

KEY TRENDS IN COMPENSATION

LIBERTY SHARED

CREATING AN ENVIRONMENT
SAFE FROM TRAFFICKING

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FOREWORD

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It has long been recognised that remedies are an integral part of the rehabilitation of victims of trafficking. However, achieving access to timely and adequate financial redress is currently an unrealisable goal for many victims.

Whilst many jurisdictions are in compliance with both international and regional standards in relation to the legal mechanisms necessary to allow victims to access compensation and/or other forms of financial redress, the position in practice is more complicated.

In many cases criminal proceedings in trafficking cases are not brought and even in cases where the alleged offender is prosecuted, a successful outcome is still relatively rare.

Civil remedies are gaining popularity as an alternative or additional form of remedy to criminal proceedings. Although such actions can present an appealing way of both providing victims with compensation by way of damages and bringing offenders to justice, they also have major disadvantage. Initiating a civil action carries risks in term of liabilities for costs and expenses and requires a determination to stay the course given the length of proceedings. For these and other reasons, civil actions remain under-utilised.

For many victims an award from a state-funded scheme is the most realistic way of accessing much needed money. Awards under state-funded compensation schemes are not made as a matter of course. For victims of trafficking they may prove particularly problematic as few jurisdictions have schemes which are specific to human trafficking. This forces victims of trafficking to fit their experiences to the eligibility requirements of schemes intended for general victims of crime. It may also leave trafficking victims under-compensated as many schemes will only make awards in respect of economic losses and will not compensate pain

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and suffering or emotional distress suffered by victims who have been subjected to coercive or psychologically abusive practices. Additionally, notwithstanding that state-funded compensation schemes are generally paper-based, the time taken from submission of application to payment of an award can be surprisingly long, sometimes running into years.

Whilst many challenges remain, we are encouraged by the efforts and progress that have already been made by many States to improve victim identification and protection. More focus is now required on strengthening the access of victims to services which are complementary to and necessary for effective financial redress. Failure to do so leads to a real risk that victims will be denied not only an acknowledgment of the wrongs done to them but also sufficient financial recompense for those wrongs.

In an ideal world, criminal investigations and financial investigations into human trafficking and related forms of exploitation would run alongside each other and result in asset seizures that would be used to compensate victims. This would present a means of increasing the financial and legal costs of trafficking people and provide the desired disruption to the activities of traffickers. However, we do not live in an ideal world and much remains to be done to ensure that victims everywhere are empowered with access to information and means to enforce their rights to compensation. There is also much that remains to be done for anti-trafficking investigations to truly identify the financial resources of traffickers and for the justice system to promote seizures and conversion of seizures into compensation that is readily accessible to victims.

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INTRODUCTION

This report summarises the findings of research into compensation practices for victims of human trafficking in various jurisdictions and offers recommendations for improvement.

Remedies are an important part in the process of recovery and successful rehabilitation/reintegration of victims of human trafficking. In particular, compensation or some form of financial redress for the economic losses suffered by victims as well as the physical and mental harm they have suffered allows victims to re-establish control over their own lives and gives them a sense of financial security. Another extremely important function of compensation is that it gives victims a sense of closure and the feeling that justice has finally been served¹.

From an offender perspective, strict enforcement of offenders' liability to pay compensation to their victims acts as a form of accountability for the crime committed. It acts as a potential deterrent against further trafficking crimes by punishing offenders and demonstrating that there are financial consequences attached to trafficking².

As demonstrated by this research, the process of seeking compensation is an arduous and complex one in many jurisdictions. An award of compensation, usually perceived as a successful end point in prosecutions, is in fact only the first step in the bureaucratic, laborious and costly processes of asset identification and enforcement. In many jurisdictions (especially in cases where the victim is a non-native speaker) this necessitates the victim having legal assistance in order to navigate the system and file the many notices, motions and applications which are necessary to seize and realise the offender's assets in order to access compensation. Unless victims have access to easy and effective methods of enforcement any financial remedies ordered in court are effectively rendered meaningless.

Care needs to be taken to ensure that human trafficking does not come to be viewed as a crime against the State in which the victims are viewed as witnesses rather than victims. It is therefore imperative that victim protection rights are enshrined in law, protected and applied consistently. In the context of compensation this involves:

1. reviewing whether existing systems facilitate victims' ability to claim compensation through multiple means including, if not already in existence, a state-funded compensation scheme designed to cover victims of human trafficking and whose aims are to deliver timely payments of awards;
2. the right of access to information;
3. the right to free legal representation extending throughout the course of the victim's engagement with the justice system (both criminal and civil and extending to the enforcement process);
4. non-criminalisation of victims (especially in respect of irregular immigration status and crimes committed as a result of the trafficking situation) and, if not already in place, the introduction of vacatur laws to expunge related existing convictions; and
5. the right to remain throughout the duration of any action in relation to a trafficking offence (not limited only to the duration of a criminal trial of any alleged offender but extending to any civil action initiated by the victim and the process for enforcement of any award).

¹ University of Amsterdam and La Strada International 'Compensation for Victims of Human Trafficking: Inconsistencies, Impediments and Improvements', by Jeltse Cusveller, Aug 2015, p.10, available at: <http://lastradainternational.org/lisidocs/3226-Compensation%20for%20victims%20of%20human%20trafficking%20-%20Cusveller.pdf> (accessed 25 January 2019).

² Ibid.

EXECUTIVE SUMMARY AND RECOMMENDATIONS

Explicit Right to Compensation for victims of Human Trafficking

1.

Some of the jurisdictions surveyed do not make the right to compensation for human trafficking explicit in their laws. This means that the right needs to be inferred as a result of the offender's obligation to provide restitution to the victim. An example of this is Cambodia where the Law on Suppression of Human Trafficking and Exploitation, 2008 does not set out a right for the victim to receive compensation from the offender if convicted pursuant to criminal proceedings.³ The only reference to compensation is in Art.47 of the law which provides that victims will have preference over items confiscated by the State for their compensation and restitution. Instead, a victim has the right to restitution for the whole of any unjust enrichment (plus accrued interest) obtained from the act of selling or buying or exchanging a person.⁴

We recommend that those jurisdictions that do not set out explicit provisions for compensation for victims of human trafficking, should aim to amend relevant legislation to include such a right. It is of vital importance that victims should have the ability to access compensation for all manner of wrongs done to them including for non-economic losses such as pain and suffering and emotional distress rather than being reliant on restitution whose primary aim is to return victims to the position they were in prior to the crimes committed against them and may be limited only to economic losses.

Existence of State-funded Compensation Schemes

2

In reality, in many cases the most realistic avenue for financial redress for many victims becomes an award under the state-funded compensation schemes. This is due to many reasons such as the complexity of both criminal trials and civil claims for damages, the length of proceedings, subsequent issues with enforcement of awards, the desire of some victims to return to their country of origin and avoid having to live in government run shelters, in some cases without the possibility of working to support themselves and their families.

Our research has revealed that 33.33% i.e. 4 of the jurisdictions surveyed do not currently have any form of state-funded compensation scheme.

We recommend that those jurisdictions that do not have state-funded compensation schemes should aim to legislate for the establishment and funding of such schemes as soon as practicable.

3

Even in those jurisdictions which have state-funded victim compensation schemes, the majority of the schemes are not specific to victims of trafficking. Only one of the jurisdictions surveyed (Thailand) has a state-funded compensation scheme which is specific to victims of human trafficking. The remaining seven jurisdictions have variations on general victims of crime schemes requiring evidence that a crime of violence has occurred. Trying to fit victims of trafficking and the abuses they have suffered into the requirement to demonstrate a crime of violence can be problematic in that victims may have difficulties in pin-pointing a violent crime which results in a compensable injury under the scheme. It also effectively

³ Note however that the Criminal Procedure Code 2007 does envisage that as part of the judgment of the criminal case, the court will decide the civil remedy (Art.355) meaning that an award of civil damages can be made as part of the criminal case. Art 2 of the Criminal Procedure Code specifically provides that the purpose of a civil action is to provide compensation to victims of an offence and to allow victims to receive sufficient damages/ reparation corresponding to the injuries they suffered. Article 14 provides for compensation for injury in civil cases by way of payment of damages or by returning to the victim the property that has been taken or by restoring the damaged/destroyed property to its original state.

⁴ Law on Suppression of Human Trafficking and Exploitation, 2008, Art.46, para.1. Note that in addition to the right to restitution, victims in Cambodia can also claim for damages (Art.46, para. 2).

excludes those who have been victims of psychological abuse and behaviour intended to coerce and/or intimidate but are unable to establish that the trafficking involved the requisite element of violence.

We recommend that jurisdictions with general victims of crime schemes re-evaluate their eligibility criteria to make sure that they are not unfairly excluding victims of trafficking and amend the relevant schemes to explicitly cover victims of human trafficking and take into consideration the specific circumstances and problems faced by such victims.

4

Problems can occur in jurisdictions where individual states have their own state-funded compensation schemes such as Australia, the USA and Canada, because whilst primarily similar, each scheme will differ slightly in terms of eligibility requirements and quantum of awards. Further, where victims have been trafficked across state borders it is likely that they would be required to lodge multiple applications to obtain full redress.

We recommend that in jurisdictions where there are individual compensation schemes at state level, an overarching federal/national scheme should be established to allow more efficient access to compensation and avoid placing the victims in a situation where they are contending with different state-level schemes.

5

Our research has shown that of the 8 jurisdictions which have state-funded compensation schemes, 75% do not specifically compensate victims for trauma suffered / emotional distress/pain and suffering. In many cases victims of human trafficking (and, more generally, victims of violent crime) are severely traumatised by their experience, a problem that may remain with them for an extended period and may develop into other long-term conditions such as depression.

We recommend that jurisdictions with a compensation scheme should consider adding pain and suffering as

a compensable element in recognition of the trauma experienced by victims.

6

Notwithstanding their experiences and the trauma they have suffered, applicants for awards under state-funded compensation schemes may find themselves subject to onerous eligibility criteria. These include but are not limited to:

- + Reporting requirements whereby applicants may receive a reduced or nil award if they fail to promptly report the crime giving rise to the application for an award to the police. Our research has revealed that 50% of the jurisdictions surveyed that have a state-funded scheme require applicants to variously report the crime ‘promptly’ (Canada), ‘as soon as reasonably practicable’ (UK) or ‘without unreasonable delay’ (Hong Kong). Victims of human trafficking may be reluctant to make a report due to their irregular immigration status, because they do not trust the police or out of fear of retaliation by their persecutor.

We recommend that:

- i. all state-funded schemes with a reporting requirement should make provision that a claim made by a victim of human trafficking should not be denied simply on the basis that no police report was made;
- ii. consideration should be given to finding alternative methods of confirming that a human trafficking crime has occurred such as those adopted under the California Victim Compensation Program which, in place of a police report, allows for certification by a human trafficking caseworker that the applicant was a victim of human trafficking;
- iii. existing guidance in relation to reduction of awards as a result of delayed reporting should also be re-evaluated to ensure that awards are only reduced if the delay significantly prejudiced any investigation; and
- iv. there should be a standard exception from reduction of an award where the physical or mental state of

the victim was such that they could not reasonably have been expected to make an immediate report.

- + *An obligation to co-operate with the investigation/prosecution of the alleged offender.* This raises issues similar to those in relation to reporting requirements. Additionally, whilst many jurisdictions give co-operating victims a right to remain during the period that they co-operate, this would likely involve the applicant living in a shelter with limited opportunities to work. Importantly, leave to remain will be limited to co-operation with the criminal investigation/trial which may or may not result in a compensation payment to the victim. It is unlikely that it would extend to claims for civil damages brought by victims or to enforcement of any subsequent award.

As with the reporting requirement our research reveals that 50% of the jurisdictions surveyed that have a state-funded scheme have a co-operation requirement which, if not met, can lead to refusal or reduction of an award.

