

## THE PREVENTION OF HUMAN TRAFFICKING ACT 2014: LEGISLATION COMMENT

RONALD J J WONG\* and JUAY WEI TIAN\*

### I. INTRODUCTION

The *Prevention of Human Trafficking Act 2014*<sup>1</sup> developed by MP Christopher de Souza together with the Inter-Agency Taskforce on Trafficking in Persons set up in 2010, came into effect on 1 March 2015. *POHTA* is an important step in Singapore's anti-trafficking efforts. First, existing laws do not specifically address trafficking in persons ("TIP"), focus on outcomes rather than process, are couched in vague terms, and in some cases have not been utilised at all.<sup>2</sup> For example, sexual exploitation cases with TIP elements are often prosecuted as prostitution-related offences under the *Women's Charter*<sup>3</sup> or the *Penal Code*.<sup>4</sup> These aim towards protection of women<sup>5</sup> and minors,<sup>6</sup> not men. Further, such provisions do not distinguish between consensual and forced prostitution.<sup>7</sup> Secondly, *POHTA* comprehensively provides for various aspects of tackling TIP, eg victim protection and enforcement procedures. Thirdly, it signals the seriousness with which the Government views TIP. In this note, we critically analyse *POHTA*, highlighting its issues and uncertainties which would, it is hoped, be addressed by the courts in the course of applying the *POHTA*.

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\* LLB, National University of Singapore.

<sup>1</sup> No 45 of 2014, Sing [*POHTA*].

<sup>2</sup> See Ronald J J Wong, "A Critique of International and Singapore Legal Treatments of Trafficking in Persons" [2014] Sing JLS 179 at 195-201 [Wong, "Critique"].

<sup>3</sup> Cap 353, 2009 Rev Ed Sing [*WC*].

<sup>4</sup> Cap 224, 2008 Rev Ed Sing [*PC*].

<sup>5</sup> See eg *WC*, *supra* note 3, s 140, 141, 146. See also cases like *Public Prosecutor v Tang Huisheng* [2013] SGDC 432; *Public Prosecutor v Seng Swee Meng* DAC No 34801 of 2011; *Public Prosecutor v Isetty Lakshmi* [2013] SGDC 279; *Public Prosecutor v Nguyen Thi Bich Lieu* [2012] SGDC 175; *Public Prosecutor v Chan Soh* [2008] SGDC 277; *Public Prosecutor v Wang Minjiang* [2009] 1 SLR(R) 867 (HC); *Public Prosecutor v Kalathithara Subran Hilan and Others* [2003] SGHC 221.

<sup>6</sup> *PC*, *supra* note 4, s 376B.

<sup>7</sup> Cf *Poh Boon Kiat v Public Prosecutor* [2014] 4 SLR 892 at para 77 (HC) [*Poh Boon Kiat*] where Menon CJ distinguished degrees of culpability regarding prostitution-related offences under the *WC*.

## II. SUMMARY OF POHTA

Section 3 of the POHTA adopts the definition of TIP set out in art 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime,<sup>8</sup> which 166 states are parties to, but not Singapore.<sup>9</sup> Section 5 of the POHTA stipulates certain situations which constitute an abetment of a s 3 offence, and is intended to cover “ringleaders or masterminds who order their subordinates to carry out the trafficking acts, and also agents and middlemen who knowingly make arrangements to place trafficked victims with their exploiters”.<sup>10</sup> Section 5(2) and the Explanatory Statement clarify that s 5 is “without prejudice to the generality of the term ‘abetment’ under the [PC]”<sup>11</sup> and that “[t]he matters specified under the clause do not limit the meaning of abetment under Chapter V of the [PC]”.<sup>12</sup> Section 6(1) of the POHTA makes it a crime for “any person who knowingly receives any payment in connection with the actual or intended exploitation in Singapore of a trafficked victim”<sup>13</sup> and “cover[s] a person who obtains a financial gain from the trafficking activity but who is not actively involved in the trafficking offence itself or in the abetment of it”.<sup>14</sup>

The offences in ss 3, 5 and 6 each attract a maximum penalty of a \$100,000 fine, 10 years’ imprisonment and 6 strokes of caning for first offenders. Subsequent offenders may be punished at the maximum a fine of \$150,000, 15 years’ imprisonment and 9 strokes of the cane. A non-exhaustive list of aggravating factors set out in s 4(2) of the POHTA is to be considered when the courts determine a sentence for a s 3 offence. As the relevant provisions state that offenders “shall be punished with”<sup>15</sup> fines and imprisonment sentences but “shall be liable to caning”,<sup>16</sup> the courts have discretion only as to the quantum of the former but have discretion to mete out the latter.<sup>17</sup>

Part 3 empowers officers listed under s 7(2) viz inspectors appointed under the *Employment of Foreign Manpower Act*,<sup>18</sup> the *Human Organ Transplant Act*<sup>19</sup> and POHTA, with certain enforcement powers comparable to that of arrestable offences stipulated in the *Criminal Procedure Code 2010*,<sup>20</sup> eg search and seizure without a warrant, and to forcibly enter premises, on the reasonable belief that evidence of the

<sup>8</sup> 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003) [*Palermo Protocol*].

