



# **Modern slavery: Guidance for Australian courts.**



Judicial  
College of  
Victoria



JUDICIAL COUNCIL ON  
CULTURAL DIVERSITY

# Modern slavery: Guidance for Australian courts.

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# **Modern slavery: Guidance for Australian courts.**

## **1. Introduction**

*Modern slavery: Guidance for Australian courts*, is the first of its kind in Australia, and was prepared by the Judicial College of Victoria at the request of the Judicial Council on Cultural Diversity following its consideration of the ground breaking work of Heather Moore, National Policy and Advocacy Adviser for The Salvation Army's Freedom Partnership to End Modern Slavery.

The College is grateful for the contributions, review, and guidance provided by the Council's editorial working group: Chief Justice Chris Kourakis, Justice Melissa Perry, and Justice Jenny Blokland.

This Guide was produced by Nicole Clark, Skye Fantin, David Tedhams, and Matthew Weatherston. It owes much to Ms Moore's previous draft *Guidance Note on Managing Cases Involving Modern Slavery: A Guide for Judicial Officers*.

The College would also like to thank His Honour Justice John Champion who kindly shared his time and insights following sentencing in the most recent modern slavery case heard in Australia, and the first to involve only domestic servitude, [R v Kannan \[2021\] VSC 439](#).

Feedback or suggestions for improvement are welcome and may be emailed to [info@judicialcollege.vic.edu.au](mailto:info@judicialcollege.vic.edu.au).

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## 2. Overview of modern slavery

The common point across all modern slavery offences is the exploitation of people and the manipulation of complex relationships resulting in the ‘serious undermining of the victim’s personal freedom’.<sup>1</sup>

### The known figures

Focusing on forced labour and forced marriage, the International Labour Organisation, *Global Estimates of Modern Slavery* (Report, 19 September 2017) (*‘Global Estimates Report’*) found that in 2016 an estimated 40.3 million people were victims of modern slavery.<sup>2</sup> Of that total, 24.9 million people were ‘forced to work under threat or coercion’ and 15.4 million people were forcibly married.<sup>3</sup>

In the five-year period between 2012 and 2016, 89 million people were victims of either forced labour or forced marriage.<sup>4</sup> The duration and nature of victimisation varied widely between the survivors.<sup>5</sup>

These estimates are ‘considered to be conservative’ due to the lack of reliable data.<sup>6</sup> The *Global Estimates Report* notes there are deficiencies particularly in relation to underreporting.<sup>7</sup> Due to the complexities of modern slavery victimisation, survivors may be apprehensive about contacting authorities or community organisations.<sup>8</sup>

### Women and Girls

The *Global Estimates Report* suggests that modern slavery disproportionately affects women and girls.<sup>9</sup> They accounted for 71% of the overall estimated total of modern slavery victims on any given day in 2016.<sup>10</sup>

### Children

In 2016, one in four victims of modern slavery were children.<sup>11</sup> In comparison to their adult counterparts, children, under 18 years of age, were more likely to be victims of forced marriage.<sup>12</sup> In terms of prevalence of modern slavery, there was little difference in victimisation between adults and children.<sup>13</sup>

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<sup>1</sup> Commonwealth of Australia, *The National Action Plan to Combat Human Trafficking and Slavery 2015-19* (2014) 4 (‘National Action Plan’).

<sup>2</sup> International Labour Organization, *Global Estimates of Modern Slavery*, (Report, 19 September 2017) 9 (‘Global Estimates’).

<sup>3</sup> *Ibid* 10.

<sup>4</sup> *Ibid*.

<sup>5</sup> *Ibid* 25.

<sup>6</sup> *Ibid* 9.

<sup>7</sup> *Ibid* 54.

<sup>8</sup> *National Action Plan* 5. For further discussion of these difficulties see Chapters 5 & 7.

<sup>9</sup> *Global Estimates* 22.

<sup>10</sup> *Ibid*.

<sup>11</sup> *Ibid* 10.

<sup>12</sup> *Ibid* 23-4.

<sup>13</sup> *Ibid* 24.

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## **Vulnerability to victimisation**

Slavery and human trafficking are highly lucrative, making the conduct attractive to criminals.<sup>14</sup> Factors that may increase an individual's vulnerability to modern slavery victimisation within Australia are:

- Poverty;
- Underemployment and unemployment;
- Lack of education, opportunities and access to resources;
- Gender inequality;
- Corruption and social and political instability;
- Significant differences in age between victim and offender;
- Lack of English language skills;
- Unfamiliarity with Australian culture and law;
- Isolation from family and friends; and
- Dependence on the offender for immigration status.<sup>15</sup>

Migrants holding visas which limit their ability to work in Australia are particularly vulnerable.<sup>16</sup> Underreporting of modern slavery cases by this group is exacerbated by a lack of understanding of Australia's legal system, and a corresponding fear of deportation or unfavourable outcomes as a non-citizen.<sup>17</sup>

All of the listed factors indicate that vulnerability may stem from a victim's circumstances, as well as their personal characteristics.<sup>18</sup>

## **2.1 - Aims of this Guide**

The term 'modern slavery' recognises that while the law formally prohibits slavery, a number of slavery-like relationships exist through purportedly legal or clearly illegal actions. The term 'modern slavery' is explained below, at 2.2 – Terminology.

This Guide focusses on how modern slavery issues are likely to arise in Australian courts and aims to equip judicial officers with the tools and information available to assist them in hearing such cases.

Despite its recent commencement and name this Guide does not examine the *Modern Slavery Act 2018 (Cth)* in depth. That legislation creates reporting requirements for businesses which are currently unenforceable. At present, it is therefore unlikely to arise as a principal issue in court proceedings.

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<sup>14</sup> [National Action Plan 7](#).

<sup>15</sup> Walk Free: The Minderoo Foundation, *Murky Waters: A qualitative assessment of modern slavery in the Pacific region*, (Report, 2020) 45 ('Murky Waters'). See

also [National Action Plan 7](#).

<sup>16</sup> [Murky Waters](#) 33.

<sup>17</sup> [Ibid](#).

<sup>18</sup> Samantha Lyneham and Kelly Richards, '[Human trafficking involving marriage and partner migration to Australia](#)' (Research and Public Policy Series No 124,

Australian Institute of Criminology, May 2014) 45.

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## 2.2 - Terminology

Modern slavery is an umbrella term which encompasses:

- Slavery;
- Slavery-like practices (servitude);
- Organ trafficking;
- Trafficking in persons (including children);
- Forced labour or services (including deceptive recruiting);
- Debt bondage; and
- Forced marriage.

All of these practices have been criminalised through Divisions [270](#) and [271](#) of the [Criminal Code Act 1995 \(Cth\)](#) ('*Criminal Code*').<sup>19</sup> This Guide will use the term modern slavery when discussing these offences collectively, and will refer to the specific offence when the discussion is limited to that offence.

Various forms of modern slavery are also separately prohibited through [Criminal Code Division 268](#), where they occur as crimes against humanity or war crimes. Those offences are outside the scope of this Guide, as they relate to offences occurring in the context of 'a widespread or systematic attack directed against a civilian population' or 'an international armed conflict'.<sup>20</sup>

## 2.3 - How modern slavery manifests

According to the Interdepartmental Committee on Human Trafficking and Slavery ('the Committee') and the United Nations Office on Drugs and Crime, the nature of modern slavery varies between regions.<sup>21</sup> The most visible form of modern slavery involves the 'transnational movement of women for exploitation in the sex industry'.<sup>22</sup>

Globally, however, individuals are being increasingly exploited for a wide range of purposes, including:

- Forced labour;
- Street begging;
- Forced recruitment into militias and armed forces; and
- Harvesting of body organs.<sup>23</sup>

This serious exploitation of people often stems from the manipulations of complex relationships.<sup>24</sup>

<sup>19</sup> [Criminal Code Act 1995 \(Cth\) sch 1](#) ('*Criminal Code*').

<sup>20</sup> [Ibid ss 268.15, 268.60, 268.83](#).

<sup>21</sup> Interdepartmental Committee on Human Trafficking and Slavery, Parliament of Australia, [Trafficking in Persons: The Australian Government Response 1 July 2015 – 30 June 2016](#) (Report No 8, 2016) 3.

<sup>22</sup> [Ibid 25](#).

<sup>23</sup> [Ibid 3](#).

<sup>24</sup> [National Action Plan 4](#).

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## 2.4 - Conduct that does not constitute modern slavery

The Commonwealth's [National Action Plan to Combat Human Trafficking and Slavery](#) provides a list of conduct that does not constitute modern slavery per se. It includes:

- Migrant smuggling;
- Poor/harsh working conditions;
- Sex work;
- Adoption and surrogacy; and
- Transplant tourism<sup>25</sup>

While these behaviours may not be modern slavery per se, they might be exploited in a way that gives rise to modern slavery. For example, migrant smuggling isn't slavery unless it is trafficking in people,<sup>26</sup> and sex work isn't slavery, but some slavery does involve non-consensual sex work. Similarly, standing alone drug smuggling and drug trafficking do not involve slavery, but forced labour and slavery can involve drug smuggling or trafficking.<sup>27</sup>

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<sup>25</sup> [Ibid 10-12.](#)

<sup>26</sup> Department of Foreign Affairs and Trade, [Amplifying Our Impact: Australia's International Strategy to Combat Human Trafficking and Slavery](#) (Report 2016) 4.

<sup>27</sup> See, eg, [Brecani v The Queen \[2021\] EWCA Crim 731 \('Brecani'\)](#).

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## 3. Legislation and Context

Modern slavery is a complex topic which includes a variety of offences across multiple pieces of Commonwealth, State and Territory legislation. This chapter aims to provide an overview of relevant legislation and case law regarding specific offences. Where applicable, readers will be directed to other chapters or topics within this guide and to external resources for further information.

Legislation in Australia relating to modern slavery has been amended over time and is dispersed across several acts. The following table contains a brief overview of significant legislative amendments to Commonwealth legislation.

| Amending Legislation   | Changes   |
|--|---|
| <a href="#"><u>Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999 (Cth)</u></a>   | <ul style="list-style-type: none"><li>Inserted Chapter 8 – Offences against humanity which included slavery, sexual servitude and deceptive recruiting for sexual services offences into <i>Criminal Code</i>.</li></ul>  |
| <a href="#"><u>Criminal Code Amendment (Trafficking in Persons Offences) Act 2005 (Cth)</u></a>  | <ul style="list-style-type: none"><li>Inserted new offences into <i>Criminal Code</i> which criminalised trafficking in persons, trafficking in children and debt bondage activities.</li></ul>   |
| <a href="#"><u>Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013 (Cth)</u></a>                     | <ul style="list-style-type: none"><li>Amended <i>Criminal Code</i> and the <a href="#"><u>Crimes Act 1914 (Cth)</u></a> ('Crimes Act').</li><li>Replaced old <i>Criminal Code</i> sexual servitude and deceptive recruiting for sexual services offences with servitude and deceptive recruiting offences which apply to sexual and non-sexual forms of exploitation.</li><li>Inserted offences of forced marriage, organ trafficking and harbouring a victim.</li><li>Inserted a new section 270.11 to the <i>Criminal Code</i> which clarified that a victim's consent or acquiescence is not a defence to conduct that would otherwise be an offence under Division 270.</li><li>Broadened definition of 'coercion' to include psychological oppression, the abuse of power or taking advantage of a person's vulnerability.</li><li>Moved debt bondage from Division 270 to Division 271.</li></ul> |
| <a href="#"><u>Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Act 2013 (Cth)</u></a> | <ul style="list-style-type: none"><li>Amended <i>Criminal Code</i> and the <i>Crimes Act</i>.</li><li><i>Crimes Act</i> amendments - increased protections for child victims of trafficking and slavery offences. Also increased protections for witnesses/victims providing evidence in retrials and subsequent trials for trafficking and slavery offences. Inserted scheme for use of victim impact statements in sentencing of federal offenders.</li><li><i>Criminal Code</i> amendment – allowed evidence by video link from witnesses outside Australia in trafficking and slavery offence cases.</li></ul>  |
| <a href="#"><u>Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018 (Cth)</u></a>                          | <ul style="list-style-type: none"><li>Amended Part IAD of the <i>Crimes Act</i> to improve protections for vulnerable witnesses and complainants.</li><li>Expanded definition of debt bondage to include the condition of a person whose personal services are pledged by another person, as security for the other person's debt. Also moved Debt bondage from Division 271 to Division 270 – slavery like offences.</li></ul>   |

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## 3.1 – Modern slavery legislation within Australia

The remainder of this chapter focuses on the law as it stands today.

### 3.1.1 – *Criminal Code Act 1995 (Cth)*

Most Commonwealth modern slavery offences are located within divisions [270-71](#) of the *Criminal Code*.

Broadly speaking these offences can be broken into five categories:

- Slavery offences;
- Slavery-like offences;
- Trafficking of persons offences;
- Organ trafficking offences; and
- Harbouuring a victim offences.

#### 3.1.1.1 – Slavery offences

[Section 270.3](#) of the *Criminal Code* creates two slavery offences. The first offence applies where a person intentionally:

- Reduces a person to slavery;
- Possesses a slave or exercises over a slave any of the other powers attaching to the right of ownership;
- Engages in slave trading;
- Enters into any commercial transaction involving a slave; or
- Exercises control or direction over, or provides finance for:
  - Any act of slave trading; or
  - Any commercial transaction involving a slave.<sup>28</sup>

The maximum penalty for this offence is 25 years' imprisonment.

The second offence applies where a person:

- Enters into any commercial transaction involving a slave;
- Exercises control or direction over, or provides finance for, any commercial transaction involving a slave; or
- Exercises control or direction over, or provides finance for, any act of slave trading; *and*
- Is reckless as to whether the transaction or act involves a slave, slavery, slave trading or the reduction of a person to slavery.<sup>29</sup>

The maximum penalty for this offence is 17 years' imprisonment.

Slavery is defined as:

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.<sup>30</sup>

<sup>28</sup> [Criminal Code s 270.3\(1\)](#).

<sup>29</sup> [Ibid s 270.3\(2\)](#).

<sup>30</sup> [Ibid s 270.1](#).

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The High Court of Australia in *R v Tang* ('Tang') held that because one person cannot legally own another human being,<sup>31</sup> the offence of slavery extends beyond 'chattel slavery' to include *de facto* slavery.<sup>32</sup> *De facto* slavery occurs where any of the powers attaching to the right of ownership are exercised by one person in a way and to an extent that amounts to effective ownership of another.<sup>33</sup>

Exercising 'powers attaching to the right of ownership' include:

- Using a slave;<sup>34</sup>
- Treating a person as an object of purchase or having the capacity to make a person the object of sale and purchase;<sup>35</sup>
- The capacity to use a person and a person's labour as a commodity in a substantially unrestricted manner;<sup>36</sup>
- An entitlement to the fruits of the person's labour without compensation commensurate to the value of the labour;<sup>37</sup>
- The power of control, such as controlling movement, physical environment or psychological control;<sup>38</sup> or
- Having dominion over another person.<sup>39</sup>

The nature and extent of the powers attaching to the right of ownership need to extend beyond mere harsh and exploitative conditions, as these on their own do not amount to slavery.<sup>40</sup> Whether the factual circumstances of a case amount to slavery, rather than extremely harsh and exploitative conditions, is a question of degree for the jury about the nature and extent to which power has been exercised by an accused over a victim.<sup>41</sup> In determining this the High Court stated:

[A] capacity to deal with a complainant as a commodity, an object of sale and purchase, may be a powerful indication that a case falls on one side of the line. So also may the exercise of powers of control over movement which extend well beyond powers exercised even in the most exploitative of employment circumstances, and absence or extreme inadequacy of payment for services. The answer, however, is not to be found in the need for reflection by an accused person upon the source of the powers that are being exercised.<sup>42</sup>

<sup>31</sup> *R v Tang* (2008) 237 CLR 1, 16-18 [25]-[26], 20 [33] ('Tang'); *Ho v The Queen* (2011) 219 A Crim R 74, 83 [32] ('Ho'); *Criminal Code s 270.2*.

<sup>32</sup> *Tang* 16-18 [25]-[27], 20-21 [33]-[34]; *R v A2* (2019) 373 ALR 214, 228 [57]; *R v Kovacs* [2009] 2 Qd R 51, 82 [96] ('Kovacs').

<sup>33</sup> *Tang* 20 [33], 57 [141]-[142]; *Nantahkum v The Queen* (2013) 279 FLR 148, 170 [80] ('Nantahkum'); *Kovacs* 82 [96]; *Criminal Code s 270.1*.

<sup>34</sup> *Tang* 17-18 [26], 25 [48].

<sup>35</sup> *Ibid* 17-18 [26], 21 [35], 23-24 [44], 25 [50]; *Ho* 90 [79]; United Nations Economic and Social Council, *Slavery, the Slave Trade, and Other Forms of Servitude*,

Report of the Secretary-General, UN Doc E/2357 (1953) 28 ('1953 UN Report').

<sup>36</sup> *Tang* 17-18 [26], 23-24 [44], 25 [50]; *Ho* 90 [79]; *1953 UN Report* 28.

<sup>37</sup> *Tang* 17-18 [26], 25 [50]; *Ho* 90 [79]; *1953 UN Report* 28.

