
Evaluating Australia's response to all forms of trafficking: Towards rights-centered reform

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This article assesses Australia's response to human trafficking in light of the growing focus on trafficking outside the commercial sex industry. The authors propose updating Australia's response to trafficking to fully reflect Australia's international obligations to address trafficking, forced labour, and practices similar to slavery such as forced marriage.

INTRODUCTION

I lost my job in my home country when the factory I worked in closed down. A friend introduced me to a man who said I could have a job at his factory in Australia. Although it was a hard decision to leave my family, I decided to come to Australia for two or three years, to earn money. I wanted my family to have a better life. I needed to work and I couldn't get a job in my country. When I arrived in Australia, the Boss took my passport away. For more than a year, I worked every day in the factory, for 12 or 13 hours. I was not paid a wage or allowed to go outside. For the first couple of months, the Boss sent a small amount of money to my family, but then he stopped. The Boss said that if I tried to escape they would kill my family. Immigration officers visited me twice. The Boss gave me a story to tell them, about where I lived, and how much I was paid. He told me that if anyone asks me why I am sleeping at work, I should say that I drank too much and could not drive home.

Anti-Slavery Project client (2009).

The severe downturn in the world economy will push more migrants into the hands of people traffickers as they seek better lives abroad. There has been a significant shift since 2003 in the circumstances driving people smuggling and trafficking within our region

Australian Minister for Foreign Affairs, Hon Stephen Smith MP (2009).¹

The 2009 US *Trafficking in Persons Report* predicted that the global financial crisis would increase the supply and demand for all forms of human trafficking, including trafficking for labour exploitation.² While Australia's initial response to trafficking focused on trafficking for sexual exploitation, there is now a growing focus on trafficking for labour exploitation outside the sex industry.³ A decade after the *United Nations Convention against Transnational Organized Crime: Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* (Trafficking Protocol)⁴ was adopted by the United Nations, is an opportune moment to assess how well Australian laws address the complex phenomena of human trafficking. The question this article focuses upon is do anti-trafficking laws fully reflect Australia's international obligations to prohibit all forms of trafficking and can Australia improve the ability of trafficked people to access remedies within and beyond the criminal justice system?

This article assesses the trafficking and slavery offences in the *Criminal Code Act 1995* (Cth) (*Criminal Code*) against Australia's international obligations. After observing that the *Criminal Code* does not contain specific offences of forced labour or forced marriage, the authors propose a review of Australia's anti-trafficking laws. The review should consider how to improve the protection of the

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¹ Cited in US Department of State, *Trafficking in Persons Report* (2009), p 32.

² US Department of State, n 1

³ *Trafficking in Persons: The Australian Government Response January 2004-April 2009*, Inaugural Report of the Anti-People Trafficking Interdepartmental Committee (2009), p 3.

⁴ Adopted 15 Nov 2000, GA Res 55/25, UN GAOR, 55th Sess, art 3, UN Doc A/RES/55/25 (2001), 2237 UNTS 319 entered into force 25 Dec 2003.

rights of trafficked people, including the opportunity to seek compensation. The authors conclude by observing that trafficking for labour exploitation exists at the extreme end of a continuum of exploitation.⁵

While it is important to distinguish between criminal exploitation and substandard working conditions, the difference may not be immediately apparent and suspected trafficking victims may have multiple pathways to effective remedies. We support the emerging focus on ensuring trafficked people receive information and advice about their rights to seek compensation as victims of crime, pursue civil remedies, or obtain redress under the *Fair Work Act 2009* (Cth).

I. SLAVERY AND TRAFFICKING IN 21ST CENTURY AUSTRALIA

A. Extent of trafficking to Australia

Australia is a destination country for victims of trafficking.⁶ So far, most of the reported cases of trafficking to Australia have involved the trafficking of women from South-East Asia for sexual exploitation in the sex industry. When Australia's response to trafficking was initially formulated in 2003, attention focused upon trafficking into the commercial sex industry (a pattern largely reflected throughout the developed world).⁷ However, Australian authorities are now paying greater attention to trafficking outside the sex industry.⁸ The 2009 US *Trafficking in Persons Report* reported that as well as being a destination country for women trafficked into the sex industry from Southeast Asia, South Korea, Taiwan, the People's Republic of China (PRC):

some men and women from several Pacific islands, India, the PRC, South Korea, the Philippines, and Ireland are fraudulently recruited to work temporarily in Australia, but subsequently are subjected to conditions of forced labor, including confiscation of travel documents, confinement, and threats of serious harm.⁹

Trafficking is a clandestine activity and, as the UN Office on Drugs and Crime (UNODC) has observed, reliable statistics are elusive.¹⁰ Global estimates of the number of people who are trafficked across borders each year are contested and vary immensely from 700,000 to 4 million.¹¹ While exploitative practices such as forced labour, slavery and practices similar to slavery often occur as a result of trafficking, this is not always the case.¹² The International Labour Organization (ILO) estimates that at any one time there are 2.4 million victims of trafficking worldwide and 12.4 million victims of forced labour.¹³

The number of people trafficked to Australia each year is not known and nor is the number of people who are subjected to exploitative practices such as slavery, and forced labour. However, statistics are available about victims of trafficking who have come into contact with law enforcement authorities. Since 2004, 131 suspected victims of trafficking have accessed the government funded Victim Support Program, the vast majority of whom were trafficked for exploitation in the sex

⁵ International Labour Organization (ILO), Special Action Program to Combat Forced Labour, *Human Trafficking and Forced Labour Exploitation: Guidelines for Legislation and Law Enforcement* (2005) p 39; ILO, *The Cost of Coercion* (2009) p 9.

⁶ Trafficking in Persons, n 3, p 7.

⁷ UN Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Persons* (2009) p 6.

⁸ See, generally, *Trafficking in Persons*, n 3.

⁹ US Department of State, n 1, p 67.

¹⁰ UNODC, *Trafficking in Persons, Global Patterns* (2006) p 43; UNODC, n 7, p 18.

¹¹ Trafficking in Persons, n 3, p 4.

¹² See Hathaway JC, "The Human Rights Quagmire of 'Human Trafficking'" (2008) 49(1) *Virginia Journal of International Law* 1; cf Gallagher AT, "Human Rights and Human Trafficking: Quagmire or Firm Ground?" (2009) 49(4) *Virginia Journal of International Law* 789 at 817.

¹³ ILO, *A Global Alliance Against Forced Labour*, Global Report under the follow-up to the ILO, *Declaration on Fundamental Principles and Rights at Work* (2005) pp 6, 15-16. Of these 2.4 million victims, the ILO estimated about 43% of all trafficked victims are exploited in the commercial sex industry while 32% are in other forms of economic exploitation and 25% in a combination of both labour and sexual exploitation. However, there are still "significant gaps in understanding the quantitative dimensions of forced labour": ILO, *Cost of Coercion*, n 5, p 6.

industry.¹⁴ There have been 270 police investigations into allegations of trafficking and related offences and seven convictions; 58% of investigations concerned trafficking for sexual exploitation; the remainder were related to other forms of labour trafficking.¹⁵ Between 2004 and 2009, there were no credible allegations of child trafficking.¹⁶ However, the case of a 13-year-old girl, who was trafficked to a Sydney brothel in 1995, provides an earlier example of child trafficking.¹⁷ So far, there have been no reported cases of trafficking of Australian citizens or trafficking within Australian borders.

The Australian Government has reported that so far more than 70% of suspected victims of trafficking have been willing to assist police.¹⁸ From 1 January 2004 to 30 April 2009, 119 Bridging Visa F, 73 Criminal Justice Stay visas and 17 Witness Protection (Trafficking) (Temporary) visas have been granted under the trafficking visa framework. In June 2009 the first five permanent protection visas were granted to people who held the Witness Protection (Temporary) visa. There are a small but significant number of trafficked people who have been granted permanent residence as refugees;¹⁹ others have obtained a visa through the exercise of a personal discretion by the Minister for Immigration.²⁰ The possibility that trafficked people may be able to seek, and obtain, permanent protection as refugees underscores the importance of ensuring every suspected trafficked victim obtains access to legal advice, regardless of whether that person is willing or able to assist police. If a trafficked person has dependent children and/or other immediate family members they may need legal advice about opportunities for family reunion.

