



Australian
Human Rights
Commission

Targeted Review of Divisions 270 and 271 of the *Criminal Code Act* 1995 (Cth)

Australian Human Rights Commission

Submission to Targeted Review of Divisions 270 and 271 of the
Criminal Code Discussion Paper

8 March 2023

ABN 47 996 232 602
Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
Complaints info line 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

Contents

1	The Australian Human Rights Commission	3
2	Introduction	3
3	Question 1.....	4
4	Question 4.....	5
5	Questions 18 - 20.....	9
6	Question 21	10
6.1	<i>Penalties.....</i>	11
6.2	<i>The labour / criminal divergence.....</i>	12
7	Questions 25 & 27	14
8	Question 40	15
8.1	<i>Trafficking sentencing guidelines.....</i>	15
8.2	<i>Increased sentences.....</i>	18
9	Question 41	19
9.1	<i>Consent irrelevant to trafficking and slavery</i>	19
9.2	<i>Victims and survivors' voices</i>	24
10	Question 42	25
11	Recommendations	26

1 The Australian Human Rights Commission

1. The Australian Human Rights Commission (Commission) is Australia's national human rights institution, established in 1986 by legislation of the Australian Federal Parliament. The Commission is an independent statutory organisation, whose operations are determined independently of the government through the President and Commissioners.
2. The role of the Commission is to work towards an Australia in which human rights are respected, protected and promoted, finding practical solutions to issues of concern, advocating for systemic change and raising awareness across the community.
3. The Commission welcomes the opportunity to make this submission to the Targeted Review of Divisions 270 and 271 of the *Criminal Code Act 1995 (Cth)* (Criminal Code) (Review). This submission builds on the previous work that the Commission has done to advocate for the strengthening of Australia's anti-slavery legal framework and a commitment to global leadership with respect to combatting modern slavery and human trafficking.¹

2 Introduction

4. Trafficking in persons and slavery-like practices are some of the most pressing human rights violations in the 21st century. The Commission notes with concern, recent estimates of 49.6 million people currently living in modern slavery across the world.² Australia is not immune to this human rights violation, with Anti-Slavery Australia estimating that over 1,900 people in Australia are victims of modern slavery.³ The impacts of modern slavery are devastating for its victims.
5. It is imperative that Australia takes strong action to counter modern slavery. All people deserve to live with dignity and respect. Modern slavery exploits the vulnerable and denies its victims their basic human rights. All parts of the criminal justice system in Australia must work collaboratively to increase awareness and strengthen its responses both to protect existing victims and prevent future victims from being created.
6. We recognise that this Review considers only one specific aspect of Australia's response to modern slavery in the form of amendments to the Criminal Code. While our submission focuses exclusively on questions related to this Review, we recognise that a holistic response needs to be taken to modern slavery. It requires not only a whole-of-government response within Australia, but also global leadership by Australia to help bring an end to modern slavery across the world.

7. This submission addresses only a selection of questions posed in the Targeted Review Discussion Paper. This is not indicative of the relative importance of particular questions. Rather, it reflects the Commission's relevant expertise in certain areas, and current capacity.

3 Question 1

Are stakeholders observing interactions between offences in Divisions 270 and 271 and other laws and frameworks that are impeding, or have the potential to impede, effective investigations and prosecutions of offences in Divisions 270 and 271?

8. While it is correct to note that reports and investigations of offending against Divisions 270 and 271 have increased over time, there remain significant impediments to effective investigations and prosecutions of these offences.
9. The Discussion Paper states that 31 people have been convicted of offences against Divisions 270 and 271 of the Criminal Code. However, it is recognised that there are many more victims/survivors of modern slavery than this. The Australian Institute of Criminology (AIC) estimated in 2019 that there are approximately four undetected victims for every victim detected, and that the number of human trafficking victims in Australia in 2015–16 and 2016–17 was between 1,300 and 1,900 individuals.⁴ In 2021, the AIC calculated an overall prosecution attrition rate in Australia of 73%, noting that this was not unique to Australia but reflective of global challenges in the investigation and prosecution of modern slavery cases.⁵
10. A key factor in ensuring the effective investigation and prosecution of offences under Divisions 270 and 271 is embedding a victim-centred approach into the criminal response framework. A strategic priority of the Australian Government's response to combatting modern slavery is to 'provide holistic and tailored victim-centred support and protection that meets the needs of victims and survivors'.⁶ For this reason, the Commission continues to recommend the establishment of a national compensation scheme for victims and the provision of alternative supports and pathways to remedies – which are not contingent on participation in criminal prosecutions.⁷
11. A key element of this includes ensuring appropriate education and training in applying a victim-centred and sensitive approach for all individuals and agencies involved in the investigation and prosecution of modern slavery cases, and the implementation of victim-centred practices throughout the criminal justice system.
12. These practices should be child-specific when responding to child victims and survivors, in accordance with the *United Nations Convention on the Rights of the*

Child (CRC). A child-specific and child-centred approach incorporates the ‘best interests of the child’ principle, and children’s right to express views, be informed and have their views taken into account during any investigation and prosecution process. Resources and support provided to children must be appropriate to their circumstances and level of development. The National Action Plan to Combat Modern Slavery requires the implementation of a protocol for the treatment of children suspected as victims of human trafficking, slavery or slavery-like practices.⁸

13. Embedding a victim-centred approach will not undermine the investigation and prosecution of modern slavery cases. It will ultimately lead to more *effective* investigations and prosecutions.

Recommendation 1: The Australian Government should embed a victim-centred approach into the investigation and prosecution of offences under Divisions 270 and 271 of the Criminal Code. This includes the establishment of a national compensation scheme for victims, provision of alternative referral pathways, enhanced education and training, and the implementation of victim-centred and child-specific practices throughout the criminal justice system.

4 Question 4

Are Divisions 270 and 271 appropriately future-proof and flexible enough to apply to the misuse of new and emerging forms of technology and online conduct? If not, why not, and are specific changes to Divisions 270 and 271 recommended?

14. In the *Human Rights and Technology Final Report*, the Commission highlighted that new and emerging forms of technology did not always require tailored legal frameworks as existing legal frameworks will apply.⁹ The first step in ensuring Divisions 270 and 271 are appropriately future-proofed is to provide greater investment in the technological capacities and training of the agencies which investigate and prosecute such crimes. As a first step, the effective application of laws to new and emerging forms of technology is critical.
15. Technology evolves at a rapid pace, constantly shaping the world in which Australians live. Early adopters of new and emerging technologies are often the beneficiaries of insufficient governmental scrutiny and policing or organisational restrictions. Criminal enterprise has capitalised on this ‘opportunity’ to commit crimes under Divisions 270 and 271 while avoiding detection.

16. For example, modern forms of slavery facilitated through the internet, are being conducted by criminal enterprises operating with a high level of sophistication. Technology is allowing criminal groups to both avoid detection and maximise their profits. Smartphones, social media, encrypted communications and the dark web are all being used to buy, sell and exploit victims.¹⁰
17. This was highlighted by the Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences which suggested that the COVID-19 lockdowns actually resulted in an increase in the use of online platforms to facilitate slavery offences as criminal enterprise adjusted their business model to respond to the changing external environment.¹¹ These operations are highly complex and flexible, being extremely responsive to global events and finding loopholes in policing and regulation.
18. The current legislative environment in respect of digital technologies also heightens the vulnerability of children as they may be unable to give informed consent to the collection of data or understand how their data may be used. Technology also offers perpetrators increased opportunities for the solicitation of children.¹² Children are therefore at higher risk of being exploited or trafficked in the digital environment and subsequently offline.
19. The Special Rapporteur on trafficking in persons, especially women and children, acknowledged the COVID-19 pandemic had a profound impact in exacerbating the vulnerability of children to sexual exploitation online. It was also acknowledged that technology facilitated child trafficking for the purpose of sexual exploitation through digital technologies as a result of children spending more time in the digital environment due to school closures.¹³
20. New and emerging technologies provide criminals and criminal organisations with an enhanced ability to facilitate the crimes captured under Divisions 270 and 271 of the Criminal Code. They often benefit from the use of technology in perpetrating their crimes by:¹⁴
 - **Remote engagement:** Physically distancing themselves from the locations of the victims and survivors, and the environments in which they are exploited. This supports them in evading detection as well as expanding the criminal enterprise of their operations beyond a more localised geography.
 - **Luring victims:** The use of social media and other online platforms enables criminals to lure victims into exploitation through a variety of means. This can often involve more proactive approaches such as 'hunting' particular victims who criminals believe are vulnerable, or

more passive ‘fishing’ expeditions, where they hope to exploit unsuspecting victims.