<sup>38</sup> *Tang* 18-19 [28], 20 [32], 21 [35], 23-25 [44], [50]; *Ho* 90 [79]; *Prosecutor v Kunarac Case No IT-96-23-T & IT-96-23/1-T United Nations International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* (22 February 2001) 194 [543] ('Kunarac Trial'); *Prosecutor v Kunarac Case No IT-96-23 & IT-96-23/1-A United Nations International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* (12 June 2002) 35-36 [117]-[119] ('Kunarac Appeal').

<sup>39</sup> *Tang* 57 [141]-[142].

<sup>40</sup> *Ibid* 20 [32], 23-24 [44]; *Ho* 90-91 [80].

<sup>41</sup> *Tang* 20 [32], 23-24 [44], 61 [155]; *Ho* 82-83 [28]-[34], 90-91 [80].

<sup>42</sup> *Tang* 23-24 [44].

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An offence of slavery can occur where a person is reduced to circumstances that amount to slavery as a result of a debt or a contract.<sup>43</sup> The fact that the offending circumstances are capable of establishing another modern slavery offence does not preclude a finding of slavery, as slavery and other modern slavery offences are not mutually exclusive.<sup>44</sup>

When determining the relevant intention necessary for committing an offence of possessing a slave or exercising any of the powers attaching to the right of ownership, the High Court stated that:

Both possessing a slave and using a slave are conduct, and the prosecution had to establish the existence of the conduct and one of the fault elements specified in s 5.1(1). The prosecution case was conducted on the basis that the relevant fault element was intention. In a footnote earlier mentioned, Eames JA [in *R v Wei Tang [2007] VSCA 134*] said that all of sub-ss (1), (2) and (3) of s 5.2 were relevant. This is not easy to understand: sub-s (1) applies where the physical element is conduct; sub-s (2) applies where the physical element is a circumstance; sub-s (3) applies where the physical element is a result. Section 4.1 says a physical element may be conduct or a result of conduct or a circumstance in which conduct or a result of conduct occurs.

The physical element was conduct (which includes a state of affairs); the fault element was intention. It was, therefore, s 5.2(1) that was relevant. A person has intention with respect to conduct if he or she means to engage in that conduct. Knowledge or belief is often relevant to intention. If, for example, it is the existence of a state of affairs that gives an act its criminal character, then proof of knowledge of that state of affairs ordinarily will be the best method of proving that an accused meant to engage in the proscribed conduct.<sup>45</sup>

The Court also said:

If a person is known by an accused to possess the qualities that, by virtue of s [270.1](#), go to make that person a slave, then the state of knowledge relevant to intention, and therefore intention itself, may be established regardless of whether the accused appreciates the legal significance of those qualities...

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](#). This is a condition that results from the exercise of certain powers.<sup>46</sup>

<sup>43</sup> [Ibid 20 \[33\], 24 \[45\]; Criminal Code s 270.1](#).

<sup>44</sup> [Tang 9 \[4\], 19 \[29\]](#).

<sup>45</sup> [Ibid 24-25 \[46\]-\[47\]](#). See also [McIvor v The Queen \[2009\] NSWCCA 264; Kovacs](#).

<sup>46</sup> [Tang 25 \[48\]-\[49\]](#).

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## Defences

A defence exists where an accused can establish that they engaged in conduct with the intention of securing the release of a person from slavery. The burden of establishing this defence rests with the accused.<sup>47</sup>

The consent or acquiescence of the alleged victim to any of the relevant conduct is not a defence.<sup>48</sup>

Where a person is convicted or acquitted in a country outside Australia of an offence against the law of that country in respect of any conduct, the person cannot be convicted of an offence against [Division 270](#) in respect of that conduct.<sup>49</sup>

### 3.1.1.2 – Slavery-like offences

[Division 270](#) of the *Criminal Code* is entitled ‘Slavery and slavery-like offences’. This subdivision includes servitude offences,<sup>50</sup> forced labour offences,<sup>51</sup> deceptive recruiting for labour or services,<sup>52</sup> forced marriage offences<sup>53</sup> and debt bondage.<sup>54</sup>

These offences can apply to the exploitation of a person’s labour or services in any industry, and exploitation within intimate relationships. Where an offence occurs within an intimate relationship there may be strong parallels with domestic violence.

There is a heavy overlap between servitude and forced labour. Both offences require proof that the victim provides labour or services and, because of the use of coercion, threats or deception:

- a reasonable person in the position of the victim would not consider himself or herself to be free:
  - (a) to cease providing the labour or services; or
  - (b) to leave the place or area where the victim provides the labour or services.<sup>55</sup>

The distinction between forced labour and servitude is that servitude contains the added element that the victim is:

significantly deprived of personal freedom in respect of aspects of his or her life other than the provision of the labour or services.<sup>56</sup>

<sup>47</sup> [Criminal Code ss 270.3\(4\)-\(5\).](#)

<sup>48</sup> [Ibid s 270.11; Tang 21 \[35\], 51 \[121\], 63-64 \[166\]; Ho 90-91 \[80\].](#)

<sup>49</sup> [Criminal Code s 270.13.](#)

<sup>50</sup> [Ibid s 270.5.](#)

<sup>51</sup> [Ibid s 270.6A.](#)

<sup>52</sup> [Ibid s 270.7.](#)

<sup>53</sup> [Ibid s 270.7B.](#)

<sup>54</sup> [Ibid s 270.7C.](#)

<sup>55</sup> [Ibid ss 270.4\(1\), 270.6\(1\).](#)

<sup>56</sup> [Ibid s 270.4\(1\)\(b\).](#)

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Coercion is defined in s 270.1A as being the use of force, duress, detention, psychological oppression, abuse of power, or taking advantage of a person's vulnerability. In the case of *R v Pulini* ('Pulini')<sup>57</sup> the offenders coerced the victim into forced labour by abusing their power over her and taking advantage of her vulnerability. The Queensland Court of Appeal stated that a person's vulnerabilities include their situational vulnerability (such as their unlawful status and absence of a visa) and personal vulnerabilities (such as fear of authorities or the offender/s, and poor financial resources).<sup>58</sup> The court also found that the offenders were in a position of power over the victim as she was dependent upon them for accommodation and income.<sup>59</sup>

The coercion, threat or deception can be in regard to another person and does not need to occur against the victim themselves.<sup>60</sup> The impact of coercion, threats or deception is assessed objectively.<sup>61</sup> The question is whether a reasonable person in the position of the victim would not consider themselves free to cease providing labour or services, or to leave the place or area where they provide the labour or services. It is not necessary to show the actual impact of the coercion, threat or deception on the victim, and servitude or forced labour may exist whether or not escape is practically possible for the victim or the victim has attempted to escape.<sup>62</sup>

The New South Wales Court of Appeal in *R v Sieders* ('Sieders')<sup>63</sup> considered an earlier version of the forced labour offence which was specific to sexual services. The Court held that proof a person is relevantly 'not free' does not require proof they have attempted to, considered, or wants to, exercise such a freedom. The question is objective and hypothetical – whether a reasonable person in the victim's position would be free to cease providing the labour or services, or leave the place where they provide the labour or services, if they wanted to.<sup>64</sup>

A victim may not be 'free to take some particular action even if they have agreed that they will not take that action, or if their being not free to take that action is a consequence of something that they have freely agreed to'.<sup>65</sup>

Proof that a person is 'not free' requires proof that there is a state of affairs which prevents or seriously inhibits them from engaging in a particular action. This may arise for many reasons, including legal, physical, social, moral and economic. However, for the servitude and forced labour offences, the relevant lack of freedom must arise from the use of coercion, threat or deception. Although the coercion, threat or deception does not need to be the only cause of the victim's lack of freedom, it should play a significant role in them not taking an action were the victim to attempt to cease providing services or leave the place where they provide services.<sup>66</sup>

<sup>57</sup> [2019] QCA 258, [80] ('Pulini').

<sup>58</sup> *Ibid* [73].

<sup>59</sup> *Ibid* [80].

<sup>60</sup> *Criminal Code s 270.4(2), 270.6(2)*.

<sup>61</sup> *Pulini* [60]-[61].

<sup>62</sup> *Criminal Code s 270.4(3), 270.6(3); Pulini* [62], [66]; *R v Sieders* (2008) 72 NSWLR 417, 423-426 [85]-[99] ('Sieders').

<sup>63</sup> *Sieders* 423-26 [85]-[99].

<sup>64</sup> *Ibid* 423-25 [85]-[93].

<sup>65</sup> *Ibid* 423-26 [85]-[99].

<sup>66</sup> *Ibid* 424-26 [90]-[99].

# Modern slavery: Guidance for Australian courts.

Deceptive recruiting for labour or services occurs where an offender (or recruiter) engages in conduct with the intention of inducing a victim to enter into an engagement to provide services or labour and the conduct causes the victim to be deceived about:

- The extent to which the victim will be free to
  - leave the place or area where they provide the labour or services; or
  - cease providing labour or services; or
  - leave his or her place of residence; or
- If there is or will be a debt owed or claimed to be owed by the victim in connection with the engagement, including the quantum, or the existence, of the debt owed or claimed to be owed; or
- The fact that the engagement will involve exploitation, or the confiscation of the victim's travel or identity documents; or
- If the engagement is to involve the provision of sexual services, including the fact, or the nature of the sexual services to be provided.<sup>67</sup>

Debt bondage occurs where an offender intentionally engages in conduct that causes a victim to enter into debt bondage.<sup>68</sup>

Debt bondage is defined as a condition of a victim arising from a pledge by:

- The victim of their own personal services or of the personal service of another person under the victim's control; or
- Another person with control over the victim for personal services of the victim.

The pledge must be made as security for a debt owed by the person making the pledge. This includes any debt incurred, or claimed to be incurred, after the pledge is given. Additionally, for a pledge in the above circumstances to be debt bondage:

- The debt owed or claimed to be owed is manifestly excessive; or
- The reasonable value of the promised services is not applied toward the liquidation of the debt or purported debt; or
- The length and nature of the promised services are not respectively limited and defined.

In *Tang*,<sup>69</sup> Gleeson CJ noted that the offences of slavery, slavery-like offences and debt bondage are not mutually exclusive, meaning it is possible for more than one of them to arise out of the same circumstances.

Lastly, forced marriage occurs where one or both parties do not fully and freely consent to the marriage because of coercion, threat or deception, or where one or both parties is incapable of understanding the nature and effect of a marriage ceremony, including for reasons such as age or mental capacity. Forced marriage also occurs where either party to the marriage is under the age of 16.<sup>70</sup>

<sup>67</sup> [Criminal Code s 270.7](#).

<sup>68</sup> [Ibid s 270.7C](#).

<sup>69</sup> [Tang](#) 9 [4], 19 [29].

<sup>70</sup> Attempting to marry a person who is not of marriageable age is also an offence under [Marriage Act 1961 \(Cth\) s 95](#).

# Modern slavery: Guidance for Australian courts.

Slavery-like offences are capable of being aggravated offences where:

- The victim is under 18 years of age;<sup>71</sup>
- The offender, in committing the offence, subjects the victim to cruel, inhumane or degrading treatment;<sup>72</sup> or
- The offender, in committing the offence, engages in conduct that gives rise to a danger of death or serious harm to the victim or another person and is reckless as to that danger.<sup>73</sup>

## **Defences**

The consent or acquiescence of the victim to any of the relevant conduct is not a defence.<sup>74</sup>

Where a person is convicted or acquitted in a country outside Australia of an offence against the law of that country in respect of any conduct, the person cannot be convicted of an offence against [Division 270](#) in respect of that conduct.<sup>75</sup>

### **3.1.1.3 – Trafficking of/in persons offences**

There are four main variations of trafficking in persons offences:

- International trafficking in persons;
- Domestic trafficking in persons;
- International trafficking in children; and
- Domestic trafficking in children.

International trafficking in persons offences occur where an offender organises or facilitates the entry, receipt, exit, or the proposed entry, receipt, or exit of a victim into or out of Australia.

An offender may traffic a victim in one or more of the following ways:

- By using coercion, threat or deception to obtain the victim's compliance in respect of entry, receipt, exit, or proposed entry or exit to/from Australia;<sup>76</sup>
- By facilitating the victim's entry, receipt, exit, or proposed entry, receipt or exit to/from Australia, while reckless as to whether the victim will be exploited after that entry, receipt, or exit;<sup>77</sup>
- By facilitating the victim's entry, receipt, exit, or proposed entry, receipt or exit to/from Australia, while deceiving the victim about the fact that their entry, receipt, exit, or proposed entry or exit to/from Australia will involve the provision of sexual services by the victim or exploitation of the victim or confiscation of the victim's travel or identity documents;<sup>78</sup>

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<sup>71</sup> [Criminal Code s 270.8\(1\)\(a\)](#). Where a victim of forced marriage is under 16 years of age the offence is also capable of being an aggravated offence under [s 270.8\(1\)\(a\)](#).

<sup>72</sup> [Ibid s 270.8\(1\)\(b\)](#).

<sup>73</sup> [Ibid s 270.8\(1\)\(c\)](#).

<sup>74</sup> [Ibid s 270.11](#); [Tang 21 \[35\]](#), [51 \[121\]](#), [63-64 \[166\]](#); [Ho 90-91 \[80\]](#).

<sup>75</sup> [Criminal Code s 270.13](#).

<sup>76</sup> [Ibid ss 271.2\(1\)-\(1A\)](#).

<sup>77</sup> [Ibid ss 271.2\(1B\)-\(1C\)](#).

<sup>78</sup> [Ibid ss 271.2\(2\)-\(2A\)](#).

# Modern slavery: Guidance for Australian courts.

- By facilitating the victim's entry, receipt, exit, or proposed entry, receipt, or exit to/from Australia where there is an arrangement for the victim to provide sexual services inside/outside Australia, and the offender deceives the victim about any of the following:
  - The nature of the sexual services to be provided.
  - The extent to which a victim is free to cease providing sexual services, leave the place or area where they provide sexual services or to leave their place of residence.
  - If there is a debt owed or claimed to be owed by the victim in connection with the arrangement for them to provide sexual services—the quantum, or the existence, of the debt owed or claimed to be owed.<sup>79</sup>

For the purpose of the offences in [ss 271.2\(2B\)-\(2C\)](#), the prosecution must prove the accused intentionally deceived the victim. This requires proof that when the accused made the relevant representations to the victim, the accused knew the representations were false and made them in order to mislead the victim into believing the statement was true.

The Queensland Court of Appeal in *R v Dobie* ('Dobie')<sup>80</sup> held that the meaning of 'cease' in the phrase 'extent to which a victim is free to cease providing sexual services' is not limited to the situation where the victim permanently stops providing sexual services. The word 'cease' includes the circumstance where a person stops an activity with a plan to resume it after an acceptable interlude. Here, the offender deceived the first victim by telling her that she would decide how much work she did and falsely told the second victim that she would have two days off per week. But he actually intended to pressure both victims to provide sexual services on demand regardless of their preferences.

And in *Pulini*<sup>81</sup> the court held that 'confiscation of travel or identity documents' can occur even where the victim does not ask for the return of the documents.<sup>82</sup> The victim in this instance handed over her passport after being falsely told that it would be given to a friend of the offender's in the immigration department for the purpose of obtaining an appropriate visa.<sup>83</sup>

Domestic trafficking in persons occur where an offender organises or facilitates the transportation or proposed transportation of a victim from one place in Australia to another place in Australia. The requirements for domestic trafficking in persons are the same as for trafficking in persons offences listed above; however, the requirement of 'entry, receipt or exit or proposed entry or exit to/from Australia' is replaced with a requirement of 'transportation or proposed transportation from one place to another within Australia'. The extent to which the person is moved from one place to another is not defined, but must comply with the jurisdiction requirements in [s 271.11](#), which is discussed below in 3.2.2 (jurisdiction requirements for domestic trafficking in persons, children or organs).

<sup>79</sup> [Ibid ss 271.2\(2B\)-\(2C\)](#).

<sup>80</sup> [Ibid 379-81 \[23\]-\[28\]](#).

<sup>81</sup> [Pulini \[53\]-\[58\]](#).

<sup>82</sup> [Ibid](#).

<sup>83</sup> [Ibid](#).

# Modern slavery: Guidance for Australian courts.

All trafficking in persons offences will be aggravated where an offender:

- Intends for the victim to be exploited after entry, exit, or transportation to/from/within Australia;
- Subjects the victim to cruel, inhumane, or degrading treatment; or
- Recklessly engages in conduct that gives rise to a danger of death or serious harm to the victim or another person.

Trafficking in children occurs where an offender organises or facilitates the entry, receipt, exit, transportation, or proposed entry, receipt, exit, or transportation of a victim under 18 years of age into/out of Australia or from one place to another within Australia. In organising or facilitating the entry/exit or transportation of the victim, the offender must intend or be reckless as to the fact that the victim will be used to provide sexual services or will be otherwise exploited either by the offender or another person after entry, receipt, exit or transportation.

In *DPP (Cth) v McIntosh (a pseudonym)*, ('McIntosh')<sup>84</sup> the County Court of Victoria found that the offender's online conversations with others prior to the birth of his twin daughters, who were born overseas via a surrogate, about what sexual acts he wanted to commit against them once they were born, was sufficient to establish his intent prior to arranging for the twins to be brought to Australia. The court also stated that his intent was confirmed by the fact that his sexual offending against the babies started days after their arrival in Australia.<sup>85</sup> Additionally, the fact that he entered into the arrangement for the babies to be born with the intention of using them for his own sexual purposes was an aggravating factor for the purpose of sentencing.<sup>86</sup>

## **Defences**

The consent or acquiescence of the alleged victim to any of the relevant conduct is not a defence.<sup>87</sup>

Where a person is convicted or acquitted in a country outside Australia of an offence against the law of that country in respect of any conduct, the person cannot be convicted of an offence against [Division 271](#) in respect of that conduct.<sup>88</sup>

### **3.1.1.4 – Organ trafficking offences**

Organ trafficking occurs where a person's organ/s is/are removed or an agreement for removal is entered into in circumstances that are contrary to the law of the State or Territory where the removal occurs or is to be carried out.<sup>89</sup>

Organ trafficking can also occur where neither the victim or the victim's guardian consents to the removal of an organ and the removal of the organ would not meet a medical or therapeutic need of the victim.<sup>90</sup>

<sup>84</sup> [2016] VCC 622, [59]-[60] ('McIntosh').