We recommend that, where this is not already the case:

- i. the guidelines for state-funded schemes should contain a direction (again, as per the California Victim Compensation Program) that non-co-operation should not be found solely because a victim of human trafficking delayed reporting the crime;
 - ii. awards should only be reduced on the basis of non-co-operation if, taking into account all the circumstances of the applicant, the failure to co-operate significantly hindered the investigation or prosecution of the alleged offender; and
 - iii. given the fact that our research shows that all jurisdictions surveyed give victims the right to claim civil damages, in the case of co-operating victims, leave to remain should automatically be extended beyond the end of the criminal trial if they can demonstrate an intention to commence civil proceedings for damages.
- + *Residence requirements.* Eligibility for an award is generally based on the fact that the crime giving rise to the award occurred within the jurisdiction in question. The effect of this is that victims trafficked across multiple borders are limited to a claim in respect of crimes of violence that occurred in jurisdiction to the exclusion of crimes of violence against them that may have occurred elsewhere. Of the 8 jurisdictions having a state-funded compensation scheme, 5 jurisdictions (62.5%) have a residence requirement.

We recommend that:

- i. eligibility requirements for state-funded schemes should provide that applicants can make a claim if either: (a) the crime in question occurred within the borders of that jurisdiction OR (b) the victim is a resident of the relevant jurisdiction irrespective of

where the qualifying crime occurred; and

- ii. where the qualifying crime occurred in the relevant jurisdiction and the victim is non-resident with an irregular immigration status but has an entitlement to compensation (be it by way of an award pursuant to a claim from a state-fund or through the criminal justice system or the civil system) they should be given a right to remain until any compensation claim pursued by the victim has been finalised and enforced.
- + *Good conduct requirements.* These relate to conduct of the applicant which contributed to his/her injury. Examples include participating in an act of violence (Australia); having certain previous convictions (UK and USA); past history of violent acts that might have motivated commission of the crime of violence (Canada) or where the applicant's character makes it inappropriate to make an award or a full award (UK). Of the 8 jurisdictions surveyed that have state-funded schemes, 5 jurisdictions (62.5%) have some form of good conduct requirement. These focus heavily on past/present contributory behaviour on the part of the victim/applicant.

Given that in human trafficking situations victims may be coerced or forced under threat to commit crimes, **we recommend that:**

- i. each jurisdiction should ensure that explicit legislation is in place prohibiting criminalisation of victims of human trafficking in respect of crimes which they were forced to commit as a direct result of their trafficking situation. Consideration should also be given to the inclusion of vacatur laws; and
- ii. a provision in relation to non-criminalisation should also be incorporated into the state-funded compensation schemes. This should make clear that where it can be established that crimes committed by the victim/applicant were as a direct result of his/her trafficking situation, such crimes cannot be used as justification to withhold or reduce an award under the relevant scheme.

7

Enforcement of an award of compensation/damages is a further problem facing victims of trafficking who have persevered and have been awarded compensation in criminal proceedings or damages in civil proceedings. There are a number of issues:

- + *Stays on execution/enforcement proceedings until the convicted offender has exhausted all avenues of appeal.* In 50% of the jurisdictions surveyed an appeal stays execution until the appeal has been decided or there is no further possibility of appeal. In the majority of the remaining jurisdictions, lodging the appeal does not automatically stay execution but there is a discretion for a court to grant such a stay.

- + *Relationship with asset seizures and sale in anti-money laundering (“AML”) investigations.* In many jurisdictions human trafficking is a predicate offence for the purposes of money laundering prosecutions. AML investigations are carried out by trained AML officers, well-practised in enforcement/execution procedures. If the assets of the perpetrators of the predicate offence are seized as part of the AML investigation this leaves victims trying to enforce against the remaining personal assets of the offenders. Our research reveals that in 8 out of the 12 jurisdictions surveyed (67%), the proceeds of criminal behaviour are confiscated into state funds. A related point is the late stage at which asset-tracing and investigation is initiated. AML investigations aside, this usually begins at the end of trial meaning that the alleged offender has plenty of time to dispose of/transfer assets or remove them from the jurisdiction.

We recommend:

- i. asset investigation and freezing should be started at the beginning of the criminal process, preferably as soon as the alleged offender has been charged;
- ii. asset tracing /investigation/freezing and provisions for seizure and sale should be undertaken by trained AML officers with provision for the court involved in prosecution of the predicate offence to notify prosecutors and officers in any linked AML investigation of the likelihood that the victim will be ordered compensation and of the need to trace/freeze assets to satisfy any compensation ordered. This would, in essence, create a first lien over the proceeds in favour of the victim. Provisions similar to these are being considered in Thailand as part of the amendments to s.15/16 of the Human Trafficking Criminal Procedure Act;⁵ and
- iii. the proceeds of crime recovered as a result of investigations based on human trafficking crimes should not be confiscated into State funds but should, in the first instance, be used to compensate victims of the relevant human trafficking predicate offence. Any balance should be put into state-funded compensation schemes and/or used for human trafficking victim assistance initiatives.

- + *The complexity/expense of the enforcement process.* All but one of the jurisdictions surveyed place responsibility for enforcement of money judgments in the hands of the victim/judgment creditor with the assistance of sheriffs or bailiffs. This can be a daunting process for victims unfamiliar with the processes and procedures of the legal system in question and who may be non-native speakers. In addition the expense involved in enforcement proceedings may be prohibitive and the length of time required to pursue successful enforcement proceedings may also dissuade victims from enforcing their awards.

We recommend that States consider the ways in which they can simplify and speed-up enforcement processes. Procedures need to be introduced whereby victims are provided with more assistance throughout the duration of the enforcement process so that realising the award does not become their responsibility and deprive them of the financial redress to which they are entitled.

- + *Lack of legal aid/legal representation/assistance for victims throughout the enforcement process.* Our research reveals that only one of the jurisdictions surveyed (Thailand) extends legal aid/assistance to victims during the enforcement process.⁶

We recommend that all States take steps to introduce a provision into law that legal aid/assistance is extended to victims of human trafficking for the duration of the enforcement process.

⁵ Liberty Shared, *Turning Possibilities into Realities: Compensating Victims of Trafficking under Anti-Trafficking Legal Frameworks in Thailand and Cambodia*, p.45.

⁶ Human Trafficking Criminal Procedure Act, BE 2559 (2016), s.15.

AIMS, METHODOLOGY AND LIMITATIONS

This report comprises a comparison of twelve jurisdictions found to have some form of compensation mechanism(s) including enforcement processes, with a view to highlighting trends related to compensation of victims of human trafficking. The jurisdictions forming the basis of the research are:

1. Australia (NSW);
2. Cambodia;
3. Canada (Ontario);
4. Hong Kong;
5. India (Capital Territory of Delhi);
6. Malaysia,
7. Philippines;
8. Singapore;
9. Thailand;
10. UK;
11. USA (California); and
12. Vietnam.

We have carried out a desk review of legal frameworks established in each jurisdiction to provide victims with access to compensation. This involved a review of primary legislation, reports prepared by NGOs and academics, country assessment reports in relation to human trafficking and press reports. Whilst some of the legislation reviewed deals specifically with human trafficking, other legislation to which we have referred has more general application.

The report and the information it contains has been prepared as a work of comparative legal research. It does not and is not intended to provide legal advice in relation to the laws of the relevant jurisdictions. Due to the limitations set out below neither does it purport to guarantee completeness of the information provided.

The limitations to which this report is subject are as follows:

1. Limited availability of information and data in some jurisdictions;
2. Lack of availability of English language versions of some source materials;
3. In respect of enforcement proceedings, research was limited to enforcement of domestic judgments and does not cover enforcement of foreign judgments;
4. In jurisdictions where there is both federal and state/county level legislation we have, wherever possible, referred to the state/county level legislation⁷;
5. In relation to the comparisons of state-funded compensation schemes, we have in relation to the United Kingdom, based our research on the Criminal Injuries Compensation Scheme 2012 which applies only in England, Scotland and Wales and does not cover Northern Ireland; and
6. In relation to India, our research is based on the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill 2018 (Bill No.89 of 2018). Whilst this Bill has been passed by the Indian Lower House, it is still pending in the Upper House.

⁷ In relation to state-funded schemes, we have focused on the state level as the schemes are administered at that level. Schemes at federal level often exist to act as a repository for money which is eventually channelled down to the states. More generally throughout the report, where relevant legislation does not exist at state level we have referred to the appropriate federal level legislation.



CHAPTER 1

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COMPENSATION MECHANISMS

We have compared the availability of compensation based on 6 different compensation⁸ mechanisms namely: state-funded compensation schemes; from the offender (either as part of criminal proceedings or pursuant to a civil action); where the victim joins as a civil party to the criminal proceedings; restitution and reparation. The results are summarised at Table 1 below.

TABLE 1: JURISDICTIONAL COMPARISON OF AVAILABLE COMPENSATION METHODS – AT A GLANCE

JURISDICTION	STATE FUNDED COMPENSATION SCHEME (specific to trafficking victims or via a general victims of crime fund)	FROM OFFENDER (as part of criminal proceedings)	FROM OFFENDER (civil claim for damages by the victim)	RESTITUTION	REPARATION	VICTIM TO JOIN AS A CIVIL PARTY TO CRIMINAL TRIAL
Australia (NSW)	✓	✓ ⁹	✓	-	-	-
Cambodia	-	✓ ¹⁰	✓	✓ ¹¹	-	✓ ¹²
Canada (Ontario)	✓	-	✓	✓ ¹³	-	-
Hong Kong	✓	✓ ¹⁴	✓	✓ ¹⁵	-	-
India (Capital Territory of Delhi)	✓	✓ ¹⁶	✓	✓ ¹⁷	-	-
Malaysia	✓ ¹⁸	✓ ¹⁹	✓	-	-	-
Philippines	✓	-	✓ ²⁰	-	-	✓ ²¹
Singapore	-	✓ ²²	✓	-	-	-
Thailand	✓	✓ ²³	✓	-	-	✓ ²⁴
UK (England, Scotland and Wales)	✓	✓ ²⁵	✓	-	✓ ²⁶	-
USA (California)	✓	-	✓	✓ ²⁷	-	-
Vietnam	✓ ²⁸	✓ ²⁹	✓	✓ ³⁰	-	✓ ³¹

⁸ Note that in this report we use the term ‘compensation’ as a general reference to various forms of financial redress available to victims.

⁹ s.94(2) and s.97(2) (NSW) Victims’ Rights and Support Act 2013 No. 37.

¹⁰ Note that the Criminal Procedure Code 2007, (Art.355) makes provision for a civil claim to be attached to the criminal case and for an award of damages in respect of the civil claim to be made as part of the criminal trial. It is the victim’s lawyer who must apply to join the civil claim to the criminal trial and request that an award be made by the court. Alternatively, the victim can also bring a separate civil case but we understand that in practice this does not often happen.

¹¹ A person who obtains enrichment without a legal cause knowing that the enrichment has been obtained from the act of selling, buying or exchanging a person or sexual exploitation, shall be liable for restitution of the whole of the unjust enrichment along with accrued interest – Law on the Suppression of Human Trafficking and Sexual Exploitation 2008, Art.46, para.1.

¹² Art. 355 Criminal Procedure Code of the Kingdom of Cambodia 2007.

¹³ s.16 Canadian Victims Bill of Rights S.C. 2015, c.13. Such an order would be made as part of the criminal trial of the offender.

¹⁴ s.73 Criminal Procedure Ordinance (Cap 221).

¹⁵ s.84 Criminal Procedure Ordinance (Cap 221).

¹⁶ s.357(3) Indian Criminal Procedure Code 1973 (2 of 1974) and s.357(1)(b) Indian Criminal Procedure Code.