B. Nature of trafficking to Australia

The first step toward protecting the human rights of people who have been trafficked to Australia is identifying suspected victims. Failing to identify a trafficked person correctly “is likely to result in a further denial of that person’s rights”.²¹ Trafficking to Australia occurs for the purpose of exploiting the victim in Australia through slavery, forced labour, sexual servitude, debt bondage or other forms of exploitation. However, until this exploitation has occurred sometimes it may be difficult to tell the difference between trafficking and people smuggling.²² Trafficking and smuggling are separately defined by international instruments but, as Anne Gallagher has observed “no legal definition of trafficking, no matter how carefully crafted, can every be expected to respond fully to the shades and complexities of the real world ... an individual can be smuggled one day and trafficked the next”.²³

The challenge of identification is compounded by the fact that very few of the cases that have been uncovered by police have reflected “the traditional stereotype of ‘slavery’”.²⁴ Rather, it is the more subtle forms control such as “debt, fear of violence, psychological coercion and control” that

¹⁴ Trafficking in Persons, n 3, p 30.

¹⁵ Trafficking in Persons, n 3, p 19.

¹⁶ Trafficking in Persons, n 3, p 26.

¹⁷ Craig N, “Sex slave victim wins abuse claim”, *The Age*, 29 May 2007; see also Lewis J, “Out of the Shadows” (2007)(Feb) *Law Soc J* 17.

¹⁸ Trafficking in Persons, n 3, p 20.

¹⁹ See, eg, *VXAJ v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 198 FLR 455; [2006] FMCA 234.

²⁰ *Migration Act 1958* (Cth), s 351 or s 417.

²¹ UN Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 20 May 2002, E/2002/68/Add 1.

²² Gallagher A and Holmes P, “Developing an effective criminal justice response to human trafficking: Lessons from the front line” (2008) 18(3) *International Criminal Justice Review* 318.

²³ Gallagher, n 12 at 817.

²⁴ David F, “Trafficking for Sexual Purposes” in Australian Institute of Criminology (AIC), *Research and Public Policy Series*, No 95, p 39; see also David F, “Prosecuting Trafficking in Persons: Known issues, emerging response” in AIC, *Trends and Issues in Criminal Justice*, No 358, June 2008.

have been central to identifying the existence of slavery in Australia.²⁵ Suspected victims of trafficking and slavery who have been identified by the Australian Federal Police (AFP) may not be kept under lock and key “kidnapped from their home villages, held at gunpoint or chained to beds”.²⁶ Trafficked people may be effectively controlled through the confiscation of travel documents, threats of violence, fear of being reported to authorities and social, cultural and physical isolation. While some trafficked people may be working in Australia without a valid visa, others are lawfully entitled to work or hold other types of visas such as student or holiday visas. Traffickers may retain control over their victims by frightening them about the consequences of being identified by immigration officials, withholding personal identity documents or threatening to harm either the trafficked person or their family.²⁷

The fact that the nature of trafficking and slavery in Australia rarely corresponds with stereotypical images of slavery heightens the risk of missing opportunities for detection. Without adequate training and awareness raising targeting government officials, health workers, NGOs and unions who are likely to come into contact with trafficked people, trafficked people may not be identified. Australia's initial response to trafficking focused on sex trafficking and very little is known about the nature and extent of other forms of trafficking in Australia. Identifying sectors of the workforce that are prone to trafficking and exploitation is vital so that victim identification procedures can be improved and clear referral pathways can be established between unions, anti-trafficking NGOs, and government agencies. Many migrant workers may be unaware of their legal rights and this can increase their vulnerability to exploitation in Australia.

C. Australia's response to trafficking

Before 2003, traffickers had effective immunity from Australian laws while legal and immigration processes focused primarily on identifying unlawful non-citizens in the absence of adequate processes to safeguard the rights of trafficked people.²⁸ A trafficked person without a visa or in breach of the conditions of the visa was at risk of being placed in immigration detention and removed from Australia “as soon as practicable”.²⁹ Australia's response to trafficking began to improve in 2003 when the Australian Government announced dedicated funding for anti-trafficking measures. In 2004, the Australian Government launched its Action Plan to Eradicate Trafficking in Persons,³⁰ and in 2005, new offences that criminalised trafficking in persons (*Criminal Code*, s 271.2), trafficking in children (s 271.4), domestic trafficking in persons (s 271.5) and debt bondage arrangements (s 271.8) were introduced into the *Criminal Code*. Shortly after the introduction of the new criminal laws, Australia ratified the Trafficking Protocol.

Australia's anti-trafficking strategy has four key elements: prevention, detection and investigation, criminal prosecution, and victim support and rehabilitation. Although Australia's response to trafficking has been criticised for focusing on law enforcement at the expense of the rights of trafficked people,³¹ recent reforms to the visa framework for trafficked people reflect a greater willingness to develop policies that are responsive to the needs of trafficking people. The original visa framework for trafficked people was established in 2004 to enable suspected victims and witnesses of trafficking to

²⁵ David, n 24.

²⁶ David, n 24.

²⁷ Trafficking in Persons, n 3, p 1.

²⁸ See Carrington K and Hearn J, *Trafficking and the Sex Industry: From Impunity to Protection*, Current Issues Brief No 28 2002-03, Australian Parliamentary Library.

²⁹ *Migration Act 1958* (Cth), s 198.

³⁰ To date the Australian Government has allocated \$58.3 million to anti-trafficking measures in Australia and the Asia Pacific Region. More information about Australia's response to trafficking can be found in *Trafficking in Persons*, n 3. See generally Schloenhardt A, Beirne G and Corsbie T, “Human Trafficking and Sexual Servitude in Australia” (2009) 32 UNSWLJ 27.

³¹ See Dorevitch and Foster, “Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law” (2008) 9 *Melbourne Journal of International Law* 1; Pearson E, “Australia” in *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007, Global Alliance Against Trafficking in Women); Burn J, Blay B and Simmons F, “Combating Human Trafficking: Australia's Response to Modern Day Slavery” (2005) 79 ALJ 543; Burn J and Simmons F, “Trafficking and Slavery in Australia: An evaluation of victim support strategies” (2006) 15 *Asian and Pacific Migration Journal* 4553; Burn J and Simmons F, (2005) “Rewarding

remain in Australia, assist police investigation and prosecutions and access the government funded Support for Victims of Trafficking Program (SVPTP).³² The framework consisted of four visas: the Bridging F visa, the Criminal Justice Stay visa, the Witness Protection (Trafficking) (Temporary) visa and the Witness Protection (Permanent) visa. Bridging visas were only available to people who were assessed by the AFP as being “of interest” to police. Criminal justice stay visas were offered to those who could provide ongoing assistance to police investigations or prosecutions. Because the SVPTP was only available to people trafficked to Australia who were granted a visa under the people trafficking visa framework this effectively made victim support contingent upon a trafficked person being of interest or assistance to police.

In mid 2009, the Australian Government reformed the framework of visas and victim support for trafficked people. As the authors have discussed elsewhere, the reforms, which came into effect in July 2009, simplified a complex framework, provided victims and their immediate family members with greater certainty about their immigration status, facilitated family reunion, and improved access to the SVPTP.³³ Under the new framework, any person in Australia who is identified by police as a suspected victim of “human trafficking” can obtain a Bridging F visa (BFV) irrespective of whether they are willing or able to assist police. A BFV can now last for up to 45 days instead of 30 days and a second BFV can be granted if necessary. Temporary witness protection visas have been abolished in favour of a one-stage process offering trafficked people and their immediate family members a permanent witness protection visa. Eligibility for the SVPTP is no longer contingent on the visa holder holding a visa from the trafficking visa framework. This means a person who holds another valid visa (for example, a student visa) can access limited victim support.

The reforms to the visa framework were the outcome of close consultation between government agencies and NGOs. In 2008, the first National Roundtable on People Trafficking was convened by the Minister for Home Affairs. The first Roundtable provided a forum for NGOs to identify areas for priority action, namely the reform of the visa framework, and the provision of culturally appropriate information and support services to trafficked people.³⁴ After the 2008 Roundtable, community organisations were funded to raise awareness of trafficking in Australia.³⁵ At the 2009 Roundtable participants focused upon the importance of developing communication strategies to focus on promoting awareness of all forms of trafficking. To date, community awareness campaigns to raise awareness of trafficking have been targeted at those working in or with the sex industry and their clients. The development of targeted campaigns to raise awareness of trafficking outside the sex industry will help focus attention upon the broader issue of labour trafficking.