<sup>85</sup> *Ibid* [59]-[60].

<sup>86</sup> *Ibid*. Note, however, that unlike the offences of trafficking in persons and domestic trafficking in persons, there is no aggravated offence of trafficking in children or domestic trafficking in children (compare [Criminal Code ss 271.2, 271.3, 271.5, 271.6](#) and [271.4](#) and [271.7](#)).

<sup>87</sup> [Criminal Code s 271.11B](#); *R v Grey (No 3)* [2020] ACTSC 43, [39].

<sup>88</sup> [Criminal Code s 271.13](#).

<sup>89</sup> *Ibid* s 271.7A(a).

<sup>90</sup> *Ibid* s 271.7A(b).

# Modern slavery: Guidance for Australian courts.

The offence of organ trafficking requires an offender to engage in conduct which consists of organising or facilitating the transportation of a victim into, out of, or from one place to another within Australia while reckless as to whether the conduct will result in the illegal removal of an organ from the victim by the offender or another person after or in the course of transportation.<sup>91</sup> It is an aggravated offence where the offender intends that an organ of the victim will be removed after, or in the course of entry to or exit from Australia.<sup>92</sup>

The aggravated offence will also be proved where:

- The victim is under 18 years of age;<sup>93</sup>
- The offender, in committing the offence, subjects the victim to cruel, inhumane or degrading treatment;<sup>94</sup> or
- The offender, in committing the offence, engages in conduct that gives rise to a danger of death or serious harm to the victim or another person and is reckless as to that danger.<sup>95</sup>

It is likely that proof of an aggravated offence on the basis that the victim is under 18 years of age will require further proof that the accused was reckless as to the victim being under 18 years of age. It is also likely that if the accused is alleged to have subjected the victim to cruel, inhumane or degrading treatment, the prosecution must prove the accused intended to do so.<sup>96</sup>

## **Defences**

The consent or acquiescence of the alleged victim to any of the relevant conduct is not a defence.<sup>97</sup>

Where a person is convicted or acquitted in a country outside Australia of an offence against the law of that country in respect of any conduct, the person cannot be convicted of an offence against [Division 271](#) in respect of that conduct.<sup>98</sup>

### **3.1.1.5 – Harbouuring a victim offences**

The offence of harbouring a victim applies where:

- The accused intentionally harbours, receives or conceals another person (the victim);
- The harbouring, receiving or concealing:
  - Assists a third person in connection with a relevant offence committed by the third person; or
  - Furthering a third person's purpose in relation to a relevant offence committed by the third person;
- The accused is reckless as to the harbouring, receiving or concealing having that effect;
- The relevant offence is an offence against [Division 270](#) or [271](#) (other than [s 271.7F](#)).<sup>99</sup>

Where the victim is a person under the age of 18 an alternative charge of aggravated harbouring of a victim is available.

## **Defences**

The consent or acquiescence of the alleged victim to any of the relevant conduct is not a defence.<sup>100</sup>

<sup>91</sup> [Ibid ss 271.7B, 271.7D](#).

<sup>92</sup> [Ibid ss 271.7C\(1\)\(b\), 271.7E\(1\)\(b\)](#). Note, however, that under [Criminal Code s 5.4\(4\)](#), proof of intention or knowledge will satisfy a fault element of recklessness. Therefore, the prosecution may prove that the accused acted knowing or intending that the victim's organ would be removed, even if the prosecution has not charged the aggravated offence.

<sup>93</sup> [Criminal Code ss 271.7C\(1\)\(a\), 271.7E\(1\)\(a\)](#).

<sup>94</sup> [Ibid ss 271.7C\(1\)\(c\), 271.7E\(1\)\(c\)](#).

<sup>95</sup> [Ibid ss 271.7C\(1\)\(d\), 271.7E\(1\)\(d\)](#).

<sup>96</sup> [Ibid s 5.6](#).

<sup>97</sup> [Ibid s 271.11B](#).

<sup>98</sup> [Ibid s 271.13](#).

<sup>99</sup> [Ibid s 271.7F](#).

<sup>100</sup> [Ibid s 271.11B](#).

# Modern slavery: Guidance for Australian courts.

Where a person is convicted or acquitted in a country outside Australia of an offence against the law of that country in respect of any conduct, the person cannot be convicted of an offence against [Division 271](#) in respect of that conduct.<sup>101</sup>

## 3.1.2 – *Migration Act 1958 (Cth)*

The [Migration Act 1958 \(Cth\)](#) ('*Migration Act*') contains offences of allowing, referring or continuing to allow an unlawful non-citizen or lawful non-citizen to work in breach of their work-related conditions or visa conditions.<sup>102</sup> While these offences on their own are not considered modern slavery offences, they each have an aggravated offence where the offences occur in circumstances where the victim is knowingly or recklessly exploited by an offender or another person.<sup>103</sup>

Exploitation is defined as conduct of an offender that causes a victim to enter into slavery, or a condition similar to slavery, servitude, forced labour, forced marriage, or debt bondage.<sup>104</sup>

Differences in the elements between modern slavery offences and these aggravated *Migration Act* offences mean that a person may be convicted of both offences. However, the sentencing court will need to take account of any overlap between the modern slavery offence and the exploitation for the purpose of the aggravated *Migration Act* offence to avoid double punishment in sentencing.<sup>105</sup>

## 3.1.3 – *Witness Protection Act 1994 (Cth)*

For consideration of protections and procedures available for witnesses and victims under the [Witness Protection Act 1994 \(Cth\)](#) and other legislation refer to Chapter 7 – Victim and Witness Support.

## 3.1.4 – State and Territory Acts

With the exception of Tasmania and Queensland all other Australian States and Territories have some form of sexual servitude offences which are outlined in the Appendix below.

### 3.1.4.1 – Specific State and Territory offences

Broadly speaking all state and territory sexual servitude offences can be broken into four categories:

- Causing sexual servitude;
- Conducting a business involving sexual servitude;
- Deceptive recruiting for sexual services or commercial sexual services;
- Other sexual services or sexual servitude offences

<sup>101</sup> [Ibid s 271.13](#).

<sup>102</sup> [Migration Act 1958 \(Cth\) ss 235, 245AB, 245AC, 245AE, 245AEA](#) ('*Migration Act*').

<sup>103</sup> [Ibid ss 245AD, 245AEB](#).

<sup>104</sup> [Ibid s 245AH; Criminal Code s 271.1A](#).

<sup>105</sup> [Nantahkum 156-58 \[29\]-\[37\]](#).

# Modern slavery: Guidance for Australian courts.

## Definitions applicable to sexual servitude offences

Victorian,<sup>106</sup> South Australian,<sup>107</sup> Western Australian,<sup>108</sup> Northern Territory,<sup>109</sup> ACT<sup>110</sup> and New South Wales<sup>111</sup> legislation regarding modern slavery offences contain definitions for the meaning of common phrases used throughout their statutory sexual servitude offences. These include the meaning of:

- Sexual servitude or commercial sexual servitude;
- Sexual service/s or commercial sexual service/s; and
- Threat.

New South Wales,<sup>112</sup> ACT,<sup>113</sup> and Northern Territory<sup>114</sup> legislation defines sexual servitude as 'the condition of a person who provides sexual services and who, because of the use of force or threats is not free to cease providing sexual services or is not free to leave the place or area where they provide the sexual services'.

South Australian legislation defines sexual servitude as 'the condition of a person who provides commercial sexual services under compulsion'.<sup>115</sup> Compulsion occurs where 'a person controls or influences another person's conduct by means that effectively prevent the other person from exercising freedom of choice'.<sup>116</sup> South Australian legislation also contains a lesser charge of sexual servitude by intentional or reckless undue influence, which occurs where 'a person uses unfair or improper means to influence another person's conduct'.<sup>117</sup>

Victorian and Western Australian legislation do not define sexual servitude. Instead, the principles used in other states as part of the definition are treated in Victoria as part of the definition of a sexual servitude offence.<sup>118</sup>

Western Australia,<sup>119</sup> ACT,<sup>120</sup> Northern Territory,<sup>121</sup> Victorian<sup>122</sup> and New South Wales<sup>123</sup> legislation defines sexual service/s or commercial sexual service/s as 'the commercial use or display of the body of the person providing the service for the sexual arousal or sexual gratification of others'. South Australian legislation defines commercial sexual service as 'the provision of payment involving the use or display of the body of the person who provides the services for the sexual gratification of another or other'.

In Victoria, New South Wales, the ACT and the Northern Territory, threat is defined as including a threat of force, a threat to cause a person's deportation or a threat of any other detrimental action.

The ACT's<sup>124</sup> definition of threat includes a defence where there are reasonable grounds for the threat of any other detrimental action. New South Wales<sup>125</sup> and Victoria's<sup>126</sup> legislative definition of threat also contains an

<sup>106</sup> [Crimes Act 1958 \(Vic\)](#) ('Vic Act').

<sup>107</sup> [Criminal Law Consolidated Act 1935 \(SA\)](#) ('SA Act').

<sup>108</sup> [Criminal Code Act Compilation Act 1913 \(WA\)](#) ('WA Act').

<sup>109</sup> [Criminal Code Act 1983 \(NT\)](#) ('NT Act').

<sup>110</sup> [Crimes Act 1900 \(ACT\)](#) ('ACT Act').

<sup>111</sup> [Crimes Act 1900 \(NSW\)](#) ('NSW Act').

<sup>112</sup> [Ibid s 80B\(1\)](#).

<sup>113</sup> [ACT Act s 78](#).

<sup>114</sup> [NT Act s 202A\(1\)](#).

<sup>115</sup> [SA Act s 65A](#).

<sup>116</sup> [Ibid s 65A](#).

<sup>117</sup> [Ibid ss 65A, 66\(2\)](#).

<sup>118</sup> [Vic Act s 53B](#).

<sup>119</sup> [WA Act s 331A](#).

<sup>120</sup> [ACT Act s 78](#).

<sup>121</sup> [NT Act s 202A\(1\)](#).

<sup>122</sup> [Vic Act s 53A](#).

<sup>123</sup> [NSW Act s 80B\(2\)](#).

<sup>124</sup> [ACT Act s 78\(3\)](#).

<sup>125</sup> [NSW Act s 80B\(2\)](#).

<sup>126</sup> [Vic Act s 53A](#).

# **Modern slavery: Guidance for Australian courts.**

additional proviso that the reasonable ground for the threat of any other detrimental action must occur in connection with the provision of sexual services by a person.

## **Causing sexual servitude offences**

New South Wales,<sup>127</sup> Northern Territory<sup>128</sup> and ACT<sup>129</sup> legislation state that sexual servitude occurs where a person intentionally or recklessly causes a victim to enter or continue in sexual servitude. These offences are aggravated where the victim is under 18 years of age. In New South Wales, the offence is also aggravated where the victim has a cognitive impairment.

In Western Australia<sup>130</sup> and South Australia,<sup>131</sup> sexual servitude occurs where a person intentionally or recklessly compels a victim to provide or continue to provide a sexual service or commercial sexual service. An important difference between those two jurisdictions, however, is that South Australia defines compulsion by reference to whether the victim is effectively prevented from exercising freedom of choice.<sup>132</sup> In contrast, Western Australia does not define compulsion.

South Australian legislation also contains a lesser charge of sexual servitude by intentional or reckless undue influence which occurs where a person uses undue influence to get a victim to provide or continue providing commercial sexual services.<sup>133</sup>

These offences are aggravated where the victim is under 18 years of age,<sup>134</sup> and in Western Australia the offence of sexual servitude is also aggravated where the victim is mentally impaired.<sup>135</sup>

Victoria has two distinct offences relating to the provision of sexual services, which are:

- Using force, threat etc. to cause another person to provide commercial sexual services;<sup>136</sup> and
- Causing another person to provide commercial sexual services in circumstances involving sexual servitude.<sup>137</sup>

Using force, threats, etc. to cause another person to provide commercial sexual services occurs where a person engages in conduct which causes the victim to provide or continue to provide commercial sexual services, or causes a victim to not be free to leave the place where the victim provides sexual services and the accused intends the conduct will have that effect, or knows that the conduct will, or probably will, have that effect.

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<sup>127</sup> [NSW Act s 80D](#).

<sup>128</sup> [NT Act 202B](#).

<sup>129</sup> [ACT Act s 79\(1\)](#).

<sup>130</sup> [WA Act s 331B](#).

<sup>131</sup> [SA Act s 66\(1\)](#).

<sup>132</sup> [Ibid s 65A](#).

<sup>133</sup> [Ibid s 66\(2\)](#).

<sup>134</sup> [Ibid ss 66\(2\)\(a\)-\(b\); WA Act s 331B\(a\)](#).

<sup>135</sup> [WA Act ss 330\(1\), 331B\(a\)](#).

<sup>136</sup> [Vic Act s 53B](#).

<sup>137</sup> [Ibid s 53C](#).

# Modern slavery: Guidance for Australian courts.

For this purpose, the relevant conduct occurs where the accused:

- Uses force against a victim or another person;
- Makes a threat to, or against, a victim or another person;
- Unlawfully detains a victim or another person;
- Engages in fraud or misrepresentation (including by omission) in relation to the victim or another person; or
- Uses a manifestly excessive debt owed, or purportedly owed, by the victim or any other person.

Causing another person to provide commercial sexual services in circumstances involving sexual servitude occurs where an offender knowingly causes or induces a victim to provide or continue to provide commercial sexual services and the victim is not free to stop providing those services, or to leave the place or area where the victim provides those services because the offender or another person:

- Uses force against the victim or another person;
- Makes a threat to, or against, the victim or another person;
- unlawfully detains the victim or another person;
- Engages in fraud or misrepresentation (including by omission) in relation to the victim or another person; or
- Uses a manifestly excessive debt owed, or purportedly owed, by the victim or any other person.

Both of these Victorian offences are aggravated where the offender knows that the victim is, or probably is, under 18 years of age.<sup>138</sup>

## **Conducting a business involving sexual servitude offences**

In New South Wales,<sup>139</sup> the ACT<sup>140</sup> and the Northern Territory<sup>141</sup> an offence of conducting a business involving sexual servitude occurs where a person intentionally or recklessly conducts a business that involves sexual servitude. The Northern Territory also has two additional offences of conducting a business involving sexual servitude of a child over 12<sup>142</sup> and under 12.<sup>143</sup>

In Western Australia,<sup>144</sup> conducting a business involving sexual servitude occurs where a person conducts a business that involves any other person being compelled to provide or to continue to provide a sexual service.

<sup>138</sup> [Ibid s 53E](#).

<sup>139</sup> [NSW Act s 80E](#).

<sup>140</sup> [ACT Act ss 79\(2\)-\(3\)](#).

<sup>141</sup> [NT Act s 202C\(1\)](#).

<sup>142</sup> [Ibid s 202C\(2\)](#).

<sup>143</sup> [Ibid s 202C\(3\)](#).

<sup>144</sup> [WA Act s 331C](#).

# Modern slavery: Guidance for Australian courts.

In Victoria conducting a business involving sexual servitude occurs where a person knowingly conducts a business that involves the provision of commercial sexual services by a victim and the victim is not free to stop providing those services, or to leave the place or area where the victim provides those services, because the offender or another person:

- Uses force against the victim or another person;
- Makes a threat to, or against, the victim or another person;
- Unlawfully detains the victim or another person;
- Engages in fraud or misrepresentation (including by omission) in relation to the victim or another person; or
- Uses a manifestly excessive debt owed, or purportedly owed, by a victim or any other person.<sup>145</sup>

In New South Wales,<sup>146</sup> Victoria,<sup>147</sup> the ACT<sup>148</sup> and Western Australia<sup>149</sup> the offence of conducting a business involving sexual servitude is aggravated where the victim is under 18 years of age. In New South Wales<sup>150</sup> and Western Australia<sup>151</sup> the offence is also aggravated where the victim has a cognitive impairment or is an incapable person.

South Australia does not have an offence of conducting a business involving sexual servitude.

## **Deceptive recruiting for sexual services or commercial sexual services offences**

In Victoria,<sup>152</sup> the Northern Territory<sup>153</sup> and the ACT,<sup>154</sup> deceptive recruiting for sexual services or commercial sexual services occurs where a person intentionally induces a victim to enter into an agreement to provide sexual services or commercial sexual services by deceiving the victim about the fact that the engagement will involve the provision of sexual services.

In Western Australia<sup>155</sup> and South Australia,<sup>156</sup> the offence of deceptive recruiting for commercial sexual services occurs where a person knowingly fails to disclose when offering a victim employment to provide sexual services that the victim in the course of their employment will be asked or expected to provide commercial sexual services and that the continuation or advancement of the victim's employment will be dependent on the victim's preparedness to provide commercial sexual services.