¹⁷ Very limited. Under s.49(1) Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill 2018 (Bill No. 89 of 2018) (the ‘2018 Bill’), a designated court may order any back wages of the victim to be paid to him.

¹⁸ A general compensation scheme (not specific to human trafficking) is being considered – see: Malaymail.com, ‘Putrajaya stays firm on scrapping death penalty, mulls compensation fund’ Ida Lim, 20.10.18.

¹⁹ s.66A(1) Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670) as amended by the Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Amendment) Act 2015 (Act A1500). Also, provision for compensation pursuant to s.426 (1A) Criminal Procedure Code (Act 593).

²⁰ May be inferred from s.13 of the Anti-Trafficking in Persons Act 2003 which acknowledges the right of a trafficked person to institute a separate civil action. Also, if a criminal action is instituted the civil action arising from the offence charged is deemed instituted with the criminal action unless the victim waives the civil action or reserves the right to institute it separately or institutes a civil action before the criminal action – r.39, Rules and Regulations Implementing the Anti-Trafficking in Persons Act (2003) RA9208 and r.111 (Prosecution of Civil Action) of Revised Rules of Criminal Procedure.

²¹ See footnote 20 above.

²² s.359(1) and (2) Criminal Procedure Code (Ch.68) enacted Act 15 of 2010, revised 2012.

²³ s.35 Anti-TIP Act B.E.2551 (2008) and s.13 Human Trafficking Criminal Procedure Act B.E. 2559 (2016). Even in the absence of a motion claiming compensation the court may include in the criminal judgment an order for payment by the accused of compensation to the injured person – s.13 and s.14 Human Trafficking Criminal Procedure Act.

²⁴ See s.44/1 of the Criminal Procedure Code which provides that in relation to a public prosecution, the victim may, if certain conditions are met, submit a motion for coercively directing the defendant to make compensation. Note also that in Thailand the victim can join the prosecutor as co-plaintiff in the criminal trial. This must be formalized before judgment is given in the court of first instance. Additionally an order for non-prosecution does not prevent a victim from bringing a prosecution by himself/herself – s.34 Criminal Procedure Code.

²⁵ s.130 Powers of Criminal Courts (Sentencing) Act 2000.

²⁶ Slavery and Trafficking Reparation Order made under s. 8, 9 and 10 of the Modern Slavery Act 2015.

²⁷ §1202.4 California Penal Code.

²⁸ There is no specific compensation fund but Arts. 32-38 of the Law on Human Trafficking Prevention and Combat (2012) (No. 66/2011/QH12) provide a support regime for victims who are Vietnamese citizens/stateless persons permanently residing in Vietnam. This includes support to meet essential needs, medical and psychological support, legal aid, support in general education and vocational training and loan borrowing support.

²⁹ Ibid., Art. 6(3) provides that victims have a right to be compensated for damage under law. Art. 23(1) of the same law provides that “a person who commits a ‘prohibited act’ pursuant to Art. 3 shall...if causing damage, compensate under law.”

³⁰ Art. 45(1) of the Criminal Procedure Code 2015.

³¹ The Vietnam Criminal Procedure Code 2003, Art.28 provides that the settlement of civil matters in criminal cases shall be carried out together with the settlement of criminal cases. Where a criminal case involves the compensation or indemnification matter which cannot be proved yet and does not affect the settlement of the criminal case, such civil matter may be separated and settled according to civil procedure.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the “**Palermo Protocol**”) which supplements the United Nations Convention against Transnational Organized Crime (the “**UNTOC**”), obliges State parties to provide trafficked people with the legal possibility of obtaining compensation.³² The UNTOC contains a similar provision.³³ According to the related Legislative Guide,³⁴ the Palermo Protocol does not specify any potential source of compensation, which means that any or all of the following general options would meet the requirement of the Palermo Protocol:

- a) provisions allowing victims to sue offenders or others under statutory or common-law torts for civil damages;
- b) provisions allowing criminal courts to award criminal damages (that is, to order that compensation be paid by offenders to victims) or to impose orders for compensation or restitution against persons convicted of offences;
- c) provisions establishing dedicated funds or schemes whereby victims can claim compensation from the State for injuries or damages suffered as a result of a criminal offence.

In addition there are numerous regional policy documents such as the ASEAN Convention against Trafficking in Persons, Especially Women and Children containing provisions relating to the ability of trafficking victims of accessing compensation.³⁵

In relation to the 12 jurisdictions surveyed:

1.

One third of the jurisdictions (33%) have no state-funded scheme. This is of particular concern because in many cases (and notwithstanding the challenges often associated with state-funded schemes) these schemes often represent the best chance for a victim to access compensation.

2.

One third of the jurisdictions (33%) surveyed do not offer the victim the opportunity to access full compensation from the offender as part of the sentence under a criminal trial. In three of the cases (Cambodia, Ontario and California), compensation is effectively given via restitution orders. In the case of California the restitution is limited to economic loss. In Canada a restitution order can only cover losses up to the time the offender is sentenced i.e. it does not cover future losses. Additionally, in Canada no compensation is offered under a restitution order for pain

and suffering or emotional distress or any other losses that can only be assessed in civil courts.³⁶ In Cambodia, restitution covers any unjust enrichment obtained by the offender.³⁷ In the Philippines (where neither reparation or restitution are available as alternatives) a victim would either have to apply to the state fund for compensation or initiate civil proceedings.

3.

All the jurisdictions allow victims to institute civil proceedings for damages as a way of obtaining compensation from the offender. Additionally one quarter of the jurisdictions surveyed (25%) permit victims to join as a civil party to the criminal trial (‘partie civile’) which has the benefit of giving the court an overview of the totality of harm suffered by the victim.

Tort law has the potential to provide a significant remedy for victims of human trafficking. However, in a number of jurisdictions, for example the UK, there is no legislative right to a civil remedy for victims of human trafficking. This leaves victims having to “fit” crimes to existing torts.

Examples of tortious actions which may be available to victims of trafficking are:

- trespass to the person i.e. assault and battery;
- false imprisonment; and
- the tort of deceit.

Tortious actions could, if successful, result in significant awards of damages which may be notably higher than those available under alternative methods of accessing financial redress. Nonetheless, there are significant barriers which mean that victims may ultimately be better off relying on claims for breach of employment legislation or claiming compensation from state-funded compensation schemes or relying on compensation ordered as part of the criminal prosecution of the alleged offender. Matters to be taken into consideration when deciding whether to initiate a civil damages claim in tort include: (a) length of trial and whether the victim/claimant will have a right to remain in the relevant jurisdiction throughout the trial; (b) the victim’s ability to access legal representation or assistance; (c) the likelihood of a costs order being made against the victim/claimant; (d) the ability of the alleged offender to actually pay the damages awarded and (e) the complexities involved in enforcing any award.

In her article on Tortious Remedies for Deliberate Wrongdoing to Victims of Human Trafficking and Slavery in Australia,³⁸ Pam Stewart points out that the practical advantage of a claim in tort will depend on the availability

³² Article 6, para.6 of the Palermo Protocol requires each State Party to ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

³³ Article 25, para.2 of the UNTOC requires States to establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.

³⁴ Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, p.285/286, para.60, available at: https://www.unodc.org/pdf/crime/legislative_guides/03%20Legislative%20guide_Trafficking%20in%20Persons%20Protocol.pdf (accessed 19 February 2019).

³⁵ Art.14(13) of the ASEAN Convention against Trafficking in Persons, Especially Women and Children, 2017.

³⁶ See Department of Justice, Victim’s Rights in Canada, Restitution Orders, available at: <https://www.justice.gc.ca/eng/cj-jp/victims-victimes/factsheets-fiches/restitution-dedommage.html> (accessed 25 January, 2019).

³⁷ See footnote 11 above.

³⁸ Stewart, Pam – Tortious Remedies for Deliberate Wrongdoing to Victims of Human Trafficking and Slavery in Australia, [2011] UTSLRS 3; (2011) 34(3) University of New South Wales Law Journal 898.

of suitable legal representation and on the determination of the victim to see the litigation process through to a conclusion.

4.

Half of the jurisdictions surveyed (50%) have provisions for restitutionary awards.

5.

Only one jurisdiction (8.33%) makes provision for reparation. This is the UK Slavery and Trafficking Reparation Order (the “Reparation Order”) pursuant to s.8, 9 and 10 of the Modern Slavery Act 2015. The reason for introduction of the Reparation Order was that, notwithstanding that UK legislation already provided for compensation orders in favour of victims,³⁹ statistics showed that the number of compensation orders made in human trafficking and slavery cases during the 10 years prior to introduction of the Modern Slavery Act was relatively low. It was therefore decided that a specific order was necessary to deal with trafficking/slavery cases.⁴⁰

A Reparation Order is an order requiring the person against whom it is made to pay compensation to the victim of a relevant offence for any harm resulting from that offence.⁴¹ A court must consider making a Reparation Order in any case where it has power to make one, even if an application for an order has not been made. If the court does not make an order, it must give reasons for not doing so.⁴²

Reparation Orders have been subject to criticism on the following grounds:

a.

A Reparation Order can only be made against a convicted offender thereby rendering it inapplicable to the many cases where prosecution or conviction does not occur for example, where there is insufficient evidence.⁴³ Additionally, the criminal proof threshold which is ‘beyond a reasonable doubt’ is a high bar which means that many prosecutions do not succeed.

b.

Similarly, a Reparation Order can only be made if a confiscation order under s.6 of the Proceeds of Crime Act 2002 has been made against the offender. Since the amount payable by way of compensation under a Reparation Order must not exceed the amount the defendant is required to pay under the confiscation order made in relation to that offence⁴⁴ it follows that compensation will be limited to the relevant and available property and assets of the offender at the time that the confiscation order was made.

³⁹ Powers of Criminal Courts (Sentencing) Act 2000, s.130-134.

⁴⁰ Explanatory Notes to s.8 of the Modern Slavery Act 2015, para 48, available at: www.legislation.gov.uk/ukpga/2015/30/notes/division/5/1/8 (accessed 18 February 2019).

⁴¹ The Modern Slavery Act 2015, s.9(1).

⁴² Ibid., s.8(7).

⁴³ Focus on Labour Exploitation (FLEX) Working Paper: Access to Compensation for Victims of Human Trafficking, July 2016, Slavery and Trafficking Reparation Orders, available at: <https://www.labourexploitation.org/publications/flex-working-paper-access-compensation-victims-human-trafficking> (accessed 18 February 2019).

⁴⁴ The Modern Slavery Act 2015, s.9(4).

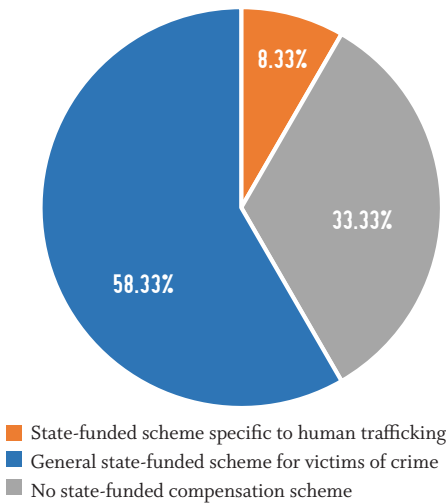


Despite the existence of many state-funded schemes to compensate victims of crime, the rationale for having such schemes is not always clear. Some are justified on the basis that they are ‘an extension of the welfare state’ or on the basis that they redistribute the costs of crime throughout the community. They are also seen as methods to increase victim engagement with the criminal justice system as a result of reporting requirements which are a pre-requisite of many such schemes.⁴⁵

State-funded schemes play a very important part in victim compensation. They are generally perceived to offer quicker access to financial redress than court-based processes which can take years to run their course. They are also more victim-friendly and are often paper based so victims are not required to attend hearings which can potentially re-traumatise them.