- **Encryption:** Encryption of online conduct enables criminals and criminal organisations to carry on their illegal businesses while reducing the availability of the evidence trail needed by law enforcement to detect and prove the criminal conduct.
- **Anonymisation:** Technology is used to anonymise the stakeholders in the perpetration of the crime. This means that victims and survivors may never know who they are communicating with, making it difficult for them to identify individuals involved in the crimes.
- **Communications:** Criminals have access to a myriad of online platforms by which to contact, coerce, threaten and/or deceive victims and survivors. This includes through websites, job sites, dating apps and social media.
- **Increased Scope of Business:** Criminal enterprises now have an unprecedented ability to connect victims with those who would seek to take advantage of such illegal operations. This includes via the provisions of materials, products, labour and services produced or provided through exploitation – including images and videos of sexual exploitation.

21. Criminals and criminal organisations may use publicly available personal data and the anonymity of the internet to contact victims for recruitment, exploitation or blackmail. The ways in which this exploitation occurs have also been modified by the use of digital platforms. Exploitation can now occur via webcams and livestreams, reducing the need to physically transport victims, which in turn reduces the risk of detection and capture by police.¹⁵

22. Advertising practices alone suggest the extent to which criminal enterprises are operating online. In one example, a single trafficker (who was working alone) sexually exploited and connected one victim with over 100 buyers for sex over 60 days. This was all facilitated using online advertisements.¹⁶ Further, a United Nations Office on Drugs and Crime (UNODC) study found that of 79 trafficking cases considered, 44 of those cases used online advertisements - with 278 victims affected.¹⁷

23. The internet vastly improves the ability of criminals and criminal organisations to avoid detection while also increasing revenue and exploitation. Criminals may operate in multiple jurisdictions simultaneously, and while a single victim may be physically located in one place, their exploitation often extends far beyond that single location.

24. The adoption of new and emerging technologies, which are generally less effectively regulated at an organisational and governmental level, has allowed criminal enterprise to flourish. This in turn creates difficulty for the relevant bodies to investigate, establish evidence and successfully bring to justice those who are involved in offences under Divisions 270 and 271.
25. To best ensure that Divisions 270 and 271 are future-proofed, agencies' capabilities need to be matched with the technological advancements of the criminals they seek to bring to justice.¹⁸ However increased funding alone is insufficient, as all aspects of the criminal justice system must be aware of the risks and utilisation of technology to facilitate offences.

Recommendation 2: Technology education should be provided to those who operate in the criminal justice system and who will interact with Divisions 270 and 271 in court. Increased education will ensure a more articulate criminal justice system which is readily able to understand the nuances of the technologies used to commit offences. Additional funding should be provided to the agencies which investigate and prosecute offences under Divisions 270 and 271. Greater funding will better allow agencies to match the technology of criminals to develop sophisticated operations to better infiltrate and prosecute online criminal enterprises.

26. To best ensure that the agencies involved in bringing these cases to court can effectively investigate the alleged offending, robust lines of communication with private business and tech companies will be necessary. This is paramount given private organisations and tech companies may unknowingly be used to facilitate offences under Divisions 270 and 271. Best practice communications are fundamental in allowing flexibility in responding quickly and precisely in bringing online criminals to justice. This must be done with safeguards in place to ensure that the agencies involved in policing and prosecuting do not go beyond their remit and misuse such lines of communications to unjustly monitor, investigate or retain the data of individuals who are not genuinely suspected of committing an offence under Divisions 270 and 271

Recommendation 3: The agencies involved in policing and prosecuting Divisions 270 and 271 must develop a framework (potentially including regular roundtable conversations, targeted consultations or structured information sessions) with private businesses to ensure robust and productive lines of communication. This must be done with safeguards in

place to ensure that the agencies do not go beyond their remit and misuse such lines of communications.

5 Questions 18 - 20

Does the forced marriage offence, as it is currently phrased, adequately capture conduct that leads to a forced marriage taking place, including coercion that occurs as a pattern of behaviour over time? If not, why not, and are specific solutions recommended?

Should Australia's forced marriage offences in the Criminal Code contain stronger protections for children between the age of 16 and 18? If so, how could this be achieved?

Does the definition of marriage in subsection 270.7A(2) adequately apply to the types of forced marriages that are being observed by Australian law enforcement agencies and other stakeholders? If not, why not, and what changes or solutions are recommended?

27. While it is difficult to obtain accurate statistics about the true extent of forced marriage in Australia, the Australian Federal Police (AFP) received 92 reports of forced marriage in 2019–20, with 51% of forced marriage reports concerning victims under 18 years of age.¹⁹ This compares to 11 reports in 2013–14 when the offence of forced marriage was first introduced, highlighting the growing risk of forced marriage.²⁰ The AIC found in 2018 that forced marriage ‘now represents the most commonly investigated form of human trafficking and slavery in Australia’.²¹
28. One important consideration is to ensure that the forced marriage offence under the Criminal Code is supported by, and consistent with, other laws in Australia relating to marriage, sexual offences, and the age of consent.
29. For example, the laws concerning when a marriage is void under section 23 of the *Marriage Act 1961* (Cth) (Marriage Act) substantially align with the Criminal Code. A marriage will be void under section 23(1)(d)(iii) of the Marriage Act if the victim ‘was mentally incapable of understanding the nature and effect of the marriage ceremony’, which directly correlates to the wording of section 270.7A(1)(a)(ii) of the Criminal Code. However, a key question to ask is whether the phrases ‘coercion, threat or deception’ (as used in the Criminal Code) and ‘obtained by duress or fraud’ (as used in the Marriage Act) cover the same range of behaviours such that any marriage fitting the definition of ‘forced marriage’ under the Criminal Code is also a marriage that will be void under the Marriage Act. For the avoidance of doubt, we would recommend including forced

marriage as a ground on which marriages are void under section 23 of the Marriage Act.

Recommendation 4: ‘Forced marriage’ should be included as a ground on which marriages are void under section 23 of the Marriage Act.

30. The current definition of forced marriage focuses on consent at the time the marriage was entered into. It is important to recognise that forced marriage is best described as ‘a process rather than an event’.²² A forced marriage ‘can involve a spectrum of coercive and controlling behaviours’ and ‘the coercion or threats that cause a non-consenting party to enter into a marriage can encompass conduct that began long before the marriage’.²³
31. It is difficult to know with certainty whether the current definition is sufficiently broad given the lack of judicial authority regarding the interpretation of the forced marriage provisions. As an initial step, therefore, we would encourage the Australian Government to ensure that law enforcement, prosecutors and the judiciary are provided with appropriate education and training to understand the drivers and indicators of forced marriage, particularly as they relate to questions of consent.

Recommendation 5: The Australian Government should ensure that law enforcement, prosecutors and the judiciary are provided with appropriate education and training about the drivers and indicators of forced marriage, particularly as they relate to questions of consent.

6 Question 21

Does the debt bondage offence continue to be fit-for-purpose and provide an appropriate investigation and prosecution option where more serious labour exploitation offences cannot be made out?

32. Debt bondage is a serious issue that has been highlighted in several cases in recent years which demonstrates its prevalence in Australia, as students²⁴ and migrant workers are especially vulnerable to exploitative employment practices.²⁵ The UN Special Rapporteur on contemporary forms of slavery, including its causes and consequences, highlighted in 2016 that the practice of debt bondage ‘is prevalent worldwide in numerous sectors of the economy and particularly affects people belonging to minority groups’.²⁶

33. The Commission considers the penalties for the offence of debt bondage insufficient and the divergence between criminal and labour legislation problematic.