<sup>9</sup> The Singapore courts may thus draw from and contribute to international jurisprudence on TIP: see United Nations Office on Drugs and Crime [“UNODC”] Human Trafficking Case Law Database, online: UNODC <<https://www.unodc.org/cld/index.jsp>>.

<sup>10</sup> Explanatory Statement to the Prevention of Human Trafficking Bill (Bill 39 of 2014) [*Explanatory Statement*].

<sup>11</sup> Section 5(2) of the PC, *supra* note 4.

<sup>12</sup> See *Explanatory Statement*, *supra* note 10.

<sup>13</sup> Section 6(1) of the PC, *supra* note 4.

<sup>14</sup> See *Explanatory Statement*, *supra* note 10.

<sup>15</sup> See ss 4, 6 of the POHTA, *supra* note 1 [emphasis added].

<sup>16</sup> *Ibid* [emphasis added].

<sup>17</sup> *Cf Poh Boon Kiat*, *supra* note 7 at paras 28-36.

<sup>18</sup> Cap 91A, 2009 Rev Ed Sing.

<sup>19</sup> Cap 131A, 2012 Rev Ed Sing.

<sup>20</sup> Cap 68, 2012 Rev Ed Sing [*CPC*].

commission of a TIP offence can be found in the premises or on any person within the premises.<sup>21</sup> Part 4 of the *POHTA* provides for victim protection and assistance.

### III. DEFINITION OF TIP

To constitute TIP under s 3, three elements of ‘act’, ‘means’ and ‘purpose’ must be proven. ‘Act’ refers to the recruitment, transportation, harbouring or receipt of the individual. This potentially covers not only recruiters, brokers and transporters but also owners and managers, supervisors, and controllers of any place of exploitation such as a factory, household or brothel.<sup>22</sup> The ‘means’ element includes the threat or use of force or coercion, abduction, fraud or deception, the abuse of power, the abuse of the position of vulnerability or the giving to, or receipt by, another person having control over that individual of any money or benefit to secure that other person’s consent. The ‘means’ requirement is unnecessary if the victim is below the age of 18;<sup>23</sup> a presumption that minors are unable to give informed consent. The element ‘purpose of exploitation’ includes sexual exploitation, forced labour, organ removal or any practice similar to slavery or servitude.

TIP applies to both transnational and national trafficking. Where all the TIP elements are fulfilled, TIP is established regardless of whether the victim is a Singapore citizen or was trafficked within the country or across borders.<sup>24</sup> It is not known whether the minors in the first case invoking the *POHTA* are Singaporeans or foreigners.<sup>25</sup> Nonetheless, it is submitted that the *POHTA* with its roots in the *Palermo Protocol*, a supplement to the *United Nations Convention against Transnational Organised Crime*,<sup>26</sup> should ideally be used where cross-border migration is concerned.

At this juncture, we turn to discuss five issues and uncertainties with s 3.<sup>27</sup>

#### A. The ‘Means’ Element and the Vitiating of Consent

Essential to TIP is vitiating of consent to the exploitative act encapsulated in the ‘means’ element.<sup>28</sup> Unfortunately, the requisite extent or nature of the ‘means’

<sup>21</sup> Section 8(1) of the *POHTA*, *supra* note 1. However, under the *POHTA*, there is no need to prove reasonable belief that the person who would otherwise be issued with police order is unlikely to produce the evidence, that the evidence is likely to be removed or lack of knowledge as to identity of possessor of evidence. See s 34(1) of the *CPC*, *supra* note 20.

<sup>22</sup> Anne T Gallagher, *The International Law of Human Trafficking* (New York: Cambridge University Press, 2010) at 30 [Gallagher, *International Law of Human Trafficking*].

<sup>23</sup> *POHTA*, *supra* note 1, s 3(2); *Palermo Protocol*, *supra* note 8, art 3(c).

<sup>24</sup> Gallagher, *International Law of Human Trafficking*, *supra* note 22 at note 74. See also Sing *Parliamentary Debates* vol 92(16) (3 November 2014) (Mr Christopher de Souza, MP for Holland-Bukit Timah GRC) [“*Second Reading, CDS*”]: “[U]nderlying this Bill is the need for us to show care and compassion for people, whether Singaporean or foreign, who have been, and continue to be, victims of human trafficking.”

<sup>25</sup> Yvonne Lim, “18 Charges for First Man Arrested under Human Trafficking Act”, *TODAY* (29 April 2015), online: *TODAY* <<http://www.todayonline.com/singapore/first-singaporean-faces-18-charges-under-newly-enacted-prevention-human-trafficking-act?singlepage=true>>.