Set out at Figure 1 below is a pie chart illustrating the percentage of jurisdictions which were surveyed that have (a) no state-funded compensation schemes (Cambodia, Malaysia, Singapore and Vietnam) ; (b) schemes in place but where such schemes are general ‘victims of crime’ schemes which are not specific to human trafficking (Australia, Canada, Hong Kong, India, the Philippines, UK and USA); and (c) schemes that are specific to human trafficking (Thailand).

Figure 1: State-funded Compensation Schemes



Schemes which are general to ‘victims of crime’, can be problematic for victims of human trafficking. Crimes of violence schemes depend on the applicant being to demonstrate a qualifying (physical) injury and this may prove difficult for trafficking victims especially those primarily suffering from trauma due to acts of psychological control, deception, coercion or debt bondage rather than physical violence.

Legislation in respect of human trafficking in many countries tends to be centred on the alleged offender. Protections for victims of trafficking do exist but generally involve an element of reciprocity that is, are victims willing

to co-operate with the justice system in investigation and prosecution of the alleged offender?

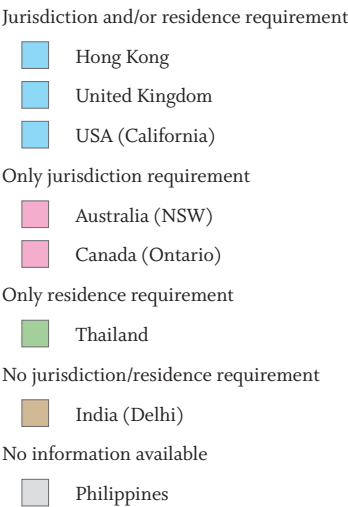
State-funded schemes are normally subject to: (a) eligibility criteria such as a requirement that the crime occurred within the jurisdiction and/or a requirement that the victim is ordinarily resident in the jurisdiction in question and (b) requirements which, if not met, can result in a nil or reduced award for example, reporting the crime to the police and co-operating with any investigation/prosecution. Further details are set out below.

Jurisdiction/Residence Requirements

Set out at Figure 2 below is a graph which, in respect of the 8 jurisdictions which have state-funded schemes, shows those with residence and/or jurisdictional eligibility criteria.

Figure 2 reveals that three quarters (75%) of jurisdictions that have a state-funded scheme have either a requirement that the act of violence occurred within the jurisdiction or a residence requirement, in certain cases both. In the case of India, the Delhi Victims Compensation Scheme has no formal requirement as to jurisdiction/residence but, as its name suggests, we believe it likely that victims claiming under the scheme would have to show a connection to Delhi either by way of residence or as a result of the fact that the injury/crime occurred there. In the case of the UK, which has both a jurisdiction and a residence requirement, there is express provision that although a victim of trafficking may not be ordinarily resident in the UK, they can claim under the Criminal Injury Compensation Scheme if they have been referred to a competent authority as a potential victim of human trafficking.⁴⁶ Hong Kong, another jurisdiction which has both residence and jurisdiction requirements, requires victims to have a right to stay in Hong Kong⁴⁷ thereby excluding victims of trafficking brought into Hong Kong illegally.

Figure 2: Jurisdiction/Residence Requirements



45 Mathew Hall, Victims and Policy Making: A Comparative Perspective, p.170.
46 Criminal Injury Compensation Scheme, 2012, para.10 and para.13(a). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/243480/9780108512117.pdf (accessed 26 January 2019).
47 See footnote 49 below.

Reporting Requirements

These require a claimant under the relevant scheme to report the incident giving rise to the claim to the police. Failure to do so results either in no award being made or a reduced award. Whilst most schemes do not specify a definitive time period within which reporting must take place, the obligation to report is often phrased on the basis that reporting must be 'prompt' (Canada (Ontario⁴⁸)); made 'without unreasonable delay' (Hong Kong⁴⁹); and 'reported as soon as possible' (UK⁵⁰). In the case of the UK, the guidance to the Scheme further limits the time period within which a report must be made by stating that the incident should be reported as soon as reasonably practicable and that normally this will mean 'immediately after the incident'.⁵¹

The reason for imposition of a reporting requirement originates in the fact that no conviction is required for an application to be made under the schemes. Accordingly the reporting requirement acts as a safeguard against fraud.⁵²

However, there may be many reasons why many victims may not promptly report a crime. For example, victims may be reluctant to report a crime due to language barriers or if their immigration status is irregular, they may not view themselves as victims, they are suspicious of police or they fear retaliation against themselves or their family.⁵³

Some schemes, although requiring victims to report the crime, take into account some of the vulnerabilities of human trafficking victims. The California Victim Compensation Scheme contains specific provision that an application for a claim based on domestic violence, sexual assault or human trafficking should not be denied only because the victim did not make a police report. In such cases the California Victim Compensation Board is under an obligation to adopt guidelines that allow it to consider and approve applications relying on evidence other than a police report to establish that a trafficking crime occurred. In the case of human trafficking crimes (pursuant to s.236.1 of the California Penal Code) such evidence may include reliable corroborating evidence such as a Law Enforcement Agency Endorsement or where a human trafficking

caseworker has provided an affidavit confirming that the individual in question is a victim of human trafficking.⁵⁴

Figure 3 below shows that:

- a.** 37.5% i.e. 3 of the 8 jurisdictions that have a state-funded compensation scheme do not have reporting requirements. In Australia (NSW) there were previously reporting requirements in s.44(1) of the Victims Rights and Support Act 2013 but these have been repealed.⁵⁵ In relation to Thailand, the provisions in the Anti-Trafficking in Persons Act B.E. 2551 (2008) relating to the Anti-Trafficking in Persons Fund do not contain a reporting requirement. Further, we note that the documents to be attached to the application form for an award from the fund do not refer to a police report⁵⁶ which strengthens the argument that there is no reporting requirement. In relation to California, whilst there are co-operation requirements (see below), there is no reporting obligation. As mentioned above, there is provision that an application based on human trafficking should not be denied solely because no police report was made;⁵⁷
- b.** four jurisdictions (Canada (Ontario); Hong Kong; India (Delhi)⁵⁸ and the UK) have reporting requirements although in some cases the relevant schemes have specific factors which must be taken into account in deciding whether or not to refuse or reduce an award on the basis of non or delayed reporting. In the case of the UK, the Criminal Injuries Compensation Scheme states that in relation to reporting, particular account will be taken of (a) the age and capacity of the applicant at the date of the incident and (b) whether the effect of the incident on the applicant was such that it could not reasonably have been reported earlier.⁵⁹ Canada also has factors which are to be taken into account. These are whether: (a) the applicant completely failed to report the incident so that there was no police investigation, (b) the delay or lack of reporting was self-serving and intended to conceal the applicant's participation in

48 s.17(2) Compensation for Victims of Crime Act R.S.O. 1990, Chapter C.24.

49 CLEIC Scheme, Social Welfare Department, Information Leaflet, p.3, Eligibility Criteria, available at: <https://www.swd.gov.hk/doc/social-sec/CLEICL1107.pdf> (accessed 20 February 2019). Note that under the CLEIC Scheme an alternative to the reporting requirement is that the police have brought criminal proceedings in respect of the injury/act in question (Ibid.).

50 Criminal Injury Compensation Scheme, 2012, para.22.

51 Criminal Injuries Compensation: A Guide, 26.03.14, p.8, available at: <https://www.gov.uk/guidance/criminal-injuries-compensation-a-guide> (accessed 20 February 2019).

52 See David Miers, 'Offender and state compensation for victims of crime: two decades of Development and Change', https://www.researchgate.net/publication/275458867_Offender_and_state_compensation_for_victims_of_crime_Two_decades_of_development_and_change (accessed 24 January 2019).

53 See BBC News, 'Human Trafficking: Why do so many victims refuse help?' by Michael Bradley, 17 October 2013, available at: <https://www.bbc.com/news/uk-england-24548143> (accessed 26 January 2019).

54 California Government Code, Title 2, Division 3, Part 4, Chapter 5, Art.3, § 13956(b)(1), (2), (3) and (4).

55 See paragraph 10, First Schedule, Victims Rights and Support Amendment (Statutory Review) Act 2018.

56 See: Bureau of Anti-Trafficking in Women and Children and Japan International Cooperation Agency, MDT Operational Guidelines for the Protection of Victims of Human Trafficking, p.98, available at: https://www.jica.go.jp/project/thailand/016/materials/ku57pq00001yw2db-att/mdt_guideline_practical_version.pdf (accessed 26 January 2019).

57 California Government Code, Title 2, Division 3, Part 4, Chapter 5, Art.3, § 13956(b)(4).

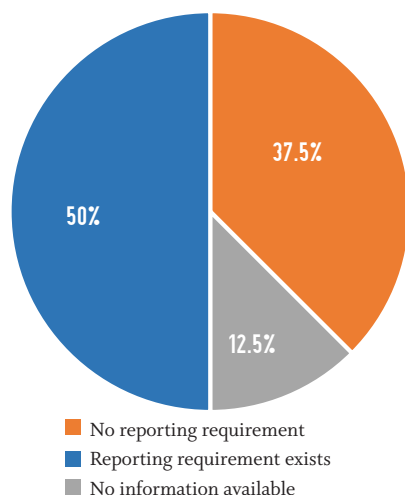
58 Note that in the case of India, although there is no specific reporting requirement under the Delhi Victims Compensation Scheme 2015, this may be inferred from the requirement at s.5 that any application must be accompanied by a First Information Report. A Hindi version followed by an English language version of the Scheme is available at: <http://dlsa.org/wp-content/uploads/2015/12/337686203-Delhi-Victim-Compensation-Scheme-2015.pdf> (accessed 27 January 2019).

59 The Criminal Injuries Compensation Scheme 2012, para. 22.

criminal conduct or to conceal key information and (c) any delay in reporting hindered the investigation;⁶⁰ and

c. in respect of the Philippines we have been unable to find any information relating to the existence or otherwise of a reporting requirement.

Figure 3: Reporting Requirements



Co-operation with the Investigation and Prosecution

Co-operation from victims and witnesses of trafficking crimes is an essential element of any investigation or prosecution. A lack of co-operation could result in having no case to bring.

As with the reporting requirement many state-funded compensation schemes also include provision that a lack of co-operation with the investigation and any subsequent prosecution will lead either to a nil award or a reduced award.

There are several factors that may disincentivise victims of human trafficking from co-operating with any investigation or prosecution. Survivors of human trafficking may not identify with being a victim and simply see themselves as having had bad luck.⁶¹ Alternatively, they may want nothing more than to return to their home country. Due to long periods of captivity and severe abuse and coercive behaviour, many victims suffer severe psychological symptoms.⁶² Some may realise that co-operation may require them to remain in the destination country for a long period sometimes running into years depending on the efficiency of the legal system in question. During the period of co-operation they may not have the right to work, could be required to live in a shelter (sometimes

with restrictions on their movement) and will be required, at times, to re-tell their story which could lead to re-traumatisation. Ultimately they may be required to come face-to-face with their abuser/attacker in court. Additionally, in many cases, leave to remain will be limited to the period of co-operation with the criminal investigation/trial which may not necessarily result in a compensation payment to the victim. It is unlikely that it would extend to civil damages claims brought by victims or subsequent enforcement proceedings.

Our research, as illustrated at Figure 4 below, reveals that:

a.