II. THE GROWING FOCUS ON LABOUR TRAFFICKING

In July 2009, the Australian Government foreshadowed that “over the next year, there will be an increased focus on issues related to trafficking for labour exploitation outside the commercial sex industry, including enhanced engagement with peak employer and industry organizations and unions”.³⁶ In the last two years the Fair Work Ombudsman, and the Department of Education, Employment and Workplace Relations have become more involved in the implementation of Australia’s anti-trafficking strategy. While initially the issue of sex trafficking has monopolised the attention of legislators, media, and courts, now the focus is slowly shifting to labour trafficking and the

witnesses, ignoring victims: An evaluation of the new trafficking visa framework” (2005) 24 *Immigration Review* 6; Segrave M, “Surely Something is better than nothing? The Australian response to the trafficking of women into sexual servitude in Australia” (2004) 16(1) *Current Issues in Criminal Justice*.

³² *Migration Amendment Regulations 2003* (No 363).

³³ Burn J and Simmons F, “Prioritising Protection: Changes to the visa framework for trafficked people” (2009) *Immigration Review* 42 (arguing that a victim-centred approach is essential to create relationships of trust between trafficked people and law enforcement).

³⁴ National Roundtable on People Trafficking, *Statement of Outcomes*, October 2008, http://www.ag.gov.au/www/agd/agd.nsf/Page/PeopleTrafficking_PeopleTrafficking.

³⁵ US Department of State, n 1, pp 66-67.

³⁶ *Trafficking in Persons*, n 3, p 43.

broader issue of exploitation.³⁷ The formal definitions of the different types of labour exploitation are found in international conventions. The term “labour trafficking” itself is not defined in these instruments but can be used to describe trafficking that can result in a range of different types of labour exploitation including “trafficking the end purpose of which involves forced labour on fishing vessels, the enslavement of migrant domestic workers, bonded labour in agricultural settings, and sweatshop labour”.³⁸

The growing focus on labour trafficking is both timely and necessary. While trafficking can occur and across and *within* state borders,³⁹ migrant workers are especially vulnerable to trafficking and exploitation.⁴⁰ In 2009, the International Organisations for Migration forecast that the global financial crisis would encourage growth in informal labour markets as employers make savings, unemployed migrants in destination countries overstay without a valid visa and regular labour migration decreases.⁴¹ Migrant workers may be unfamiliar with Australian labour laws, criminal prohibitions, appeal mechanisms, and avenues for seeking legal advice and assistance. Some will take risks to seize any opportunity to change their and their families’ circumstances. Some will have incurred significant debts to off-shore recruiters. Some will be hoping to settle permanently in Australia and this desire may leave them particularly vulnerable to exploitation by employers who can determine whether or not they can stay in Australia.⁴²

The line between labour trafficking and substandard working conditions may not always be immediately clear. Trafficking for labour exploitation occurs at the extreme end of a spectrum of exploitative practices.⁴³ At one end of this spectrum are extreme forms of exploitation that breach fundamental human rights such as slavery and forced labour. At the other is freely chosen employment. In between these extremes, “there are a variety of employment relationships in which the element of free choice by the worker begins at least to be mitigated or constrained, and can eventually be cast into doubt”.⁴⁴ In cases where the evidence is insufficient to support a criminal prosecution efficient and timely referral systems must be maintained between AFP and workplace authorities such as the Fair Work Ombudsman. While courts must decide whether the facts in a specific case amount to a criminal violation, even where a suspected case of trafficking does not result in a successful prosecution, it may involve violations of Australia’s workplace relations laws. Empowering migrant workers to exercise their labour rights breaks the pattern of dependency of vulnerable workers upon abusive employers and helps prevent the conditions in which trafficking and exploitation flourish. Thus, for suspected victims of trafficking there may be multiple pathways to legal remedies; the alleged victim in an unsuccessful criminal prosecution might have a successful civil claim. As well as

³⁷ For example, in 2009 the Australian Institute of Criminology and the Anti-Slavery Project held forums on labour trafficking.

³⁸ AIC, “Labour Trafficking: key concepts and issues”, *Transnational Crime Brief*, No 3, 2009. It is noted that trafficking for the purpose of exploitation in the commercial sex industry can be characterised as a form of a trafficking for labour exploitation.

³⁹ UNODC, *Legislative Guide to the Implementation of the Trafficking Protocol* (2004).

⁴⁰ ILO, *International Labour Migration: A Rights Based Approach* (2010) 2, p 113.

⁴¹ International Organisations for Migration, *The impact of the global economic crisis on migrants and migration* (2009), <http://www.unescap.org/esid/Meetings/Migration09/IOM.pdf>.

⁴² Reports about the exploitation of temporary migrant workers led to an independent review of whether the Subclass 457 – Business (Long Stay) visa program was vulnerable to abuse by employers. This review identified many of the practices which can leave people vulnerable to exploitation such as deception by offshore migration agents, passing on immigration costs to visa holders, and charging exorbitant fees for migration advice: see Deegan B, *Visa Subclass 457 Integrity Review*, Department of Immigration and Citizenship, October 2008. It is noted that the reported cases of the abuse of the 457 visa program did not lead to prosecutions under the slavery or trafficking provisions of the *Criminal Code*. The *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth) introduced new legal obligations for employers who want to sponsor temporary workers under the 457 visa program.

⁴³ ILO, *Human Trafficking*, n 5, p 39.

⁴⁴ ILO, *Cost of Coercion*, n 5, p 9.

criminal laws prohibiting trafficking, trafficking may also contravene civil standards (for example, industrial laws that provide for minimum standards of pay or federal anti-discrimination laws).⁴⁵

Australia does not have a forced labour offence but, as we discuss below, factual situations that fall within the international definition of forced labour may fall within the slavery provisions in the *Criminal Code*. However, so far cases of labour exploitation outside the sex industry have generally been addressed as violations of labour laws leaving scholars to question why exploitation in the sex industry leads to criminal charges and exploitation in other industries leads to civil penalties.⁴⁶ To date, there have only been two prosecutions for slavery outside the sex industry: the first, an attempt to prosecute the owner of a restaurant for slavery and trafficking, failed; the second, which involved allegations a woman was enslaved as a domestic servant, ultimately resulted in the conviction of the defendants, who were husband and wife, of slavery offences.

In the first case, a restaurant owner, Mr Rasalingam, allegedly forced the complainant to work 14 hours a day, seven days a week for 40 consecutive days without pay and withholding his passport from him. A jury acquitted Mr Rasalingam of the offence of trafficking a person⁴⁷ as well as a second charge of intentionally exercising control over a slave.⁴⁸ After the conclusion of the criminal trial, the federal Workplace Ombudsman (now rebadged as the Fair Work Ombudsman) successfully brought proceedings against the company owned by Mr Rasalingam for failing to meet minimum standards of pay and workplace entitlements.⁴⁹ Cameron FM decided that the respondent's conduct was in breach of eight Award provisions including the failure to meet minimum standards of pay and entitlements within the required timeframe. The case highlights the importance of effective referral pathways between the Department of Immigration and Citizenship, the AFP and the Fair Work Ombudsman.⁵⁰

In the second case Melita and Zoltan Kovacs brought a young woman from the Philippines to the Australia after arranging a sham marriage. When the young woman arrived in Australia, the prosecution contended she was effectively enslaved and used to provide slave labour in the Kovacs' home and their takeaway shop. The offences were alleged to have been committed prior to the introduction of trafficking offences in 2005. The Kovacs were charged with the offences of possessing and using a slave,⁵¹ as well as organising a sham marriage.⁵² In 2007, a jury found both Melita and Zoltan Kovacs guilty of possessing and using a slave and organising a sham marriage. However, in 2008 the Kovacs' convictions for slavery offences were quashed and a retrial was ordered.⁵³ At a retrial in February 2010 the Kovacs were convicted of slavery offences.⁵⁴

⁴⁵ The *Migration Amendment (Employer Sanctions) Act 2007* (Cth) has also introduced offences targeting employers who exploit unlawful non-citizens by criminalising knowingly or recklessly allowing an unlawful non-citizen to work or to allow a non-citizen to work in breach of his/her visa conditions. Each of the four offences will be deemed an aggravated offence if the worker is *exploited* and the accused either had knowledge of this fact, or was reckless to the fact. The term "exploited" is defined to mean the condition of *forced labour*, sexual servitude, or slavery: *Migration Act 1958* (Cth), s 245AH. Forced labour has the same meaning as it has in s 73.2 of the *Criminal Code*. To date, one case has been prosecuted under these provisions: *Trafficking in Persons*, n 3, p 22.

⁴⁶ See Cullen M and McSherry B, "Without Sex: Slavery, trafficking in persons and the exploitation of labour in Australia" (2009) 34(1) *Alternative Law Journal* 4 at 5.

⁴⁷ *Criminal Code* (Cth), s 271.2(1B).