In Victoria,<sup>157</sup> the Northern Territory,<sup>158</sup> the ACT,<sup>159</sup> Western Australia<sup>160</sup> and South Australia,<sup>161</sup> the offence of deceptive recruiting for sexual services or commercial sexual services is aggravated where the victim is under 18 years of age. The offence is also aggravated in Western Australia where the victim is mentally impaired.<sup>162</sup>

## **Other sexual services or sexual servitude offences**

<sup>145</sup> [Vic Act s 53D](#).

<sup>146</sup> [NSW Act ss 80C, 80E\(2\)](#).

<sup>147</sup> [Vic Act s 53E](#).

<sup>148</sup> [ACT Act s 81](#).

<sup>149</sup> [WA Act s 331C\(2\)](#).

<sup>150</sup> [NSW Act ss 80C, 80E\(2\)](#).

<sup>151</sup> [WA Act s 331C\(2\)](#).

<sup>152</sup> [Vic Act s 53F](#).

<sup>153</sup> [NT Act s 202D](#).

<sup>154</sup> [ACT Act s 80](#).

<sup>155</sup> [WA Act s 331D](#).

<sup>156</sup> [SA Act s 67](#).

<sup>157</sup> [Vic Act s 53G](#).

<sup>158</sup> [NT Act s 202D\(2\)](#).

<sup>159</sup> [ACT Act s 81](#).

<sup>160</sup> [WA Act s 331D\(2\)](#).

<sup>161</sup> [SA Act s 67](#).

<sup>162</sup> [WA Act s 331D\(2\)](#).

# Modern slavery: Guidance for Australian courts.

In addition to the previous offences, South Australia also has an offence of using children in commercial sexual services.<sup>163</sup> The use of children in commercial sexual services can occur in three ways:

- Where a person employs, engages, causes or permits a child to provide or continue to provide commercial sexual services;
- Where a person asks a child to provide commercial sexual services; or
- Where a person receives money from a child engaged in commercial sexual services. A person is in receipt of money from a child engaged in commercial sexual services where the person:
  - Has an arrangement with a child who provides commercial sexual services under which the person receives, on a regular or systematic basis, the proceeds, or a share in the proceeds, of commercial sexual services provided by the child; or
  - Exploits a child by obtaining money knowing it to be proceeds of commercial sexual services provided by the child.

The ACT<sup>164</sup>, Queensland<sup>165</sup> and Victoria<sup>166</sup> also have a Human Rights Act or equivalent that contains the right to freedom from forced work which prohibits holding someone in slavery or servitude and making them perform forced or compulsory labour. These Acts do not, however, create free-standing criminal offences.

## 3.2 – Jurisdictional requirements

As modern slavery offences can occur on a global scale rather than a purely local scale, there may be instances where territorial jurisdiction becomes relevant.

The *Criminal Code* contains four categories of extended geographic jurisdiction. However, this section discusses only Category B and Category D extended geographic jurisdiction as these are the two categories applicable to modern slavery offences under divisions [270](#) and [271](#) of the *Criminal Code*. This section also discusses the jurisdiction requirements in [s 271.11](#), as that provision applies to offences such as domestic trafficking in persons, children, or organs.

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<sup>163</sup> [SA Act s 68](#).

<sup>164</sup> [Human Rights Act 2004 \(ACT\) s 25](#).

<sup>165</sup> [Human Rights Act 2019 \(Qld\) s 18](#).

<sup>166</sup> [Charter of Human Rights and Responsibilities Act 2006 \(Vic\) s 11](#).

# Modern slavery: Guidance for Australian courts.

The following table provides information about which jurisdictional requirements are applicable to modern slavery offences under the [Criminal Code](#) and [Migration Act](#):

| Offence   | Section                                   | Jurisdictional requirement/s         |
|---|---|--------------------------------------|
| Slavery offences  | <a href="#">Criminal Code s 270.3</a>     | Category D                           |
| Servitude offences <ul style="list-style-type: none"> <li>• Causing a person to enter into or remain in servitude</li> <li>• Conducting a business involving servitude</li> </ul>   | <a href="#">Criminal Code s 270.5</a>     | Category B                           |
| Forced labour offences <ul style="list-style-type: none"> <li>• Causing a person to enter into or remain in forced labour</li> <li>• Conducting a business involving forced labour</li> </ul>   | <a href="#">Criminal Code s 270.6A</a>    | Category B                           |
| Deceptive recruiting for labour or services   | <a href="#">Criminal Code s 270.7</a>     | Category B                           |
| Forced marriage offences <ul style="list-style-type: none"> <li>• Causing a person to enter into a forced marriage</li> <li>• Being a party to a forced marriage</li> </ul>   | <a href="#">Criminal Code s 270.7B</a>    | Category B                           |
| Debt bondage  | <a href="#">Criminal Code s 270.7C</a>    | Category B                           |
| Slavery like offences (aggravated offences) <ul style="list-style-type: none"> <li>• Servitude offences</li> <li>• Forced labour offences</li> <li>• Deceptive recruiting for labour or services</li> <li>• Forced marriage offences</li> <li>• Debt bondage</li> </ul> | <a href="#">Criminal Code s 270.8</a>     | Category B                           |
| International trafficking of persons  | <a href="#">Criminal Code s 271.2</a>     | Category B                           |
| International trafficking of persons (aggravated offence)   | <a href="#">Criminal Code s 271.3</a>     | Category B                           |
| International trafficking of children   | <a href="#">Criminal Code s 271.4</a>     | Category B                           |
| Domestic trafficking of persons   | <a href="#">Criminal Code s 271.5</a>     | s 271.11 jurisdictional requirements |
| Domestic trafficking of persons (aggravated offence)  | <a href="#">Criminal Code s 271.6</a>     | s 271.11 jurisdictional requirements |
| Domestic trafficking of children  | <a href="#">Criminal Code s 271.7</a>     | s 271.11 jurisdictional requirements |
| Organ trafficking   | <a href="#">Criminal Code s 271.7B</a>    | Category B                           |
| Organ trafficking (aggravated offence)  | <a href="#">Criminal Code s 271.7C</a>    | Category B                           |
| Domestic trafficking of organs  | <a href="#">Criminal Code s 271.7D</a>    | s 271.11 jurisdictional requirements |
| Domestic trafficking of organs (aggravated offence)   | <a href="#">Criminal Code s 271.7E</a>    | s 271.11 jurisdictional requirements |
| Harbouring a victim   | <a href="#">Criminal Code s 271.7F</a>    | Category B                           |
| Harbouring a victim (aggravated offence)  | <a href="#">Criminal Code s 271.7G</a>    | Category B                           |
| Allowing an unlawful non-citizen to work (aggravated offence)   | <a href="#">Migration Act s 245AD(1)</a>  | Category B                           |
| Allowing a lawful non-citizen to work in breach of a work-related condition (aggravated offence)  | <a href="#">Migration Act s 245AD(2)</a>  | Category B                           |
| Referring an unlawful non-citizen for work (aggravated offence)   | <a href="#">Migration Act s 245AEB(1)</a> | Category B                           |
| Referring a lawful non-citizen for work in breach of a work-related condition (aggravated offence)  | <a href="#">Migration Act s 245AEB(2)</a> | Category B                           |

# Modern slavery: Guidance for Australian courts.

## 3.2.1 – Extended geographic jurisdiction

### 3.2.1.1 – Category B

Category B extended geographic jurisdiction is contained within [s 15.2](#) of the *Criminal Code* and states that where it applies a person does not commit the offence unless:

- (a) The conduct constituting the offence occurred:
  - (i) Wholly or partly in Australia; or
  - (ii) Wholly or partly on board an Australian aircraft or an Australian ship; or
- (b) The conduct constituting the offence occurred wholly outside Australia and a result of the conduct occurs:
  - (i) Wholly or partly in Australia; or
  - (ii) Wholly or partly on board an Australian aircraft or an Australian ship; or
- (c) The conduct constituting the offence occurred wholly outside of Australia and:
  - (i) At the time of the alleged offence, the person is an Australian citizen; or
  - (ii) At the time of the alleged offence, the person is an Australian resident; or
  - (iii) At the time of the alleged offence, the person is a body corporate incorporated under a law of the Commonwealth, State or Territory; or
- (d) All of the following conditions are satisfied:
  - (i) The alleged offence is an ancillary offence;
  - (ii) The conduct constituting the alleged offence occurs wholly outside Australia; and
  - (iii) The conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship.

### Exemptions to Category B extended geographic jurisdiction

There are two legislative exemptions to Category B extended geographic jurisdiction. One applies where the person is charged with a primary offence and one applies where the person is charged with an ancillary offence. A primary offence is an offence that is not an ancillary offence. An ancillary offence is an offence against [ss 11.1, 11.4 or 11.5](#), or an offence against a law of the Commonwealth to the extent the offence arises out of the operation of [ss 11.2, 11.2A or 11.3](#).<sup>167</sup>

The evidential burden of proving one of these exemptions rests with the defendant, while the legal burden rests on the prosecution.<sup>168</sup>

<sup>167</sup> [Criminal Code Dictionary](#).

<sup>168</sup> [Ibid ss 13.3\(3\), 15.2\(3\), 15.2\(5\)](#).

# Modern slavery: Guidance for Australian courts.

## Primary offence defences

Under [s 15.2\(2\)](#) a person does not commit an offence if the alleged offence is a primary offence and:

- (a) the conduct constituting the alleged offence occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
- (b) the person is neither:
  - (i) an Australian citizen; nor
  - (ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and
- (c) there is not in force in:
  - (i) the foreign country where the conduct constituting the alleged offence occurs; or
  - (ii) the part of the foreign country where the conduct constituting the alleged offence occurs;  
a law of that foreign country, or a law of that part of the foreign country, that creates an offence that corresponds to the first mentioned offence.

## Ancillary offence defences

Under [s 15.2\(4\)](#) a person does not commit an offence if:

- (a) the alleged offence is an ancillary offence; and
- (b) the conduct constituting the alleged offence occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
- (c) the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs or is intended by the person to occur, wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
- (d) the person is neither:
  - (i) an Australian citizen; nor
  - (ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and
- (e) there is not in force in:
  - (i) the foreign country where the conduct constituting the alleged offence occurs; or
  - (ii) the part of the foreign country where the conduct constituting the alleged offence occurs;  
a law of that foreign country, or a law of that part of the foreign country, that creates an offence that corresponds to the first mentioned offence.

### 3.2.1.2 – Category D

Category D extended geographic jurisdiction is contained within [s 15.4](#) of the *Criminal Code*, and states that where it applies to a particular offence, the offence applies:

- (a) whether or not the conduct constituting the alleged offence occurs in Australia; and
- (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.

Category D extended geographical jurisdiction does not contain any defences or exemptions to its application unlike Category B extended geographic jurisdiction.

# **Modern slavery: Guidance for Australian courts.**

## **3.2.2 – Subdivision 271.11 - Jurisdictional requirements for domestic trafficking in persons, children or organs**

Where [s 271.11](#) applies a person commits an offence only if one or more of the following apply:

- (a) the conduct constituting the offence occurs to any extent outside Australia;
- (b) the conduct constituting the offence involves transportation across State borders, either for reward or in connection with a commercial arrangement;
- (c) the conduct constituting the offence occurs within a Territory or involves transportation to or from a Territory;
- (d) the conduct constituting the offence is engaged in by, or on behalf of, a constitutional corporation, or in circumstances where the victims of the trafficking conduct were intended to be employed by a constitutional corporation;
- (e) some of the conduct constituting the offence is engaged in by communication using a postal, telegraphic or telephonic service within the meaning of paragraph 51(v) of the Constitution;
- (f) the victim of the conduct constituting the offence is an alien for the purposes of paragraph 51(xix) of the Constitution.

# Modern slavery: Guidance for Australian courts.

## 4. Reporting requirements

### 4.1 - Modern Slavery Act 2018 (Cth)

The [Modern Slavery Act 2018 \(Cth\)](#) establishes a national reporting requirement for businesses and other entities in the Australian market with an annual consolidated revenue of at least \$100 million.

Under this Act entities that are required to comply with the reporting requirements must prepare an annual Modern Slavery Statement which sets out the entity's actions to assess and address modern slavery risks in their global operations and supply chains. This obligation also applies to the Australian Government, which must publish an annual Modern Slavery Statement that covers Commonwealth procurement and investment activities.

Once available, the Australian Government will publish the Modern Slavery Statements on a central register.<sup>169</sup>

The Act does not contain penalty provisions for a company's non-compliance with its reporting requirements. The relevant Minister may request an explanation or remedial action for non-compliance, and, if the entity fails to comply, may publish information about that failure.<sup>170</sup>

The Act is subject to review three years from the date of its commencement at which time its operation, compliance rates, and the possible need for any amendments including penalties may be considered.<sup>171</sup>

Detailed discussion of the [Modern Slavery Act](#) is beyond the scope of this publication.

For further information see:

- [Australian Government, Department of Home Affairs – Modern Slavery webpage](#)
- [Commonwealth Modern Slavery Act – Guidance for Reporting Entities](#)
- [Modern Slavery Register](#)

### 4.2 - Modern Slavery Act 2018 (NSW)

It is worth noting that although operation will not commence until 1 January 2022, New South Wales has its own [Modern Slavery Act 2018 \(NSW\)](#) which will establish an Anti-slavery Commissioner and reporting obligations for commercial organisations with employees in NSW that supply goods and services for profit or gain and have an annual financial year turnover of at least \$50 million.<sup>172</sup>

Significantly, unlike the [Commonwealth Modern Slavery Act](#), the [NSW Modern Slavery Act](#) creates two offences for commercial organisations – failing to prepare a modern slavery statement when required, and providing false and misleading material in regard to their statements. The maximum penalty for these offences is a fine of 10,000 penalty units.<sup>173</sup>

## 5. Evidentiary concerns

Because so few cases of modern slavery have been prosecuted in Australia it is difficult to predict where evidentiary issues might arise in such cases. Fortunately, the experience of Australian courts in managing native title cases and historic sex offences has provided some guidance, as has the experience of the UK courts which

<sup>169</sup> <https://modernslaveryregister.gov.au/>

<sup>170</sup> [Modern Slavery Act 2018 \(Cth\) ss 11, 16A](#).

<sup>171</sup> [Ibid s 24.](#)

<sup>172</sup> [Modern Slavery Act 2018 \(NSW\) pt 3.](#)

<sup>173</sup> [Ibid ss 24 \(2\), \(6\)-\(7\).](#)

# Modern slavery: Guidance for Australian courts.

have heard a large number of modern slavery cases, although many of them arose under different legislative schemes.

## 5.1 – Reliability

The United Kingdom courts have observed that people who have been trafficked are likely to be traumatised and shocked, and so may give evidence that is inconsistent, lacking in detail, or late. But these factors should not lead to the person's evidence being disbelieved and allowances should be made when considering the reliability of their account.<sup>174</sup>

## 5.2 – Admissibility

### 5.2.1 – Admissibility of victim behaviours

Because so many of the indicators of modern slavery are behavioural in nature, it is likely the question of their admissibility will frequently be at issue. Fortunately, the question of whether evidence of a victim's behaviour is admissible has been addressed by Australian courts in the context of sexual offending.

One of those cases also involved a modern slavery offence. In *R v Kovacs* ('Kovacs'),<sup>175</sup> the accused were convicted of arranging a marriage, possessing a slave, and using a slave. One of the accused also raped the victim, repeatedly, for which he was not charged. The victim did not complain about the rapes because she did not want to worry her sick mother and because the accused said that if she did they would all go to jail.<sup>176</sup> After more than of year of being held and used, the complainant told the accused's estranged daughter of the rapes and asked for help to escape. This was provided and successful. On appeal, the accused argued, relevantly, that the trial judge had erred by admitting evidence of the victim's complaint to his daughter. The Court of Appeal noted that evidence of early or recent complaint in cases of sex offences is admissible as an exception to the rules excluding hearsay evidence and self-serving statement.<sup>177</sup> It stated, without deciding, that the rationale for the admissibility of this evidence is equally applicable to a case in which the doing of acts constituting a sexual offence is a particular of a charged non-sexual offence. Particularly in cases of intentionally possessing a slave where the role of the alleged sexual conduct is to assist in establishing the true nature of the accused's behaviour in relation to the victim.<sup>178</sup>

<sup>174</sup> *R (on the application of SF) v The Secretary of State for the Home Department* [2015] EWHC 2705 (Admin), [22], [79]; *R v L* [2017] EWCA Crim 2129, [31]; *BTT v The Queen* [2021] EWCA Crim 4, [49] ('BTT').

<sup>175</sup> [2009] 2 Qd R 51.

<sup>176</sup> *Ibid* 61-63 [2]-[13].

<sup>177</sup> *Ibid* 73-74 [59]-[60].

<sup>178</sup> *Ibid* 75-76 [65]-[66] (for forensic reasons the defence made no objection to the evidence).

# Modern slavery: Guidance for Australian courts.

In *MCA v Western Australia* ('MCA')<sup>179</sup> the accused was convicted of various sexual offences against his niece. He appealed contending the trial judge had erred by allowing the prosecution to adduce evidence from her mother of the child's changed behaviour around the time of the offending. The court found that because the evidence by the victim's mother of changes in her daughter's behaviour supported her daughter's evidence that the accused had sexually abused her, it was relevant and admissible.<sup>180</sup>

Evidence of a victim's changed behaviour must be treated with care. A jury may need directions on how the evidence can be used, or where it is admitted on only a limited basis. Where it is used as evidence to support the truth of the complainant's account, then the jury should be directed that it can only be used in that way if they can exclude other possible causes of the changed behaviour besides the alleged offending.<sup>181</sup>

## 5.2.2 – Expert evidence

The admissibility of expert opinion evidence in Australia is governed by either the common law or the *Uniform Evidence Acts*.<sup>182</sup> In addition, many of the higher courts have their own practice notes, directions or guidelines regarding the giving of expert evidence and the preparation and presentation of expert reports.<sup>183</sup> These should be adhered to closely.