3 out of the 8 jurisdictions having state-funded compensation schemes, do not have a requirement to co-operate. In the case of Hong Kong, whilst there is no official co-operation requirement, compensation payable on the basis of the Emergency Relief Fund Scale can be increased by up to 100% where the victim has made “exceptional efforts, in the face of personal embarrassment, inconvenience or danger to assist the police in the arrest or prosecution of an offender or suspected offender.”⁶³ In relation to Thailand, the Anti-Trafficking in Persons Act 2008 envisages that victims may stay in Thailand for the purposes of taking actions against an offender and makes provision for assistance to be given to victims to enable them to remain in Thailand and work temporarily.⁶⁴

b.

half of the jurisdictions (Australia (NSW), Canada (Ontario), UK and USA (California)) with state-funded compensation schemes have co-operation requirements. As in the case of the reporting requirement, some of the schemes specify factors to be taken into consideration when deciding whether to refuse or reduce the award on the basis of non-co-operation. In the case of Canada, the Board must take into account whether the applicant: (a) refused to be interviewed by police or to participate in a photographic line-up so that police were unable to identify or catch the offender; (b) refused to testify so that charges against the accused were withdrawn or dismissed; (c) withheld information from the police so that the investigation was hampered.⁶⁵ In the UK, the Criminal Injuries Compensation Scheme makes clear that an award will be withheld unless the applicant has co-operated as much as possible in bringing the offender to justice.⁶⁶ By contrast with the reporting requirement, in this case there are no specific factors to be taken into account when considering this requirement. The Guidance for the Scheme highlights the lack of sympathy for special circumstances. It states: “While you may be reluctant to bring charges

⁶⁰ Compensation of Victims of Crime Act, RSO 1990, c.24, s.17(2).

⁶¹ Australian Institute of Criminology, ‘Law Enforcement Responses to Trafficking in Persons; challenges and emerging good practice’, Fiona David, 2007, available at: <https://aic.gov.au/publications/tandi/tandi347> (accessed 27 January 2019).

⁶² Ibid.

⁶³ CLEIC Scheme, Social Welfare Department, Information Leaflet, p.8. For availability see footnote 49 above.

⁶⁴ See Anti-Trafficking in Persons Act B.E.2551 (2008), s.36 and s.37.

⁶⁵ CICB, Manual of Practice for Board Members, August 2012, p.89, available at: <http://www.ontla.on.ca/library/repository/mon/27009/324090.pdf> (accessed 27 January 2019).

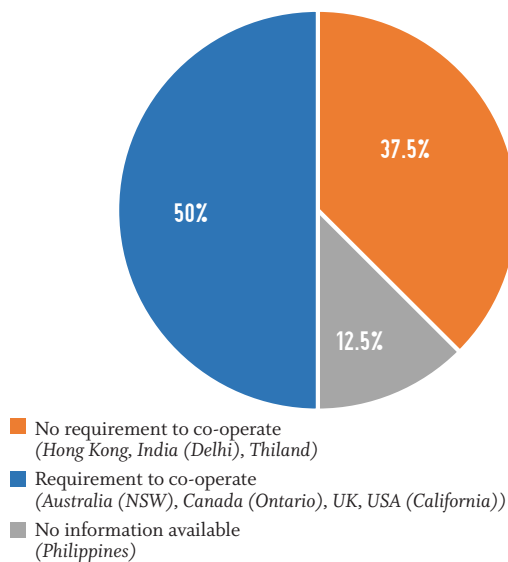
⁶⁶ The Criminal Injuries Compensation Scheme 2012, para. 23.

(for example if you fear a revenge attack or reprisal) the Scheme is publicly funded and you will not be eligible for a payment unless you co-operate fully with the investigation into the crime and any prosecution that follows.”⁶⁷ This is to be contrasted with the position in California where there is provision that, when considering whether co-operation has been reasonable, the Board must consider (among other things) the victim’s: (a) age and physical condition; (b) psychological state; (c) cultural or linguistic barriers and (d) any compelling health and safety concerns including a reasonable fear of retaliation or harm that would jeopardise the well-being of the victim or his/her family;⁶⁸ and

c.

in respect of the Philippines we have been unable to find any information relating to the existence or otherwise of a co-operation requirement.

Figure 4: Requirement to Co-operate



Good Conduct Requirement

Perhaps one of the more controversial of the requirements/conditions of the state-funded compensation schemes is the ‘good conduct’ requirement.

This often takes the form of a provision that in deciding whether to make an award and the amount of the award, consideration needs to be given to any behaviour of the victim that may have contributed (directly or indirectly) to his/her injury or death. This is similar to the concept of ‘contributory negligence’ in tort.

The extent of the good conduct requirement varies from country to country. Examples include:

a.

The Australian NSW Scheme which provides that where the victim participated in an act of violence or encouraged another person to commit the act of violence or assisted the person who committed the act of violence, this will result in a reduced/nil award.⁶⁹ Further, if the victim fails to take reasonable steps to mitigate the extent of the injury sustained by the victim (e.g. by failing to seek medical advice after the act of violence has been committed) this can lead to a nil/reduced award;⁷⁰

b.

Hong Kong where there is provision that compensation may be reduced or refused if, having regard to the conduct, character and way of life of the victim (before and after the events giving rise to the claim) it is inappropriate that the victim should be granted a full award or any award.⁷¹ There is also provision that the Board will “scrutinise with particular care” any application in respect of sexual offences in order to determine if there was any responsibility either because of provocation or otherwise on the part of the victim, and they will particularly have regard to any delay in submitting the application;⁷²

c.

California where an application may be denied in whole or part because of the nature of the involvement of the victim/applicant in the crime or the involvement of the person whose injury/death gives rise to the application. A victim/applicant would be involved in the events leading up to the crime if he/she initiated the crime or provoked/aggravated the suspect into initiating the crime or the crime was a reasonably foreseeable consequence of the conduct of the victim/applicant;⁷³ and

⁶⁷ Criminal Injuries Compensation: A guide, ‘Co-operation with the police and the criminal justice system’, p.19, available at: <https://www.gov.uk/guidance/criminal-injuries-compensation-a-guide> (accessed 27 January 2019).

⁶⁸ California Government Code, Title 2, Division 3, Part 4, Chapter 5, Art.3, § 13955(f).

⁶⁹ Victims Rights and Support Act 2013 No.37, s.44(d).

⁷⁰ Ibid., s.44(f).

⁷¹ CLEIC Scheme, Administrative Document, para.12, available at: https://www.swd.gov.hk/storage/asset/section/243/en/2018.04_CLEIC_Admin_Doc_Eng.pdf (accessed 27 January 2019).

⁷² Ibid., para.9.

⁷³ California Government Code, Title 2, Division 3, Part 4, Chapter 5, Art.3, § 13956(a)(1).

d.

The UK where an award can be withheld or reduced when the conduct of the applicant before, during or after the incident makes it “inappropriate” to make an award or a full award. For these purposes, conduct does not include intoxication through alcohol or drugs to the extent that such intoxication made the applicant more vulnerable to being a victim of crime.⁷⁴

Another example of the good conduct requirement involves refusal of compensation to people who have previously been convicted of an offence. A striking example of this is the UK Criminal Injuries Compensation Scheme which is expressed to be “a government funded scheme designed to compensate **blameless** victims of violent crime in Great Britain”⁷⁵ i.e. the Scheme is designed to compensate good, law-abiding citizens.⁷⁶ Consequently, an award will be withheld or reduced where the applicant has a criminal record **even though the applicant may have been blameless in the incident resulting in the injury**.⁷⁷

An award will not be made to an applicant who on the date of his/her application has an unspent conviction for an offence which resulted in various types of sentence including a sentence excluded from rehabilitation or a custodial sentence or a community order.⁷⁸ An award will be **withheld or reduced** if at the date of application the applicant has unspent convictions⁷⁹, unless there are exceptional reasons not to do so.⁸⁰ On 9 September 2018, the UK Justice Secretary, David Gauke, announced a full review of the UK Criminal Injuries Compensation Scheme. The review will look at various issues including the automatic exclusion from compensation for applicants who have unspent convictions resulting in a specified sentence (i.e. a custodial sentence, community order or youth rehabilitation order) as the rules disproportionately impact vulnerable victims of child sex abuse who may have offended in response to being abused/exploited/groomed.⁸¹

Our research reveals that:

a.

5 out of the 8 (i.e. 62.5%) of the jurisdictions with a victim compensation scheme have some form of good conduct requirement. Those jurisdictions are: Australia (NSW); Canada (Ontario); Hong Kong; UK; and USA (California);

b.

In the remaining 3 (i.e. 37.5%) of the jurisdictions, namely India (Delhi); Thailand and the Philippines there was no information available to suggest the existence of a good conduct requirement.

Good conduct requirements, particularly those relating to applicants convicted of crimes can have serious implications for victims of human trafficking who are sometimes forced to commit criminal offences as a result of their trafficking situation and, in the absence of guidance to the contrary, may be penalised by receiving no compensation or, at best, reduced compensation where they have been convicted of such offences. Further, such convictions can also prejudice the future chances of victims to obtain work or enter certain professions, affect their credit ratings and ability to obtain loans or, in some circumstances grants, and result in higher insurance premiums. It is therefore very important that trafficking victims have the protection of non-criminalisation legislation and vacatur laws.

Do State-funded compensation schemes specifically compensate victims for trauma suffered or pain and suffering?

Many state-funded compensation schemes are described as schemes of last resort or consider the scheme to essentially be one that reimburses the victim for actual losses incurred rather than providing compensation for harm, especially where such harm is of a non-economic nature.

The majority of jurisdictions with state-funded schemes recognise that victims of violent crime may not only suffer physical but also psychological injuries and will therefore include an element in the award for counselling or psychological rehabilitation. However, out of the 8 jurisdictions which have a state-funded scheme, only 2 jurisdictions (Australia (NSW) and Canada (Ontario)) specifically compensate claimants for pain and suffering.

Maximum awards under state-funded compensation schemes

Figure 5 below shows the split between schemes that (a) have an overall maximum award (b) schemes which do not have an overall maximum but which cap various individual elements of the award or which have a range of payments for various individual elements of the award and (c) schemes which have both.

⁷⁴ The Criminal Injuries Compensation Scheme 2012, para. 25.

⁷⁵ Criminal Injuries Compensation: A guide, ‘What is the Criminal Injuries Compensation Scheme?’, p.3. For availability see footnote 67 above.

⁷⁶ See David Miers, ‘Offender and state compensation for victims of crime: two decades of Development and Change’. For availability see footnote 52 above.

⁷⁷ Ibid., p.20 and The Criminal Injuries Compensation Scheme 2012, para. 26.

⁷⁸ The Criminal Injuries Compensation Scheme 2012, Annex D, para.3.

⁷⁹ In respect of adults subject to custodial sentences, convictions for custodial sentences of less than 4 years become spent after a specified period from the end of the sentence (known as the ‘rehabilitation period’). The rehabilitation period ranges from 2 to 7 years depending on the length of the custodial sentence. Custodial sentences in excess of 4 years are never spent. In respect of non-custodial sentences such as fines or community orders, the rehabilitation period is one year from the date of the conviction. There is no rehabilitation period in respect of an absolute discharge.

⁸⁰ Criminal Injuries Compensation: a guide, ‘Previous convictions other than those which result in an award being withheld’, p.21.

⁸¹ See Gov.uk ‘Justice Secretary announces victim compensation scheme review, scraps unfair rule’, available at: <https://www.gov.uk/government/news/justice-secretary-announces-victim-compensation-scheme-review-scraps-unfair-rule> (accessed 27 January 2019).

Half of the jurisdictions surveyed which have a state-funded scheme do not have overall maximum amounts payable in respect of the schemes but do have either a cap or a range for individual elements of the award:

a.

In Hong Kong, the levels of compensation for criminal injuries are assessed on the basis of the payment schedule under the Emergency Relief Fund, which is subject to periodic revision.⁸² An applicant will be entitled to one or more of various grants (injury grant, maintenance grant, disability grant, burial grant or death grant). The burial grant and death grant both have a cap. The remaining grants are subject to a range;⁸³

b.