<sup>26</sup> 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003).

<sup>27</sup> See Wong, “Critique”, *supra* note 2 at 184.

<sup>28</sup> UNODC, “Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons” (April 2013) at 78: “[I]t is equally clear that the mere use of

element which would vitiate consent remains to date uncertain.<sup>29</sup> For example, does deception or fraud relate *only* to the *nature* of work that the victim believes he would undertake, or also include *conditions* of work? Section 3 of the *POHTA* does not stipulate this. The UNODC suggests both the nature and conditions of work are included.<sup>30</sup> However, where deception relates to conditions of work, it is usually difficult to assess whether the degree of deception is sufficient to establish the means element.<sup>31</sup>

### B. Meaning of Sexual Exploitation

The meaning of “sexual exploitation” in s 2 of the *POHTA* is similar to that of the UNODC in UNODC, “Model Law”,<sup>32</sup> encompassing various forms of sexual exploitation. In particular, it includes the production of pornography and cyber sexual services. However, the definition does not resolve the debate on whether all sex work, or only sex work in exploitative conditions, falls within the meaning of “sexual exploitation”. Indeed, “sexual exploitation” was intentionally undefined in the *Palermo Protocol* due to deep-seated ideological disagreements.<sup>33</sup> Neo-abolitionist groups argue that all prostitution is sexual exploitation as it perpetuates abusive conditions and patriarchal structural inequalities, and that real consent to sex work is impossible since it is poverty which ‘consents’.<sup>34</sup> Other groups argue that sex work does not perpetuate oppression; cultural and legal marginalisation of sex workers does.<sup>35</sup> They advocate female sexual autonomy and the exercise of intelligent

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means alone is not enough; the result of the use of those means to achieve the relevant ‘act’ must be that the victim’s consent was vitiated.” Online: <[http://www.unodc.org/documents/human-trafficking/2012/Issue\\_Paper\\_Abuse\\_of\\_a\\_Position\\_of\\_Vulnerability.pdf](http://www.unodc.org/documents/human-trafficking/2012/Issue_Paper_Abuse_of_a_Position_of_Vulnerability.pdf)>.

<sup>29</sup> Gallagher, *International Law of Human Trafficking*, *supra* note 22 at 31.

<sup>30</sup> UNODC, “Model Law Against Trafficking In Persons” (September 2009) [UNODC, “Model Law”] at 12, online: <[https://www.unodc.org/documents/human-trafficking/Model\\_Law\\_against\\_TIP.pdf](https://www.unodc.org/documents/human-trafficking/Model_Law_against_TIP.pdf)>. See also UNODC, “Anti-Human Trafficking Manual for Criminal Justice Practitioners: Module 1” (August 2009) [UNODC, “Anti-Human Trafficking Manual”] at 9, online: <[http://www.unodc.org/documents/human-trafficking/TIP\\_module1\\_Ebook.pdf](http://www.unodc.org/documents/human-trafficking/TIP_module1_Ebook.pdf)>.

<sup>31</sup> The International Labour Office (“ILO”) has listed deception as to the “nature of the job, location or employer” as a strong indicator of deceptive recruitment, and deception about “conditions of work” as a medium indicator: See ILO and the European Commission, “Operational Indicators of Trafficking in Human Beings” (September 2009), online: ILO <[http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—declaration/documents/publication/wcms\\_105023.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_105023.pdf)>.

<sup>32</sup> UNODC “Model Law”, *supra* note 30 at 20: “‘Sexual exploitation’ shall mean the obtaining of financial or other benefits through the involvement of another person in prostitution, sexual servitude or other kinds of sexual services, including pornographic acts or the production of pornographic materials.”

<sup>33</sup> United Nations General Assembly, “Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime on the work of its first to eleventh sessions: Addendum Interpretative notes for the official records (travaux préparatoires) of the negotiations for the United Nations Convention against Transnational Organised Crime and the Protocols thereto” A/55/383/Add 1 (Nov 3, 2000) at 334 [UNGA, “Travaux Préparatoires”].

<sup>34</sup> Catherine Mackinnon, “Prostitution, Trafficking and Inequality” (2011) 46 Harv CR-CLL Rev 271; Kara Abramson, “Beyond Consent, Toward Safeguarding Human Rights Implementing the UN Trafficking Protocol” (2003) 44 Harv Int’l LJ 473; Jo Doezeema, “Who Gets to Choose? Coercion, Consent, and the UN Trafficking Protocol” (2002) 10(1) Gender and Development 20.

