined in section 2 below, ACRATH has limited its submissions to selected issues and questions raised by the Discussion Paper. In particular, the Discussion Paper asks interested stakeholders to consider whether s21B of the *Crimes Act 1914* (Cth) (the **Crimes Act**) adequately provides for reparation orders to be made to survivors of people trafficking. For the reasons set out in more detail in section 3 below, ACRATH submits that s21B suffers from some key limitations, not all of which may be capable of amelioration. These include the following:

- the discretionary nature of orders under s21B;
- the fact that not all survivors of people trafficking give evidence in criminal prosecutions;
- the challenges inherent in prosecuting people traffickers, meaning that not all offenders will be convicted;
- a s21B order is a civil judgment which must be enforced by the survivor of people trafficking; and
- the requirement in s21B that survivors have suffered 'loss' as a direct result of an offence, which appears to limit reparation to economic loss.

While s21B orders may adequately provide for reparation in some circumstances, in light of the perceived limitations ACRATH submits that statutory victims of crime compensation schemes, appropriately modified to ensure greater fairness, transparency and uniformity of treatment across Australia, are likely to provide more user-friendly, practical and relevant redress to survivors of people trafficking in most cases. However, the amount of compensation that is currently available under the statutory victims of crime compensation schemes is not particularly generous and may not in all circumstances be adequate to provide a real opportunity for survivors to heal, recover and retrain. What ACRATH seeks to advocate is that the federal government consider, explore and develop better systems and options than those presently available for survivors of trafficking to obtain compensation. ACRATH is particularly keen to explore raising the issue of compensation at the Standing Committee of Attorneys-General (SCAG), in particular the need for a harmonisation of state victims of crime compensation schemes. ACRATH would also like to explore the possibility of having trafficking and forced labour related offences explicitly recognised in the victims of crime compensation jurisdictions.

Despite some clear benefits of statutory compensation schemes over other avenues, there remain significant challenges for survivors of people trafficking in seeking appropriate redress.

One of the possibilities that ACRATH asks that the government consider is the national harmonisation and reform of the state based statutory compensation schemes. Harmonisation and reform of the schemes would:

- facilitate equal access to compensation for survivors, wherever the victims have been exploited in Australia;

- provide an opportunity to revise the schemes to ensure the schemes adequately meet the needs of survivors of people trafficking; and
- facilitate closer cooperation and efficient collaboration between community legal centres, victim support services, and other stakeholders, within and outside Australia.

ACRATH also proposes judicial education for those sitting in the relevant tribunals to promote greater understanding of the unique circumstances of survivors of people trafficking.

ACRATH congratulates the former Victorian Attorney-General on encouraging the judiciary to express views on matters of public interest. In particular, ACRATH particularly welcomed the views shared by Judge McInerney of the County Court of Victoria concerning people trafficking.

2. About ACRATH

ACRATH works towards the elimination of people trafficking in Australia, the Asia Pacific region and internationally. ACRATH does this by:

- conducting education and community awareness campaigns;
- networking with like-minded organisations in Australia, the Asia Pacific region and internationally to advocate for measures to address people trafficking; and
- working to ensure trafficked people's needs are met, be they retraining, access to financial compensation, medical and dental care, accompaniment, or other needs.

ACRATH is grateful for the opportunity to make this submission. ACRATH is pleased to see that this Inquiry involves several Federal government departments, researchers and the community sector. We believe change can be achieved when civil society and government work together co-operatively to tackle issues. We endeavour to work from a collaborative model.