⁴⁸ *Criminal Code* (Cth), s 270.3(1)(d). Rasalingam was convicted of the less serious offence of misleading a Commonwealth official in the immigration process contrary to *Criminal Code*, s 135.1.

⁴⁹ *Fryer v Yoga Tandoori House* [2008] FMCA 288.

⁵⁰ The Fair Work Ombudsman may commence court proceedings against employers who contravene the civil penalty provisions of the federal workplace laws. The new system created by the *Fair Work Act 2009* (Cth) contains 10 national employment standards that now apply to all federal employees.

⁵¹ Contrary to *Criminal Code*, s 270.3(1)(a).

⁵² Both Melita and Zoltan Kovacs were convicted of arranging a marriage for visa purposes contrary to *Migration Act 1958* (Cth), s 240. Zoltan Kovacs was also convicted of sexual assault under the *Criminal Code 1899* (Qld)

⁵³ The retrial was ordered in *R v Kovacs* [2009] 2 Qd R 51; (2008) 192 A Crim R 345.

⁵⁴ Schwarten E, "Couple jailed for sex slavery in Cains Supreme Court", *Courier Mail*, 18 February 2010.

III. INTERNATIONAL LEGAL FRAMEWORK

Australia's obligations to combat human trafficking, prohibit exploitation, and protect trafficked people must be understood within a framework of international instruments ratified by Australia. The development of national anti-trafficking laws has been shaped by the Trafficking Protocol, which provides the first international definition of trafficking. Article 3 defines trafficking in persons as

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Under the Trafficking Protocol the consent of adult victims of trafficking is irrelevant if it was obtained by using force, threats, coercion or abusing a position of power or vulnerability. The recruitment, transportation, harbouring or receipt of children by any means for the purpose of exploitation will constitute trafficking, regardless of whether consent is present. As the travaux préparatoires of the Trafficking Protocol make clear, the concept of an abuse of position of power or a position of vulnerability makes it clear that the concept of coercion encompasses nonviolent methods that leave a person with no reasonable alternative but to submit to the exploitation.⁵⁵

Article 3(a) goes on to explain the term "exploitation" includes, at a *minimum*, "the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs". This definition of exploitation has novel aspects (the terms "sexual exploitation" and "exploitation of prostitution of others" are not defined in the Trafficking Protocol or by other international laws) but most of the types of exploitation it identifies are defined and prohibited by international instruments that pre-date the Trafficking Protocol. The internationally accepted definition of slavery is still found in the *International Convention to Suppress the Slave Trade and Slavery 1926* (1926 Slavery Convention),⁵⁶ which was augmented by the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956* (1956 Supplementary Convention),⁵⁷ which prohibits practices similar to slavery including debt bondage and child labour. Article 2 of the ILO (No 29) *Forced or Compulsory Labour Convention 1930*,⁵⁸ defines and prohibits forced labour, while Art 8 of the *International Covenant on Civil and Political Rights* (ICCPR)⁵⁹ prohibits slavery, servitude and forced and compulsory labour.

The Trafficking Protocol does not explicitly require that states introduce laws prohibiting exploitation but states do have obligations under other international instruments to criminalise forced labour, slavery and practices similar to slavery.⁶⁰ Moreover, an effective legislative response to trafficking requires national anti-trafficking laws to precisely define what constitutes exploitation.⁶¹ Therefore the UNODC *International Framework for Action to Implement the Trafficking in Persons Protocol* advises that effective anti-trafficking laws should "address all the forms of exploitation with reference to international human rights standards including fundamental principles and rights at work such as the abolition of forced labour and child labour".⁶²

⁵⁵ The "travaux préparatoires" state that the phrase "abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved": UNGA, *Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (UN Doc A/55/383/Add1, 3) Nov 2000, Interpretative Note, 63.

⁵⁶ Opened for signature 25 September 1926, 212 UNTS 17 (entered into force 18 June 1927), Art 1(1).

⁵⁷ Article 7(a).

⁵⁸ Opened for signature 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932).

⁵⁹ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 except Art 41 which came into force 28 March 1979).

⁶⁰ UNODC, *Model Law Against Trafficking in Persons* (2009), pp 35-36.

⁶¹ UNODC, *Model Law Against Trafficking in Persons* (2009), pp 35-36.

⁶² UNODC, *International Framework for Action to Implement the Trafficking Protocol* (2009), p 18.

The UN Special Rapporteur on Trafficking in Persons has observed that while the issue of trafficking “can be considered from a number of different perspectives, including human rights, crime control, criminal justice, migration and labour [a]n integrated approach that places human rights at the core of all efforts is most desirable”.⁶³ Thus, while the Trafficking Protocol has been criticised for imposing inadequate obligations upon state parties to protect rights of trafficked people,⁶⁴ these gaps in the protection can be filled by according trafficked people the full protection of rights recognised in international human rights instruments and labour treaties.⁶⁵ Along with the ICCPR, the *International Covenant on Economic Social and Cultural Rights*,⁶⁶ and international treaties specifically prohibiting forced labour,⁶⁷ and torture,⁶⁸ and protecting the rights of women,⁶⁹ children,⁷⁰ and prohibiting discrimination on the grounds of race⁷¹ and disability⁷² these instruments form the normative international framework against which Australia’s response to trafficking must be assessed.

IV. IS AUSTRALIA COVERED? DEFINING TRAFFICKING, SLAVERY, FORCED LABOUR AND PRACTICES SIMILAR TO SLAVERY

This Part focuses on the question of how to define and prohibit all forms of trafficking and exploitation in a manner that fully reflects Australia’s international legal obligations. As discussed above, international instruments prohibiting trafficking, forced labour and practices similar to slavery should inform the design and interpretation of domestic laws that define and criminalise trafficking and the types of exploitation that can result from trafficking including slavery, debt bondage, and sexual servitude. The introduction of the Commonwealth offences of trafficking and slavery was an exercise of the Commonwealth’s constitutional power to legislate with respect to “external affairs”⁷³ and the drafters of these provisions were required to ensure the scope of the offences was appropriate and adapted to implement Australia’s international obligations. As a matter of statutory interpretation the

⁶³ UN Special Rapporteur on Trafficking in Persons, especially women and children, (A/HRC/10/16),(2009), [15], [44] (observing trafficking is related to a range of fundamental rights including the right to freedom from discrimination, right to life and security of person, right to human dignity, freedom from torture, inhuman or degrading treatment, right to recognition as a person before the law, right to freedom from arbitrary detention, right to access to justice, legal aid and representation, right to equal protection before the law, right to compensation and effective remedy, right to non-conditional assistance, right to privacy, right to freedom of movement, right to information and freedom of expression, right to freedom of association, right to be heard, right not to be held in slavery and freedom from forced or compulsory labour, right to just and favourable conditions of employment, right to remuneration, right to equal pay for equal work, right to marry, right to health, right to bodily integrity, right to reproductive self-determination, right to gender equality).

⁶⁴ Gallagher, n 12 at 793. Specific guidance on using human rights principles to protect the rights of trafficked people can be found in the UN Principles and Guidelines on Human Rights and Human Trafficking.

⁶⁵ Gallagher, n 12 at 793.

⁶⁶ Opened for signature 16 December 1966, 993 UNTS 3, Art 1 (entered into force 3 January 1976)

⁶⁷ See ILO Convention No 29 on Forced and Compulsory Labour; ILO Convention No 105 on the Abolition of Forced Labour; ILO Convention No 182 on the Worst Forms of Child Labour.

⁶⁸ *United Nations Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

⁶⁹ *United Nations Convention on the Elimination of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

⁷⁰ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁷¹ *The International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

⁷² *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007 (entered into force 3 May 2008).

⁷³ *Australian Constitution*, s 51xxix.

meaning of domestic legislation that gives effect to international conventions must be ascertained by reference to the relevant provisions of that convention.⁷⁴

A. Trafficking Protocol

The Trafficking Protocol is the first international instrument to define trafficking. The definition of trafficking in persons, which is quoted in full above, has three critical elements. There must be an *action* which involves recruitment, transfer, transfer, harboring or receipt of persons (the *first element*); by *means* of the threat or use of force, coercion, deception, the abuse of power or a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another (the *second element*); for the *purpose* of exploitation (the *third element*). As we discussed above, exploitation includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, and the removal of organs. As the Trafficking Protocol does not define these terms, the meaning of phrases such as “practices similar to slavery”, “slavery” and “forced labour” must be determined by reference to other international instruments.