<sup>35</sup> Barbara Sullivan, “Trafficking in Women: Feminism and New International Law” (2003) 5 Int’l Feminist J Pol 67.

choice to seek a better livelihood.<sup>36</sup> The drafting committee ultimately decided to leave it to State Parties to define “sexual exploitation” according to their domestic policy on prostitution.<sup>37</sup>

In Singapore’s context, as the supply of sexual services by persons above the age of 18 is not criminalised, it is unlikely that all adult prostitution would be deemed “sexual exploitation” under the *POHTA*. In any event, the consent-nullifying means element must still be established,<sup>38</sup> which would be absent in *consensual* adult prostitution. However, it remains uncertain whether sex work by *minors* is necessarily sexual exploitation under the *POHTA* considering that commercial sex with minors below the age of 18 is criminalised under s 376B of the *PC*. If the question is answered in the affirmative, any prostitution by minors would be trafficking as the means elements need not be proven. The issue would be most polemical where it involves a person between the ages of 16 and 18, who is able to consent to sex,<sup>39</sup> but not to sex work in the light of, *inter alia*, the presumptions in s 3(2) of *POHTA* and s 376B of the *PC*.

### C. Meaning of Forced Labour

The purpose element, “forced labour”, is not defined in the *POHTA*. It is unclear if the offence in s 374 of the *PC*, which criminalises a person who “unlawfully compels any person to labour against the will of that person” is the same as that for “forced labour” for the purposes of the *POHTA*. Given the dearth of reported Singapore cases on s 374 of the *PC*, we submit that “forced labour” should be defined with reference to international law instruments, particularly, the ILO’s standards. This approach has also been posited in Parliament.<sup>40</sup>

ILO defines “forced labour” as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.<sup>41</sup> Threat of penalty may take the form “of a loss of rights or privileges’ such as a promotion, transfer, access to new employment, housing, *etc*” and may include “psychological coercion or economic compulsion”.<sup>42</sup> Several indicators of forced labour include abuse of vulnerability, deception, restriction of movement, isolation, physical and sexual violence, intimidation and threats, retention

<sup>36</sup> Janie A Chuang, “Rescuing Trafficking from Ideological Capture: Prostitution Reform and AntiTrafficking Law and Policy” (2010) 158 U Pa L Rev 1655.

<sup>37</sup> UNGA, “Travaux Préparatoires”, *supra* note 33 at 347.

<sup>38</sup> It would arguably be easier to prove sex trafficking if all sex work is deemed sexual exploitation, because “even minor fraud or deception on the part of an individual recruiting a person into prostitution would amount to trafficking”. See Anne T Gallagher, “Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis” (2001) 23(4) Hum Rts Q 975 at 986.

<sup>39</sup> The threshold age for statutory rape is 16: *PC*, *supra* note 4, s 376A.

<sup>40</sup> *Second Reading*, *CDS*, *supra* note 24: “The definitions in our existing laws and the international conventions, such as the Forced Labour Convention. . . will certainly be useful references.”

<sup>41</sup> See ILO, *Convention Concerning Forced or Compulsory Labour* (ILO No 29), 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932), art 2.

<sup>42</sup> ILO, *Forced Labour and Human Trafficking: Casebook of Court Decisions* (Geneva: ILO, 2009) [ILO, *Casebook*] at 12.

of identity documents, withholding of wages, debt bondage, abusive working and living conditions, and excessive overtime work.<sup>43</sup>

A related controversial issue is whether economic compulsion would constitute a “threat of penalty” or “coercion” in respect of TIP.<sup>44</sup> ILO supervisory bodies appear to hold that economic compulsion generally, *ie* not attributable to direct coercion of an employer does not *per se* constitute “threat of penalty”.<sup>45</sup> However, forced labour may be present if the employer exploits a person’s specific economic condition and compels him to provide labour of a kind, or under conditions, which he would not otherwise accept.<sup>46</sup> While the above indicators may not be independently determinative, they may be especially significant in cases where the victim is a foreigner whose immigration status is uncertain and potentially illegal, which is likely to be a common occurrence.

#### D. Mens Rea for TIP

Fifthly, what is the *mens rea* element for the s 3 offence? The UNODC clarifies that the *mens rea* is the “purpose of exploitation” element, which is ‘*dolus specialis*’, *ie* a specific intent of exploitation is required, but not the successful execution of the purpose.<sup>47</sup> However, would it suffice that the offender: (i) *intended* a *specific* form of exploitation; (ii) *knew*, or had ‘wilful blindness’ that,<sup>48</sup> the victim would be subject to a *specific* form of exploitation; (iii) *intended* or *knew*, or had ‘wilful blindness’ that, the victim would be subject to, *some form* of exploitation?

Given that the *mens rea* does not require execution of the intended exploitation, it follows, in our view, that an offender need not be cognisant of particulars of the intended exploitation especially since any exploitative intent may be solely in the mind of the offender. It should suffice that the offender had in mind that the victim would be subject to at least one type of exploitation.