3. Reparation orders

3.1 Introduction

Section 21B of the Crimes Act provides as follows:

- (1) Where:
- (a) a person is convicted of a federal offence; or
 - (b) an order is made under section 19B in relation to a federal offence committed by a person;

the court may, in addition to the penalty, if any, imposed upon the person, order the offender:

- (c) to make reparation to the Commonwealth or to a public authority under the Commonwealth, by way of money payment or otherwise, in respect of any

loss suffered, or any expense incurred, by the Commonwealth or the authority, as the case may be, by reason of the offence; or

- (d) to make reparation to any person, by way of money payment or otherwise, in respect of any loss suffered by the person as a direct result of the offence.
- (2) A person is not to be imprisoned for a failure to pay an amount required to be paid under an order made under subsection (1).
- (3) Where:
- (a) the court orders a federal offender to make reparation to the Commonwealth, to a public authority of the Commonwealth or to any other person by way of payment of an amount of money; and
 - (b) the clerk, or other appropriate officer, of the court signs a certificate specifying:
 - (i) the amount of money to be paid by way of reparation; and
 - (ii) the identity of the person to whom the amount of money is to be paid; and
 - (iii) the identity of the person by whom the amount is to be paid; and
 - (c) the certificate is filed in a court (which may be the first-mentioned court) having civil jurisdiction to the extent of the amount to be paid;

the certificate is enforceable in all respects as a final judgment of the court in which it is filed in favour of the Commonwealth, of that public authority or of that person.

3.2 Inadequacy of s21B of the *Crimes Act 1914* (Cth)

The Discussion Paper asks interested stakeholders to consider whether s21B of the Crimes Act adequately provides for reparation orders to be made to survivors of people trafficking. ACRATH considers that it does not.

The Discussion Paper suggests that reparation orders are an established and effective way of recognising the interests and needs of survivors of crime. However, there is no reported case in which a reparation order has been made in favour of a survivor of people trafficking under s21B of the Crimes Act. Further, there are few reported cases in which reparation orders have been made under this legislation for other types of crime.

ACRATH has identified a number of difficulties in the application of s21B of the Crimes Act to the circumstances of survivors of people trafficking. For these reasons, which are set out in more detail below, ACRATH regards s21B as an inadequate mechanism for providing reparation to survivors of people trafficking offences. Rather, ACRATH supports a comprehensive and harmonised state-based system of compensation. This proposal is set out in more detail in section 5 below.

3.3 Potential inequity caused by discretionary nature of remedy

As mentioned in paragraph 103 of the Discussion Paper, reparation orders under s21B are discretionary. There is no guarantee that a survivor of an offence will recover any compensation at all. Other than the requirement that the person has suffered loss as a direct result of the offence, the Crimes Act does not prescribe any factors which must be considered by a judge when exercising discretion to make an order for reparation. In

Davies v Taylor,¹ Slicer J made the following comments, which indicate the type of factors that courts have previously considered in exercising this discretion:

The conclusion arrived at is that the exercise of discretion is not wholly constrained. It permits limited regard to personal circumstances, efficacy of the order, relative causative effect on loss, the conduct of co-offenders and complexity. But its exercise is guided by an objective rather than a subjective approach to those circumstances.²

When interpreting s21B, courts have generally taken the defendant's financial means into account. However, as Cummins J noted in *Gregory v Gregory*,³ a key difficulty raised by the use of reparation orders in this context is that the amount recovered by the survivor is not necessarily proportionate to the harm suffered:

[D]ifferentially to award compensation because of the offender's means to pay gives the wholly undesirable appearance that victims with similar suffering are valued differentially by the law. Just as there should not be one law for the rich and one for the poor, so there should not be a sliding scale of compensation for victims of crime because the offender is rich or poor.⁴

As noted below, not all survivors of people trafficking will appear as a witness in a criminal prosecution. There are many such survivors who will not come to the attention of a judge with the power to make a s21B order in their favour. As a primary measure, ACRATH favours a nationally uniform state-based scheme of compensation. However, ACRATH submits that the Crimes Act should also be amended such that it is mandatory for judges to consider whether there is any person who has suffered injury as a direct result of an offence.