6.1 Penalties

34. The offence of debt bondage, as set out under Division 270.7C is not aligned with penalties set out in the *Wage Theft Act 2020 (Vic)* (Wage Theft Act) and *Queensland Criminal Code 1899 (Qld)* as amended by the *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020 (Qld)* (Wage Theft Offences) which both deal with wage theft through an employment perspective. When compared to state responses, the maximum penalty of seven years imprisonment for debt bondage under the Criminal Code is insufficient.
35. Law reform relating to wage theft has been considered by a number of Australian jurisdictions in recent years.²⁷ Both Queensland and Victoria have introduced wage theft legislation which (broadly speaking) criminalises the underpayment of workers.²⁸ There is also movement in both South Australia and Western Australia to introduce criminal offences for wage theft²⁹ and potential developments in New South Wales.³⁰ Some have also called for the Australian Government to criminalise wage theft at the Federal level – although a previous attempt to do so was not approved by the Australian Senate.³¹
36. The Wage Theft Act created a statutory body corporate in Victoria, the Wage Inspectorate of Victoria, which is charged with investigatory and prosecutorial functions under the Wage Theft Act.³² In contrast, the Wage Theft Offences in Queensland are handled by the Queensland Police.
37. These state-based legislative responses prohibit and criminalise unfair payment practices such as unlawful deductions, which can constitute debt bondage in certain circumstances.
38. Under the Wage Theft Offences in Queensland, a failure to pay an employee an amount payable to them constitutes stealing and is punishable by up to 10 years imprisonment.³³ Under the Wage Theft Act in Victoria, dishonestly withholding an owed employee entitlement is punishable by 6,000 penalty units (or \$1,109,520)³⁴ for a body corporate or a maximum of 10 years imprisonment for an individual.³⁵ However, the willingness of courts in Victoria to apply the higher range of sentencing remains untested due to the relatively recent introduction of the Wage Theft Act and Wage Inspectorate of Victoria. It is important to note that ‘withholding’ is defined within the Wage Theft Act to include unlawful deductions.³⁶

39. An individual tried under the Criminal Code for debt bondage only faces a maximum sentence of seven years, while those tried in either Victoria and Queensland face a maximum penalty of 10 years.
40. The decision to criminalise such unfair employment practices in both States undoubtedly reflects a growing public sentiment that worker exploitation in Australia needs to be addressed, and that action must be taken to deter such conduct. This is particularly so for vulnerable groups, such as migrant workers on certain visas, workers with disability, young workers and those in insecure employment.³⁷
41. Division 270.7C does not adequately reflect contemporary public understanding and sentiment in respect of wage theft being unacceptable in Australia. The Criminal Code should be amended to increase the maximum penalty for debt bondage to reflect community values and to align with the Wage Theft Act and Wage Theft Offences in Victoria and Queensland respectively. This would ensure legislative consistency across state and federal levels and reflect the Australian public's denunciation of offences which relate to debt bondage or unlawful deductions of wages.

Recommendation 6: The offence of debt bondage contained in division 270.7C of the Criminal Code be amended to allow a maximum penalty of 10 years imprisonment.

6.2 The labour / criminal divergence

42. The effective duplication of offences under Division 270.7C Criminal Code, Wage Theft Act, Wage Theft Offences and the *Fair Work Act 2009 (Cth)* (FW Act) unnecessarily complicates investigation, prosecution and sentencing.
43. Circumstances of debt bondage may enliven offences of contravening a:
- national minimum wage order³⁸
 - modern award,³⁹
 - enterprise agreement.⁴⁰
- (NES Offences)
44. All such NES Offences are civil penalty provisions under the FW Act⁴¹ and carry maximum penalties for serious contraventions of 600 penalty units.⁴² A federal penalty unit is currently \$275,⁴³ providing a maximum penalty of \$165,000. It is important to note that the FW Act contains no criminal liability for wage theft.

45. It is also possible that debt bondage can be investigated under the FW Act in the form of unlawful deductions,⁴⁴ where an employer charges expenses which are unreasonable.
46. Depending on circumstances, an individual or organisation committing debt bondage could face allegations under the:
- Criminal Code
 - Wage Theft Act
 - Wage Theft Offences
 - FW Act.
47. This means that the entity responsible for investigating and/or prosecuting the offence could be the:
- Fair Work Ombudsman (FWO)
 - Australian Federal Police
 - Commonwealth Director of Public Prosecutions
 - Queensland Police
 - Wage Inspectorate of Victoria.
48. This creates unnecessary complications in respect of jurisdiction and investigation, given the difficulty already noted in investigating and prosecuting of exploitative labour practices. These difficulties are raised in the FWO's report 'Identifying and addressing the drivers of non-compliance in the 7-Eleven network'.⁴⁵
49. The investigation and prosecution of debt bondage should be streamlined across jurisdictions at the state and federal levels as well as across the criminal and labour legislative divide to best protect Australians from debt bondage while ensuring effective justice processes.
50. Understandably in streamlining the investigation and prosecution of debt bondage across jurisdictions there will necessarily be a need for greater funding for the relevant agencies charged with working with debt bondage and wage theft offences.
51. Such funding should be targeted towards increasing the capabilities of regulatory bodies (such as the FWO) to investigate and prosecute debt bondage or wage theft offences. In addition, further funding should be used to increase education, awareness and training provided to practitioners, investigators and vulnerable workers who may come across these offences under either criminal or employment law.

Recommendation 7: There should be greater education, awareness and training provided to practitioners, investigators and vulnerable workers to inform them about rights and legal pathways under both criminal and employment law. The Federal government should increase funding, capabilities and legislative scope of the FWO to assist in the pursuit of allegations against perpetrators of debt bondage, as the body with the most relevant expertise in this area.

7 Questions 25 & 27

Should the cross-border trafficking offences (including trafficking in children) be amended so that they do not require the physical movement of a person? If so, how could this be achieved through amendments to the offences?

Should the domestic trafficking offences (including trafficking in children) be amended so that they do not require the physical movement of a person? If so, how could this be achieved through amendments to the offences?

52. Both the cross-border trafficking offences and domestic trafficking offences under Division 271 require the physical movement of a person as an element of the offence. To emphasise that the core of the harm lies in the exploitation of the victim, rather than their movement, the requirement of physical movement should be deleted. This is particularly important given our submissions above at [14]-[26] concerning the impact of new and emerging forms of technology, which have increased opportunities for exploitation without requiring the physical movement of a person.

Recommendation 8: Both the cross-border trafficking offences and domestic trafficking offences under Division 271 should be amended to remove the requirement of the physical movement of a person as an element of the offence.

53. This was one of the prioritised recommendations made in respect of Australia in the 2022 Trafficking in Persons Report (TIP Report). It was noted that Division 270 could potentially be used to prosecute trafficking crimes that did not involve victim movement. However, the TIP Report emphasised that the current definition of 'trafficking' under Division 271 was inconsistent with international law because it required the element of movement of a victim to be established.⁴⁶

54. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) was ratified by Australia in 2005. It defines ‘trafficking in persons’ in a way that specifically encompasses actions that do not require any movement.⁴⁷ The United Nations Office on Drugs and Crime has concluded that ‘the weight of opinion and state practice is consistent with the position that no movement of a victim is required’ to establish ‘trafficking in persons’ under this definition.⁴⁸
55. The framework established under Divisions 270 and 271 establishes separate offences for various elements of the definition of ‘Trafficking in persons’ provided under the Palermo Protocol. For example, while harbouring a person is an example of an action included within the Palermo Protocol definition that does not require any movement,⁴⁹ harbouring a victim is criminalised as a separate offence under Division 271.⁵⁰ The use of separate offences highlights the importance of ensuring that any amendments to individual divisions do not have unintended consequences throughout other parts of the division. It does not remove the overall importance of ensuring that Australia’s legislative framework is fully consistent with our obligations under international law.

8 Question 40

Do the penalties contained in Divisions 270 and 271 appropriately reflect the seriousness of the offences? If not, why not?

56. While the penalties for offences contained in Divisions 270 and 271 appropriately reflect the seriousness of these offences (with the exclusion of debt bondage, as discussed above), greater guidance and transparency are needed in sentencing.

8.1 Trafficking sentencing guidelines

57. Australia, in line with the international community, has focused on the criminalisation of trafficking (and similar offences) to punish and deter future offenders.⁵¹ Although there is some variation in the length and severity of penalties among international jurisdictions, it is essential that at least a minimum level of deterrence is applied by the international community to ensure harmony among jurisdictions. This ensures that offenders do not find jurisdictions where they can commit wrongdoing and face significantly lesser penalties – making the wrongdoing ‘worthwhile’.
58. At the international level, there has been a history of attempting to provide a minimum floor for penalties relating to slavery offences (which often involve trafficking). Article 6 of the *Convention to Suppress the Slave Trade and Slavery*

(signed in 1926) (1926 Slavery Convention) provides that offences of slavery and related practices should receive 'severe penalties'.