At common law, expert evidence may be admissible if an affirmative answer is given to these questions:

1. Is the opinion relevant?
2. Is a person of ordinary experience unable to form a sound judgment on the subject matter without the assistance of an expert with specialised knowledge or experience in the area?
3. Is the subject matter part of a body of knowledge or experience that is sufficiently organised or recognised to be accepted as reliable?
4. Has the witness acquired sufficient knowledge of the subject by study or experience to make their opinion valuable in resolving the issues before the court?<sup>184</sup>

<sup>179</sup> [2019] WASCA 22 ('MCA').

<sup>180</sup> *Ibid* [49], [57], [59]. See also *MWL v The Queen* [2016] NTCCA 6, [140] (Hiley J) ('MWL').

<sup>181</sup> *MCA* [59]; *MWL* [97]-[98] (Blokland J). See also *R v Longi* [2021] QCA 43, [18].

<sup>182</sup> See, e.g., *Evidence Act (Cth)* s 79(1), a.k.a., the *Uniform Evidence Act* ('UEA') (adopted in nearly identical form by the Australian Capital Territory, New

South Wales, the Northern Territory, Tasmania, and Victoria).

<sup>183</sup> See, eg, Federal Court of Australia, *General Practice Note: Expert Evidence*, 25 October 2016; Federal Circuit and Family Court of Australia, *Guideline:*

*Expert's conference (prescribed brochure)*; Federal Circuit and Family Court of Australia, *Expert witnesses in Family Law*; Federal Circuit and Family Court of

Australia, *Court*; Supreme Court of New South Wales, *Practice Note SC Gen 11: Joint Conferences of Expert Witnesses*, 17 August 2005; Supreme Court of

New South Wales, *Practice Note SC Gen 10: Single Expert Witness*, 17 August 2005; Supreme Court of the Northern Territory, *Practice Note 6 of 2015: Expert*

*Reports*, 11 September 2015; Supreme Court of Queensland, *Practice Direction 2: Expert Evidence*, 12 April 2005; Supreme Court of Tasmania, *Practice*

*Direction 1 of 2016: Expert Opinion Evidence – Expert Evidence Code of Conduct*, 5 January 2016; Supreme Court of Victoria, *Practice Note 3: Expert Evidence in*

*Criminal Trials*, 30 January 2017; Supreme Court of Victoria, *Practice Note 7: Expert Reports on Mental Functioning of Offenders*, 1 July 2017;

County Court of Victoria, *Practice Note 1 of 2014: Expert Evidence in Criminal Trials*, 24 June 2014.

<sup>184</sup> *R v Bonython* (1984) 38 SASR 45, 46-47; *HG v The Queen* (1999) 197 CLR 414, [58]; *Liyanage v Western Australia* [2017] WASCA 112, [122] ('Liyanage').

# Modern slavery: Guidance for Australian courts.

In contrast, the admissibility of expert opinion evidence under the *Uniform Evidence Acts* requires the court to consider the following questions:

1. Does the witness have ‘specialised knowledge’?
2. Is the specialised knowledge based on training, study or experience?
3. Is the proposed evidence wholly or substantially based on that knowledge?<sup>185</sup>

For this purpose, the court does not consider the reliability of the proposed evidence, as reliability is ordinarily a matter for the jury. This means that a suitably qualified or experienced person can give evidence of theories, based on their expertise, which have not been generally accepted as correct within that field.<sup>186</sup>

Specialised knowledge is that which is outside the knowledge of an ordinary person who has not acquired an understanding of it by training, study or experience. A person without formal qualifications may acquire specialised knowledge by experience – if it is not of a technical or scientific nature.<sup>187</sup>

It is important to consider whether the proffered evidence is actually an opinion and whether it really requires specialised knowledge. For example, in [MCA](#) the court noted that the evidence by the victim’s mother of changes in her daughter’s behaviour was not in any way expert evidence. She did not give an opinion - she made observations of her daughter’s behaviour which as her mother she was well able to make.<sup>188</sup> Further, the court stated that knowledge of how a child might behave as the result of sexual abuse is not beyond the common experience of a jury and does not require expert testimony. Their common experience was sufficient for the jury to draw a conclusion about the effect that the trauma of childhood sexual abuse may have on the behaviour of the victim.<sup>189</sup>

When expert evidence is concerned with human behaviour or mental state, the question is not whether the actor is an ordinary person, but whether the influence of their characteristics or circumstances is outside the knowledge and experience of an ordinary person.<sup>190</sup> This need arises because jurors are unlikely to have experienced such abuse and they are also likely to misapprehend the psychological impact of such violence without expert assistance.<sup>191</sup>

<sup>185</sup> See, eg, [Evidence Act 1995 \(NSW\) s 79](#); [Dasreef Pty Ltd v Hawchar](#) (2011) 243 CLR 588, 603-604.

<sup>186</sup> [Tuite v The Queen](#) (2015) 49 VR 196, [70]; [Xie v The Queen](#) [2021] NSWCCA 1, [297]-[300].

<sup>187</sup> [Honeysett v The Queen](#) (2014) 253 CLR 122, 131-32 [23]. See also Heydon JD, *Cross on Evidence* (LexisNexis Butterworths, 12<sup>th</sup> ed, 2019) ch 15 [29060].

<sup>188</sup> [MCA](#) [49]; [MWL](#) [97], [140], [143].

<sup>189</sup> [MCA](#) [61]-[62]. But see [Evidence Act 1995 \(Cth\) s 79\(2\)\(b\)](#), which ensures that an opinion relating to the development and behaviour of children who

have been victims of sexual offences, or offences similar to sexual offences, can be a form of specialised knowledge.

<sup>190</sup> [Livanage](#) [88].

<sup>191</sup> [Ibid](#) [104].

# Modern slavery: Guidance for Australian courts.

In *Liyanage v Western Australia*,<sup>192</sup> the trial judge ruled that a social worker's opinion on domestic violence was not admissible because the risk assessment tests she used were fairly new and not established as being scientifically reliable. They were also designed to assess a present risk to a victim and not to be applied historically at trial. Further, the social worker was not qualified to give an opinion on "battered women syndrome" because the qualifications for doing so were psychiatry or psychology, not social work, and her opinion that the victim believed what she had said about her experience is not a subject for expert evidence; the jury should determine for itself whether a witness is truthful.<sup>193</sup> The Court of Appeal largely agreed,<sup>194</sup> its main point of distinction was

in emphasising that the social worker did not have any special knowledge that a jury could not understand itself.<sup>195</sup>

*MA v The Queen*<sup>196</sup> was a historic child sex abuse case in which the defence argued that the complainant's behaviour (not screaming, not telling her mother immediately, remaining in the home, retaining a relationship with her father) was inconsistent with being the victim of such abuse. The prosecution rebutted that assertion with expert evidence that the complainant's behaviour (and her mother's in disbelieving her subsequent complaint) was not inconsistent with her claims nor was it an abnormal response to the offending. The Court of Appeal held that the expert evidence could establish that complainant's behaviour did not demonstrate she was untruthful by reference to common or usual patterns of behaviour as argued by the defence. It established that her counter-intuitive behaviour was of neutral significance.<sup>197</sup>

Notably, the Court also said that the occasions should be rare when an expert is asked to express an opinion as to the actual behaviour of a victim or their parent and whether it makes the existence of a fact in issue more probable. If a party seeks to do so, a court's duty to exclude the evidence if its probative value is outweighed by its prejudice 'may assume greater significance'.<sup>198</sup> This is because the admission of expert evidence of patterns of behaviour of normal human beings, even in abnormal situations, is fraught with danger for the integrity of the trial process. There is a risk that trials will become battles of the experts and the capacity of the jury and court to discharge their fact finding functions will be impaired.<sup>199</sup>

Moreover, and more specifically, the UK Court of Appeal has found that evidence from experts in human trafficking is of limited assistance in determining the credibility of a person's account as this is a function of the jury, not the expert.<sup>200</sup>

<sup>192</sup> [2017] WASCA 112.

<sup>193</sup> *Ibid* [110]-[116].

<sup>194</sup> *Ibid* [159].

<sup>195</sup> *Ibid* [183].

<sup>196</sup> (2013) 40 VR 564 ('MA').

<sup>197</sup> *Ibid* 568-69 [22]-[23], 571 [34], 575-76 [53], 583 [89].

<sup>198</sup> *Ibid* 586 [100]; *Woods (a pseudonym) v The Queen* [2021] VSCA 105, [106], [110].

<sup>199</sup> *R v Runjanjic* (1991) 56 SASR 114, 121. See also *MA* 585-86 [97]-[98].

<sup>200</sup> *BTT* [34].

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Nonetheless, that same court has also found there can be circumstances where a suitably qualified expert can give evidence relevant to the existence of modern slavery, ‘particularly to provide context of a cultural nature’.<sup>201</sup> Australian courts have also said that broadly speaking, evidence of the social context in which the victim acted may be relevant.<sup>202</sup> This evidence may include the identification of cultural barriers to a wife leaving her husband in certain societies,<sup>203</sup> or non-psychological barriers, such as financial dependence, to a woman leaving an abusive partner.<sup>204</sup> Ordinarily, evidence of relevant customs or traditions will be given greater weight if given by someone subject to those traditions, rather than the evidence of an observer. However, it may be that opinion evidence by some observers will have significant weight by reason of training. For example, that of an anthropologist who is trained to observe human societies.<sup>205</sup> However, evidence relating to anthropological literature and the conclusions to be drawn from it is clearly opinion evidence requiring relevant expertise, so too are expressions of opinion as to how the relevant facts can be viewed within the broader framework of custom and tradition.<sup>206</sup> Additionally, there is the danger that the opinion evidence of an expert may become more that of an advocate than of a dispassionate observer. This will affect not only its weight, but its possible admissibility.<sup>207</sup>

Other kinds of contextual evidence may be relevant depending on the circumstances and some may meet the criteria for admissibility of opinion evidence by a qualified expert. However, counsel who seeks to adduce that evidence will have to explain precisely and specifically how it is relevant to the issues the jury must decide. To be useful, identifying this relevance must be by reference to both the legal issues and the evidence of the primary facts that will or have been adduced.<sup>208</sup> For example, in *Livanage* the court found that a general statement about the ‘nature of domestic violence and the fact that it’s about coercion and control’ would not have assisted the jury in determining if the accused reasonably believed her actions were necessary for defence. ‘The question for the jury was not what domestic violence was “about”’.<sup>209</sup>

Lastly, written reports that do not identify links between methodology, matters of apparent fact, matters of apparent opinion, and matters of apparent conclusion may cause difficulties for a court.<sup>210</sup> Lawyers should be involved in the writing of expert reports, not in relation to the substance, that would be inappropriate and go beyond their proper role, but only in order to ensure that the legal tests of admissibility are addressed and that the report is comprehensible to a legal audience.<sup>211</sup> Forensic reports are of limited utility when they fail to comply with the rules of evidence,<sup>212</sup> therefore, counsel should ensure expert reports do not contain ‘undifferentiated statements of facts, expressions of opinion [not based on specialised knowledge] and advocacy of a claimants’ case’.<sup>213</sup>

## 5.3 – Summing up and jury directions

Slavery offences are very serious and very clear directions are required. ‘It is imperative that jury directions be comprehensible and avoid over-subtle distinctions’, they must provide practical guidance on the critical issues to jurors.<sup>214</sup>

<sup>201</sup> *Brecani* [58].

<sup>202</sup> *Livanage* [161].

<sup>203</sup> *Ibid* [164].

<sup>204</sup> *Ibid* [165].

<sup>205</sup> *Gumana v Northern Territory* [2005] 218 ALR 292, 334 [161] (‘Gumana’).

<sup>206</sup> *Ibid* 334 [162].

<sup>207</sup> *Ibid* 334 [163].

<sup>208</sup> *Livanage* [166].

<sup>209</sup> *Ibid* [168].

<sup>210</sup> *Gumana* 335-36 [165].

<sup>211</sup> *Harrington-Smith v Western Australia (No 7)* (2003) 130 FCR 424, 427 [19]; *Jango v Northern Territory (No 2)* [2004] FCA 1004, [8]-[10] (‘Jango No 2’); *Akiba v Queensland (No 2)* (2010) 204 FCR 1, [74].

<sup>212</sup> *Jango No 2* [17].

<sup>213</sup> *Ibid* [20]. See also *Jango v Northern Territory (No 4)* [2004] FCA 1539, [12]-[19].

<sup>214</sup> *Kovacs* 65 [20]-[21].

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For example, in *Kovacs*, the Court of Appeal found the trial judge had failed to properly direct the jury on how it might infer the requisite intention as defined in the *Criminal Code*. Nor was the jury properly directed on the meaning of intention or how it was related to the physical element of conduct.<sup>215</sup> This was significant because the accused did not give evidence and the jury therefore had to determine his intention and how it related to his conduct as a matter of inference. The trial judge did give a standard direction as to circumstantial evidence and drawing inferences, but the Court of Appeal said that otherwise there was no direction or assistance given to the jury on how the prosecution 'might prove intention by inferential reasoning drawn from the facts found by the jury'.<sup>216</sup>

Moreover, the trial judge's summing up in relation to intention was limited to a brief general direction at its commencement as to circumstantial evidence. The Court of Appeal stated that it would have been preferable if the judge had further explained to the jury how, in the absence of an admission, a person's intention can be inferred from their conduct and had done so by reference to the facts of the case. Despite this,<sup>217</sup> the Court of Appeal did not consider that this failure caused the jury's deliberations to miscarry. Nor was there any error in the trial judge's instruction distinguishing slavery with controlling or overbearing employment conduct.<sup>218</sup>

With respect to evidence of changed behaviour, as explained above, the judge should direct the jury about how the evidence is relevant. This may include a direction that the changed behaviour may be evidence that the complainant experienced a traumatic event which, on the available evidence, may be the offences charged. Using evidence in this way does not require supporting expert evidence about the behavioural responses of victims of sexual offences.<sup>219</sup> However, the jury should also be directed to consider other possible causes of the changed behaviour which are identified by the evidence.<sup>220</sup>

<sup>215</sup> *Ibid* 65 [22].

<sup>216</sup> *Ibid* 65 [23].

<sup>217</sup> *Ibid* 66 [26]-[27].

<sup>218</sup> *Ibid* 67-68 [29]-[32].

<sup>219</sup> MCA [59]; *Uddin v The Queen* [2020] NSWCCA 115, [66]-[85]. Cf MWL [142]-[144].

<sup>220</sup> MCA [65].

## 6. Sentencing issues

### 6.1 – Circumstances and gravity of the offence

The maximum penalty for an offence provides one guide to the gravity of that offence.<sup>221</sup> Applied to the structure of offences in the *Criminal Code*, this suggests that slavery is the most serious offence, followed by servitude and then forced or compulsory labour. This hierarchy has also been endorsed by courts in the United Kingdom.<sup>222</sup>

The hierarchy of these offences does not necessarily define their gravity or the culpability of the offender in a particular case. But if other circumstances are broadly similar, then slavery is likely to be punished more severely than servitude, and servitude more severely than forced labour.<sup>223</sup>

In sentencing for conspiracy to require a person to perform forced or compulsory labour, relevant considerations for determining the seriousness of the offence include:

- The nature and degree of the deception or coercion involved in persuading the worker to join the organisation;
- Conditions at the workplace;
- The level and methods of control to ensure the worker remains trapped in the organisation;
- The level and extent of the victim's vulnerability;
- The degree of harm they suffer, including physical, psychological or financial harm;
- The nature and extent of the organisation and the financial objects and profits achieved;
- The number of those exploited by the organisation and the individual offender's role within it.<sup>224</sup>

In *McIntosh*<sup>225</sup> the Victorian County Court sentenced an offender for trafficking in children in addition to numerous sex offences against the children, and in doing so the court identified factors going to the circumstances and gravity of the trafficking offence. In that case the offender facilitated the entry of two babies into Australia whose birth was the result of an overseas surrogacy arrangement in which he was the sperm donor, and so their biological father.<sup>226</sup> The court found the fact that he had entered into an arrangement for the birth of two children so that he might sexually exploit them was an aggravating feature of the offence.<sup>227</sup> The court similarly found that the extremely young age of the newborn children increased the gravity of the offending and held that the presumption of harm to children from sexual offending extends to trafficking in children.<sup>228</sup>

<sup>221</sup> *R v Oliver* (1980) 7 A Crim R 174; *Hansford v His Honour Judge Neesham* [1995] 2 VR 233, 236.

<sup>222</sup> *Connors v The Queen* [2013] EWCA Crim 324, [6] ('Connors').

<sup>223</sup> *Ibid* [8].

<sup>224</sup> *Ibid* [9].

<sup>225</sup> [2016] VCC 622.

<sup>226</sup> *Ibid* [56].

<sup>227</sup> *Ibid* [60].

<sup>228</sup> *Ibid* [70]-[71].