3.4 Limitations of civil actions

Although civil actions were not directly raised by the Discussion Paper as an alternative to s21B orders, ACRATH considers civil actions to be, in most cases, an impractical option for survivors of people trafficking. Pursuing this course of action would require survivors to instigate and prosecute a potentially lengthy and distressing civil trial after, in many cases, surviving the trauma of assisting the police and giving evidence in a criminal prosecution, always assuming they were able to access Legal Aid funding, or a legal practitioner who would be willing and able to take the case on a pro bono basis, given the very limited financial circumstances of the trafficking survivor. ACRATH also notes that civil actions raise many of the same concerns as the discretionary nature of orders under s21B. Where the defendant has limited financial resources, the survivor will not be able to recover damages commensurate with his or her injury. However, ACRATH notes that a civil action has the potential to provide significantly more compensation than an order under s21B.

¹ (1996) 140 ALR 245.

² *Ibid* 254.

³ [2000] VSC 190.

⁴ *Ibid* [29].

3.5 Challenges in the investigation and prosecution of people trafficking offences

As noted in section 3.4 of the Discussion Paper, there are a number of challenges involved in investigating and prosecuting people trafficking offences. These may include difficulties in obtaining sufficient evidence, corroborating evidence, and locating survivors and offenders. The Discussion Paper acknowledges that survivors may be reluctant to participate in the court process as a result of their fear of violence or threats of violence. Due to these obstacles, it is apparent that not all those who have committed people trafficking offences will be brought to trial, let alone convicted. Since there is no discretion to award a reparation order under s21B unless a person has been 'convicted of a federal offence', many survivors of people trafficking will simply not be able to access reparation orders under this regime.

Similarly, for a wide variety of reasons, including the challenges related to the investigation and prosecution of people trafficking offences noted above, not all survivors of people trafficking offences will become witnesses in criminal trials. Unless a survivor appears as a witness in a criminal trial, the court will generally not be in a position to identify that person as someone who has suffered loss as a direct result of the commission of an offence. ACRATH submits that a survivor's entitlement to reparations should not be contingent on an arbitrary factor such as whether the survivor has appeared as a witness in a criminal trial.

3.6 A s21B order is a civil judgment requiring enforcement by the survivor of people trafficking

A significant disadvantage of seeking to compensate survivors of people trafficking by way of reparation orders is that the order must be enforced by the survivor. Survivors of people trafficking who have endured the additional trauma of giving evidence at a criminal proceeding may be very reluctant to enforce a reparation order, particularly if the convicted offender does not voluntarily pay the amount ordered, as one would assume may be the case. ACRATH is aware of survivors who have given evidence at court proceedings resulting in convictions. These survivors of people trafficking have reported feeling terrified of the accused. The Discussion Paper describes reparations as 'any attempt to make amends for a wrong or injury'. The wrong or injury suffered by survivors of people trafficking arises from, among other things, the fear and distress to which they were subjected by people traffickers, often caused by violence or threats of violence against the survivors or their families. Appearing in court in close proximity to accused traffickers is a source of great distress and anxiety. ACRATH submits that it is likely that those survivors who have suffered the greatest harm may in fact be among the least likely to seek reparations directly from the relevant offenders. The process of obtaining and enforcing a reparation order in these circumstances is inconsistent with the overall purpose of the order, which must be to facilitate recovery rather than to exacerbate the survivor's injury.

3.7 Survivors are not independently represented

In a criminal trial, the survivor of an offence appearing as a witness giving evidence against the accused is not a party to the action and does not usually have independent counsel or legal advice. While it is always open to a court to make a reparation order if the

requirements of s21B are satisfied, the Crimes Act does not specifically require courts to determine whether there are any persons who have suffered loss as a direct result of an offence for which a person has been convicted. ACRATH submits that the Crimes Act should be amended to require judges to consider whether there is any person who has suffered injury as a result of the commission of an offence, and if so, to invite any such person to make application to the Court for a s21B order.