59. The Palermo Protocol requires State parties to 'adopt such legislative and other measures as may be necessary to establish as criminal offences' the conduct defined as 'trafficking in persons' under Article 3(a).⁵² Because the Palermo Protocol supplements the *United Nations Convention Against Transnational Organized Crime* (UNTOC), the two must be read together.⁵³ When considered in conjunction the two instruments require that persons convicted of offences, as established under the Palermo Protocol, must be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions (including monetary sanctions).⁵⁴ Such penalties are required to take into account the gravity of the offence committed.⁵⁵

60. However, the Palermo Protocol has rightly been criticised for a lack of explicit guidance on penalties and a failure to set a minimum sentence.⁵⁶

61. The UNODC's Framework for Action to Implement the Trafficking in Persons Protocol (UNODC Framework) sets out a minimum penalty for serious crimes of at least four years – and that the penalty for offences committed against vulnerable people be increased appropriately and proportionately.⁵⁷ Divisions 270 and 271 meet this minimum penalty.

62. Furthermore, the UNODC Framework provides five operational indicators for the implementation of the sanction obligations provided under Article 11(1) of the Palermo Protocol. The operational indicators to be considered in sanctioning are as follows:⁵⁸

- severity of sanctions imposed for trafficking in persons
- number of sanctions reflecting aggravating circumstances
- number of additional administrative and/or other non-criminal sanctions used
- number of penal sanctions applied
- number of recidivist/repeat offenders.

63. Similarly, the UNODC's Model Law Against Trafficking in Persons (Model Law) recommends a minimum penalty of at least four years imprisonment.⁵⁹ However, the Model Law also provides a list of 13 aggravating factors which would increase the seriousness of an offence:⁶⁰

- the offence involves serious injury or death of the victim or another person, including death as a result of suicide
- the offence involves a victim who is particularly vulnerable, including a pregnant woman

- the offence exposed the victim to a life-threatening illness, including HIV/AIDS
- the victim is a person with physically or mentally disability
- the victim is a child
- the offence involves more than one victim
- the crime was committed as part of the activity of an organized criminal group
- drugs, medications or weapons were used in the commission of the crime
- a child has been adopted for the purpose of trafficking
- the offender has been previously convicted for the same or similar offences
- the offender is a public official/civil servant
- the offender is a spouse or the conjugal partner of the victim
- the offender is in a position of responsibility or trust in relation to the victim
- the offender is in a position of authority concerning the child victim.

64. The UNODC's Anti-Human Trafficking Manual for Criminal Justice Practitioners also provides similar guidance.⁶¹ Such guidance is very generalised with limited elaboration on what each aggravating factor should consider, and how it ought to be weighed by a court. Accordingly, the direct usefulness of this guidance is more limited.⁶²

65. Without definitive international guidance on sentencing, difficulty often arises when the courts are faced with novel trafficking offences.⁶³ The creation of more thorough guidelines, which provide details about:

- aggravating factors
- mitigating factors
- how both factors interact
- the effect they may have on sentencing,

would greatly improve consistent and proportionate punishment.

66. When the offences contained in Divisions 270 and 271 were first introduced, great importance was placed on deterrence – ensuring that the penalties would themselves have a negative impact on the human trafficking business.⁶⁴ The government at the time stated that the legislation would send 'a firm message

to the organisers and recruiters that Australia will not be a destination for their trade'.⁶⁵

67. Greater domestic guidance on what factors should affect sentencing, and how to weigh those factors, is required to ensure consistency across decisions and to ensure that punishments serve as a deterrent, while also providing certainty of justice. Such guidance may include the creation of a domestic and more in-depth guide for sentencing which could include a detailed list of aggravating and mitigating factors and how they would impact sentencing. This would also assist in clarifying the position of consent in slavery/trafficking cases as discussed below.

Recommendation 9: Definitive sentencing guidance should be created to ensure consistency across sentencing for offences.

8.2 Increased sentences

68. Individuals found guilty of the offence of debt bondage under division 270.7C Criminal Code face a penalty of seven years imprisonment for aggravated offences and only four years in any other case. This is insufficient when considering labour offences (as discussed above) which include maximum penalties of up to 10 years imprisonment.

69. Debt bondage is an incredibly serious offence and particularly impacts vulnerable people. It is also an offence that requires, as an element, that the perpetrator intended to cause the victim to enter into debt bondage. In numerous cases, victims of trafficking have been subject to illegal agreements that included inflated debts which were owed to their captor. In extreme cases such arrangements have resulted in trafficked people working relentless hours in horrific conditions to discharge their debts.⁶⁶ In 2010, the Victorian *Inquiry into People Trafficking for Sex Work* detailed evidence of repayments ranging from \$35,000 to \$53,000 and taking approximately six to 18 months to repay, on the basis of 10-hour days for nearly seven days a week.⁶⁷ In such horrific conditions, we consider a maximum penalty of up to seven years to be manifestly insufficient.

70. Simply increasing the length of sentences in isolation will likely be ineffective in ensuring justice for victims and deterring these offences. Focus should also be placed on policing and prosecuting individuals, as general deterrence (which refers to the certainty of punishment) is an effective measure in lowering crime,

whereas marginal general deterrence (which refers to the degree of punishment) is less effective.⁶⁸

71. Treating lengthy sentences as a panacea to crimes is misguided. The most effective way to deter offenders is through a multifaceted approach, involving continued training of law enforcement, prosecutors, defence counsel and judges on the characteristics and factors involved in slavery and slavery-like offences. Further education and awareness raising amongst the public will also help to prevent such wrongdoing and ensure the community is protected as discussed above.⁶⁹

9 Question 41

Do stakeholders have recommendations about how Divisions 270 and 271 can take a victim and survivor-centred approach and reduce reliance on victim and survivor testimony while maintaining the core elements of the offences that align with international law and standards?

72. Divisions 270 and 271 can be reformed to better confirm the role, or lack of role, that consent plays in the consideration of sentencing individuals accused of the offences contained in divisions 270 and 271 (excluding forced marriage offences and the removal of organs) (Relevant Offences). A victim-centred approach would better provide that a victim's initial consent to work, or engage in conduct, is irrelevant to the culpability of the alleged offender and should play no role in sentencing.

9.1 Consent irrelevant to trafficking and slavery

73. In the Criminal Code, consent is not an element of the Relevant Offences, nor is it a substantive defence to trafficking or other offences under Divisions 270 and 271.⁷⁰

74. The relevant international law and standards make clear that consent is irrelevant to the general concepts of trafficking in persons and slavery. For example, Article 3(b) of the Palermo Protocol provides that the consent of a victim of trafficking is irrelevant. Similarly, the absence of any reference to the agency of the victim in the definition of slavery in the 1926 Slavery Convention indicates that slavery is fundamentally a coercive state to which a person cannot consent to.⁷¹

75. The *Explanatory Memorandum, Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (Cth)* further reinforces this, stating that 'to allow a defendant to escape liability because his or her offending

achieved the desired effect in bringing about these changes in a victim so that the victim appears to acquiesce in his or her treatment would be inexcusable'.⁷²

76. If the necessary elements of an offence are established, whether the victim gave consent during any stage of the trafficking process is irrelevant to sentencing. However, Australian courts have shown a willingness to discuss consent during criminal proceedings.⁷³ Consideration of consent which does not, and should not, negate the criminality of acts has been comprehensively discussed in borderline cases. Consent may be examined, and held to be evidentially relevant, in determining if the elements of an offence are established.⁷⁴ This is different from concerns where consent is considered in sentencing, including that consent has been considered by the courts as a relevant factor in the sentencing of offenders.⁷⁵
77. This is especially troubling as many instances of trafficking do not neatly fall within the traditional notion of slavery.⁷⁶ Trafficking is a complex concept. Victims may be portrayed in line with the 'ideal victim' myth, where all victims of trafficking are 'innocent young women and children ... [who] are captured and sexually exploited by sociopaths and predators, gendered male, who force them into prostitution far from home'.⁷⁷ This is reinforced by the view that a 'real victim' will also make every possible attempt to escape, and who suffers severe physical force at the hands of their captors.⁷⁸
78. The 'ideal victim' myth may also make it difficult for judges and juries to view victims as victims. This difficulty is especially evident where consent was gained through psychological or emotional duress, and where no direct physical force was used against them.⁷⁹ This has been increasingly recognised by the Australian legislature and caselaw.⁸⁰ This presentation of the 'ideal victim' may be difficult to reconcile with the lived experience and circumstances of many victims of trafficking and may affect consideration of trafficking cases.
79. Additionally, children are unable to provide legal consent in many circumstances, depending on their age and level of development. For instance, children under the age of 16 are legally unable to marry in Australia, and therefore consent is irrelevant for them under the forced marriage provisions of the Criminal Code.
80. In circumstances where direct physical force is not applied, victims in the sex industry risk being labelled as 'shrewd business women' and not as victims.⁸¹ This is contrary to evidence which highlights that victims of trafficking in Australia are usually controlled by more subversive methods – as opposed to direct force.⁸² This makes it difficult for the criminal justice system to make the distinction between the role consent should, or should not, play in sentencing.⁸³