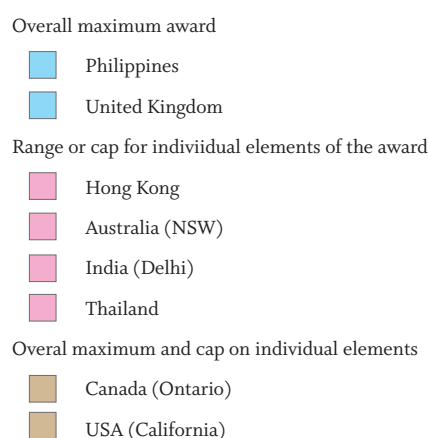
in respect of the Delhi Victims Compensation Scheme, each offence has its own range subject to minimum and maximum figures;⁸⁴ and

c.

for Thailand, there is no overall cap. There is guidance as to the maximum amount for each element (covering elements such as living and medical expenses, physical and mental rehabilitation, lost income and accommodation).⁸⁵

The two jurisdictions which have an overall maximum award are the Philippines and the UK.⁸⁶ Canada (Ontario)⁸⁷ and USA (California)⁸⁸ have both an overall cap and various elements of the award are separately capped.

Figure 5: Are awards subject to an overall maximum or capped elements or both?



In relation to the state-funded schemes that have overall maximum awards, Table 2 below shows the maximum award amount, in each case converted to US Dollars.

TABLE 2: MAXIMUM AWARDS PAYABLE

JURISDICTION	MAXIMUM AWARD (USD)
Canada (Ontario)	In case of injury or death of a single victim, the maximum award for a lump sum payment is: <i>USD 18,792.60</i> In case of injury or death of a single victim, the maximum award for a periodic payment is: <i>USD 751.70</i> Where both lump sum and periodic payments are awarded, the lump sum element cannot exceed: <i>USD 9397.09</i> In the case of multiple victims, the total paid to all applicants in respect of one occurrence is limited to a maximum amount of: <i>USD 112,765.19 (by way of a lump sum payment)</i> and <i>USD 274,392.97 (in respect of periodic payments)</i> ⁸⁹
The Philippines	<i>USD 951.84</i> or the amount necessary to reimburse the claimant the expenses incurred for hospitalisation, medical treatment, loss of wage, loss of support or other expenses directly related to the injury (whichever is lower) ⁹⁰
UK	The maximum award payable to an applicant sustaining one or more criminal injuries (before any reduction is): <i>USD 644,300.00</i> ⁹¹
USA (California)	For applications filed on or after 1.1.2001: <i>USD 63,000</i> For applications filed on or after 1.1.2017: <i>USD 70,000 (if Federal funds are available)</i> ⁹²

The results indicate a wide variation in maximum awards across different jurisdictions. Whilst it is worth noting that these are maximum awards which would presumably only be made in cases of very serious injuries, the range of the awards is perhaps indicative of the lottery faced by trafficking victims in relation to the quantum of award which may be awarded in the destination country.

82 Criminal Law Enforcement Injuries Compensation Boards, 44th Annual Report for the year ending 31 March 2017, p.7 as referred to in Simmons & Simmons, Strategy Guide on Measuring Damages for Injuries Suffered by Migrant Workers: An overview of the avenues of redress in Hong Kong (17 January 2019), p.18.

83 Simmons & Simmons, Strategy Guide on Measuring Damages for Injuries Suffered by Migrant Workers: An overview of the avenues of redress in Hong Kong (17 January 2019), pp.29/30.

84 Schedule to the Delhi Victims Compensation Scheme 2015. For availability see footnote 58 above.

85 Order of Trafficking Fund Committee for Guidance, the Procedure and the Condition of Approving the Use of the Money and the Property for Trafficking in Persons Prevention and Suppression, Sec.6, 25.05.18. English language version is currently unavailable.

86 In respect of the UK note that individual injury payments are calculated according to a tariff attached to the Criminal Injuries Compensation Scheme.

87 Only expenses claims such as therapy and travel to treatment are capped.

88 Various elements of the award such as home security installation or improvement and outpatient mental health counselling are capped.

89 Compensation for Victims of Crime Act, RSO 1990, C.24, S.19(1) and s.19(2).

90 s.4 Act for Creating a Board of Claims under the Department of Justice for Victims of Unjust Imprisonment/Detention and Victims of Violent Crimes and for Other Purposes RA 7309 (as amended).

91 The Criminal Injuries Compensation Scheme, para.31.

92 California Government Code, Title 2, Division 3, Part 4, Chapter 5, Art.4 § 13957.9(b).

CHAPTER 3

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PROBLEMS IN REALISING A COMPENSATION AWARD

It has been established that compensation is a vital element in the recovery of trafficking victims, not only for the financial security that it provides but also as an acknowledgement of the wrong done to them.

Whilst in recent years there has been a focus by Governments on human trafficking with many jurisdictions enacting legislation to criminalise trafficking and many more taking positive steps to strengthen their response to trafficking and the identification and subsequent treatment of victims, little has been done to facilitate victims' rights and abilities to claim and realise compensation/damages awards.

Our research has revealed that two-thirds of the jurisdictions surveyed make provision for payments of compensation to the victim from the offender as part of the sentence in criminal proceedings. Half of the jurisdictions make provision for restitutionary payments intended to return the victim to the position he/she was in prior to the offence committed against him/her. Only one jurisdiction (the UK) makes provision for reparation.

However, a court order for compensation may not translate into money in the hands of the victim for a considerable period of time depending on the speed and efficiency of the justice system of the relevant jurisdiction.

1 Time and Financial Limitations on Compensation/ Enforcement

These manifest in different ways. Many jurisdictions limit the ability of the judgment creditor (i.e. victim) who has the benefit of a court order for compensation to enforce the order until the convicted offender has exhausted all avenues of appeal i.e. the victim's ability to enforce is delayed. Others have other provisions which limit the amount of compensation ultimately recoverable by victims or the types of losses for which compensation may be obtained.

TABLE 3A: DOES AN APPEAL STAY ENFORCEMENT OF A COMPENSATION ORDER?

JURISDICTION	APPEAL STAYS ENFORCEMENT	APPEAL DOES NOT STAY ENFORCEMENT
Australia (NSW)	YES for District Court ⁹³	YES for Supreme Court ⁹⁴
Cambodia	YES ⁹⁵	N/A
Canada (Ontario)	At discretion of court	At discretion of court ⁹⁶
Hong Kong	NO	YES although an order to withhold enforcement may be granted ⁹⁷
India (Capital Territory Of Delhi)	YES ⁹⁸	N/A
Malaysia	NO ⁹⁹	YES ¹⁰⁰ although an order to stay enforcement may be granted
Philippines	YES ¹⁰¹	N/A
Singapore	NO ¹⁰²	YES ¹⁰³ although an order to stay enforcement may be granted
Thailand	UNCLEAR in respect of criminal cases ¹⁰⁴	YES in respect of civil cases ¹⁰⁵
UK	YES ¹⁰⁶	N/A
USA (California)	NO	YES although an order to stay enforcement may be granted ¹⁰⁷
Vietnam	YES In relation to criminal trials ¹⁰⁸ and in relation to civil trials, unless the law requires immediate enforcement ¹⁰⁹	N/A

93 s.63(2)(a) Crimes (Appeal and Review) Act 2001 (NSW).

94 Supreme Court of NSW, Practice and Procedure, Court of Appeal FAQs, How do I seek a stay of lower court proceedings?

95 Art. 398 of the Code of Criminal Procedure for the Kingdom of Cambodia 2007 provides that during an appeal, enforcement of judgment shall be suspended.

96 In criminal proceedings, Criminal Code of Canada, R.S.C. 1985, s.683(5).

97 O.59, r.13 Rules of the High Court.

98 Code of Criminal Procedure 1973, s. 357(2). Additionally, in a pending appeal, a judgment cannot be executed by the court. Under those circumstances the parties are directed to maintain the status quo until the final order of the Court of Appeal has been pronounced. Only after the matter has been heard and judgment not set aside by the Court of Appeal can the judgment creditor enforce it - Thompson Reuters (Practical Law) Enforcement of Judgements and Arbitral Awards in India: An overview by Murali & Co. Advocates (1.4.2017).

99 There is an exception to this in cases of a sentence of whipping where execution is stayed pending appeal (s.311 of the Criminal Procedure Code, Act 593).

100 Criminal Procedure Code, Act 593, s.311. Also note that a party against whom a judgment has been given or an order made may apply to the court for a stay of execution on the ground of matters which occurred since the date of the judgment and the court may grant such relief on such terms as it thinks fit – O.45, r.11 Rules of Court 2012.

101 Revised Rules of Criminal Procedure (effective 1.12.2000), r.122, s.11(c) and Civil Rules of Court (1997), r.39, s.1.

102 There is an exception to this in cases of execution of death sentences which must not be carried out until the sentence is confirmed by the Court of Appeal (s.383(3) Criminal Procedure Code, Ch.68).

103 Criminal Procedure Code, Ch.68, s.383(1).

104 The Thai Criminal Procedure Code, Div.VI, Enforcement of Judgment and Costs, Ch.I, s.245 states that enforcement of a judgment cannot take place until after the case is final. There is no definition of 'final' for these purposes but it is presumed that it would require any appeal to have been heard and for a decision in respect of the appeal to have been given.

105 However the judgment debtor can file a motion for a stay to avoid the judgment being enforced – Conventus Law, Thailand – Dispute Resolution Guide 2016, available at: <http://www.conventuslaw.com/report/thailand-dispute-resolution-guide-2016/> (accessed 12 February 2019).

106 Powers of Criminal Courts (Sentencing) Act 2000, s.132(1) and the Modern Slavery Act 2015, s.10(3).

107 California Penal Code § 1467.

108 Vietnamese Criminal Procedure Code 2003, art. 250.

109 Vietnamese Civil Procedure Code 2015, art. 282 provides that:

a) First instance court's judgments/decisions that are appealed against shall not be enforced unless the law requires immediate enforcement. Art. 482 states that certain first instance judgments will be immediately enforced though they may be appealed against. These include judgments for compensation for loss of capacity at work and health or mental damage suffered by citizens.

b) First instance court's judgments that are not appealed against shall take effect from the day on which the appeal time limit expires. For first instance judgments this is 15 days from the date of pronouncement of judgment (art.273).