#### E. Extra-Territoriality

Finally, as TIP is typically transnational, s 3 of the *POHTA* expressly provides for extra-territorial jurisdiction. The actual or intended exploitation need not take place within Singapore, and s 3(4) allows for prosecution as though the trafficking act is done wholly in Singapore.<sup>49</sup> However, according to the *Explanatory Statement*, the

<sup>43</sup> ILO, “Special Action Programme to Combat Forced Labour: ILO Indicators of Forced Labour” (1 October 2012) at 3, online: ILO <[http://www.ilo.org/wcmsp5/groups/public/-ed\\_norm/-declaration/documents/publication/wcms\\_203832.pdf](http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-declaration/documents/publication/wcms_203832.pdf)>.

<sup>44</sup> See ILO, *Casebook*, *supra* note 42 at 12.

<sup>45</sup> ILO, Report of the Committee set up to examine the Article 24 representation concerning Portugal (Geneva: ILO, 1985) at 97; ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1B), International Labour Conference, 96th Session, Geneva, (Geneva: ILO, 2007) at 39.

<sup>46</sup> People’s Union for Democratic Rights v Union of India (1982) AIR 1473 (18 September 1982).

<sup>47</sup> See UNODC, “Anti-Human Trafficking Manual”, *supra* note 30 at 4; UNODC, “Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organised Crime and the Protocol Thereto” (October 2004) at 269, online: <[http://www.unodc.org/pdf/crime/legislative\\_guides/Legislative%20guides\\_Full%20version.pdf](http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf)>.

<sup>48</sup> See *infra* body accompanying note 56.

<sup>49</sup> *PC*, *supra* note 4, s 108B.

offence must still have a nexus to Singapore. This is since TIP does not customarily attract the exercise of universal jurisdiction unlike *eg* piracy, war crimes and crimes against humanity.<sup>50</sup> Thus, trafficking activities occurring completely outside Singapore will not be covered.<sup>51</sup> The extra-territorial jurisdiction of the Singapore courts in respect of s 3 is limited to the situation where *part* of the TIP act was done or purported to be done in Singapore, or where the offender was a Singaporean. Interestingly, s 6, which penalises knowing receipt of any payment connected with exploitation, does not attract extra-territorial jurisdiction. This is likely due to the lower *actus reus* threshold requirement for the s 6 offence. It is also noteworthy that reading s 108B of the *PC* with ss 3(1), 3(4) and 5 of the *POHTA* together, abetment of the *POHTA* committed outside Singapore may be prosecuted in the Singapore courts if the abetted offence was committed in Singapore, or part of the abetted act was done or purported to be done in Singapore.

#### IV. ABETMENT OF TIP

##### A. Relationship with s 107 of the *PC*

However, s 5(2) and the *Explanatory Statement* are unclear on whether: (i) s 5(1) *inclusively* lists plausible abetment scenarios but does not exclude others; or (ii) s 5(1) *exhaustively* defines abetment scenarios, while s 5(2) is intended to clarify that the construction of s 107 of the *PC*—definition of ‘abetment’—for non-*POHTA* offences should not be affected by s 5(1). We submit that the former is a preferable interpretation. First, s 107 of the *PC* applies to *POHTA* offences in any event pursuant to s 40(2) of the *PC* since the *POHTA* does not exclude its application. Secondly, s 107 of the *PC* has a broader scope than s 5(1) of the *POHTA*, encompassing instigation, conspiracy and intentional aiding by any act or omission. For example, while s 5(1)(a) of the *POHTA* criminalises giving of “instruction” to another person to commit a s 3 offence, s 107(a) of the *PC* criminalises the “instigation” of an offence. We submit that the plain and ordinary meanings of “instruction” and “instigation” respectively are vastly different.<sup>52</sup> Also, s 107(b) of the *PC* criminalizes a conspiracy to commit an offence, whereas this is not stipulated in s 5(1) of the *POHTA*. Thirdly, the *Explanatory Statement* on Part 2 states: “Part 2. . . specifies *some of the circumstances* in which abetment of the offence of trafficking in persons may arise”.<sup>53</sup>

<sup>50</sup> Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), [2002] ICJ Rep 3.

<sup>51</sup> Inter-Agency Task Force on TIP, “Public Consultation on the ‘Prevention of Human Trafficking Bill’” (2014) at 3, which states that one of the key principles undergirding *POHTA* is to “catch acts of trafficking that occur within Singapore (even if a trafficked person only transits through Singapore) and acts of trafficking perpetuated by Singaporeans overseas” [emphasis removed], online: Ministry of Manpower <[https://www.reach.gov.sg/Portals/0/EConsult/147/Prevention%20of%20Human%20Trafficking%20Bill%20Public%20Consultation\\_1.pdf](https://www.reach.gov.sg/Portals/0/EConsult/147/Prevention%20of%20Human%20Trafficking%20Bill%20Public%20Consultation_1.pdf)>.

<sup>52</sup> *Public Prosecutor v Ng Ai Tiong* [2000] 1 SLR(R) 454 (HC) at para 20; *Public Prosecutor v Lim Tee Hian* [1991] 2 SLR(R) 393 (HC) at paras 50, 51.