In 2005, eight trafficking offences were introduced to implement Australia's obligations under the Trafficking Protocol. These offences prohibit trafficking in persons to and from Australia by means of force or use of threats⁷⁵ or deception⁷⁶, or in circumstances where a person is reckless as to whether another person will be exploited regardless of the means used.⁷⁷ An offence will occur where the trafficker deceives their victim about the fact that this or entry or exit will involve the provision of sexual services, exploitation, debt bondage or the confiscation of the other person's travel identity documents.⁷⁸ An offence will also occur in circumstances where there is an arrangement for the victim to provide sexual services and the victim has been deceived by the trafficker about the nature of the services to be provided, the extent to which victim is free to leave their residence or the place where he or she provides sexual services, the extent to which the person is free to cease providing sexual services, and the amount or existence of any debt owed or claimed to be owed.⁷⁹ There are separate offences of trafficking in children⁸⁰ and domestic trafficking within Australia.⁸¹ Unlike the offences prohibiting the trafficking of adults, establishing the use of force, threats or deception is never necessary to prove a child has been trafficked.

The trafficking offences in the *Criminal Code* do not fully adopt the language of Trafficking Protocol. Significantly, the description of the circumstances in which the consent of the trafficked person will be annulled does not explicitly include trafficking which occurs by means of: “other forms of coercion”; “the abuse of power or of a position of vulnerability”; or “the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”.⁸² The

⁷⁴ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 264-265 (Brennan J); *Gerhardy v Brown* (1985) 159 CLR 70 at 124 (Brennan J); *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 at 303 (McHugh J), 332-333 (Kirby J). It has been held that approach is not confined in its application to ambiguous statutory provisions: *X v Commonwealth* (1999) 200 CLR 177 at 223 (Kirby J); *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 at 333 and fnn 168-169 (Kirby J).

⁷⁵ *Criminal Code 1995* (Cth), s 271.2(1).

⁷⁶ *Criminal Code 1995* (Cth), ss 271.2(2), 271.2(2B).

⁷⁷ *Criminal Code 1995* (Cth), s 271(1B).

⁷⁸ *Criminal Code 1995* (Cth), s 271.2(2A).

⁷⁹ *Criminal Code 1995* (Cth), s 271.2(2B).

⁸⁰ *Criminal Code 1995* (Cth), s 271.4.

⁸¹ *Criminal Code 1995* (Cth), s 271.5

⁸² This can be contrasted to the offence of debt bondage (s 271.8(2) which makes it clear that in determining whether one person caused another person to enter into a condition of debt bondage a court or jury can take into account the differential power relationship between the alleged perpetrator and the alleged victim including their economic relationship, the alleged victim's ability to speak, write and understand English or the language in which the deception or inducement occurred and the extent of the alleged victims social and physical dependence on the accused.

Criminal Code defines “threat” broadly to capture any threat of detrimental action⁸³ that cannot be reasonably justified. However, the omission of the term “abuse of a position of vulnerability” from the *Criminal Code* should be reconsidered in light of the importance of clarifying how a trafficker can exercise control by preying upon the special vulnerabilities of his or her victim. The UNODC *Model Law Against Trafficking in Persons* recommends that laws criminalising trafficking should specifically define abuse of a position of vulnerability as referring to any situation in which the person involved believes he or she has no real or acceptable alternative but to submit or taking advantage of the vulnerable position a person is placed in by virtue of a range of factors including (but not limited to) having entered a country illegally or without proper documentation, reduced capacity to form judgments by virtue of being a child, illness, infirmity or a physical disability, pregnancy, promises or giving of sums of money or other advantages to those having authority over a person, or being in a precarious position from the standpoint of social survival.⁸⁴

The developing international jurisprudence on the meaning of “coercion” can also provide helpful guidance on how to identify the very subtle forms of control that are exercised by traffickers.⁸⁵ In the United States, for example, recent reforms to the statutory definition of trafficking have affirmed the approach taken by superior courts in the United States, namely that the concept of coercion encompasses “any harm, whether physical or non-physical, including psychological, financial, or reputational harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labour or services in order to avoid incurring that harm”.⁸⁶

B. Prohibiting slavery

The right to be free from slavery is one of the “obligations erga omnes arising out of human rights law”.⁸⁷ The freedom from slavery and servitude is an absolute right that cannot be restricted in any circumstances.⁸⁸ The internationally accepted definition of slavery is still found in the 1926 Slavery Convention which defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”.⁸⁹ The fact that the definition fails to refer to the free will or coercion reflects the assumption that slavery is an inherently coercive state: a person simply cannot consent to slavery. The challenge is identifying what constitutes a power attaching to the right of ownership, when, as UNODC has observed, “there is no settled exhaustive list of all the rights of ownership”.⁹⁰

⁸³ *Criminal Code 1995* (Cth), s 271.1 defines threat as (a) a threat of force; or (b) a threat to cause a person’s removal from Australia; or (c) a threat of any other detrimental action; unless there are reasonable grounds for the threat of that action.

⁸⁴ UNODC, *Model Law Against Trafficking in Persons* (2009).

⁸⁵ See eg. *United States v Bradley* 390 F 3D 145 (1st Cir 2004). This followed the introduction of a definition of coercion by the *Trafficking Victims Protection Act 2000* (US) (TPVA). The definition of coercion was clarified by the *Trafficking Victims Protection Reauthorization Act 2008* (US).

⁸⁶ 18 USC 1589(c)(2), 2008 TPVRA. See further Doyle C, *The William Wilberforce Trafficking Victims Reauthorization Act of 2008* (PL 110-457), Congressional Research Service, Report for Congress, 29 January 2009.

⁸⁷ *Barcelona Traction, Light & Power Co Ltd (Belgium v Spain)* Judgment of 5 February 1971, ICJ Reports 1970, 32. The practice of slavery has been prohibited by many international instruments including the 1926 Slavery Convention; the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956*, opened for signature 7 September 1956, 266 UNTS 3 (entered into force 6 January 1958); *Universal Declaration of Human Rights* GA res 217A (III), UN Doc A/810 at 71 (1948); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 except Art 41 which came into force 28 March 1979); *Rome Statute of the International Criminal Court*, opened for signature 17 June 1998, 2187 UNTS 90 (entered into force 1 July 2002). See M Cherif Bassiouni, “Enslavement as an International Crime” (1991) 23 *New York University Journal of International Law and Politics* 445 at 467.

⁸⁸ ICCPR, Art 4(2).

⁸⁹ Art 1(1). The language of Art 1(1) has “proved to be abiding” and is now accepted to define slavery at international customary law: UN Security Council, International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Kunarac, Kovac and Vukovic* (IT-96-23 & IT-96-23/I-T) Judgment, 22 Feb 2001, [519].

⁹⁰ See further UNODC, *Model Law Against Trafficking in Persons*, (2009).

In 1999 the Commonwealth introduced offences of slavery, sexual servitude and deceptive recruiting for sexual services.⁹¹ Section 270.3 of the *Criminal Code* makes it an offence to possess a slave or exercise over a slave any other powers attaching to the right of ownership,⁹² engage in slave trading,⁹³ enter into a commercial transaction involving a slave,⁹⁴ and exercise control or direction over, or provide finance for a commercial transaction involving a slave or an act of slave trading.⁹⁵ These offences are the most serious in a hierarchy of offences in Divs 270-271 of the *Criminal Code* and carry a maximum penalty of 25 years imprisonment. The word “slave” takes its meaning from the definition of slavery in s 270.1. This definition states slavery is “the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person”.

The question of what it means to be a slave was considered in the *R v Tang* (2008) 237 CLR 1; 82 ALJR 1334,⁹⁶ where the High Court considered how to distinguish between slavery and harsh and exploitative employment arrangements. In 2006 a jury convicted a Melbourne brothel owner, Wei Tang, of five offences of possessing a slave and five offences of exercising a power of ownership over a slave. Wei Tang owned a licensed brothel and the five women who she was alleged to have used as slaves all travelled from Thailand to Australia with the intention of working in the sex industry. Ms Tang had a 70% share in a “syndicate” which “purchased” four of the women for \$20,000 each. The fifth woman was brought to Australia by other “owners” before being moved to the brothel owned by Ms Tang. Each woman was informed she had a “debt” to the “syndicate” of \$45,000. Customers paid \$110 for the services of each woman. Ms Tang kept the majority of the profits with the remainder shared between the other syndicate members. The women, who had limited English and little money, received nothing. Their passports and return airline tickets were confiscated. Their visas were fraudulently obtained, and they feared being detected by immigration authorities. They worked long hours, six days a week. To pay off their “debt” they were required to serve up to 900 customers in four to six months. Two women paid off their “debts” in six months. The restrictions on the freedom of these two women were removed and their passports were returned. The two women chose to remain working in the sex industry, where subsequently they were paid and choose their hours of work.