TABLE 3B: OTHER LIMITATIONS ON ENFORCEMENT

JURISDICTION	OTHER LIMITATIONS
Australia (NSW)	A court that convicts a person of an offence may direct the offender to pay a sum not exceeding AUD 50,000 to be paid out of the property of the offender by way of compensation for an injury sustained by reason of any offence. ¹¹⁰ Further, a court may not give a direction for compensation (a) for economic loss for which financial support is payable under the Act or under the provision for restitution by offenders or (b) for an amount in excess of the maximum amount that, in its civil jurisdiction, the court is empowered to award in proceedings for recovery of a debt. ¹¹¹
Cambodia	Whilst there does not seem to be a legal provision to this effect it appears that, in practice, if financial compensation is awarded to a victim, the offender is not obligated to pay until he/she has served his jail term. ¹¹² Also, in practice, access to compensation is further limited by the burden placed on the victims to locate and identify the defendant's assets. Courts and judicial authorities rarely assist in investigating the defendant's assets. The law is silent on this point. Note also that there is a right in Cambodia to imprison the offender in lieu of payment of damages/compensation. ¹¹³
Canada (Ontario)	Under Ontario law there is a cap on damages for non-pecuniary losses. In 2018 the cap was approximately CAD 366,000.00. Also, if the victim is successful in civil proceedings he/she must reimburse the Criminal Injuries Compensation Board for any compensation received under the Criminal Injuries Compensation Scheme. ¹¹⁴ Note that in relation to sentences involving payment of a fine the court may direct that the defendant be imprisoned in default of payment. ¹¹⁵
Hong Kong	Compensation will be reduced by any sum which the victim has received in respect of his injuries, whether in pursuance of an order for compensation or damages by a court or otherwise. ¹¹⁶
India (Capital Territory of Delhi)	N/A
Malaysia	N/A However, note that in relation to sentences involving payment of a fine the court may direct that the defendant be imprisoned in default of payment. ¹¹⁷
Philippines	N/A
Singapore	If compensation is granted in a criminal prosecution, this amount is set off against any civil award of damages arising from the same injury. ¹¹⁸ Further, if no direction as to priority is given, an order for payment of costs by the accused takes priority over an order for payment of compensation. ¹¹⁹ Note that in relation to any orders for compensation made pursuant to the Criminal Procedure Code, the court may at any time before payment is made, direct that the defendant is imprisoned in default of payment of the compensation. ¹²⁰
Thailand	N/A
UK	In the case of both a slavery and trafficking reparation order (a "slavery order") made under s.8 of the Modern Slavery Act 2015 and a compensation order made under s.130 Powers of Criminal Courts (Sentencing) Act 2000, the defendant must have been convicted before the order can be made. In addition, before a slavery order can be made, a confiscation order under s.6 of the Proceeds of Crime Act 2002 needs to be made against the alleged offender. The level of compensation under a slavery order cannot exceed the amount recovered under the confiscation order. It is not possible to have both a slavery order and a compensation order under s.130 in respect of the same offence. ¹²¹ An award under the Criminal Injuries Compensation Scheme if the victim (a) receives or is awarded criminal injuries compensation; (b) receives an order for damages from a civil court; (c) agrees the settlement of a damages claim; or (d) receives a compensation order or offer made during criminal proceedings. ¹²²
USA (California)	A civil action under the California Civil Code § 52.5 is stayed during the continuation of a criminal action arising out of the same occurrence in which the claimant is the victim. The stay operates until a final adjudication in the trial court or a dismissal. ¹²³ Any restitution paid by the offender to the victim is credited against the judgment award/settlement under § 52.5. ¹²⁴ The California Victim Compensation Programme is entitled to a lien over a judgment/award/settlement in the amount of the award made under the Programme. ¹²⁵
Vietnam	N/A

¹¹⁰ Victims' Rights and Support Act 2013, No.37, s.94 (1).

¹¹¹ Ibid., s.98.

¹¹² APLE: Investigating Travelling Child Sex Offenders, An analysis of the trends and challenges in the field of child sexual abuse and exploitation in Cambodia, 2014, p.17, available at: <https://aplecambodia.org/wp-content/uploads/2015/03/Analytical-Report-on-Investigating-Travelling-Child-Sex-Offenders-Web-Version.pdf> (accessed 12 February 2019). Note that there appears to be no basis in law for this practice.

¹¹³ See Articles 523-533 of the Criminal Procedure Code.

¹¹⁴ Compensation for Victims of Crime Act, RSO 1990, c.24, s.26(5.1).

¹¹⁵ S.734(4) Criminal Code, RSC 1985.

¹¹⁶ CLEIC Scheme, Administrative Document, para. 32. For availability see footnote 71 above.

¹¹⁷ Criminal Procedure Code, Act 593, s.283(1)(iv).

¹¹⁸ Criminal Procedure Code, s.359(4).

¹¹⁹ Ibid., s.355(3).

¹²⁰ Criminal Procedure Code, s.360(1)(d).

¹²¹ Modern Slavery Act 2015, s.10(1).

¹²² Criminal Injuries Compensation Scheme, s.85.

¹²³ California Civil Code, § 52.5(h).

¹²⁴ Ibid., § 52.5(g).

¹²⁵ Ibid. and California Government Code § 13963.

In relation to limitations, our research has revealed that:

- a) in 7 of the 12 jurisdictions surveyed (58.33%) a notice of appeal does not automatically stay enforcement/execution. In 5 of these 7 jurisdictions, there is provision that notwithstanding the default position of 'no stay' there is a discretion to grant a stay of execution. In Australia, the position appears to differ depending on the court dealing with the offence i.e. an appeal does not stay execution in the Supreme Court but does in the District Court. In Canada there is no default of 'no stay' – it is simply left to the court's discretion to decide whether or not to issue a stay;
- b) in 5¹²⁶ jurisdictions (approx. 42%) an appeal stays execution until the appeal has been decided or there is no further possibility of appeal;
- c) in Cambodia it seems that, in practice, an offender is not required to satisfy a compensation order until he/she has served their term of imprisonment. However, this practice has no basis in law;
- d) some jurisdictions impose financial caps on compensation - see Australia (NSW) and Canada (Ontario). The UK effectively caps the amount recoverable under a slavery and trafficking reparation order to the amount recovered from the offender pursuant to a confiscation order made under the Proceeds of Crime Act 2002; and
- e) it is worth noting that many of the state-funded compensation schemes have provisions limiting double recovery. This is enforced by means of a first lien (extending to the amount of the award made to the victim by the relevant scheme) over any compensation received by victim pursuant to either criminal or civil proceedings against their alleged offender. The state-funded compensation schemes in the UK, Canada (Ontario) and USA (California) are all examples of schemes reserving such a lien. Note also that in Thailand, there is a requirement that victims return state-funded compensation in cases where the alleged offender is acquitted. This is a major restriction to a victim's right to access compensation.¹²⁷

2 The Enforcement Process

Often, reaching the point where compensation has been ordered is just the first step in the long process of realising the amount due to the victim. If an offender either refuses or is unable to comply with the terms of a judgment for compensation, victims can be left with not much more than the satisfaction of having received a judgment in their favour. Whilst the justice system is, of its nature, risky, one of the risks which may not be uppermost in the minds of victims is the inability to execute or enforce a judgment. Processes aimed at ensuring justice and fairness in legal systems such as enforcement action (which are often left to the victims) can be bureaucratic, time consuming, expensive and puzzling for victims.

We have identified the following problems with enforcement processes in human trafficking cases:

a. **Enforcement not permitted until the offender has exhausted all avenues of appeal:**

See Tables 3A and 3B above.

b. **Relationship with enforcement actions taken under anti-money laundering ("AML") prosecutions:**

In many jurisdictions human trafficking is a predicate offence for the purposes of AML (and, in some cases, combating financing of terrorism) cases. This means that the crimes are often investigated by specialised, highly-trained teams familiar with money laundering practices and ways to realise recovery of the proceeds of the crime such as asset tracing/freezing, seizure, forfeiture and subsequent sale of perpetrator's assets.

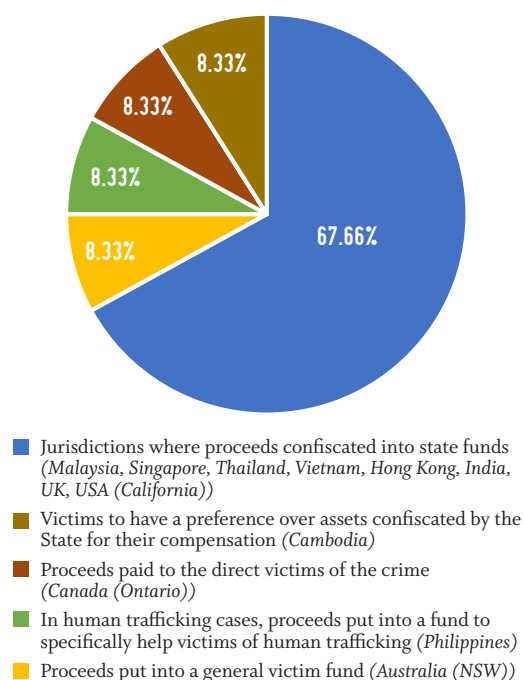
However, governments can complicate enforcement proceedings by confiscating into State funds the proceeds of crime recovered under AML prosecutions. This leaves the victims of the underlying crime trying to enforce compensation/damages awards against the personal assets of the perpetrators.

Figure 6 below sets out the results of our research into the destination of the proceeds of criminal offences (whether under AML legislation or as a result of prosecutions for offences).

¹²⁶ This number includes Australia in relation to the District Court system.

¹²⁷ Liberty Shared, *Turning Possibilities into Realities, Compensating Victims of Trafficking under Anti-Trafficking Legal Frameworks in Thailand and Cambodia*, p.42, available at: https://static1.squarespace.com/static/53038dd2e4b0f8636b5fa8c3/t/5b7fdca60ebbe8d5b49e25c1/1535106264552/viccompreport_update_0816.pdf (accessed 22 February 2019).

Figure 6: Destinations of proceeds of crime



As can be seen, the majority of jurisdictions confiscate the proceeds of crime to State funds and do not ring fence those funds to specifically compensate the victims of the underlying offence. There are, however, some notable exceptions:

- a) In Canada (Ontario), in civil asset forfeiture cases (these are cases in which law enforcement are entitled to seize cash and property suspected of being connected to criminal activity), the proceeds may be used for cost recovery to the Crown¹²⁸ then for compensation to direct victims of the unlawful activity that gave rise to the forfeiture.¹²⁹ Priority may be given to the compensation payments (over Crown costs) if all the money is necessary to compensate the direct victims.¹³⁰
- b) In the Philippines all fines imposed under the Anti-Trafficking in Persons Act 2003 and all proceeds and properties derived from trafficking in persons are to accrue to a trust fund used for programs that will prevent acts of trafficking and protect, rehabilitate and reintegrate trafficked persons into mainstream societies.¹³¹ S.28A of the Expanded Anti-Trafficking in Persons Act 2012, provides that any amount collected from every penalty, fine or asset derived from violation of the Act shall be earmarked

as additional funds for the Inter-Agency Council Against Trafficking.¹³²

- c) In Australia (NSW), all proceeds of property confiscated under the Proceeds of Crime Act 1989 are to be paid into the victim support fund.¹³³ Note that the victims support fund is not specific to victims of human trafficking.
- d) In the case of Cambodia, the original AML legislation provided that proceeds relating to violations of AML laws result in confiscation of assets as State property with no corresponding obligation to compensate the victims of the predicate offence.¹³⁴ However, Art.30 of the Law on AML and CFT was amended in 2013 by insertion of a new Art.30 (1) to (5).¹³⁵ New Art.30 does not contain an express provision that confiscated assets are State property. The new Art.30 envisages the freezing of property which is suspected to be the proceeds of a predicate offence before applying for a court order for “keeping” the property which is subject to confiscation. Art. 47 of the Law on Suppression of Human Trafficking and Sexual Exploitation (2008) gives victims preference over property confiscated by the State for their compensation and restitution.

Of the 8 jurisdictions which confiscate the proceeds of crime to State funds, changes are being considered (but to date have not been implemented) in two of the jurisdictions as follows:

- In the UK, a House of Commons Home Affairs Committee report on money laundering and proceeds of crime recommended that the existing asset sharing incentive scheme (ARIS) under which the Home Office retains 50% of all seized assets with the remaining 50% being shared between investigation, prosecution and enforcement authorities, be changed. The committee recommended that at least 10% of criminal assets recovered are returned or donated to communities that have suffered at the hands of crime. The 10% would be deducted from the portion currently retained by the Home Office.¹³⁶
- In Thailand there is an attempt to use the money and assets seized from wrongdoers which normally go to the national coffers to compensate victims directly.¹³⁷

¹²⁸ Civil Remedies Act 2001 S.O. 2001, Ch.28, s.6(2.1).

¹²⁹ Ibid., s.6(3)(1).

¹³⁰ Ibid., s.6(3.1),

¹³¹ Anti-Trafficking in Persons Act 2003, RA 9208, s.15.

¹³² The Inter-Agency Trafficking Council is a body established to, amongst other things, formulate a comprehensive programme to prevent and suppress trafficking in persons and to exercise all powers and perform all functions necessary to attain the purposes and objectives of the anti-trafficking in persons legislation.