81. This narrow view of victims and reliance on victim myths ultimately undermines the credibility of victims who do not meet this misguided perception, which is especially relevant when they must provide evidence.⁸⁴

82. Case law and relevant literature suggests that most victims will give their consent in at least one stage during the trafficking process.⁸⁵ However, this consent may be given without genuine understanding of the conditions or type of work a victim will be engaged in when they arrive in Australia.⁸⁶ This is in part due to the recruitment of trafficked people generally involving false representations about lucrative employment opportunities and favourable working conditions. This can involve recruiters lying about a victim's potential:

- type of work
- accommodation
- pay
- personal freedom.⁸⁷

83. However, cases where a victim is totally misled about the type of work to be conducted in Australia are isolated.⁸⁸ For example, the parliamentary Inquiry into the Trafficking of Women for Sexual Servitude identified three broad categories of victims with respect to the particular terms of that inquiry:

- women who come to Australia intending to work in the sex industry
- women who come knowingly intending to work in the sex industry, but are misled by traffickers as to the conditions under which they will be working
- women who are totally deceived about the fact that they will be required to work as sex workers in Australia.⁸⁹

Recommendation 10: The Commonwealth government should engage in community education campaigns, alongside its regional partners, on the risks of exploitation from traffickers promising work in Australia. Those living abroad, and looking to migrate to Australia, should be better informed on how to identify individuals seeking to traffic them and how to refer these offenders to the appropriate authorities.

84. Courts have engaged in discussion surrounding consent in borderline cases in determining if a victim was a trafficked person.

85. Irrespective of legislation, the caselaw indicates that consent is an important subtext during proceedings.⁹⁰ However, this does not excuse its consideration when determining the gravity of offending or during sentencing.
86. Consent was considered by the High Court of Australia in *R v Tang* in the context of considering whether it negated a finding of slavery.⁹¹ Gleeson CJ noted that the presence of consent by a victim was not inconsistent with a finding of slavery. His Honour also reflected that it has always been possible for a person to sell themselves into slavery, and that doing so never negated the fact that a person was enslaved.⁹² Hayne J further added that the conditions that the women in this case were subjected to, had the effect that they were no longer capable of consenting.⁹³ This indicates that consent is irrelevant, because the quality of consent was undermined by the conditions the women endured.⁹⁴
87. Justice Eames has also previously noted that ‘a volunteer slave ... is no less a slave’.⁹⁵ Yet the High Court left open the consideration of consent in determining if a victim was enslaved, as Gleeson CJ found that in certain cases ‘consent may be factually relevant to a determination of guilt’.⁹⁶
88. There have been several cases which have subsequently considered consent in determining if a victim was enslaved.⁹⁷ This indicates that whilst not a defence, consent will be considered when determining if the elements of slavery-related offences can be established. However, the Commission is worried about the relevance of consent for the purposes of sentencing given caselaw and lack of express legislative guidance.
89. There is caselaw which would support consent being treated as a mitigating factor.⁹⁸ This raises concern that there could be a development of caselaw which treats offenders as less culpable where a victim has consented to the initial migration to Australia and/or to engage in the relevant work. In contrast, this would mean that the absence of consent may be treated as an aggravating factor in sentencing.
90. The courts have previously noted that had the case of *R v Tang* involved kidnapping, or the use of coercion to elicit agreement to come to work in the Australian sex industry, the applicant’s culpability would have been higher – aggravating the seriousness of the offending.⁹⁹ In *Ho v The Queen* Buchanan and Ashley JJA noted that such factors mitigated the culpability of the defendant.¹⁰⁰
91. However, considering consent when sentencing can lead to a slippery slope wherein sentencing is inappropriately determined in cases where victims do not meet the ‘ideal victim’ notion.¹⁰¹ This is illustrated in Williams DCJ’s findings in *R v Mclvor*.¹⁰²

92. Williams DCJ made comments in sentencing which indicate that consent, and prior experience as a sex worker, would mitigate the length of the sentence. In our view, this sets a troubling precedent. This is illustrated while discussing two of the victims – Yoko and Mickey (both pseudonyms). During sentencing their Honour made comment that Yoko’s lack of consent ‘must have been a source of additional distress to her’.¹⁰³ The absence of consent was clearly considered as making her experience more distressing than that of Mickey – who had initially consented, and had previously worked in the sex industry.¹⁰⁴ In relation to the count of using Mickey as a slave, the offenders received three years, compared to a four-year sentence for the same offence in respect of Yoko.¹⁰⁵
93. Mickey’s initial consent and previous experience in the sex industry may have mitigated the gravity of offending according to Williams DCJ’s ruling. There were also minor differences in Yoko and Mickey’s treatment. Mickey was detained constantly at the brothel and serviced nearly twice the number of clients over a shorter period, when compared to Yoko.¹⁰⁶ This is concerning given the higher penalty applied in respect of Yoko.
94. The implication that victims who have previously engaged in the sex industry suffer less ‘pain and distress’ detracts from victims and survivors’ lived experiences. Applying a lesser sentence to offenders who traffic victims with prior sex work experience may motivate traffickers to target sex workers to receive a lesser sentence should they be caught.¹⁰⁷ This would negatively impact an already marginalised group of people.
95. The Commission is concerned that caselaw may develop where initial consent is used to mitigate the gravity of offending. Such an approach to sentencing is fails to reconcile the true realities of victims who are trafficked. In taking a victim and survivor-centred approach to reduce reliance on victim and survivor testimony, discussion should focus on the actions of the offender, and not the intentions or actions of the victim in respect of consent. It is especially important that consideration not be given to a victim’s previous work experience in the sex industry when determining the length of punishment.¹⁰⁸ By prohibiting the consideration of consent and previous sex work in sentencing, this will ensure that these factors do not play a role as a possible mitigating or aggravating factors.

Recommendation 11: Division 271 should be amended to expressly prohibit the consideration of consent, and previous sex work, when sentencing offenders. This will ensure that the courts avoid treating consent and previous sex work as a mitigating/aggravating factor.

Recommendation 12: Where appropriate, updated guidance should be provided to judges detailing prescriptive directions to juries instructing them as to the irrelevance of consent. This should note that although a victim may initially consent to certain aspects throughout trafficking (and thus not fulfill the ‘ideal victim’ myth), this does not negate the culpability of the offender.

9.2 Victims and survivors’ voices

96. A victim and survivor-centred approach to modern slavery must include input and engagement with victims and survivors. The importance of including victim and survivor voices in the development of policies and laws is highlighted in Anti-Slavery Australia ‘Beyond Story Telling: towards survivor-informed responses to modern slavery’.¹⁰⁹

Recommendation 13: Government, agencies and law enforcement should engage with victims and survivors to best inform how to ensure a victim and survivor-centred approach to reforming Divisions 270 and 271.

97. Including the views and perspectives of victims and survivors with lived experience, can not only protect their human rights and empower them, but also leads to better and more effective legal, policy and practice responses. This is especially the case when protecting children and young people. Under article 12 of the CRC, children have a right to express their views in any decisions that affect them. One of the overarching points to make about children who are victimised is that they experience the psychosocial, physical and psychological harms acutely and are more vulnerable to exploitation.

98. Accordingly, children and young people require additional or special supports in accordance with their circumstance and level of development, from those provided by adult victims and survivors. This includes in relation to laws, policies, programs and interventions that protect, respect and fulfil the rights of child victims and survivors under the CRC. Anti-Slavery Australia report that there is no guidance on procedures to respond to child victims of modern slavery publicly available in Australia.¹¹⁰ It is for this reason that the National Action Plan to Combat Modern Slavery requires the implementation of a protocol for the treatment of children suspected as victims of human trafficking, slavery or slavery-like practices.¹¹¹

99. Child-centred laws, policies, programs and interventions mean that children are given the same opportunity to access information and supports as adult victims and survivors. Children capable of expressing their views are supported to do so with respect, dignity and compassion.

Recommendation 14: A protocol for the treatment of children suspected as victims of human trafficking, slavery or slavery-like practices be implemented as recommended by the National Action Plan to Combat Modern Slavery.