<sup>53</sup> *Explanatory Statement*, *supra* note 10 [emphasis added].

### B. Mens Rea Requirement

Section 5(1)(b) states the *mens rea* to be “the intention of facilitating the commission of the offence”, while s 5(1)(c) has a more specific requirement of “intention of facilitating the commission of the offence *against the individual*”. Unlike ss 5(1)(b) and 5(1)(c), s 5(1)(a) does not expressly stipulate a *mens rea* requirement. It appears that the *mens rea* requirement in s 5(1)(a) is implicit within the *actus reus* because an “instruction to another person to commit” TIP necessarily entails an intention to facilitate the commission of TIP.

It is noteworthy that the *mens rea* requirements in ss 5(1)(a) and 5(1)(b) are different from that of s 5(1)(c), with the latter having a more specific requirement of facilitating the commission of TIP *against a specific individual*. Based on the *Explanatory Statement* and the *actus reus* referred to in each sub-section, we posit that ss 5(1)(a) and 5(1)(b) are drafted to cover “ringleaders or masterminds who order their subordinates to carry out the trafficking acts”,<sup>54</sup> whilst s 5(1)(c) is targeted at the mid-level subordinates who assist in the trafficking acts. For ss 5(1)(a) and 5(1)(b), it would be infeasible to require proof that ringleaders or masterminds had intended to facilitate the commission of TIP *against a certain individual*. This is sensible since syndicated operations typically insulate ringleaders and masterminds from day-to-day ground operations.

### C. Actus Reus in s 5(1)(c) Offence

Section 5(1)(c) has a lower *actus reus* requirement as compared to s 3. The various clauses in s 5(1)(c) correspond to each of the elements which constitute TIP under s 3. Thus, it appears that the *actus reus* of s 5(1)(c) would be made out if only one of the elements under s 3 is made out. However, we are of the view that this would not make s 5(1)(c) over-inclusive because of the *mens rea* requirement for an intention to facilitate the commission of the offence *against the individual*. As such, any owner, manager or employee of the transportation company, brothel or employment agency may not *per se* be liable for abetting TIP, in the absence of an intention to facilitate TIP against a certain individual.

## V. SECTION 6: KNOWING RECEIPT OF PAYMENT IN CONNECTION WITH TIP

### A. ‘In Connection With’

The phrase “in connection with” in s 6 is broad and may include: (i) payment for selling goods or services directly resulting from *his* exploitation of the victim’s labour, prostitution or organ harvesting; (ii) payment for providing services ancillary to, or supportive of, the exploitation, *eg* watchmen, employment agents, hotel owners, transport companies; (iii) payment for selling goods or services indirectly resulting from the victim’s exploitation, *eg* a person who is aware that the product he possesses was produced by a trafficking victim and later sells the product. Given its wide scope, it is unclear what s 6(1) is intended to apply to.

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<sup>54</sup> *Explanatory Statement*, *supra* note 10.



Nonetheless, the scope of s 6(1) appears to be intentionally limited to receipt of payment (money) rather than receipt of *benefits*. A person may receive benefits other than money from the exploitation of a victim, *eg* the direct benefit of a victim's labour. Thus, s 6 is unlikely to apply to consumers downstream of a supply chain of goods or services resulting from trafficked victims.<sup>55</sup>

### B. Mens Rea Requirement for s 6 Offence

Section 6(1) expressly provides that knowledge is the requisite *mens rea* element. What must the accused know to be liable under s 6? Possibilities include knowledge that the payment relates to: (i) a *specific* trafficked victim who was exploited or intended to be exploited; (ii) exploitation which involves trafficked victims but the accused does not know which victim the payment in question relates to; (iii) exploitation which *may* involve trafficked victims; (iv) a specific form of exploitation, actual or intended; (v) some form of exploitation but the accused does not know exactly which; or (vi) *may* relate to some form of exploitation.

It is plausible that (ii), (iii), (v) and (vi) may suffice as the requisite *mens rea* because 'knowledge' includes actual knowledge and *wilful blindness*. The Court of Appeal's discussion in *Tan Kiam Peng v Public Prosecutor*<sup>56</sup> on the 'knowledge' element generally is pertinent (although the case concerned the *Misuse of Drugs Act*<sup>57</sup>). First, wilful blindness is legally equivalent to actual knowledge (as opposed to constructive knowledge), which is more often than not inferred from the facts and circumstances of the case.<sup>58</sup> Constructive knowledge applies where someone "ought to have known", *ie* the person effectively had the means of knowledge but neglects to make inquiries a reasonable and prudent person would make.<sup>59</sup> While constructive knowledge generally has no place in criminal law,<sup>60</sup> the distinction between actual and constructive knowledge may sometimes be blurred.<sup>61</sup> Further, legislation may expressly provide for constructive knowledge.<sup>62</sup> Secondly, suspicion which causes a person to refuse to investigate further is necessary to establish wilful blindness.<sup>63</sup> If a person ought to have been suspicious, and the reason for refusing to make inquiries is because he was almost certain that doing so would confirm his suspicions, it would amount to wilful blindness.<sup>64</sup> Thirdly, wilful blindness is distinguished from recklessness; the former entails a deliberate decision not to make inquiries whereas suspicions may not be aroused in the latter.<sup>65</sup> The analysis ultimately depends on the specific facts.<sup>66</sup> However, in the context of s 6(1) of the *POHTA*, it is likely that a ringleader who owns or operates a business involving the actual or intended