¹³³ Victims Rights and Support Act 2013, s.15(a).

¹³⁴ Law on AML and CFT, 2007, Art.30.

¹³⁵ Law on Amendment of Art. 3, Art.29 and Art. 30 of the Law on AML and CFT (2013).

¹³⁶ House of Commons, Home Affairs Committee, Proceeds of Crime, Fifth Report of Session 2016-2017, Conclusions and Recommendations (Enforcement and Collection), p.36, para.10, available at: <https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/25/25.pdf> (accessed 17 February 2019).

¹³⁷ Thailand's Country Report on Anti-Human Trafficking Response (1 January to 31 December 2017). P.46, para. 5.3, available at: <https://www.jica.go.jp/>

c. Complexity/Expense of the Enforcement Process

The results of our research reveal that 11 out of the 12 jurisdictions surveyed place responsibility for enforcement of money judgments in the hands of victims/ claimants using execution processes administered by sheriffs, bailiffs, levying officers or other court enforcement officers.

Placing responsibility for the tracing of assets in the hands of the claimant/victim is unduly onerous and can cause multiple difficulties:

- Many jurisdictions have extremely ‘court-centric’ enforcement processes which are complex and bureaucratic requiring the filing of multiple forms, service of notices and issue of originating summonses/writs (depending on the jurisdiction and the type of enforcement process pursued). It is unrealistic to expect victims, already traumatised by their experiences, many of whom will not be native speakers to negotiate the system on their own and without legal assistance.
- Another problem faced by victims is that in the majority of cases, the execution processes require payment of fees to those who administer the process. The expense involved may be prohibitive and therefore deny victims the right to enforce judgments in their favour.
- Length of process is another issue. Depending on the complexity of the process, execution can take years from start to finish. In Thailand, it has been reported that execution can take up to 10 years reaching the point where the statute of limitations has expired.¹³⁸ In Thailand, a consultation which includes relevant agencies such as the Legal Execution Department, the Office of the Attorney General, AMLO, Lawyers Council under the Royal Patronage has been set up to provide legal assistance on execution of judgment.¹³⁹
- Tracing of assets can be particularly problematic. Courts can be reluctant to use their powers to force disclosure of assets or provision for asset disclosures is made at the end of trial /beginning of the enforcement process by which time the offender has had time to dispose of assets or remove them from the jurisdiction. Alternatively, depending

on the jurisdiction in question, there may be data protections which mean that institutions such as banks will not make disclosures to victims without a court order compelling disclosure of information.

There are some examples of good practice or alternative means of enforcement of awards which do not require the victim to take responsibility for the process. Examples are:

- In the Netherlands a court can order a criminal compensation order (“CCO”) of its own motion or if the prosecutor requests it. Under the CCO, the State is responsible for collecting the compensation on behalf of the victim. This is done by the Central Judicial Collection Agency on instruction of the prosecutor. The agency sends a payment notice to the offender and if the offender fails to pay, the claim is transferred to a bailiff for seizure of assets.¹⁴⁰

Pursuant to the Law on Strengthening the Position of Victims of Crime,¹⁴¹ victims of violent crime and sexual offences including trafficking can seek an advance payment from the State if the offender was convicted and ordered to pay damages but failed to make payment within an 8 month period after sentence was passed down.¹⁴²

The effect of this is that if the whole or part of the amount payable under a CCO remains unpaid 8 months after sentencing, the State pays the outstanding amount.¹⁴³

- In California, in respect of offenders sent to a California Department of Corrections and Rehabilitation (“CDCR”) prison, upon the offender’s arrival at CDCR, an inmate trust account is established to accommodate deposits (such as wages) and withdrawals. It also tracks all the obligations of the offender such as fines or orders, with a restitution order taking precedence in terms of payment over a fine. Any money that is deposited in the account is garnished at 50%.

When a victim contacts the Office of Victim and Survivor Rights and Services, CDRC verifies that a court order for restitution exists by requiring a certified copy. Money recovered from the inmate’s trust deposits is transferred to the Victim Compensation and Government Claims Board for disbursement to the victim. Disbursements are

project/thailand/016/materials/ku57pq00001yw2db-att/thailands_country_report_2017.pdf (accessed 17 February 2019) and Liberty Shared, Turning Possibilities into Realities: Compensating Victims of Trafficking under Anti-Trafficking Legal Frameworks in Thailand and Cambodia, p.45, footnote 199, available at: https://static1.squarespace.com/static/53038dd2e4b0f8636b5fa8c3/t/5b7fdca60ebbe8d5b49e25c1/1535106264552/viccompreport_update_0816.pdf (accessed 17 February 2019).

138 Liberty Shared, Turning Possibilities into Realities: Compensating Victims of Trafficking under Anti-Trafficking Legal Frameworks in Thailand and Cambodia, p.44, footnote 193.

139 Thailand’s Country Report on Anti-Human Trafficking Response (1 January to 31 December 2017), p.46, para. 5.3.

140 Netherlands Government, Departments and Institutions, Central Fine Collection Agency (CJIB), available at: <https://www.government.nl/ministries/ministry-of-justice-and-security/organisation/departments-and-institutions> (accessed 17 February 2019).

141 The “wet ter versterking van de positie van het slachtoffer in het strafproces”.

142 Compensation for Victims of Human Trafficking: Inconsistencies, Impediments and Improvements, Master Thesis Criminology, Jeltsje Cusveller, August 2015, Advance Payment, p.30, para.3.4.3.2, available at: <http://lastradainternational.org/lisdocs/3226-Compensation%20for%20victims%20of%20human%20trafficking%20-%20Cusveller.pdf> (accessed 17 February 2019).

143 Compensation of Victims of Human Trafficking under International and Dutch Law, Marjan Wijers, 2014, p. 17, available at: http://lastradainternational.org/lisdocs/3062-Policy%20paper%20compensation_Netherlands_28%20April%202014.pdf (accessed 17 February 2019).

made in increments of USD 50 or every 6 months, whichever is reached first.¹⁴⁴ If restitution has not been paid in full by the time the offender leaves prison, the victim's order is referred to the Franchise Tax Board which has authority to collect payments.

d.

Lack of legal aid/legal assistance

The position in relation to accessibility of victims of human trafficking to legal assistance is varied. Even in cases where legal aid/assistance is available, it is not clear whether this will extend to legal representation during the enforcement process. This is of concern given the bureaucratic nature of the enforcement processes in many jurisdictions which require filing of numerous legal motions/applications in order to successfully navigate the process.

Figure 7: Availability of legal aid/assistance

Legal aid or assistance specifically available for enforcement

Thailand

Legal aid or assistance may extend to enforcement depending on interpretation of the wording of the law

Philippines

Canada (Ontario)

Vietnam

Legal aid or assistance is available but there is no specific reference to it covering enforcement

Australia (NSW)

Hong Kong

India (Delhi)

United Kingdom

No legal obligation to provide legal aid or assistance but, in practice, pro bono legal assistance is available

Cambodia

Singapore

USA (California)

Position unclear

Singapore

1. Of the jurisdictions surveyed, the only country to specifically allow victims legal aid/assistance in respect of enforcement proceedings is Thailand.¹⁴⁵
2. In 3 countries (25% of the jurisdictions surveyed) legal aid/assistance is available and may extend to enforcement. In Ontario a pilot programme offering free legal support to survivors of trafficking launched on 1 May 2018, the first of its kind in Canada.¹⁴⁶ The Philippines grants free legal

services for "...claiming compensation and such other legal remedies available to them" in a language understood by the trafficked person.¹⁴⁷ In Vietnam victims can receive legal aid to register residence and civil status, receive support, claim compensation, participate in judicial proceedings and "carry out other legal procedures related to human trafficking cases."¹⁴⁸

3. In Malaysia, The National Legal Aid Foundation (YGBK), a joint enterprise between the government and the three Bars of Malaysia, only assists Malaysians and foreigners under 18 years of age.¹⁴⁹

e.

Late stage at which asset identification/freezing is undertaken

In relation to enforcement proceedings (other than those in AML investigations) provisions allowing the convicted judgment debtor to be examined as to the extent and location of his/her assets occur at the end of trial. This gives the offender ample opportunity to remove assets outside the jurisdiction, transfer them to relatives or dispose of them altogether.

A far more sensible approach would be to:

- i. initiate asset investigation and freezing at the beginning of the criminal process, preferably as soon as the alleged offender has been charged;
- ii. ensure asset tracing /investigation/freezing and provisions for seizure and sale is undertaken by trained anti-money laundering officers with provision for the court involved in prosecution of the predicate offence to notify prosecutors and officers in any linked anti-money laundering investigation of the likelihood that the victim will be ordered compensation and of the need to trace/freeze assets to satisfy any compensation ordered. This could, in essence, create a first lien over the proceeds in favour of the victim. Provisions similar to these are being considered in Thailand as part of the amendments to s.15/16 of the Human Trafficking Criminal Procedure Act;¹⁵⁰ and
- iii. ensure that the proceeds of crime recovered from investigations based on human trafficking offences should not be confiscated into State funds but should in the first instance be used to compensate victims of the human trafficking predicate offence, with any balance being put into state-funded compensation schemes or used for human trafficking related victim assistance initiatives.

¹⁴⁴ CA.GOV, CDCR, Restitution Guide, How does the victim collect on the restitution order from an inmate or parolee?, available at: https://www.cdcr.ca.gov/victim_services/restitution_collections.html (accessed 17 February 2019).

¹⁴⁵ Human Trafficking Criminal Procedure Act, BE 2559 (2016), s.15.

¹⁴⁶ The programme offers, amongst other things, representation at application hearings in any Ontario Court of Justice, See <https://news.ontario.ca/mag/en/2018/05/ontario-offering-free-legal-support-for-survivors-of-human-trafficking.html> (accessed 17 February 2019).

¹⁴⁷ The Anti-Trafficking in Persons Act 2003, s.23.

¹⁴⁸ Law on Human Trafficking Prevention and Combat 2012, s.36.

¹⁴⁹ FMT News, Provide legal aid to all foreigners, Bar urges Putrajaya, 30 October 2018, available at: <https://www.freemalaysiatoday.com/category/nation/2018/10/30/provide-legal-aid-to-all-foreigners-bar-urges-putrajaya/> (accessed 17 February 2019).

¹⁵⁰ Liberty Shared, Turning Possibilities into Realities: Compensating Victims of Trafficking under Anti-Trafficking Legal Frameworks in Thailand and Cambodia, p.45.



CONCLUSION

Most countries have legal provisions for financial reparation to victims of crime whether that be by way of compensation pursuant to criminal trials or damages pursuant to civil actions or by way of awards under a state-funded compensation scheme. This is in compliance with the Palermo Protocol and the UNCTOC.

However, in practice, the existence of a legal framework does not guarantee the right of people who have been trafficked or exploited to seek and recover compensation. In 2017, there were a total of 17,880 human trafficking prosecutions worldwide with 7,045 convictions during the same period.¹⁵¹ There is little statistical information about the numbers of trafficking victims worldwide who seek compensation. Nor is there information available on the numbers who receive a compensation payment. Excluding awards under state-funded schemes it is believed that the numbers would be low.

Viewing the success or otherwise of compensation provision solely through the lens of the legal framework for the grant of financial redress for victims is a mistake. A system of financial redress will only ever be as good as the complementary measures for victim protection and assistance that accompany it. In order to comply with their international obligations States should be seeking to improve victim protections and assistance measures in relation to ease of access to compensation to enable more victims to seek compensation and maximise the number of those receiving awards. Far greater efforts also need to be made to assist victims to realise compensation/damages awards into money in their hands which can enable them to move forward with their lives.

¹⁵¹ See: <https://www.statista.com/topics/4238/human-trafficking/> (accessed 19 February 2019).