# Modern slavery: Guidance for Australian courts.

The Victorian Court of Appeal in [\*R v Tang\*](#)<sup>229</sup> ('*Tang COA*') made the following observations in relation to sentencing for slavery offences:

- Where the prosecution charges both "possession" and "use" offences under the separate offences created by [\*Criminal Code s 270.3\(1\)\(a\)\*](#) in relation to a single victim, the sentencing court must be astute to avoid double punishment, as there is clear overlap between possession and use; full concurrency is not an adequate solution to the problem of double punishment;<sup>230</sup>
- It is necessary to consider the character of the work which the victims were required to perform. Where the work involves prostitution, the court must avoid moral judgments about prostitution. But the use of slaves within the prostitution industry robs the victims of control over both their lives and their bodies and dehumanises the victims.<sup>231</sup>
- Reducing a person to a state of slavery through kidnapping or coercion is more serious than where the victims give ostensible consent – but offending may remain very serious notwithstanding ostensible consent;<sup>232</sup>
- The moral culpability of the offender does not depend on recognising that their conduct involves treating a person as a slave.<sup>233</sup>

More recently, the Victorian Supreme Court in [\*DPP \(Cth\) v Kannan\*](#) ('*Kannan*')<sup>234</sup> noted that, like sexual servitude as considered in [\*Tang COA\*](#), domestic servitude involved control of personal and working life, remuneration, and freedom of movement.<sup>235</sup> The court found the following facts were also indicators of how serious the offending was:

- The victim's illiteracy, poverty, deprived circumstances, ignorance of Australia, and inability to extricate herself and return home made her vulnerable and were facts taken advantage of by offenders to possess, control and manage her;
- The severe limitation of the victim's freedom to act and make decisions for herself;
- The almost complete control the offenders exercised over the victim throughout the period she lived with them;
- It 'occurred in the daily presence and with the obvious knowledge and comprehension of [the offenders'] children. [The offenders] set them a deplorable example of how parents should act towards another human being.'<sup>236</sup>

<sup>229</sup> [\(2009\) 23 VR 332](#).

<sup>230</sup> [Ibid 338-40 \[28\]-\[34\]](#).

<sup>231</sup> [Ibid 341 \[40\]-\[41\]](#).

<sup>232</sup> [Ibid 341-42 \[42\]-\[43\]](#).

<sup>233</sup> [Ibid 343 \[50\]](#).

<sup>234</sup> [\[2021\] VSC 439](#) ('*Kannan*');

<sup>235</sup> [Ibid \[232\]](#).

<sup>236</sup> [Ibid \[218\], \[220\], \[223\], \[225\], \[229\]](#).

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The New Zealand High Court has stated that the aggravating factors for human trafficking and dealing in slaves, globally, include:

- The extent of the resulting harm;
- Abusing a position of trust or authority;
- Vulnerability of the victim;
- Premeditation;
- The number of victims;
- The nature of the exploitation;
- The degree and method of control exercised over the victims, including any degrading treatment or actual or threatened violence;
- The age of the victims;
- Any financial benefit received;
- The duration of the offending and the circumstances in which it stopped;
- The nature and degree of deception practiced on the victim in their home country;
- The mechanism of entering the country of enslavement.<sup>237</sup>

Lastly, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v Kunarac* agreed with the Trial Chamber that the length of the period of enslavement is also relevant to the seriousness of the offence – the longer the period, the more serious the offence.<sup>238</sup> Similarly, in *R v Nettip*, the offence had ‘considerable objective seriousness because...the period of offending conduct’ was more than two and a half years.<sup>239</sup> The same was held to be true in *Kannan* where the period of enslavement was eight years. The court noted that it could have been stopped at any time by either offender, but continued until the victim became so gravely ill the offenders were forced to act.<sup>240</sup>

<sup>237</sup> *R v Matamata* [2020] NZHC 1829, [33]-[34], [40] (‘Matamata’).

<sup>238</sup> *Kunarac Appeal* [356].

<sup>239</sup> [2010] NSWDC 159, [16]. See also *Kannan* [103], [232].

<sup>240</sup> *Kannan* [104], [218], [229].

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## 6.2 – Sentencing purposes

It appears clear that deterrence, denunciation, and just punishment are the principle purposes in sentencing for modern slavery offences.

Courts in Australia, the UK, and New Zealand have said that trafficking and slavery are abhorrent crimes against human dignity that degrade individual autonomy and life. Deterrent sentences are required to make clear that degrading the worth of a fellow human being through such exploitation is unacceptable.<sup>241</sup>

Moreover, sentences for this class of offending must make clear that every vulnerable victim of exploitation will be protected by the criminal law and must emphasise that no victim is so vulnerable that they become invisible, unknown to, or somehow beyond the protection of the law. Exploitation of fellow human beings in any of the ways criminalised by legislation is the deliberate degradation of another. It is not straightforward for the victim to complain about their treatment, much less report it, and so when it is brought to light, a substantial sentence is required.<sup>242</sup>

In *Kannan*, the court noted that it was remarkable the victim had remained in Australia for eight years without coming to the attention of a number of fundamental institutions. Notably, the Department of Immigration. Had the Department made an appropriate follow-up investigation, in light of a series of previously rejected visa applications made by the offenders and after expiration of the short-stay visa issued to the victim, the whole scenario that then played out over the following years might have been avoided. For the purpose of Australian institutions, the victim was an ‘undiscovered, non-person, living and working under the radar, until the point at which her identity was revealed while receiving life-saving care’ at hospital. The way she came to be in those circumstances was reprehensible and the offenders deserve condemnation’.<sup>243</sup>

<sup>241</sup> *Matamata* [25]. See also *McIntosh* [75]; *Kannan* [103], [232].

<sup>242</sup> *Connors* [10]; *McIntosh* [75].

<sup>243</sup> *Kannan* [228].

## 7 – Victim and witness support

### 7.1 – Legislative and other support considerations

#### 7.1.1. Commonwealth offences

##### 7.1.1.1 *Crimes Act 1914* (Cth)

Part IAD of the *Crimes Act* provides various protections for vulnerable persons giving evidence in proceedings involving Commonwealth modern slavery offences.<sup>244</sup>

Vulnerable persons include:

- Children;<sup>245</sup>
- Adult complainants,<sup>246</sup> unless they inform the court that they do not wish to be treated as a vulnerable witness;<sup>247</sup> and
- Special witnesses.<sup>248</sup>

These protections include:

- Limitations on the ability to cross examine vulnerable persons;
- Enabling the use of closed-circuit television, video-link or video recording for vulnerable persons to give evidence;<sup>249</sup>
- Allowing vulnerable persons to have an accompanying support adult;
- Enabling closed court proceedings;
- Prohibiting the publication of material identifying a vulnerable person.

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<sup>244</sup> Of course where the Commonwealth is relying on State processes, the *Judiciary Act 1903* (Cth) s 79 applies. See, eg, *Chaarani v The Queen* (2020) 61 VR 353, 370-71 [63].

<sup>245</sup> *Crimes Act 1914* (Cth) s 15Y(1) ('Crimes Act').

<sup>246</sup> *Ibid* s 15Y(2).

<sup>247</sup> *Ibid* s 15YAA(2).

<sup>248</sup> A court may deem a person a special witness if satisfied they are unlikely to be able to satisfactorily give evidence in the ordinary manner because of a disability, intimidation, distress or emotional trauma arising from the person's age, their cultural background, any relationship to a party to the proceeding, the nature of the evidence, or some other relevant factor. A declaration that a person is a special witness may be made on the court's own initiative or on application by a party. See *Crimes Act* ss 15Y(3), 15YAB.

<sup>249</sup> These Part IAD protections for vulnerable persons do not affect the provisions for witnesses giving evidence via video link.

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In *Kannan*, the victim was a vulnerable adult, her evidence was taken via video and audio recording, and the court ruled that it was admissible as evidence in chief.<sup>250</sup> It rejected the defence argument that it was not in the interests of justice for video components where the complainant was shown in a hospital bed to go to the jury. Nor did the court accept the defence claim that the probative value of this evidence was outweighed by the danger of unfair prejudice.<sup>251</sup>

In reaching this conclusion, the court found that it was entitled to take the complainant's physical and mental condition into account in determining whether to allow the material.<sup>252</sup> And it said that the protective legislative regime enacted in Part IAD does not limit a court's discretion, under [s 137](#) of the *Evidence Act 2008 (Vic)*, to order that video aspects of evidence be altered to removed them from a jury's consideration. This is consistent with a court's ability to order the removal of any potentially prejudicial evidence.<sup>253</sup>

However, the court noted that in making this decision it is important to keep in mind the combined nature of the evidence obtained under this regime. The audio and video components form a unified body of evidence which the legislative scheme clearly mandates be assessed by a jury in its unified form. The jury should see and hear the evidence as recorded pursuant to the mandated procedure. Given the protective purpose of the scheme any separation of the components requires careful consideration.<sup>254</sup>

## **Cross-examination of vulnerable persons**

A court must disallow a question put to a vulnerable person in cross-examination if it is inappropriate or unnecessarily aggressive. In determining whether a question is inappropriate or unnecessarily aggressive, the court should have regard to the vulnerable person's personal characteristics, including their age, culture, mental capacity and gender.<sup>255</sup>

An unrepresented defendant may not directly cross-examine a vulnerable person<sup>256</sup> unless the court gives them leave to do so. The court may give leave if it is satisfied that doing so will not adversely affect the vulnerable person's ability to give evidence. In determining whether this might occur, the court must consider any trauma that could be caused by the defendant cross examining the vulnerable person. If leave is refused, the court must appoint a person to ask any questions that the defendant requests be asked of the vulnerable person during cross-examination.<sup>257</sup>

Where a defendant is represented by counsel, the defendant may not cross-examine a vulnerable person except through their counsel.<sup>258</sup> Nor is a vulnerable person to be cross-examined at a committal or similar proceedings.<sup>259</sup>

<sup>250</sup> *R v Kannan (Ruling No 1) [2019] VSC 461, [40]*.

<sup>251</sup> *Ibid* [42].

<sup>252</sup> *Ibid*.

<sup>253</sup> *Ibid* [47].

<sup>254</sup> *Ibid* [49].

<sup>255</sup> *Crimes Act s 15YE*.

<sup>256</sup> Other than a child complainant – see *Crimes Act s 15YG(1A)*. There is an absolute prohibition on an unrepresented accused personally cross-examining a child complainant and there is no power to grant leave – *Crimes Act s 15YF*.

<sup>257</sup> *Ibid* s 15YG.

<sup>258</sup> *Ibid* s 15YH.

<sup>259</sup> *Ibid* s 15YHA.

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## Closed-circuit television

A vulnerable person must give evidence by means of closed-circuit television unless:

- They are at least 16 years old and choose not to;
- The court is not equipped with facilities for evidence to be given by this means; or
- The court orders that the vulnerable person not give evidence by closed-circuit television.<sup>260</sup>

A court may only make an order that a vulnerable person give evidence in person, rather than by closed-circuit television, if it is satisfied that it is not in the interests of justice for the vulnerable person to give evidence by closed-circuit television.<sup>261</sup>

## Subsequent trials

The following are special rules for later trials if a proceeding involving the trial of one or more defendants concludes and on appeal a new proceeding involving the trial of any or all of the defendants is ordered,<sup>262</sup> or the original proceeding is discontinued and a new proceeding involving the trial of any or all of the defendants is ordered.<sup>263</sup>

### *Record of evidence*

The prosecutor may prepare a record of all the evidence given by any person who was a child complainant<sup>264</sup> or a vulnerable adult complainant<sup>265</sup> in the original proceeding, if:

- The record is in a form and authenticated in the prescribed manner;<sup>266</sup>
- The prosecutor gives written notice to the court and to the defendants in the new proceeding of the intention to tender that record as evidence in the new proceeding; and
- That notice is given at least 21 days before the court commences hearing the new proceeding<sup>267</sup> or within such other period as the court allows.<sup>268</sup>

The prosecutor may also alter or edit the record with the agreement of each defendant in the new proceeding.<sup>269</sup> A record altered or edited in this way or prepared as above is admissible as evidence in the new proceeding,<sup>270</sup> as are the exhibits tendered in the original proceeding in connection with that evidence.<sup>271</sup>

If a record so prepared or altered includes a video recording, neither the defendants in the new proceeding,<sup>272</sup> nor their legal representatives,<sup>273</sup> are entitled to be given the video recording or a copy of it. However, they must be given reasonable access to the video recording in order to view it.<sup>274</sup>

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<sup>260</sup> [Ibid s 15YI\(1\)](#).

<sup>261</sup> [Ibid s 15YI\(2\)](#).

<sup>262</sup> [Ibid s 15YNA\(a\)](#).

<sup>263</sup> [Ibid s 15YNA\(b\)](#).

<sup>264</sup> [Ibid s 15YNB\(1\)\(4\)\(a\)](#).

<sup>265</sup> [Ibid s 15YNB\(1\)\(4\)\(b\)](#).

<sup>266</sup> [Ibid s 15YNB\(1\)\(a\)](#).

<sup>267</sup> [Ibid s 15YNB\(1\)\(c\)\(i\)](#).

<sup>268</sup> [Ibid s 15YNB\(1\)\(c\)\(ii\)](#).

<sup>269</sup> [Ibid s 15YNB\(2\)](#).

<sup>270</sup> [Ibid s 15YNB\(3\)\(a\)](#).

<sup>271</sup> [Ibid s 15YNB\(3\)\(b\)](#).

<sup>272</sup> [Ibid s 15YND\(1\)\(a\)](#).

<sup>273</sup> [Ibid s 15YND\(1\)\(b\)](#).

<sup>274</sup> [Ibid s 15YND\(2\)](#).

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If there is a jury in the new proceeding, the judge is not to warn the jury or suggest in any way that the law requires greater or lesser weight to be given to evidence that is included in a record admitted in this way.<sup>275</sup>

## *Vulnerable person not to be made to give further evidence*

A vulnerable person whose evidence is included in such a record does not need to give further evidence in the new proceeding unless the court considers this is necessary:

- To clarify the vulnerable person's evidence given in the original proceeding,<sup>276</sup>
- To give proper consideration of information or material that has become available since the original proceeding;<sup>277</sup> or
- In the interests of justice.<sup>278</sup>

If the court makes an order directing the vulnerable person to give evidence in the new proceeding, the court must ensure that the vulnerable person is questioned only about the matters specified in its order.<sup>279</sup> Such an order may be made on the court's own initiative, or on application by, or on behalf of, a party to the new proceeding.<sup>280</sup> The vulnerable person may also seek leave of the court to give further evidence in the new proceeding, in which case these limitations do not apply if leave is given.<sup>281</sup>

## Adult accompanying a vulnerable person

An adult may accompany a vulnerable person while they give evidence in a proceeding, including while giving evidence by closed-circuit television, unless the court determines it is not appropriate. The court may permit more than one adult to accompany the person if this is considered to be in the interests of justice.<sup>282</sup>

An adult accompanying the vulnerable person must not prompt them, influence their answers,<sup>283</sup> or disrupt the questioning of the vulnerable person.<sup>284</sup> Any words spoken by an accompanying adult must be able to be heard by the judge,<sup>285</sup> and if there is a jury in the proceeding, the members of the jury.<sup>286</sup>

## Excluding people from the courtroom

A court may order that some or all of the members of the public be excluded from the courtroom when a vulnerable person is giving evidence.<sup>287</sup>

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<sup>275</sup> [Ibid s 15YNC](#).

<sup>276</sup> [Ibid s 15YNC\(1\)\(a\)](#).

<sup>277</sup> [Ibid s 15YNC\(1\)\(b\)](#).

<sup>278</sup> [Ibid s 15YNC\(1\)\(c\)](#).

<sup>279</sup> [Ibid s 15YNC\(2\)](#).

<sup>280</sup> [Ibid s 15YNC\(3\)](#).

<sup>281</sup> [Ibid s 15YNC\(4\)](#).

<sup>282</sup> [Ibid s 15YO\(1\)-\(3\)](#).

<sup>283</sup> [Ibid s 15YO\(4\)\(a\)](#).

<sup>284</sup> [Ibid s 15YO\(4\)\(b\)](#).

<sup>285</sup> [Ibid s 15YO\(5\)\(a\)](#).

<sup>286</sup> [Ibid s 15YO\(5\)\(b\)](#).

<sup>287</sup> [Ibid s 15YP](#).

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## 7.1.1.2 Witness Protection Act 1994 (Cth)

A witness may be included in the National Witness Protection Program ('NWPP') if the Commissioner of the Australian Federal Police ('AFP') decides to include the witness,<sup>288</sup> and the witness agrees<sup>289</sup> and signs a memorandum of understanding.<sup>290</sup> If the witness is under 18 years old a parent or guardian of the witness must sign the memorandum,<sup>291</sup> or if the witness otherwise lacks legal capacity, a guardian or other person who is usually responsible for the care and control of the witness must sign the memorandum.<sup>292</sup>

A 'witness' is:

- A person who has given or agreed to give evidence on behalf of the Crown in proceedings for an offence;
- A person who has otherwise given or agreed to give evidence in relation to the commission or possible commission of an offence;
- A person who has made a statement to the AFP or an approved authority in relation to an offence;
- A person who for any other reason may require protection or other assistance under the NWPP; or
- A person who because of their relationship to or association with one of these persons may require protection or other assistance under the NWPP.<sup>293</sup>

<sup>288</sup> [Witness Protection Act 1994 \(Cth\) s 8\(2\)\(a\)](#) ('Witness Protection Act').

<sup>289</sup> [Ibid s 8\(2\)\(b\)](#).