<sup>55</sup> Wong "Critique", *supra* note 2 at 193, 194, 201, 202.

<sup>56</sup> [2008] 1 SLR(R) 1 (CA) [*Tan Kiam Peng*].

<sup>57</sup> Cap 185, 2008 Rev Ed Sing.

<sup>58</sup> *Tan Kiam Peng*, *supra* note 56 at para 123.

<sup>59</sup> *Ibid* at para 116.

<sup>60</sup> *Ibid* at para 116.

<sup>61</sup> *Ibid* at para 133.

<sup>62</sup> *Ibid* at para 135.

<sup>63</sup> *Ibid* at para 125.

<sup>64</sup> *Ibid* at para 126.

<sup>65</sup> *Ibid* at para 127.

<sup>66</sup> *Ibid* at para 141.

exploitation of trafficked victim would have the relevant knowledge to arouse his suspicion such that he would be almost certain that any inquiry would confirm his suspicion. The same may not be said of a runner or employee who works for such ringleaders but may not *necessarily* have the requisite knowledge of facts which would arouse that same suspicion.

## VI. FINES AND COMPENSATION

### A. Fines

While the maximum fines stipulated in ss 4 and 6 of the *POHTA* are comparable with some offences under the *Moneylenders Act*<sup>67</sup> and the *Prevention of Corruption Act*<sup>68</sup> the quantum must be appreciated in the context of the economics of the industry. An employer may ‘purchase’ a trafficked victim for as low as US\$200 to US\$4,000, and exploit the victim for unlimited profits at nominal costs. It has been estimated that exploiters earn about US\$180,000 to US\$250,000 for each woman trafficked into sex slavery.<sup>69</sup> Recently, a pimp reportedly earned \$1.08 million in 4 years from running “nine sleazy pubs”, where “an estimated 40 percent came from prostitution earnings” but was only fined \$98,000 for exerting financial pressure on his pub workers to provide sexual services. Thus, it is unlikely the stipulated fines would deter offenders on a cost-benefit analysis.

### B. Compensation

Unlike legislation in other jurisdictions,<sup>70</sup> the *POHTA* does not expressly provide for civil compensation to be afforded to the victim. However, s 359(1) of the *CPC* empowers the court to order a convicted person to compensate any person or his representatives injured in respect of his person, character or property by the offence. It is *mandatory* for the courts to consider making a compensation order.<sup>71</sup> Compensation orders are appropriate where, *inter alia*, victims “have no financial means or have other difficulties in commencing civil proceedings for damages against the offender”.<sup>72</sup> We submit that compensation orders are likely appropriate in TIP cases. Most trafficked victims have no means to commence civil claims against offenders. Victims would likely have suffered physical or psychiatric harm or been deprived

<sup>67</sup> Cap 188, 2010 Rev Ed Sing.

<sup>68</sup> Cap 241, 1993 Rev Ed Sing.

<sup>69</sup> See Gillian Caldwell, Steven Galster & Nadia Steinzor, “Crime & Servitude: An Expose of the Traffic in Women for Prostitution from the Newly Independent States” (Global Survival Network, 1997); Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Slavery* (New York: Columbia University Press, 2009) at 200, 219, 224-226.

<sup>70</sup> Eg Council of Europe Convention on Action against Trafficking in Human Beings, 16 May 2005, Council of Europe Treaty Series No 197 (entered into force 1 February 2008), art 15; US Victims of Trafficking and Violence Protection Act of 2000, Pub L No 106-386, 114 Stat 1464, 28 October 2000, §1593; Expanded Anti-Trafficking in Persons Act of 2012 (Republic Act No 10364, The Philippines), s 23(c).

<sup>71</sup> *Public Prosecutor v AOB* [2011] 2 SLR 793 (HC) [AOB] at para 27; *Public Prosecutor v Donohue Enilia* [2005] 1 SLR(R) 220 (HC) at para 9.