10 Question 42

Do the general defences in the Criminal Code (including duress) sufficiently capture the contexts in which a victim and survivor may commit an offence in connection to their experience of trafficking in persons, slavery or slavery-like practices? If not, why not, and what are the deficiencies? What form might additional protections for victims and survivors take?

100. A key issue canvassed within this question is the application of the non-punishment principle, which ‘recognises that victims and survivors should not be punished for conduct that they commit as a direct result of their being a victim and survivor’.¹¹² Importantly, the non-punishment principle ‘does not offer blanket immunity, but is a critical tool for victim protection and human rights-based criminal justice response to human trafficking’.¹¹³
101. The non-punishment principle is not currently incorporated within Australian law or domestic policy.¹¹⁴ It is also recognised that the non-punishment principle is not expressly included within either the Palermo Protocol or UNTOC. The principle has, however, emerged in international guidance, regional instruments, and relevant case law concerning trafficking in persons, and ‘is increasingly understood as a core component of human rights-based victim protection and assistance, including in the *Recommended Principles and Guidelines on Human Rights and Human Trafficking of the Office of the United Nations High Commissioner for Human Rights*’.¹¹⁵
102. Examples of this are outlined in the *Discussion Paper*,¹¹⁶ with the examples relating to ASEAN Member States being particularly relevant given the role played by Australia in supporting the implementation by those ASEAN Member States of their obligations under the ASEAN Convention Against Trafficking in Persons, Especially Women and Children. Indeed, Australia’s international engagement strategy on human trafficking and modern slavery

highlights advocating for the non-punishment of victims as being one of the key achievements of the ASEAN-Australia Counter-Trafficking program.¹¹⁷

103. The Special Rapporteur on trafficking in persons, especially women and children, delivered a report to the Human Rights Council in 2021 on the implementation of the non-punishment principle. In this report, the non-punishment principle was described as constituting ‘the cornerstone of an effective protection of the rights of victims of trafficking’ and it was recommended that States should, *inter alia*, ‘introduce a specific provision into domestic legislation to provide for the non-punishment of victims of trafficking’.¹¹⁸
104. Australia implicitly indicated its support for the principle when the UN General Assembly adopted the 2021 Political Declaration on the Implementation of the United Nations Global Plan of Action to Combat Trafficking in Persons without a vote on 22 November 2021.¹¹⁹ In the Declaration, Member States ‘commit to intensify efforts, subject to our national laws, rules and regulations, to implement the principle of non-punishment of victims of trafficking, which should apply to unlawful activity that a victim of trafficking in persons has been compelled to be involved in as a direct consequence of their trafficking situation and for all types of punishment, including criminal, civil, administrative and immigration offences’.¹²⁰
105. The National Action Plan to Combat Modern Slavery 2020–25 includes a commitment to undertake a targeted review of the existing support, protections, defences and remedies available to victims and survivors.¹²¹ We recommend that this review specifically consider the application of the non-punishment principle in Australia.

Recommendation 15: The targeted review of the existing support, protections, defences and remedies available to victims and survivors that will be undertaken under the National Action Plan to Combat Modern Slavery 2020-25 should specifically consider the application of the non-punishment principle in Australia.

11 Recommendations

106. The Commission makes the following recommendations.

Recommendation 1

The Australian Government should embed a victim-centred approach into the investigation and prosecution of offences under Divisions 270 and 271 of the Criminal Code. This includes the establishment of a national compensation scheme for victims, provision of alternative referral pathways, enhanced education and training, and the implementation of victim-centred and child-specific practices throughout the criminal justice system.

Recommendation 2

Technology education should be provided to those who operate in the criminal justice system and who will interact with the Divisions 270 and 271 in court. Increased education will ensure a more articulate criminal justice system which is readily able to understand the nuances of the technologies used to commit offences. Additional funding be provided to the agencies which investigate and prosecute offences under divisions 270 and 271. Greater funding will better allow agencies to match the technology of criminals to develop sophisticated operations to better infiltrate and prosecute online criminal enterprise.

Recommendation 3

The agencies involved in policing and prosecuting Divisions 270 and 271 must develop a framework be it regular roundtable conversations, targeted consultations or structured information sessions with private businesses to ensure robust and productive lines of communication. This must be done with safeguards in place to ensure that the agencies do not go beyond their remit and misuse such lines of communications.

Recommendation 4

Forced marriage should be included as a ground on which marriages are void under section 23 of the Marriage Act.

Recommendation 5

The Australian Government should ensure that that law enforcement, prosecutors and the judiciary are provided with appropriate education and training to understand the drivers and indicators of forced marriage, particularly as they relate to questions of consent.

Recommendation 6

The offence of debt bondage contained in division 270.7C of the Criminal Code be amended to allow a maximum penalty of 10 years imprisonment.

Recommendation 7

There should also be greater education, awareness and training provided to practitioners, investigators and vulnerable workers to inform them about rights and legal pathways under both criminal and employment law. The Federal government should increase funding, capabilities and legislative scope of the FWO to assist in the pursuit of allegations against perpetrators of debt bondage, as the body with the most relevant expertise in this area.

Recommendation 8

Both the cross-border trafficking offences and domestic trafficking offences under Division 271 should be amended so that they do not require the physical movement of a person as an element of the offence.

Recommendation 9

Definitive sentencing guidance should be created to ensure consistency across sentencing for the Relevant Offences.

Recommendation 10

The Commonwealth government should engage in community education campaigns, alongside its regional partners, on the risks of exploitation from traffickers promising work in Australia. Those living abroad, and looking to migrate to Australia, should be better informed on how to identify individuals seeking to traffic them and how to refer these offenders to the appropriate authorities.

Recommendation 11

Division 271 should be amended to expressly prohibit the consideration of consent, and previous sex work, when sentencing offenders. This will ensure that the courts avoid treating consent and previous sex work as a mitigating/aggravating factor.

Recommendation 12

Where appropriate, updated guidance should be provided to judges detailing prescriptive directions to juries instructing them as to the irrelevance of consent. This should note that although a victim may initially consent to certain aspects throughout trafficking this does not negate the culpability of the offender.

Recommendation 13

Government, agencies and law enforcement engage with victims and survivors to best inform how to ensure a victim and survivor-centred approach to reforming Divisions 270 and 271.

Recommendation 14

A protocol for the treatment of children suspected as victims of human trafficking, slavery or slavery-like practices be implemented as recommended by the National Action Plan to Combat Modern Slavery.

Recommendation 15

The targeted review of the existing support, protections, defences and remedies available to victims and survivors that will be undertaken under the National Action Plan to Combat Modern Slavery 2020-25 should specifically consider the application of the non-punishment principle in Australia.

Endnotes

¹ See, for example, Australian Human Rights Commission, *Statement of Support for an Australian Modern Slavery Act* (Letter to Joint Standing Committee on Foreign Affairs, Defence and Trade, 15 November 2017); Australian Human Rights Commission, *Inquiry into the Modern Slavery Bill 2018* (20 July 2018); Australian Human Rights Commission, *Review of the Modern Slavery Act 2018 (Cth) (Submission to the Statutory Review undertaken by Professor John McMillan AO)* (November 2022).

² International Labour Organization, Walk Free, and International Organization for Migration, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, 2022. <<https://www.walkfree.org/reports/global-estimates-of-modern-slavery-2022/>>.

³ Anti-Slavery Australia, *Modern Slavery* (Web Page) <<https://antislavery.org.au/modern-slavery/>>.

⁴ Lyneham S, Dowling C & Bricknell S, *Estimating the dark figure of human trafficking and slavery victimisation in Australia* (Australian Institute of Criminology, Statistical Bulletin 16, February 2019), 1. <https://www.aic.gov.au/sites/default/files/2020-05/sb_human_trafficking_050219.pdf>.

⁵ Lyneham S, *Attrition of human trafficking and slavery cases through the Australian criminal justice system* (Australian Institute of Criminology, Trends & issues in crime and criminal justice no. 640, November 2021), 1. <https://www.aic.gov.au/sites/default/files/2021-11/ti640_attrition_of_human_trafficking_and_slavery_cases.pdf>.

⁶ Australian Government, *National Action Plan to Combat Modern Slavery 2020-25*, 3. <<https://www.homeaffairs.gov.au/criminal-justice/files/nap-combat-modern-slavery-2020-25.pdf>>.

⁷ See, for example, Australian Human Rights Commission, *Submission to the Committee Against Torture* (October 2022), [132] – [133]; Australian Human Rights Commission, *Review of the Modern Slavery Act 2018 (Cth) (Submission to the Statutory Review undertaken by Professor John McMillan AO)* (November 2022), [94].