<sup>290</sup> [Ibid s 8\(2\)\(c\)](#).

<sup>291</sup> [Ibid s 8\(2\)\(c\)\(i\)](#).

<sup>292</sup> [Ibid s 8\(2\)\(c\)\(ii\)](#). [Section 9](#) outlines the requirements of the memorandum of understanding.

<sup>293</sup> [Ibid s 3](#) (definition of 'witness').

# Modern slavery: Guidance for Australian courts.

If a witness is included in the NWPP, or is being assessed for inclusion, and the Commissioner considers the action necessary and reasonable to protect the witness's safety and welfare they may, relevantly:<sup>294</sup>

- Apply for any documents necessary to allow the witness to establish a new identity<sup>295</sup> or to otherwise protect the witness;<sup>296</sup>
- Relocate the witness;<sup>297</sup>
- Provide accommodation for the witness;<sup>298</sup>
- Provide transport for the witness's property;<sup>299</sup>
- Provide payments to the witness for the purpose of meeting their reasonable living expenses (including, where appropriate, living expenses of the witness's family) and providing, whether directly or indirectly, other reasonable financial assistance;<sup>300</sup>
- Provide payments to the witness to meet costs associated with relocation;<sup>301</sup>
- Provide assistance to the witness in obtaining employment or access to education;<sup>302</sup>
- Providing other assistance to the witness to ensure they become self-sustaining;<sup>303</sup> and
- Do other things considered necessary to ensure the safety of the witness.<sup>304</sup>

## 7.1.2 State offences

The [National Domestic Violence Bench Book](#) provides an overview of the protections in place in each State and Territory for vulnerable and special witnesses.

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<sup>294</sup> [Ibid s 13\(1\)](#).

<sup>295</sup> [Ibid s 13\(2\)\(a\)\(i\)](#).

<sup>296</sup> [Ibid s 13\(2\)\(a\)\(ii\)](#).

<sup>297</sup> [Ibid s 13\(2\)\(c\)](#).

<sup>298</sup> [Ibid s 13\(2\)\(d\)](#).

<sup>299</sup> [Ibid s 13\(2\)\(e\)](#).

<sup>300</sup> [Ibid s 13\(2\)\(f\)](#).

<sup>301</sup> [Ibid s 13\(2\)\(g\)](#).

<sup>302</sup> [Ibid s 13\(2\)\(h\)](#).

<sup>303</sup> [Ibid s 13\(2\)\(i\)](#).

<sup>304</sup> [Ibid s 13\(2\)\(j\)](#).

# Modern slavery: Guidance for Australian courts.

## 7.2 – Other witness support considerations

While the legislative provisions assist victims and witnesses during court proceedings, other support systems exist outside the courtroom.

### 7.2.1 Support for Trafficked People Program

The Support for Trafficked People Program ('Support Program') provides assistance to eligible 'victims of human trafficking, slavery and slavery-like practices, including forced marriage and forced labour'.<sup>305</sup> The Support Program is administered by the Department of Social Services and delivered nationally by the Australian Red Cross.<sup>306</sup>

The program has a number of streams:

- Assessment and Intensive Support Stream;
- Extended Intensive Support Stream;
- Forced Marriage Support Stream;
- Justice Support Stream;
- Temporary Trial Support Stream.<sup>307</sup>

In addition, there is a 20 working day transition period for individuals leaving the Support Program.<sup>308</sup>

Foreign nationals who do not already hold a valid visa and are suspected victims of human trafficking or slavery are able to remain lawfully in Australia and access the Support Program if issued with visas under the Human Trafficking Visa Framework.<sup>309</sup>

#### 7.2.1.1 Assessment and Intensive Support Stream

An intensive support program for 45 days to all trafficked people referred by the AFP.<sup>310</sup> Trafficked people are eligible regardless of whether they are willing or able to assist with the investigation or prosecution of a human trafficking or slavery-related offence.<sup>311</sup>

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<sup>305</sup> Department of Social Services, Australian Government, [Support for Trafficked People Program \(Web Page\)](#), 23 December 2020) <Support for Trafficked People Program | Department of Social Services, Australian Government (dss.gov.au)>.

<sup>306</sup> [Ibid.](#)

<sup>307</sup> [Ibid.](#)

<sup>308</sup> [Ibid.](#)

<sup>309</sup> [Ibid.](#)

<sup>310</sup> [Ibid.](#)

<sup>311</sup> [Ibid.](#)

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## 7.2.1.2 Extended Intensive Support Stream

An extension of 45 days of support in addition to the initial assessment and intensive support. This support is available to people who are willing, but not able to assist with an investigation or prosecution of a human trafficking or slavery-related offence.<sup>312</sup> All victims of forced marriage and children are automatically entitled to access this extended support if it is in their best interests.<sup>313</sup>

## 7.2.1.3 Forced Marriage Support Stream

Additional intensive support for victims of or at risk of forced marriage.<sup>314</sup> This support is available for up to 200 days and can be provided in addition to assessment and intensive support and extended intensive support.<sup>315</sup> Referrals are made by the AFP, but the support is available to individuals without the requirement of contributing to a criminal investigation or prosecution against the alleged perpetrator.<sup>316</sup>

To be eligible to receive support under this stream, the individual must be:

- Assessed by the AFP as being reasonably suspected to be in or at risk of a forced marriage;
- An Australian citizen, permanent resident, or have a visa status that allows them to stay in Australia;
- Not willing to participate in a criminal investigation; and
- Be willing to receive further support.<sup>317</sup>

## 7.2.1.4 Justice Support Stream

This support is available until the investigation and prosecution of a human trafficking or slavery-related matter is finalised.<sup>318</sup> Eligible individuals can access a range of support, including assistance to secure longer-term accommodation and household items and to access Medicare, legal services, employment, and training.<sup>319</sup>

## 7.2.1.5 Temporary Trial Support Stream

Intensive support available for trafficked people who return to Australia to give evidence in a human trafficking prosecution.<sup>320</sup> The support includes short-term accommodation and a weekly living and food allowance.<sup>321</sup>

<sup>312</sup> [Ibid.](#)

<sup>313</sup> [Ibid.](#)

<sup>314</sup> [Ibid.](#)

<sup>315</sup> [Ibid.](#)

<sup>316</sup> [Ibid.](#)

<sup>317</sup> [Ibid.](#)

<sup>318</sup> [Ibid.](#)

<sup>319</sup> [Ibid.](#)

<sup>320</sup> [Ibid.](#)

<sup>321</sup> [Ibid.](#)

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## 7.2.2 Salvation Army Trafficking and Slavery Safety House

The Trafficking and Slavery Safe House ('Safe House') is a dedicated refuge 'for women who have experienced trafficking and slavery in Australia'.<sup>322</sup> The Safe House is staffed by experts with domestic and international experience<sup>323</sup> and provides comprehensive case management services<sup>324</sup> and outreach support to men, women and children living in the community.<sup>325</sup>

Prevention support can be provided on a case-by-case basis for persons at risk of trafficking, slavery or slavery-like practices.<sup>326</sup> Staff work with clients to identify interventions that may prevent their own exploitation.<sup>327</sup>

The Safe House receives referrals from community service organisations and police.<sup>328</sup> Salvos Legal supports the Safe House by providing free legal services in NSW to victims of trafficking and slavery across several areas of law.<sup>329</sup>

## 7.2.3 Witness Assistance Service

The Witness Assistance Service is part of the Victorian Office of Public Prosecutions and assists victims and witnesses of serious crime throughout the court process.<sup>330</sup> The Service can provide victims and witnesses with support, answer questions about the court process, discuss any safety concerns attending court or giving evidence and refer to other organisations for additional support.<sup>331</sup>

## 7.2.4 Additional sources of support

In addition to these government and community organisation support programs, there are other organisations that offer various types of support for victims of modern slavery, including online information, resources and ways to access further support.

These include:

- [Anti-Slavery Australia](#)

A not-for-profit organisation that provides free legal and migration advice and services to individuals who have experienced or are at risk of modern slavery. Clients can contact the organisation through its national advice hotline, My Blue Sky, which is a dedicated forced marriage website, or through referrals from the AFP, the Australian Red Cross and other community support organisations.

<sup>322</sup> Salvation Army Australia, [Fighting Modern Slavery \(Web Page\)](#) <Fighting Modern Slavery | The Salvation Army Australia>.

<sup>323</sup> Heather Moore, '[Service or Servitude: A Study of Trafficking for Domestic Work in Australia](#)' (2019) Mercy Foundation, The Salvation Army, 12 ('Service or Servitude').

<sup>324</sup> [Ibid.](#)

<sup>325</sup> Salvation Army Australia, [Fighting Modern Slavery \(Web Page\)](#) <Fighting Modern Slavery | The Salvation Army Australia>.

<sup>326</sup> [Ibid.](#)

<sup>327</sup> [Ibid.](#)

<sup>328</sup> [Service or Servitude 12.](#)

<sup>329</sup> [Ibid.](#)

<sup>330</sup> Office of Public Prosecutions Victoria, '[Witness Assistance Service', Victims and Witness Assistance Service \(Brochure\)](#)' <WAS-brochure.aspx (opp.vic.gov.au)>.

<sup>331</sup> [Ibid.](#)

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As part of the UTS Faculty of law, Anti-Slavery Australia conducts research into different areas of modern slavery and offers training programs to increase awareness of modern slavery.

- [My Blue Sky](#)

My Blue Sky is Anti-Slavery Australia's dedicated forced marriage portal, and provides information, support and legal advice to those who are in or at risk of forced marriages.

- [Project Respect](#)

Project Respect provides support and advocates for women in the sex industry, including those who have experienced trafficking.

## 7.3 – Indicators of modern slavery

This section of the guide aims to summarise the indicators of modern slavery, while also providing examples from Australian and international case law.

### 7.3.1 General guidance from case law

Factors that courts have identified as needing to be taken into account in determining if someone has been subjected to slavery include:

- Another's control of their movements;
- Another's control of their physical environment;
- Psychological control by another;
- Measures taken to prevent or deter their escape;
- Whether they were subjected to force, or the threat of force, or coercion;
- The duration of their captivity;
- Another's assertion of exclusivity over them;
- Whether they were subjected to cruel treatment and abuse;
- Whether another controlled their sexuality; and
- Whether they were forced to labour for another.<sup>332</sup>

It is unnecessary to draw hard lines between slavery and related contemporary forms of the offence like servitude, forced labour, or debt bondage. The various concepts are not all mutually exclusive. 'Those 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'.<sup>333</sup>

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<sup>332</sup> [Tang 18 \[28\]](#), citing [Kunarac Trial](#). See also [Ho 83 \[32\], 90 \[79\]](#).

<sup>333</sup> [Tang 19 \[29\]](#).

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In *McIvor v The Queen* ('*McIvor*'), the prosecution relied on nine 'indicia of slavery'. Namely, that the complainants:

1. Lived and worked in locked premises operated by the accused;
2. Did not have keys to the premises and were not permitted by the accused to leave them unaccompanied;
3. Did not speak English;
4. Did not know anyone outside the brothel;
5. Were housed, cooked for and fed by the accused;
6. Were constantly put to work by the accused;
7. Were controlled by the accused in all aspects of their lives including where they went, where they ate, where they slept and with whom they associated;
8. Had a fear of immigration authorities fostered in their minds by the accused; and
9. Were instructed by the accused to hide in the event that authorities attended the brothel.<sup>334</sup>

The court observed that these indicia were a 'characterisation of the primary facts contained in a significant body of evidence', but most were 'not capable of constituting slavery on their own'.<sup>335</sup> Instead, they were part of the 'range of circumstances which are relevant to determining the physical element of the offences' under the *Criminal Code*.<sup>336</sup> The factors 'may not be entitled to equal weight'<sup>337</sup> and some are matters that give colour to other indicia.<sup>338</sup> For example, the fact that the victims did not speak English or did not know anyone outside the brothel or were fed, clothed and housed by the accused, alone or in combination, may not have led a jury to determine the victims were reduced to slavery.<sup>339</sup> However, the significance of these matters was in 'establishing the circumstances in which powers in the nature of ownership - namely possession and use - came to exist'.<sup>340</sup>

## 7.3.1.1 A question of degree

Assessing some of these factors involves considering questions of degree – for example, harsh and exploitative labour conditions do not necessarily equal slavery.<sup>341</sup> Slavery is distinguished by the nature and extent of the power exercised by one person over another. Specifically, by the capacity to deal with them as an object for sale and purchase, limiting their movement well beyond that applied in even the most exploitative circumstances, and the absence of any or extremely inadequate payment for services.<sup>342</sup>

<sup>334</sup> *McIvor v The Queen* (2009) 247 FLR 363, 365 [7].

<sup>335</sup> *Ibid.*

<sup>336</sup> *Ibid* 365 [8].

<sup>337</sup> *Ibid* 372 [42].

<sup>338</sup> *Ibid* 372 [44].

<sup>339</sup> *Ibid.*

<sup>340</sup> *Ibid.*

<sup>341</sup> *Ho* 90-91 [80].

<sup>342</sup> *Tang* 23-24 [44].

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The traditional concept of slavery has evolved to encompass various contemporary forms.<sup>343</sup> While a person held in one of those forms may not be subject to the more extreme rights of ownership associated with chattel slavery (which the law does not recognise),<sup>344</sup> as a result of the offender exercising any or all of powers attaching to the right of ownership over them (which is what the law does recognise as an offence)<sup>345</sup> there is still some destruction of their legal personhood. This destruction may be greater in cases of chattel slavery, but the difference is only one of degree.<sup>346</sup>

References in legislation to ‘possessing a slave’ and ‘exercising any of the powers attaching to ownership’ focus attention on what the offender has done and what power, if any, have they exercised over the other person. To constitute ‘ownership’, one person has to have dominion over another. Similarly, to speak of one person ‘possessing’ another connotes dominion over that other person.<sup>347</sup> And in asking whether there was dominion over another, the question is whether the person was deprived of freedom of choice in some relevant way and what deprived them of that choice.<sup>348</sup> A person may be deprived of choice not just by physical force or threat of physical force, but also by threats to invoke the law against them<sup>349</sup> or in many other ways.<sup>350</sup>

Asking what freedom a person had may shed light on whether they were a slave; asking if they were deprived of choice may help show if an accused exercised a ‘power of ownership’ or whether they retained some freedom of choice. If they did retain some freedom of choice, again depending on the degree, it may show the person was not a slave.<sup>351</sup> It is important to look at the specific circumstances and not make a judgement based on what a specific practice might be called; it is best to look at the substance of the relationship.<sup>352</sup>

## 7.3.1.2 Consent

The presence of consent is not inconsistent with slavery; it may be factually relevant in a given case but its absence is not an element of the offence<sup>353</sup> and it may arise as the result of a contract.<sup>354</sup> Moreover, a lack of resistance or the absence of a clear and constant lack of consent during the entire period of detention cannot be interpreted as a sign of consent.<sup>355</sup> However, consent may be relevant from an evidential point as going to the question of whether the prosecution has established the accused exercised any or all of the powers attaching to the right of ownership. So, circumstances that render it impossible to express consent may be sufficient to presume the absence of consent.<sup>356</sup>

<sup>343</sup> [Kannan \[103\]](#).

<sup>344</sup> [Tang 20 \[33\], 56 \[140\]; Ho 83 \[32\]](#).

<sup>345</sup> [Tang 16-17 \[25\]](#).

<sup>346</sup> [Kunarac Appeal \[117\]-\[118\]](#).

<sup>347</sup> [Tang 57 \[141\]-\[142\], 58 \[148\]](#). See also [Ho 82-83 \[27\], \[32\]](#).

<sup>348</sup> [Tang 58 \[149\], 61 \[155\]](#).

<sup>349</sup> [Ibid 58-59 \[150\]](#).

<sup>350</sup> [Raikadroka v State \[2020\] FJCA 12, \[23\], \[25\], \[42\], \[46\]-\[47\]](#) (‘Raikadroka’). See also [Ho \[97\]](#); [Kannan \[230\]](#).

<sup>351</sup> [Tang 61 \[156\]](#).

<sup>352</sup> [Raikadroka \[26\], \[51\]](#).

<sup>353</sup> [Tang 24 \[45\]; Kunarac Trial \[120\]; Raikadroka \[17\]-\[18\]](#).

<sup>354</sup> [Tang 21 \[35\], 63-64 \[166\]; Kannan \[224\]](#).

<sup>355</sup> [Kunarac Trial \[120\]](#).

<sup>356</sup> [Ibid](#).

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In *DPP (Cth) v Ho*,<sup>357</sup> the offenders were part of a sophisticated scheme that imported women from Thailand to work for minimal pay in the sex industry. The women were traded, possessed, and used as items of property.<sup>358</sup> They were required to work six days a week, and to service a specified number of clients in order to repay the debt of their being brought to Australia. This highly exploitative debt environment was a fundamental factor establishing that powers attaching to the right of ownership were being exercised by the offenders over the women, meaning they were in the condition of slavery.<sup>359</sup>

While all of the victims were ‘mature adults, educated and aware’ and each acted or was prepared to act voluntarily as a prostitute, and to enter Australia knowingly on false documentation,<sup>360</sup> the conduct of the offenders once the victims were in Australia ‘reduced them to the condition of slavery’.<sup>361</sup>

Similarly in *Tang*, at the outset each victim entered Australia voluntarily.<sup>362</sup> The court found, however, that this ‘did not preclude the conclusion that each was possessed and used’ as if owned by the offender.<sup>363</sup>

## 7.3.2 Fact specific examples in case law

It is important to note that a number of the factors and case examples discussed below correspond directly to indicators outlined in the lists developed by government, academic and community organisations which are discussed further in section 7.3.3 of this guide.