3.8 Loss must be a 'direct result' of the offence

Paragraph 109 of the Discussion Paper indicates that it may be difficult to show that any loss occasioned by a survivor of people trafficking occurred as a *direct* result of the commission of an offence. ACRATH submits that in most cases there will be 'a close or significant connection'⁵ between the injuries suffered by survivors of people trafficking and the relevant offence. In ACRATH's experience, the injuries suffered by survivors of people trafficking can be clearly connected to the commission of the relevant offence.

To date, courts have taken a pragmatic approach to causation under s21B, similar to that used in personal injury cases. If the commission of the offence has brought about the loss in some clear and definable way, even with other concurrent or subsequent causes, it is likely to be considered a 'direct result' of the crime. That approach involves the use of the 'but-for' test with the tempering influence of common sense.⁶ While *R v Foster* notes that a closer connection is needed for a reparation order in favour of a person rather than the Commonwealth, the order is not a penalty but a civil debt and will therefore be construed less strictly than penal statutes. However, as noted above, there is no reported case in which a reparation order has been made under s21B in favour of a survivor of people trafficking.

3.9 The meaning of 'loss'

The Discussion Paper notes at paragraph 104 that the *Crimes Act* does not explicitly provide for reparation orders to be made in respect of non-economic loss. The Paper goes on to conclude that there seems to be no intrinsic purpose in distinguishing between economic and non-economic loss suffered as a result of the offence. This is an issue of great importance to survivors of people trafficking, who have typically suffered very significant non-economic injuries. ACRATH is aware of the following consequences which are often suffered by survivors of people trafficking:

- loss of personal integrity;
- loss of trust in self and others;
- loss of self-confidence;
- loss of emotional equilibrium;
- loss of psychological health and well-being;
- loss of family relationships;

⁵ *R v Foster* [2009] 1 Qd R 53, [74].

⁶ See, eg, *Davies v Taylor*; *R v Foster* [2009] 1 Qd R 53; *Kaplan v Lee-Archer* [2007] VR 405.

- loss of ability to form relationships;
- loss of physical health through excessive and onerous work; and
- loss of income for self, children and extended family.

These sorts of consequences would generally be considered injuries to a person, rather than losses. ACRATH has not been able to locate any reported decision discussing the scope of s21B and the meaning of 'loss', in which the relevant loss is non-economic. The reported decisions typically focus on easily quantifiable economic loss, such as unpaid tax debts⁷ or losses incurred as a result of money laundering.⁸ In *Hookham v R*, for example, the High Court found that the Commonwealth had suffered a loss for the purposes of s21B by being deprived of money which it would have been paid had it not been for the commission of the offences to which the appellant was a party.⁹ It is not at all clear that courts would interpret the term 'loss' in s21B as including non-economic loss.

ACRATH submits that the consequences set out above represent significant harm occasioned by traffickers, and that accordingly s21B should be amended to refer to 'loss or injury' to clarify that such matters should be considered in a s21B application.

3.10 Survivors of child sex tourism

ACRATH wishes to note its support of the recognition in paragraph 105 of the Discussion Paper that survivors of child sex tourism also suffer significant non-economic loss. ACRATH is aware of reports in 2010 of survivors of child sex tourism being returned to their home country, Cambodia, without the necessary financial support to enable them to begin to heal and start to reintegrate into society. ACRATH submits that as the Australian government's response to people trafficking is intended to address the full cycle of trafficking from recruitment to reintegration, survivors of child sex tourism must be given appropriate financial and personal support to assist them in healing and in the reintegration process.

4. Support for vulnerable witnesses

4.1 Need for support

ACRATH submits that it is of critical importance that survivors of people trafficking be provided with culturally sensitive personal and psychological support. In particular, survivors must understand their role in any prosecution and their rights. This will often require an interpreter to be available.

4.2 Suppression of names

ACRATH submits that it is of the utmost importance that a consistent and comprehensive approach be taken to the suppression of witnesses' names and other potentially identifying

⁷ *Davies v Taylor* (1996) 140 ALR 245, 247–50; *Liaver v Errington* [2003] QCA 5.