⁸ Australian Government, *National Action Plan to Combat Modern Slavery 2020-25* (2020), 26-27. <<https://www.homeaffairs.gov.au/criminal-justice/files/nap-combat-modern-slavery-2020-25.pdf>>.

⁹ Australian Human Rights Commission, *Human Rights and Technology: Final Report* (2021), 46-47.

¹⁰ United Nations General Assembly, 'A/76/170: Role of Organized Criminal Groups with Regard to Contemporary Forms of Slavery' (Report of the Special Rapporteur on contemporary forms of

slavery, including its causes and consequences, United Nations Office on Drugs and Crime (UNODC), 24 January 2022) 6.

¹¹ Ibid 8.

¹² Steven Malby, Tejal Jesrani, Tania Bañuelos, Anika Holterhof, Magdalena Hahn, *Study on the Effects of New Information Technologies on the Abuse and Exploitation of Children* (United Nations Office on Drugs and Crime, 2015) 15

<https://www.unodc.org/documents/Cybercrime/Study_on_the_Effects.pdf>.

¹³ Comments by the Special Rapporteur on trafficking in persons, especially women and children, Mis. Siobhán Mullally, to the Draft General Comment No. 25 on Children's Rights in relation to the Digital Environment (11 December 2020)

¹⁴ See Ibid; UNODC, '*Global Report on Trafficking in Persons*' (Report, 15 January 2020) 15 & 18.

¹⁵ UNODC, '*Global Report on Trafficking in Persons*' (Report, 15 January 2020) 119.

¹⁶ Ibid 120.

¹⁷ Ibid.

¹⁸ Ibid 18.

¹⁹ Australian Federal Police, *Stop human trafficking happening in plain sight* (30 July 2020).

²⁰ Australian Federal Police, *Forced marriage awareness campaign launched at Australia's busiest airport* (15 October 2019); Carla Hildebrandt, 'Federal police fear hike in child forced marriage cases as overseas travel restrictions lift', *ABC News* (4 September 2022).

²¹ Samantha Lyneham and Samantha Bricknell, *When saying no is not an option: Forced marriage in Australia and New Zealand* (Australian Institute of Criminology, Research Report 11, 2018), 2.

²² Khatidja Chantler and Melanie McCarry, 'Forced Marriage, Coercive Control, and Conducive Contexts: The Experience of Women in Scotland' (2020) 26(1) *Violence Against Women* 89, 95.

²³ Frances Simmons and Grace Wong, 'Learning from Lived Experience: Australia's Legal Response to Forced Marriage' (2021) 44(4) *UNSW Law Journal* 1619, 1624-1635.

²⁴ See Nick McKenzie and Ben Schneiders, 'Visa scheme rorting leaves foreigners in debt bondage', *Sydney Morning Herald*, (Sydney, 6 June 2013).

²⁵ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight An inquiry into establishing a Modern Slavery Act in Australia* (Final Report, December 2017) 58 [3.103].

²⁶ United Nations Office of the High Commissioner for Human Rights, *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences*, (Report, 4 July 2016) A/HRC/33/46, [53].

²⁷ For a general overview of developments see Kirchengast, T & Finlay, L, *Criminal Law in Australia* (3rd ed, LexisNexis, 2022), [5.126]-[5.127], [6.168]-[6.177], [7.94]-[7.97].

²⁸ See generally *Wage Theft Act 2020* (Vic); *Queensland Criminal Code 1899* (Qld) as amended by the *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020* (Qld).

²⁹ See Select Committee on Wage Theft in South Australia, *Interim Report* (Report, 21 July 2020) 42-43; Tony Beech, *Inquiry into Wage Theft in Western Australia* (June 2019).

³⁰ See generally *Taxation Administration Amendment (Combating Wage Theft) Bill 2021* (NSW).

³¹ See generally *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021* (Cth).

³² See generally *Wage Theft Act 2020* (Vic) Part 3.

³³ *Queensland Criminal Code 1899* (Qld) s 391(6A).

³⁴ Victoria, *Victorian Government Gazette*, No g16, Thursday 21 April 2022, 1943.

³⁵ *Wage Theft Act 2020* (Vic) s 6.

³⁶ Ibid s 3.

³⁷ Stephen Ranieri, 'Criminal Offences of Wage Theft in Victoria and Queensland' (2021) 43(9) *Law Society of South Australia* 28, 28-29.

³⁸ *Fair Work Act 2009 (Cth)* (FW Act) s 293.

³⁹ *Ibid* s 45.

⁴⁰ *Ibid* s 50.

⁴¹ See *Ibid* s 539, items 2, 4, 8, 10 and 10A.

⁴² *Ibid*.

⁴³ *Crimes Amendment (Penalty Unit) Bill 2022 (Cth)*.

⁴⁴ See FW Act ss 324–325.

⁴⁵ Fair Work Ombudsman, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven* (April 2016) <<https://www.fairwork.gov.au/sites/default/files/migration/763/7-eleven-inquiry-report.pdf>>.

⁴⁶ US Department of State, *Trafficking in Persons Report* (July 2022), 95.

⁴⁷ See Article 3(a), *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003).

⁴⁸ United Nations Office of Drugs and Crime, *The Concept of 'Harbouring' in the Trafficking in Persons Protocol* (Issue Paper, 2021).

⁴⁹ See, for example, US Department of State, *2019 Trafficking in Persons Report* (June 2019), 6.

⁵⁰ Specifically, division 271.7F of the *Criminal Code Act 1995 (Cth)*.

⁵¹ Mathew Cameron & Andreas Schloenhardy, 'Punishing Trafficking in Persons: International Standards and Australian Experiences' (2012) 24(1) *Bond Law Review* 1, 1.

⁵² *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* Art 5.

⁵³ Cameron (n 21) 5 citing *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, art 1(1)-(3); *Convention against Transnational Organised Crime* art 37(4).

⁵⁴ *Convention against Transnational Organised Crime* art 10(4).

⁵⁵ *Ibid* art 11(1).

⁵⁶ Cameron (n 21) 5 citing Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking Balances for More Effective Legislation' (2009) 17(1) *Cardozo Journal of International & Comparative Law* 101, 121; Cf Mohamed Y Mattar, 'Incorporating the Five Basic Elements of A Model Anti Trafficking in Persons Legislation into Domestic Laws: From the United Nations Protocol to the European Convention' (2006) 14(2) *Tulane Journal of International and Comparative Law* 357, 378-379.

⁵⁷ United Nations Office on Drugs and Crime (UNODC), *International Framework for Action to Implement the Trafficking in Persons Protocol* (United Nations, 2009) 24.

⁵⁸ *Ibid*.

⁵⁹ UNODC, *Model Law against Trafficking in Persons* (United Nations, 2009) 34; *Convention against Transnational Organised Crime* art 2(b); See also Inter-Parliamentary Union and UNODC, *Combating Trafficking in Persons: A Handbook for Parliamentarians* (United Nations, 2009) 28.

⁶⁰ *Ibid* 39-40; See also Inter-Parliamentary Union and UNODC, *Combating Trafficking in Persons: A Handbook for Parliamentarians* (United Nations, 2009) 28-29.

⁶¹ See generally UNODC, *Anti-Human Trafficking Manual for Criminal Justice Practitioners, Module 14 Considerations in Sentencing in Trafficking in Persons Cases* (UNODC, 2009).

⁶² Cameron (n 21) 8.

⁶³ Cameron (n 21) 8.