At Ms Tang’s trial, the trial judge said that while the complainants were not kept under lock and key, he was satisfied that, in the totality of circumstances, the women were effectively restricted to the premises. His Honour asked the “rhetorical question”: “How could they run away when they had no money, they had no passport or ticket, they entered on an illegally obtained visa, albeit legal on its face, they had limited English language, they had no friends, they were told to avoid Immigration, they had come to Australia consensually to earn income and were aware of the need to work particularly hard in order to pay off a debt of approximately \$45,000 before they were able to earn income for themselves?”⁹⁷ In 2007, Ms Tang’s appeal was upheld on the ground that the trial judge failed to direct the jury that the prosecution needed to prove that Ms Tang appreciated the character of her own actions.⁹⁸ A retrial was ordered on the basis that “it was open to a reasonable jury to have convicted [Ms Tang]”.⁹⁹

The prosecution successfully appealed to the High Court, which upheld the appeal and overturned the orders for a retrial. In deciding the case, the High Court held that the definition of slavery (which was modelled on, but not identical to, the definition of “slavery” in Art 1(1) of the 1926 Slavery

⁹¹ *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth).

⁹² *Criminal Code Act 1995* (Cth), s 270.3(1)(a).

⁹³ *Criminal Code Act 1995* (Cth), s 270.3(b).

⁹⁴ *Criminal Code Act 1995* (Cth), s 270.3(c).

⁹⁵ *Criminal Code Act 1995* (Cth), s 270.3(d).

⁹⁶ Affirmed in *McIvor v R; Tanuchit v R* [2009] NSWCCA 264.

⁹⁷ *R v Wei Tang* [2006] VCC 637 at [6].

⁹⁸ *R v Wei Tang* (2007) 16 VR 454 at [113] 479-480.

⁹⁹ *R v Wei Tang* [2007] VSCA 144.

Convention) and the offences of slavery were appropriate and adapted to implement Australia's international obligations (at [27]). In his leading judgment Gleeson CJ relied upon a 1953 report of the UN Secretary General to identify three powers attaching to the right of ownership: the capacity to use a person and a person's labour in a substantially unrestricted manner, and an entitlement to the fruits of the person's labour without compensation commensurate to the value of the labour. To this list, his Honour added a fourth power which may also be characterised as a power attaching to the right of ownership: the ability to commodify a person by treating the person as an object of sale and purchase (at [35] (Gummow J, Kirby J, Hayne J, Heydon J, Crennan and Kiefel JJ agreeing)).

In "borderline cases" drawing the distinction between slavery and harsh employment conditions is more complex than simply asking whether one person is completely controlled by another. However, as Gleeson CJ warned (at [32]), "it is important not to debase the currency of language, or to banalise crimes against humanity by giving slavery a meaning that extends beyond the limits set by the text, context and purpose of the 1926 Slavery Convention". It was therefore necessary to distinguish between "powers of control, [which], in the context of an issue of slavery, are powers of the kind and degree that would attach to a right of ownership if such a right were legally possible" and powers that "are no more than an incident of harsh employment". In particular, the capacity of the defendant "to deal with a complainant as a commodity, an object of sale and purchase, may be a powerful indication" (at [44]) of slavery. The indicia of slavery identified by the International Criminal Tribunal for the Former Yugoslavia¹⁰⁰ may also assist in identifying a condition of slavery.¹⁰¹ Significantly, proving the relevant powers were exercised without the consent of the victim is not necessary to prove the elements of slavery (at [28], [35]).¹⁰²

The High Court held the prosecution did not need to prove that Ms Tang knew or believed that the powers she exercised over the five Thai women were powers attaching to the right of ownership (at [48]).¹⁰³ On the evidence, it was open to the jury to conclude that Ms Tang had exercised the following powers attaching to the right of ownership: the power to make each woman an object of purchase, the power to use the women in a substantially unrestricted manner for the duration of their contracts, the power to control and restrict their movements, and the power to use their services without commensurate compensation. In response to the argument that "there is a clear distinction between slavery and other practices akin to slavery", Gleeson CJ observed that it was "unnecessary and unhelpful to seek to draw boundaries between slavery and cognate concepts such as servitude, peonage, forced labour, or debt bondage" (at [29]). The 1956 Supplementary Convention in Art 1 recognised that some of the institutions and practices it covered might also be covered by the definition of slavery in Art 1 of the 1926 Slavery Convention and the various concepts should not be understood as "mutually exclusive", after all, Gleeson CJ reasoned (at [29]), "[t]hose who engage in the traffic in human beings are unlikely to be so obliging as to arrange their practices to conform to some convenient taxonomy".

¹⁰⁰ United Nations, Security Council, International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Kunarac, Kovac and Vukovic* (IT-96-23 & IT-96-23/1-A) Judgment, 12 June 2002 ("Kunarac Appeal"). This case concerned allegations of systematic detention and rape of predominantly Bosnian Muslim women by the Serbian soldiers in the region of Foca in Bosnia in 1992. The three accused faced charges of rape, enslavement, torture, and outrages upon personal dignity. Their indictments invoked Art 5 of the ICTY statute, which lists rape and enslavement as crimes.

¹⁰¹ These factors included control of movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality, and forced labour.

¹⁰² After the High Court handed down its decision Ms Tang successfully appealed against her original sentence. Her appeal was successful on the ground the original sentence effectively punished her twice because the offences of using and possessing a slave contained some common elements and her sentence was reduced to nine years imprisonment. The court accepted that while the issue of consent was not a defence to slavery, it was relevant to assessing Ms Tang's culpability. If the victims had been kidnapped or coerced into agreeing to come to Australia to work in the sex industry, Ms Tang's culpability would "undoubtedly have been much higher". As it was, her original "mid-range" sentence of 10 years of imprisonment was appropriate. *R v Tang* (2009) 23 VR 332; 233 FLR 399.

¹⁰³ Gleeson CJ went on to observe: "Insofar as a state of knowledge or belief is factually relevant to intention as the fault element of the offence, it is knowledge or belief about the facts relevant to possession or using, and knowledge or belief about the facts which determine the existence of the condition described in s 270.1": *R v Tang* (2008) 237 CLR 1 at [49]; 82 ALJR 1334.

C. Prohibiting practices similar to slavery

The 1956 Supplementary Convention obligates Australia to proscribe certain exploitative practices whether or not they are covered by the definition of slavery in the 1926 Slavery Convention. Article 1 provides that state parties:

shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and *whether or not they are covered by the definition of slavery* contained in article 1 of the Slavery Convention signed at Geneva on 25 September 1926:

- (a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;
- (b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;
- (c) Any institution or practice whereby:
 - (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
 - (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
 - (iii) A woman on the death of her husband is liable to be inherited by another person;
- (d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

The trafficking offences in the *Criminal Code* cover trafficking for “exploitation”. The dictionary of the *Criminal Code* states:

exploitation, of one person (the *victim*) by another person (the *exploiter*), occurs if:

- (a) the exploiter's conduct causes the victim to enter into slavery, forced labour or sexual servitude; or
- (b) the exploiter's conduct causes an organ of the victim to be removed and:
 - (i) the removal is contrary to the law of the State or Territory where it is carried out; or
 - (ii) neither the victim nor the victim's legal guardian consented to the removal and it does not meet a medical or therapeutic need of the victim.

Unlike the definition of exploitation in the Trafficking Protocol, the definition of exploitation in the *Criminal Code* does not explicitly cover “practices similar to slavery” such as “servile marriage”;¹⁰⁴ sexual servitude is included but servitude is not. In the authors' view the definition of exploitation in the dictionary of the *Criminal Code* should be amended to include servitude and the types of “practices similar to slavery” that are prohibited by the 1956 Supplementary Convention.¹⁰⁵

Servile marriage and forced marriage are practices similar to slavery. Consideration should also be given to how Australian law should respond to situations where one person causes another person to enter into servile marriage.¹⁰⁶ A provision criminalising servile marriage could reflect the definition of “servile marriage” in Art 1(c)(i) of the 1956 Supplementary Convention which does not require the use of force or threats but recognises that there may be other circumstances in which one person has no right to refuse to be married to another. Although women are more likely to be the victim of forced marriage, UNODC suggest updating the definition in the supplementary convention “to include practices in which both women/girls and men/boys can be the subject of forced or servile marriage”. This may cover trafficking for marriage and certain forms of “mail order bride packages”.¹⁰⁷ In 2009

¹⁰⁴ Debt bondage is not defined in the definition of exploitation but it is a discrete offence under *Criminal Code*, s 271.8. Trafficking for debt bondage is addressed by s 271.2(2) and (2A).