<sup>72</sup> *AOB*, *ibid* at paras 23, 24.

of the value of their labour. Due to their uncertain immigration status and consequential inability to work, they are unlikely to be able to stay in Singapore or have the financial means to prosecute civil claims. Further, after the criminal proceedings conclude, the victims would have to return to their home countries and accordingly are unable to remain in Singapore to continue with civil proceedings. Therefore the aforesaid policy and purpose of compensation orders will often be fulfilled.<sup>73</sup>

## VII. VICTIM PROTECTION AND ASSISTANCE

Section 19(1) of the *POHTA* grants the Director of Social Welfare power to “provide to a trafficked victim such assistance as the Director considers practicable and necessary in the particular circumstances of the case. . .” Such victim assistance may be availed to a *suspected* victim while investigations are ongoing, as the definition of a “trafficked victim” is broad enough to include an *alleged* victim of the s 3 offence. In response to concerns that assistance would only be limited to the provision of temporary shelter and counselling, it was clarified during the *Second Reading, CDS* that victim assistance under s 19 is not limited to temporary shelter and counselling services.<sup>74</sup>

During the Parliamentary debate on the Bill, the Government expressed that the following would be provided to trafficked victims: (i) shelter; (ii) food; (iii) counselling, medical care, consular support, if necessary; (iv) conversational English lessons and job skills training by volunteers; (v) choice to work under the Temporary Job Scheme or Change of Employment subject to work pass source controls (eg migrants from non-traditional source countries will not be able to work in certain industries), or in the Government-funded shelters.<sup>75</sup>

However, victim assistance is only given discretionarily, and not as a matter of right. This was a point of contention raised by the various stakeholders of the StopTraffickingSg campaign,<sup>76</sup> who have called for a more victim-centric act.<sup>77</sup> They advocate, *inter alia*, that a right to work and decent income be entrenched in the *POHTA* and immunity from prosecution for immigration-related offences so that victims would be forthcoming in reporting their cases. On the latter, however, some trafficking victims would likely lack the requisite *mens rea* to commit immigration-related offences in any event.<sup>78</sup> The arguments for victim protection must be appreciated in light of the reality that many victims would often be required to stay in Singapore to assist in investigations and prosecution, which may take as long as between six months and two years. In the meantime, their immigration status

<sup>73</sup> *Ibid* at para 19.

<sup>74</sup> *Second Reading, CDS, supra* note 24.

<sup>75</sup> Sing, Parliamentary Debates, vol 92(16), (3 November 2014) by Mr Masagos Zulkifli (Senior Minister of State for Home Affairs) and Dr Amy Khor Lean Suan (Senior Minister of State for Manpower).

<sup>76</sup> The StopTraffickingSg Campaign is a joint initiative of AWARE, Healthserve, Humanitarian Organization for Migration Economics (“HOME”), Transient Workers Count Too (“TWC2”), MARUAH and UN Women.

<sup>77</sup> StopTraffickingSg Campaign, “The Full Story of our Recommendations for the Prevention of Human Trafficking Bill Before It Passes Law” (21 October 2014), online: StopTraffickingSg Campaign Group <<http://stoptraffickingsg.wordpress.com/2014/10/21/the-full-story-of-our-recommendations-for-the-prevention-of-human-trafficking-bill-before-it-passes-law/>>.

<sup>78</sup> *Second Reading, CDS, supra* note 24.

is in limbo so they are unable to work.<sup>79</sup> They have no income while riddled with the burdens of family needs and debts. The opportunity to work for decent income is therefore not a luxury but a necessity for such victims.

### VIII. CONCLUSION

The *POHTA* is to be welcomed as a calibrated tool against the organised crime of TIP. The adoption of the *Palermo Protocol* definitions in the Act coupled with local adaptations taking into account local realities, including the fact that Singapore is a receiving or transit point for TIP,<sup>80</sup> is important in balancing international harmonization and local pragmatism. It is also laudable that the drafters have sought to extend the reach of the *POHTA* to various actors who are morally culpable for their involvement in the TIP process. Nevertheless, the *POHTA* is certainly not without its limitations or problems. Insofar as it does not purport to provide justice to victims of labour-related exploitation or oppression, Singapore should concomitantly strengthen its labour laws to address those injustices. The Act is a first step in a long journey to tackle TIP in Singapore and provide justice to “the innocent who often do not have a voice, and who are caught in a merciless web of exploitation”.<sup>81</sup> It remains to be seen how the Act will be enforced and applied in a responsible way which will achieve that noble goal.

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<sup>79</sup> Sallie Yea, “Social Visits and Special Passes: Migrant Women Exploited in Singapore’s Sex & Nightlife Entertainment Industry” (29 January 2014) at 48-50, online: UN Women <<http://unwomen-nc.org.sg/tinysource/Sallie%20Yea%20-%20Social%20Visits%20and%20Special%20Passes.pdf>>.

<sup>80</sup> *Second Reading, CDS, supra* note 24: “[S]ingapore’s definition of key TIP terms should be closely aligned with international benchmarks and standards, but should also be adapted to suit the local context.”

<sup>81</sup> *Ibid.*