- ⁶⁴ Commonwealth, Parliamentary Debates, House of Representatives, 11 August 1999, 8495 (Sharman Stone).
- ⁶⁵ Ibid 8498.
- ⁶⁶ Andreas Schloenhardt & Hannah Bowcock, 'Sex Slaves and Shrewd Business Women: The Role of Victim Consent in Trafficking in Persons in Australia' (2015) 39(2) *Melbourne University Law Review* 592, 601 citing *R v Sieders* (2008) 72 NSWLR 417, 422–3 [18]–[22] (Campbell JA); *Ho v The Queen* (2001) 219 A Crim R 74, 80 [16] (Buchanan and Ashley JJA).
- ⁶⁷ Drugs and Crime Prevention Committee, Parliament of Victoria, *Inquiry into People Trafficking for Sex Work* (2010) 46–47.
- ⁶⁸ Cameron (n 21) 16 citing Andrew von Hirsch, Anthony E Bottoms, Elizabeth Burney and Per-olot Wikstrom, 'Deterrent Sentencing as a Crime Prevention Strategy' in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3rd ed, 2009) 57; see also Mirko Bagaric, 'Strategic (and Popular) Sentencing' (2006) 2(3) *International Journal of Punishment and Sentencing* 121, 126; see generally Mirko Bagaric, 'Bringing Sentencing Out of the Intellectual Wasteland - Ignoring Community Opinion' (2010) 34 *Criminal Law Journal* 281.
- ⁶⁹ Ibid 29.
- ⁷⁰ See *Criminal Code Act 1995* (Cth) divs 270.11 & 271.11B.
- ⁷¹ Frances Simmons and Jennifer Burn, 'Evaluating Australia's Response to All Forms of Trafficking: Towards Rights-Centred Reform' (2010) 84(10) *Australian Law Journal* 712, 722.
- ⁷² Explanatory Memorandum, *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012* (Cth) 31.
- ⁷³ Schloenhardt (n 35) 593.
- ⁷⁴ Ibid citing *R v Tang* (2008) 237 CLR 1; *R v Sieders* (2008) 72 NSWLR 417; *Ho v The Queen* (2011) 219 A Crim R 74.
- ⁷⁵ Ibid citing *R v Tang* (2008) 237 CLR 1; *Ho v The Queen* (2011) 219 A Crim R 74; *R v Mclvor* (2010) 12 DCLR (NSW) 77.
- ⁷⁶ Ibid 594 citing Vanessa E Munro, 'Of Rights and Rhetoric: Discourses of Degradation and Exploitation in the Context of Sex Trafficking' (2008) 35 *Journal of Law and Society* 240, 250.
- ⁷⁷ Vanessa E Munro, 'Of Rights and Rhetoric: Discourses of Degradation and Exploitation in the Context of Sex Trafficking' (2008) 35 *Journal of Law and Society* 240, 250.
- ⁷⁸ Julia Quilter, 'Re-framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform' (2011) 35 *Australian Feminist Law Journal* 23, 33–5; See also Jonathan Crowe, 'Consent, Power and Mistake of Fact in Queensland Rape Law' (2011) 23 *Bond Law Review* 21, 28–9; See generally Melanie Randall, 'Sexual Assault Law, Credibility, and "Ideal Victims": Consent, Resistance, and Victim Blaming' (2010) 22 *Canadian Journal of Women and the Law* 397, 410–12.
- ⁷⁹ See especially Schloenhardt (n 35) 610
- ⁸⁰ Ibid; Explanatory Memorandum, *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012* (Cth) 9–10.
- ⁸¹ Ibid 594–595 citing Fiona David, *Trafficking of Women for Sexual Purposes* (Research and Public Policy Series No 95, Australian Institute of Criminology, 2008) 52; See e.g. *Ho v The Queen* (2011) 219 A Crim R 74, 84 [38] (Buchanan and Ashley JJA).
- ⁸² Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, 20th session, Agenda Item 3, UN Docs A/HRC/20/18 (18 May 2012) annex ('Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, on Her Mission to Australia (17–30 November 2011)') 4 [6].

- ⁸³ Schloenhardt (n 58) 597.
- ⁸⁴ Schloenhardt (n 58) 594 citing Kay B Warren, 'Troubling the Victim/Trafficker Dichotomy in Efforts to Combat Human Trafficking: The Unintended Consequences of Moralizing Labor Migration' (2012) 19 *Indiana Journal of Global Legal Studies* 105, 106.
- ⁸⁵ Ibid 597.
- ⁸⁶ Ibid.
- ⁸⁷ Ibid 597-598.
- ⁸⁸ Ibid.
- ⁸⁹ Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Trafficking of Women for Sexual Servitude* (Report, June 2004) 8 [2.10]-[2.13].
- ⁹⁰ Ibid.
- ⁹¹ See *R v Tang* (2008) 237 CLR 1.
- ⁹² Ibid 21 [35].
- ⁹³ Ibid 63-64 [166].
- ⁹⁴ Ibid 63-64 [166]-[167].
- ⁹⁵ *R v Tang* (2007) 16 VR 454, 464 [41], cited in *R v Sieders* (2008) 72 NSWLR 417, 425 [94] (Campbell JA).
- ⁹⁶ *R v Tang* (2008) 237 CLR 1, 21 [35].
- ⁹⁷ See *R v Sieders* (2008) 72 NSWLR 417, 424 [89]; *Ho v The Queen* (2011) 219 A Crim R 74, 85 [44] (Buchanan and Ashley JJA).
- ⁹⁸ See e.g. *R v Tang* (2009) 23 VR 332; *Ho v The Queen* (2011) 219 A Crim R 74; See especially *R v Mclvor* (2010) 12 DCLR (NSW) 77.
- ⁹⁹ Ibid 341-342 [42].
- ¹⁰⁰ *Ho v The Queen* (2011) 219 A Crim R 74, 87 [61].
- ¹⁰¹ See e.g. *R v Mclvor* (2010) 12 DCLR (NSW) 77.
- ¹⁰² *R v Mclvor* (2010) 12 DCLR (NSW) 77.
- ¹⁰³ Ibid 83 [28].
- ¹⁰⁴ Ibid.
- ¹⁰⁵ Ibid 91 [65]-[66].
- ¹⁰⁶ Ibid 83-84 [28]-[31].
- ¹⁰⁷ Cameron (n 21) 27.
- ¹⁰⁸ Schloenhardt (n 58) 625.
- ¹⁰⁹ Frances Simmons and Jennifer Burn, *Beyond Storytelling: towards survivor-informed responses to modern slavery* (University of Technology Sydney, September 2022) 36 <https://antislavery.org.au/wp-content/uploads/2022/10/ASA-Beyond-Storytelling-report_FA_accessible.pdf>.
- ¹¹⁰ Frances Simmons and Jennifer Burn, *Beyond Storytelling: towards survivor-informed responses to modern slavery* (University of Technology Sydney, September 2022) 36 <https://antislavery.org.au/wp-content/uploads/2022/10/ASA-Beyond-Storytelling-report_FA_accessible.pdf>.
- ¹¹¹ Australian Government, *National Action Plan to Combat Modern Slavery 2020-25* (2020), 26-27. <<https://www.homeaffairs.gov.au/criminal-justice/files/nap-combat-modern-slavery-2020-25.pdf>>.
- ¹¹² Attorney-General's Department, *Targeted Review of Divisions 270 and 271 of the Criminal Code Act 1995 (Cth)*, Discussion Paper (2022), 35.
- ¹¹³ Marika McAdam, *Implementation of the Non-Punishment Principle for Victims of Human Trafficking in ASEAN Member States* (ASEAN-Australia Counter-Trafficking, March 2022), 2.

¹¹⁴ See, for example, Anne O'Donoghue, *Modern Slavery Reform – Punishment the victims and why this must stop – Non-Punishment Principle in Australia*.

<<https://www.lawcouncil.asn.au/international-law/ils-newsletter/modern-slavery-reform---punishing-the-victims-and-why-this-must-stop---non-punishment-principle-in-australia>>.

¹¹⁵ Marika McAdam, *Implementation of the Non-Punishment Principle for Victims of Human Trafficking in ASEAN Member States* (ASEAN-Australia Counter-Trafficking, March 2022), 2.

¹¹⁶ Attorney-General's Department, *Targeted Review of Divisions 270 and 271 of the Criminal Code Act 1995 (Cth)*, *Discussion Paper* (2022), 57.

¹¹⁷ Australian Government, *Australia's international engagement strategy on human trafficking and modern slavery: Delivering in partnership* (2022), 24.

<<https://www.dfat.gov.au/sites/default/files/dfat-international-strategy-human-trafficking-modern-slavery-2022.pdf>>

¹¹⁸ Siobhán Mullally, *Implementation of the non-punishment principles (Report of the Special Rapporteur on trafficking in persons, especially women and children, UN Doc A/HRC/47/34* (17 May 2021).

¹¹⁹ *2021 Political Declaration on the Implementation of the United Nations Global Plan of Action to Combat Trafficking in Persons*, GA/12387, UN Doc A/RES/76/7 (22 November 2021).

¹²⁰ *Ibid*, [13].

¹²¹ Australian Government, *National Action Plan to Combat Modern Slavery 2020-25* (2020), 26-27. <<https://www.homeaffairs.gov.au/criminal-justice/files/nap-combat-modern-slavery-2020-25.pdf>>.