¹⁰⁵ See UNODC, *Model Law Against Trafficking in Persons* (2009), p 35.

¹⁰⁶ In 2005, offences of child trafficking were introduced into the *Criminal Code*. There is no specific offence of child labour

¹⁰⁷ UNODC, *Model Law against Trafficking in Persons* (2009), pp 16-17.

the Australian Government indicated it is considering criminalising the practice of servile marriage and introducing a specific offence in relation to forced marriage, however to date a draft bill has not been published.¹⁰⁸ Protection from forced marriage could be provided through civil or criminal provisions and further consideration should be given to how Australian law should respond to this complex issue.

D. Prohibiting forced labour

Forced labour is believed to be a much larger problem than the human trafficking; the ILO estimates that only 20% of forced labour cases result from trafficking.¹⁰⁹ The *Forced Labour Convention 1930* (ILO No 29) and the *Abolition of Forced Labour Convention 1957* (ILO No 105)¹¹⁰ provide for the abolition of “forced labour”, which is defined 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”.¹¹¹ Article 25 of the ILO No 29 places an obligation on the state parties to criminalise forced labour and to “ensure the penalties imposed by law are really adequate and strictly enforced”. The ILO has identified six indicators of a forced labour situation: (1) physical or sexual violence (including “emotional torture like blackmail, condemnation, using abusive language”) or threats of such violence; (2) restricted movement and/or confinement to the workplace; (3) debt bondage; (4) withholding or refusing to pay wages; (5) the retention of passport and identity papers so that the worker cannot leave or prove his or her identity and status; and (6) threats of denunciation to the authorities.¹¹²

There is currently no specific offence of “forced labour” in the *Criminal Code*. However, applying Gleeson CJ’s dictum that it is unhelpful to draw boundaries between slavery and cognate concepts such as forced labour it would appear that factual circumstances that fall within the international definition of forced labour could fall within the slavery offences contained in the *Criminal Code*.¹¹³ While the question of whether a person’s conduct will fall within the meaning of slavery will depend on the facts of the case, we sound a note of caution about assuming that the concept of slavery articulated in *Tang* is broad enough to apply to all cases of forced labour, particularly in light of international commentary that suggests that only extreme forms of forced labour will fall within the offence of slavery.¹¹⁴ The power to buy and sell a person is not the only power attaching to the right of ownership but in *Tang* it was the exercise of this power that appeared to be critical in convincing the majority of the High Court that the women had been enslaved. In the absence of an arrangement to purchase the alleged victim of slavery, it may be more difficult to characterise a case of forced labour as falling within the definition of slavery. There is, in any event, an argument that there should be a hierarchy of offences in the *Criminal Code* that include slavery, forced labour, servile marriage, debt bondage, and deceptive recruiting for services. In the context of trafficking for labour exploitation outside the sex industry, introducing an offence of forced labour would narrow the stark gap between

¹⁰⁸ *Trafficking in Persons*, n 3, p 48.

¹⁰⁹ ILO, *Global Alliance*, n 13, p 14.

¹¹⁰ Opened for signature 25 June 1957, 320 UNTS 291 (entered into force 17 January 1959).

¹¹¹ *Forced Labour Convention 1930* (ILO No 29), Art 2(1). Art 2(2) makes it clear that this definition does not include compulsory military service of a purely military character, normal civic obligations, a conviction in a court of law, cases of emergency and minor communal services performed by community members in the direct interest of the community. The definition of forced labour in this convention was not changed by the *Abolition of Forced Labour Convention 1957* (No 105).

¹¹² ILO, *Human Trafficking*, n 5, pp 20-21.

¹¹³ Cullen and McSherry, n 46 at 5.

¹¹⁴ See eg, ILO, *Global Alliance*, n 13, p 8 [26] (describing forced labour as a concept that includes “but is not limited to” slavery).

the offence of “debt bondage” (punishable by up to 12 months imprisonment) and the offence of “slavery” (punishable by up to 25 years imprisonment).¹¹⁵

While Australian law prohibits trafficking for forced labour, the formulation of the trafficking and slavery offences in the *Criminal Code* reflect the a preoccupation with sex trafficking.¹¹⁶ Although there is a specific offence of sexual servitude, there is no offence of servitude or forced labour. Similarly, there is an offence of deceptive recruiting for sexual services but no offence of deceptive recruiting for other types of services. However, the trafficking offences do prohibit trafficking for “exploitation”. As we discussed above, the definition of exploitation in the *Criminal Code* dictionary specifically captures *forced labour*, which is defined in s 73.2(3) as “the condition of a person who provides labour or services (other than sexual services) and who, because of the use of force or threats” and who is either “not free to cease providing labour or services” or “is not free to leave the place or area where the person provides labour or services”.

Although working in the sex industry is a legal form of work in Australia, the definition of forced labour distinguishes between sexual exploitation and labour exploitation.¹¹⁷ The ILO has stated “a forced labour situation is determined by the nature of the relationship between a person and an ‘employer’”, and not by the type of work performed, or the legality or illegality of the work.¹¹⁸ However, while the ILO’s definition of forced labour may encompass coerced commercial sex, the definition in the *Criminal Code* does not. Australia has also chosen not to adopt the language of “menace and penalty”, preferring instead “the use of force or threats”. The term “threat” in the context of the forced labour in Australia’s *Criminal Code* means any threat of force, deportation or any other detrimental action unless there are reasonable grounds for that action.

In its current incarnation the *Criminal Code* fails to fully reflect Australia’s international obligations to address forced labour. Depending on the facts of the particular case, a case of “forced labour” may fall within the offence of slavery. However, as we discuss above, this may not always be the case and Australia’s international obligations to introduce a specific offence of forced labour are clear.¹¹⁹ Consideration should also be given to introducing an offence of deceptive recruiting for labour services and a specific offence of child labour.¹²⁰

V. COMPENSATION AND PROTECTION

International law requires Australia to protect the rights of trafficked people irrespective of whether they can help police. Section II of the Trafficking Protocol contains provisions to protect trafficking victims. Under Section II, state parties should:

- Protect the privacy and identity of trafficking victims (in appropriate cases and to the extent possible under domestic law) (Art 6(1)).
- Provide trafficking victims with information on legal proceedings and enable their views to be heard at appropriate stages during criminal proceedings (Art 6(2)).

¹¹⁵ The High Court rejected the suggestion the offences of slavery and debt bondage are mutually exclusive holding that the only relevant question was whether Ms Tang’s conduct fell within the offence of slavery: *R v Tang* (2008) 237 CLR 1 at [29]; 82 ALJR 1334. To date there have been no prosecutions of debt bondage.

¹¹⁶ Parliamentary inquiries into trafficking in Australia have focused on trafficking for sexual servitude: see eg, Senate Legal and Constitutional Legislation Committee, *Inquiry into Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004* (2004); Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the trafficking of women for sexual servitude* (2004). The title of the Transnational Sexual Exploitation and Trafficking Team, established in 2003, reflected the focus of initial law enforcement efforts.

¹¹⁷ In Australia, sex work is either legal (WA, Vic, Qld, Tas, ACT, NT) or decriminalised (NSW).

¹¹⁸ ILO, *Cost of Coercion*, n 5, p 6. Similarly UNODC has said national legislatures should “not conclude that coercive sexual exploitation does not amount to forced labour or services, particularly in the context of trafficking”: UNODC, *Model Law against Trafficking in Persons* (2009), p 14.

¹¹⁹ ILO, *Cost of Coercion*, n 5, pp 6-7. See also UNODC, *Model Law Against Trafficking in Persons* (2009), pp 42-43.

¹²⁰ In 2005 specific offences of child trafficking were introduced into the *Criminal Code*. However, there is no specific offence of child labour. Introducing a specific offence of child labour is consistent with Australia’s obligations under the *International Labour Organisation Convention No 182, dealing with the Worst Forms of Child Labour*.

- Consider implementing measures to provide for the physical, psychological and social recovery of trafficking victims and endeavour to provide for the physical safety of trafficking victims within its territory (Art 6(3)-(4)).
- Ensure trafficking victims have the possibility of seeking compensation (Art 6(4)).
- Consider adopting measures that permit trafficking victims to remain in its territory, temporarily or, if appropriate, permanently (Art 7).