⁸ *R v Foster* [2009] 1 Qd R 53, [77].

⁹ *Hookham v R* (1994) 125 ALR 23, 27 (Deane, Dawson and Gaudron JJ).

information. ACRATH is aware of instances in which suppression of witness identities was not consistent in different stages of a single proceeding. Suppression of these details is obviously ineffectual if, for example, it occurs at the appeal stage, but not the trial or interlocutory stages of a prosecution.

4.3 Conduct of interviews

ACRATH notes that the Guidelines published for use by Non-Government Organisations Working with Trafficked People stress the need to avoid re-traumatising an individual through inappropriate questioning about their experiences. The guidelines provide assistance to non-government organisations in how to conduct an interview carefully and respectfully, so as to reduce the risk of re-traumatising the person.¹⁰

Those who conduct interviews with survivors of people trafficking must receive appropriate training so that they are sensitive to the needs of survivors, and are able to recognise signs that the process may be causing undue stress to the interviewee.

ACRATH acknowledges that the evidence provided by survivors of people trafficking offences is crucial to the successful prosecution of offenders. However, ACRATH considers that where an interview conducted with a potential witness results in the development or exacerbation of mental health conditions, the Australian Government must accept responsibility for the provision of welfare and mental health care until the person has recovered.

4.4 Evaluation of Current Provisions

ACRATH recommends that an evaluation of current provisions for the protection of vulnerable witnesses be carried out. This would enable input from trafficked people who are currently participating in the government support program, or have recently left that program. Obtaining this input is essential because the existing measures for protection of witnesses must be evaluated based on their practical effect as well as their content.

ACRATH is aware of recent examples of witnesses in people trafficking prosecutions giving evidence in open court in full view of the accused, and in circumstances where the survivors remained extremely fearful and distressed.

5. Victims of crime compensation schemes

ACRATH suggests that due to the limitations outlined in section 3 above, state-based victims of crime compensation schemes, are a more accessible means, in most cases, to providing redress to survivors of people trafficking.

The primary benefits of compensation schemes arise out of their being State-funded and not requiring any ongoing involvement by the affected survivor with the trafficker. Survivors of people trafficking often live in fear of violent repercussions from traffickers, and are deeply traumatised by their experiences. Compensation schemes are attractive because ordinarily applicants are not required to 'confront' or claim directly from a trafficker. In

¹⁰ Working Group of the National Roundtable on People Trafficking to Assist Non-Government Organisations Working with Trafficked People, 'Guidelines for NGOs: Working with Trafficked People' (2010) 3.4.

addition, having applications dealt with 'on the papers' can relieve applicants of some of the hardship associated with reliving their ordeals.

However, despite the benefits of statutory compensation schemes over other avenues, there remain significant challenges for survivors of people trafficking to seek and obtain compensation. In large part, these difficulties arise because the state-based schemes have not been conceived by reference to some of the peculiar circumstances arising in the case of survivors of people trafficking and do not offer a user-friendly, transparent and predictable outcome.

Applications for compensation by survivors of people trafficking are somewhat unique for the following reasons:

- The exploitation commonly occurs over a long period of time. The existing compensation schemes are better adapted to providing redress for discrete 'acts of violence'.
- The exploitation often takes place over a substantial geographical range. Some relevant conduct frequently occurs outside Australia, or otherwise within more than one Australian jurisdiction.
- The exploitation frequently involves many different persons, including 'recruiters' in the country of origin and 'purchasers' in Australia, and intermediaries.
- Those exploited are often quite deliberately engendered with a deep-seated fear of authorities, and are subject to implicit and explicit threats to their safety and to the safety of their families. Some emanate from countries where authorities are susceptible to corruption and brutality.