Section III concerns “Prevention, cooperation and other measures” and encourages state parties to establish “comprehensive policies and programs to prevent and combat trafficking” and protect trafficking victims from re-victimisation. State parties must also endeavour to alleviate the factors such as poverty, underdevelopment and lack of equal opportunity that make people, especially women and children, vulnerable to trafficking (Art 9).

The importance of protecting the rights of trafficked people is clearly articulated in international law. Article 2(3) of the ICCPR provides that if a person’s rights have been violated that person has a right to an “effective remedy”, including, where appropriate, compensation.¹²¹ The *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* states that victims of crime have the right to “prompt redress, as provided for by national legislation, for the harm that they have suffered” and sets out the rights of victims of crime¹²² However, at a federal level there is concern that existing law provides inadequate protection for vulnerable victim-witnesses.¹²³ The authors support the introduction of a federal charter of victims’ rights that sets out the rights of people who are identified as victims of federal crime. The absence of a charter at a federal level means that there is no formal guidance about what type of service, assistance and protection victims of federal crimes can expect from public authorities. Any charter should reflect, at a minimum, the principles articulated in the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* and be available in a multi-lingual format. Another welcome initiative would be to provide for the use of victim statements in trafficking cases.¹²⁴ This reform would be consistent with the Trafficking Protocol (Art 6(b)), which requires state parties to provide trafficking victims with assistance to enable their views to be heard at appropriate stages of criminal proceedings.

There is a growing focus upon ensuring trafficked people have access to legal advice about their prospects of seeking compensation, recovering unpaid wages, or commencing civil action against their traffickers. The only publicly reported case of a trafficking victim receiving compensation as a victim of crime was not actually made on the basis of the woman’s status as a victim of trafficking. In May 2007, *The Age* reported that a “former child sex slave has become the first person in Australia to be compensated as a victim of sex trafficking”.¹²⁵ This case was brought on behalf of a Thai woman, Ms C, who was trafficked to Australia when she was 13 years old in 1995 for the purposes of sexual exploitation. At that time Australia had not introduced trafficking offences and when Ms C was found by Australian authorities she was returned to Thailand without any opportunity to seek legal remedies in Australia. In 2004, after interviewing the young woman for a film on trafficking of children¹²⁶ a film-maker lodged a claim for compensation for sexual assault on behalf of Ms C under a State-based statutory victims’ compensation scheme.¹²⁷

¹²¹ UNHRC, *The nature of legal obligations imposed on state parties to the covenant*, General Comment No 31, UN Doc CCPR/C/21/Rev 1/Add 13 (2004) [15].

¹²² UN Doc A/Res/40/34 (1985), [4].

¹²³ The *Crimes Act 1914* (Cth) only contains provisions protecting child victims providing evidence for sex and sex-related offences: see David, n 24, *Prosecuting Trafficking in Persons*.

¹²⁴ Currently, federal sentencing laws do not provide for the use of victim impact statements but may be considered where criminal trials are held in State and Territory courts. The ALRC recommended that, subject to safeguards, victim impact statements should be allowed in the sentencing of federal offenders. ALRC, *Same Crime, Same Time: The Sentencing of Federal Offenders*, Report No 103 (2006).

¹²⁵ Craig, n 17.

¹²⁶ The film was *Trafficked: The Child Sex Trade*.

¹²⁷ *Victims Support and Rehabilitation Act 1996* (NSW), ss 25, 29.

Sexual servitude, slavery and human trafficking are not listed as a compensable injury under the New South Wales Statutory Compensation Scheme. Ms C needed to seek compensation as a victim of sexual assault. No criminal charges had been brought in Australia, but evidence was provided about the conviction of one of the traffickers in Thailand, along with psychiatric assessments and a declaration from a former AFP officer who met the victim in 1995. The evidence satisfied the compensation assessor that there had been multiple acts of sexual intercourse by numerous offenders over a period of 10 days while the victim was virtually held captive. In view “of the age of the victim, the circumstances of the assaults, the nature and number of offences and the impact upon her of this appalling episode in her life”, an award was made to the victim on the basis that she was a victim of sexual assault.

While the Trafficking Protocol “does not specify any potential source of compensation”, UNODC has suggested that “any or all” of the following options might meet the requirements of the Protocol: allowing victims to sue offenders under statutory or common law torts for civil damages; enabling criminal courts to award damages or to make orders for restitution; or establishing dedicated victim compensation schemes whereby the victim can claim compensation from the state.¹²⁸ In the authors’ view the best way to improve the ability of trafficked people to seek compensation would be to implement the former Minister for Home Affairs’ suggestion to establish a statutory compensation scheme for federal victims of crime.¹²⁹ Alternatively, efforts should be made to improve the capacity of trafficked people to pursue compensation claims under State and Territory victims of crime compensation schemes, action to recover unpaid wages, or tort claims (eg, false imprisonment). Moreover, when a court sentences a trafficking offender, the prosecution should consider whether it is appropriate to seek a court order of reparations or compensation.¹³⁰ Consideration could be given to how to link the confiscation of offenders’ assets by the Commonwealth and the financial compensation of trafficking victims.¹³¹ Ultimately, unless trafficked people receive counselling and information about their legal rights in a language that they can understand they may be unable to assert their rights and the opportunities to seek compensation will be missed.¹³² Thus it is critical that each trafficked person receives independent legal advice about his or her prospects of seeking compensation, recovering unpaid wages, or pursuing civil claims.

VI. THE WAY FORWARD

A decade after the adoption of the Trafficking Protocol it is time to formally review if Australian anti-trafficking laws adequately cover all forms of human trafficking and exploitation.¹³³ The review would provide an opportunity to identify how to strengthen Australia’s anti-trafficking laws to fully reflect Australia’s international obligations and to draw upon lessons that have been learnt during the

¹²⁸ UNODC, *Toolkit to Combat Trafficking in Persons* (2006) p 141; IPU-UNODC *United Nations Combating Trafficking in Persons – A Handbook for Parliamentarians* (2009) p 56.

¹²⁹ See Pearlman J, “Rights Charter to Vindicate Victims”, *Sydney Morning Herald*, 7 February 2008, p 4.

¹³⁰ In the State context see eg, *Victim Support and Rehabilitation Act 1996* (NSW), s 71. In the federal context the utility of *Crimes Act 1914* (Cth), s 21B could be considered. While this provision has traditionally been used in cases involving economic loss, not non-economic loss such as pain and suffering, there is no barrier to making a reparations order about non-economic loss. See discussion in ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), [8.41]-[8.46]. A victim’s right to commence civil proceedings is not affected by a federal reparation order: *Crimes Act 1914* (Cth), s 15F.

¹³¹ The *Proceeds of Crime Act 2002* (Cth) has been used to restrain the alleged proceeds of trafficking in persons in at least one Australian prosecution (see eg, *Director of Public Prosecutions (Cth) v Xu* (2005) 154 A Crim R 173; [2005] NSWSC 191: David, n 24, *Prosecuting Trafficking in Persons*).

¹³² Trafficking Protocol, 6(3).

¹³³ In 2005 the Parliamentary Joint Committee on the Australian Crime Commission recommended a review of the operation of the trafficking and slavery offences in the *Criminal Code* take place a year after the 2005 reforms and, as part of that review, consideration be given to amendments to include the provision to the court of victim impact statements: Parliamentary Joint Committee on the Australian Crime Commission, *Supplementary Report to the Inquiry into trafficking of women in sexual servitude* (2005), p 7.

first five years of the operation of Australia's anti-trafficking laws. Particular consideration should be given to enacting a specific offence of forced labour and forced marriage, as well as clarifying the definition of exploitation and coercion.¹³⁴

While the courts must distinguish between trafficking and substandard working conditions, an effective anti-trafficking strategy must recognise the "thin dividing line between coerced and non-coerced exploitation".¹³⁵ The combination of the lack of information about their rights and immigration status and the desire to find a better life can leave migrant workers vulnerable to sliding along a continuum of exploitation. Prevention and protection strategies must look beyond the criminal justice system and acknowledge how empowering groups that are vulnerable to trafficking to exercise their rights under Australian law can help prevent the conditions in which trafficking and exploitation flourish.

¹³⁴ Guidance should be sought from the UNODC *Model Law Against Trafficking in Persons* and anti-trafficking laws in comparative jurisdictions. See eg, comparative analysis of forced labour cases: ILO, *Forced Labour and Human Trafficking: Casebook of Court Decisions* (2009); UNODC, *International Framework of Action to Implement the Trafficking in Persons Protocol* (2009).

¹³⁵ ILO, *Cost of Coercion*, n 5, p 7 [41].