These difficulties are exacerbated by the fact that the crimes most relevant to survivors of people trafficking are found in Commonwealth legislation. Commonwealth criminal law was, until recently, 'victim-less'. ACRATH notes that the recently enacted criminal offence provisions relating to internet pornography and overseas sex tourism also have clearly identifiable victims.

Perhaps due to the traditional character of Commonwealth crimes, there is no Commonwealth compensation scheme. Rather, each state and territory has its own compensation scheme, which was designed to provide redress to victims of conduct criminalised by the laws of each particular jurisdiction. Applications are determined according to the scheme in place in the jurisdiction where a given applicant was a victim of a crime. ACRATH submits that this introduces a measure of arbitrariness. Commonly, trafficked persons will have no control over their ultimate destination within Australia.

There are significant differences between the schemes. By way of example, ACRATH highlights the following differences between the New South Wales and Victorian schemes.

The New South Wales scheme permits compensation for psychological or psychiatric injury only in circumstances where the victim is suffering from a:

- 'chronic psychological or psychiatric disorder that is moderately disabling', where the applicant was a victim of armed robbery, abduction or kidnapping; or
- 'chronic psychological or psychiatric disorder that is severely disabling'.

Under the Victorian scheme, compensation is available for:

- 'mental illness or disorder or an exacerbation of a mental illness or disorder'; or
- 'any grief, distress, trauma or injury' (under the head of 'special financial assistance').

It would appear, therefore, that the Victorian scheme more readily grants compensation for mental harm. Under the New South Wales scheme, with respect to a victim of a crime other than armed robbery, abduction or kidnapping, it must be shown that mental harm is 'severely disabling', whereas under the Victorian scheme it is sufficient to demonstrate *some* mental harm (or some exacerbation of pre-existing mental harm), or otherwise 'any grief, distress, trauma or injury'.

A further point of difference is that the Victorian scheme largely restricts compensation to amounts directly referable to expenses incurred or to be incurred by the survivor in recovering from the relevant crimes. This can be difficult to quantify and estimate. Funds are only available 'at large' under the 'special financial assistance' head, which is capped at \$10,000. Under the New South Wales scheme, victims are able to access more significant amounts of compensation without needing to itemise expenses connected with their recovery. For example, up to \$50,000 can be obtained for a pattern of unlawful sexual intercourse.

In addition, the New South Wales scheme contemplates the recovery by the state from offenders of sums paid to victims, whereas the Victorian scheme does not. As noted above, survivors of people trafficking are often fearful of violence from traffickers both in Australia and in their country of origin. The possibility of funds being reclaimed from traffickers may make survivors reluctant to apply for compensation.

One matter that the schemes do have in common is that they are not well adapted to providing certainty of redress for Commonwealth crimes. In particular, the mechanics of the schemes are designed to pick up salient features of state- and territory-based crimes.

ACRATH notes and commends the recent efforts made to overhaul and simplify regulation in the sphere of fair trading and consumer protection, with the Australian Consumer Law replacing some 20 Commonwealth, state and territory acts. ACRATH further notes that, as part of the reform, a public consultation process was conducted, with the aim of ensuring reform would be 'based on best practice in existing state and territory consumer laws'.

ACRATH urges the Government to consider harmonising the current state compensation schemes. As part of the harmonisation, ACRATH suggests that a consultation process be undertaken to ensure that the best elements of the various schemes are combined, and that the harmonised scheme is otherwise suitable to address the needs of survivors of Commonwealth crimes, including survivors of people trafficking.

Additionally, a harmonised scheme will facilitate closer cooperation and efficient collaboration between community legal centres, victim support services, and other stakeholders, within and outside Australia.

ACRATH would also like to explore the possibility of having trafficking and forced labour related offences explicitly recognised in the victims of crime compensation jurisdictions.

As noted above, survivors of people trafficking are in many ways unique as victims of crime in Australia. To assist judges to deal with compensation claims, ACRATH proposes judicial education concerning the plight of trafficked persons for judges in relevant tribunals.