### 7.3.2.1 Control of movement and measures taken to prevent escape

#### Confiscation of passports

In *Ho* (‘*Ho Trial*’), the victims were ‘not permitted to keep possession of their passports’ for ‘at least the duration of their contracts, and usually longer’.<sup>364</sup> The confiscation of the victims’ passports ‘was a critical operational and psychological element of control and disempowerment’.<sup>365</sup>

The meaning of ‘confiscate’ was raised in *Pulini*<sup>366</sup> where the victim gave her passport to Mrs Pulini for what she believed was for the purpose of obtaining a visa.<sup>367</sup> Mrs Pulini contended that there was no suggestion that the victim ever sought return of her passport, nor that at any time she was refused access to it. Further, although the victim may have been deceived about the purpose of providing her passport to Mrs Pulini, it was not ‘taken to her exclusion and therefore confiscated’. The court rejected this and held that the circumstances amounted to confiscation of the victim’s passport as possession was taken to the exclusion of the victim, and ‘so far as she had been told and believed’ her passport was in the possession of someone in the Department of Immigration whose ‘possible response caused her to be scared about what would happen with her unlawful status’.<sup>368</sup>

<sup>357</sup> [\[2009\] VSC 437](#) (‘*Ho Trial*’).

<sup>358</sup> [Ibid](#) [26].

<sup>359</sup> [Ibid](#) [28]-[29].

<sup>360</sup> [Ibid](#) [31].

<sup>361</sup> [Ibid](#) [42].

<sup>362</sup> [Tang](#) 62 [160].

<sup>363</sup> [Ibid](#) 63 [166].

<sup>364</sup> [Ho](#) (‘*Ho Trial*’) 80 [18]; [Kovacs](#) 71 [48].

<sup>365</sup> [Ho Trial](#) [42].

<sup>366</sup> [\[2019\] QCA 258](#).

<sup>367</sup> [Ibid](#) [46].

<sup>368</sup> [Ibid](#) [56].

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## **Restricted and supervised movement**

In *Ho* ('*Ho Trial*'), the victims were under 'very strict control over almost every significant aspect' of their lives.<sup>369</sup> Specifically, the victims were:

- Transported by one of the accused between the brothels and places of residence;
- Effectively restricted to the residential premises, which were shared;
- Not allowed to have a key to the premises;
- Given strict instructions that they were not to go outside unaccompanied;
- Told to contact their minder or the accused if they needed anything; and
- Rarely permitted to go out to have something to eat or to go shopping, and if they did it was under supervision.<sup>370</sup>

They were effectively prisoners in their residences and the control exerted over their work and residence constituted slavery.<sup>371</sup>

### **7.3.2.2 Psychological control**

In *Ho* ('*Ho Trial*'), the control exercised was not only physical, it was mental. The offenders controlled the women by exploiting their vulnerability; they feared apprehension and deportation, they were in a foreign country where they did not speak the language, their passports had been taken from them, they were always under the shadow of a 'minder', they had no family or friends with them, and no personal history in Australia. This disempowerment resulted in 'modern slavery: not with physical chains but with mental chains'.<sup>372</sup> The manipulation was so sophisticated it treated the women with a 'veneer of civility' for the sole purpose of ensuring that they worked productively as prostitutes.<sup>373</sup>

In *Kovacs*, a number of similar psychological factors operated to the victim's disadvantage:

- Limited knowledge of English;
- A lack of Australian friends or associates;
- An unspecified amount of debt; and
- The remote location of the shop and house.<sup>374</sup>

<sup>369</sup> *Ho Trial* [29].

<sup>370</sup> *Ibid.*

<sup>371</sup> *Ibid* [32], [42].

<sup>372</sup> *Ibid.*

<sup>373</sup> *Ibid* [31].

<sup>374</sup> *Kovacs* 71 [48].

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### 7.3.2.3 Threat(s) of force or coercion

In the case of *DPP (Vic) v Shaik* ('Shaik'),<sup>375</sup> the victim was employed by a restaurant owner, who refused to pay her wages. The offender used an ambiguous Punjabi term which could be taken as a threat either to kill or hit the victim.<sup>376</sup> It was sufficiently serious for the victim to feel intimidated and agree that she would not ask about payment of her wages again.<sup>377</sup> Although the victim did make subsequent requests for payment, she did so via telephone and email but never in person.<sup>378</sup>

In *Sieders*,<sup>379</sup> the court said that the victims fell into sexual servitude because their lack of freedom arose from the use of force or threats.<sup>380</sup> These may be made by anyone; what is essential is the role the use of force or threats play in the lack of freedom of the person in servitude.<sup>381</sup> A threat can be of 'any disadvantage at all' whether to the person held in servitude or anyone else such as their friend or family member. Moreover, there is no reason why a threat needs to be to take only an illegal action; taking a legal action like reporting someone to the immigration authorities may be a threat. Nor does a threat have to be specific.<sup>382</sup>

### 7.3.2.4 Control of labour

In *Tang*, while under contract, the victims were to work in the respondent's brothel 'six days per week, serving up to 900 customers over a period of four to six months'.<sup>383</sup> In *Dobie*,<sup>384</sup> the offender intended to pressure both victims to provide sexual services on demand, despite initially presenting different arrangements to both victims.<sup>385</sup> The victim was pressured to work almost constantly in providing sexual services, through verbal abuse and the notion that the victim must work to pay for her travel, passport and accommodation.<sup>386</sup>

### 7.3.2.5 Failure to pay

*Shaik* highlighted the 'misuse and abuse of power' in forcing a victim to work without paying their wages. It emphasised the power imbalance between the offender, 'a businessman and Australian citizen', and the victim, a migrant worker who aspired to permanent residency, and noted that the offender exploited the victim on threat of deportation for his own financial gain.<sup>387</sup> However, unpaid wages alone are not an indicator of a slavery offence and this is an area where factual issues may arise.

<sup>375</sup> [\[2020\] VCC 909](#) ('Shaik').

<sup>376</sup> [Ibid \[12\]](#).

<sup>377</sup> [Ibid](#).

<sup>378</sup> [Ibid](#).

<sup>379</sup> [\(2008\) 72 NSWLR 417](#).

<sup>380</sup> [Ibid 425 \[95\]-\[96\]](#).

<sup>381</sup> [Ibid 426 \[98\]](#).

<sup>382</sup> [Ibid 426 \[99\]-\[101\]](#).

<sup>383</sup> [Tang 14 \[14\]](#).

<sup>384</sup> [\[2011\] 1 Qd R](#).

<sup>385</sup> [Ibid 377 \[14\]](#).

<sup>386</sup> [Ibid 378 \[16\]](#).

<sup>387</sup> [Shaik 4 \[25\], 9 \[55\]](#).

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## 7.3.3 Government, academic, and community organisation guidance

The United Nations Office on Drugs and Crime ('UNODC'), the AFP and other community and government organisations<sup>388</sup> have compiled non-exhaustive lists of factors that may indicate the presence of modern slavery. These factors may assist in the initiation of an investigation, but do not prove or disprove the offences of human trafficking, forced marriage or slavery.<sup>389</sup>

These lists can be found here:

- [United Nations Office on Drugs and Crime \(UNODC\)](#)
- [International Labour Organization](#)
- [Australian Federal Police](#)
- [Anti-Slavery Australia](#)

A summary of the factors outlined within these lists is in this table.

| GENERAL INDICATORS |  |
|--------------------|--|
|                    | Subjected to violence or threats of violence against themselves or against their family members and loved ones<br>Have no access or control of their earnings<br>Received little or no payment for employment<br>Unexpected financial pressures within the family unit<br>Perception that unable to cease work or bonded by a debt<br>Excessive cost charged for accommodation or living expenses<br>In a situation of dependence<br>Evidence of economic abuse, dowry abuse or financial gain from the arrangement<br>Travel costs paid for by facilitators, whom they must pay back by working or providing services<br>Provided limited or substandard food<br>Disciplined through punishment<br>Evidence of untreated physical injuries or illnesses<br>No access to medical care<br>Suffer injuries that appear to be the result of an assault or the result of the application of control measures<br>Control of movement<br>Fearful, anxious, distressed or nervous<br>Distrustful of authorities<br>Noticeable deterioration in person's self-esteem and appearance<br>Under psychological or physical control of or surveillance by another person<br>Threats of deportation or arrest<br>Afraid to reveal immigration status<br>Passports or identity documents confiscated or not in their possession<br>Have false travel or identity documents<br>Live in poor or substandard accommodation |

<sup>388</sup> For example, [Anti-slavery Australia](#), Australian Institute of Criminology.

<sup>389</sup> Australian Federal Police, [Human trafficking & slavery indicators \(Web Page\)](#) <<https://www.afp.gov.au/what-we-do/crime-types/human-trafficking/human-trafficking-slavery-indicators>>.

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|  |   |
|--|---|
|  | <p>No knowledge of home or work address</p> <p>No key to residence</p> <p>Feel that they cannot leave work or accommodation</p> <p>Transported between accommodation and work by others</p> <p>Limited or no contact with their families or people outside immediate environment</p> <p>Deceived about nature of job, migration status, employment or location</p> <p>Have acted on the basis of false promises</p> <p>Unable to communicate freely with others</p> <p>Respond as though coached by a third party</p> <p>Allow others to speak for them when addressed directly</p> <p>Limited or no social interaction</p> <p>Unfamiliar with the local language</p> <p>Poor social awareness</p> <p>Forced to work under certain conditions/unable to negotiate working conditions</p> <p>Work excessively long hours over long periods</p> <p>Not have any days off or adequate breaks</p>   |
| <b>SEXUAL SERVITUDE</b><br>(in addition to general indicators) | <p>Be of any age, although the age may vary according to location and market</p> <p>Move from one brothel to the next or work in various locations</p> <p>Be escorted to and from work and other outside activities</p> <p>Sleep where they work</p> <p>Live or travel in a group, sometimes with other women who do not speak the same language</p> <p>Be with groups of women who are under the control of others</p> <p>Unable to refuse unprotected and/or violent sex</p> <p>Injuries from unprotected and/or violent sex</p> <p>Have tattoos or marks that indicate 'ownership' by exploiters</p> <p>Show evidence they have been bought and sold</p> <p>Very few items of clothing</p> <p>Appear in advertisements for brothels or similar places offering the services of women from a particular ethnicity<br/>Or nationality or provide services to clientele of a particular ethnicity or nationality</p> <p>Be coerced into decisions regarding their sexual or reproductive health such as coercing a person into undergoing an abortion</p> |

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|   |   |
|---|---|
| <b>SERVITUDE</b><br>(in addition to general indicators) | <ul style="list-style-type: none"> <li>Live with a family</li> <li>Not eat with the rest of the family</li> <li>Have no private area or space</li> <li>Have few or no personal possessions</li> <li>Sleep in a shared or inappropriate space</li> <li>Be forced to take drugs or alcohol to allow for greater control</li> <li>Be reported missing by their employer even though they are still living in their employer's house</li> <li>Have experience sexual assault with partner or others</li> <li>Be subjected to insults, abuse, threats or violence</li> <li>Never or rarely leave the house without their employer</li> <li>Have an instilled fear of engaging with persons outside the household</li> <li>Signs of domestic or family violence</li> <li>Make excuses for physical injuries incurred at home</li> <li>Be forced to undertake free or low paid domestic or other labour</li> </ul>   |
| <b>CHILDREN</b><br>(in addition to general indicators)  | <ul style="list-style-type: none"> <li>Have no access to their parents or guardians</li> <li>Look intimated and behave in a way that does not correspond with behaviour typical of children their age</li> <li>Have no friends their own age</li> <li>Live apart from other children and in substandard accommodation</li> <li>Have no access to education</li> <li>Have no time for playing</li> <li>Eat apart from other members of the 'family'</li> <li>Be given only leftovers to eat</li> <li>Be engaged in work that is not suitable for children</li> <li>Travel unaccompanied by adults with telephone numbers for calling taxis</li> <li>Travel in groups with persons who are not relatives who may claim to have 'found' the child</li> <li>Possess child-sized clothing typically worn for doing manual or sex work</li> <li>Possess toys, beds and clothing in inappropriate places such as brothels and factories</li> <li>Be in an environment where health and safety equipment is of poor quality, missing or modified so that it can be operated by children</li> <li>Discovery of cases involving illegal adoption</li> </ul> |

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|   |  |
|---|--|
| <p><b>LABOUR EXPLOITATION</b><br/>(in addition to general indicators)</p> | <p>Sectors where people who have been trafficked are typically made to work:</p> <ul style="list-style-type: none"><li>• Agriculture</li><li>• Construction</li><li>• Entertainment</li><li>• Service industry</li><li>• Manufacturing</li></ul> <p>Deceived about:</p> <ul style="list-style-type: none"><li>• the nature of the job, location or employer</li><li>• conditions of work</li><li>• content or legality of work contract</li><li>• family reunification</li><li>• housing and living conditions</li><li>• obtaining legal migration status</li><li>• wages and earnings</li><li>• marriage</li><li>• education opportunities</li></ul> <p>Exploitative factors:</p> <ul style="list-style-type: none"><li>• Excessive workdays or hours</li><li>• Work in unskilled manual labour for little or no pay</li><li>• Work in unsanitary and/or unsafe conditions</li><li>• Not be dressed adequately for the work they do</li><li>• Have no choice of accommodation or accommodation is poor quality and occupied by multiple people</li><li>• Be in an environment where there are no health or safety notices</li><li>• Have no labour contract</li></ul> <p>Coercive recruitment:</p> <ul style="list-style-type: none"><li>• Violence</li><li>• Forced marriage</li><li>• Have their passport or identity documents kept by employer</li><li>• Debt bondage</li><li>• Isolation, confinement or surveillance</li><li>• Threat of arrest or deportation</li><li>• Threats of violence against victim or victim's family</li><li>• Withholding of moneys</li></ul> <p>Recruitment by abuse of vulnerability:</p> <ul style="list-style-type: none"><li>• Abuse of difficult family situation, illegal status, lack of education, lack of local language, lack of information</li><li>• Control</li><li>• Economic reasons</li></ul> <p>Be forced to work</p> <p>Have little to no understanding of work rights and entitlements</p> <p>Receive threats against joining a union</p> <p>Work in environment where labour laws are being breached</p> <p>Be subjected to security measures designed to keep them on the work premises</p> <p>Lack basic training and professional licences</p> <p>Work where notices have been posted in languages other than the local language</p> <p>Be disciplined through fines</p> <p>Have to pay for tools, food or accommodation or that those costs are being deducted from their wages</p> <p>Live in groups in the same place where they work and leave those premises infrequently</p> <p>Forced to open bank accounts controlled by the employer</p> <p>Depend on their employer for a number of services, including work, transportation and accommodation</p> <p>Have their movements and access to transport controlled</p> <p>Have an employer or manager who is unable to show the documents required for employing workers from other countries or records of wages paid to employees</p> |
|---|--|

## 7.3.4 Forced marriage

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As discussed in Chapter 3, the forced marriage offences in [s 270.7B](#) of the *Criminal Code* relate to causing a person to enter into a forced marriage<sup>390</sup> and being a party to a forced marriage.<sup>391</sup> Forced marriage is defined in the *Criminal Code* as a marriage the victim entered into without freely and fully consenting because of the use of coercion, threat or deception,<sup>392</sup> or because they were incapable of understanding the nature and effect of the marriage ceremony.<sup>393</sup>

An arranged marriage is distinguished from a forced marriage because in the former, in conformity with their cultural expectations, two people consent to marry per an arrangement negotiated between their respective families.<sup>394</sup>

## 7.3.4.1 Indicators of forced marriage

The Australian Department of Home Affairs has compiled the following list of signs that may indicate an individual is at risk of or is in a forced marriage:

- A sudden announcement that the person is engaged;
- The person's older siblings stopped going to school or were married early;
- The person's family have a lot of control over their life which doesn't seem normal or necessary (for example, the person is never allowed out or always has to have somebody else from the family with them);
- The person displays signs of depression, self-harming, social isolation and substance abuse;
- The person seems scared or nervous about an upcoming family holiday overseas;
- The person spends a long time away from school, university or work;
- The person often does not come to, or suddenly withdraws from school, university or work;
- The person does not have control over their income;
- The person is unable to make significant decisions about their future without consultation or agreement from their parents or others;
- There is evidence of family disputes or conflict, domestic violence, abuse or running away from home.<sup>395</sup>

<sup>390</sup> [Criminal Code s 270.7B\(1\)](#).

<sup>391</sup> [Ibid s 270.7B\(2\)](#).

<sup>392</sup> [Ibid s 270.7A\(1\)\(a\)](#). See also [FMN17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs \[2020\] FCA 326, \[26\]-\[27\], \[29\], \[49\]](#) ('FMN17').

<sup>393</sup> [Criminal Code s 270.7A\(1\)\(b\)](#).

<sup>394</sup> [FMN17 \[26\], \[29\]](#).

<sup>395</sup> Australian Department of Home Affairs, '[People smuggling and human trafficking](#)', *Criminal Justice* (Web Page, 4 January 2021) <<https://www.homeaffairs.gov.au/about-us/our-portfolios/criminal-justice/people-smuggling-human-trafficking/forced-marriage>>.

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Additional indicators identified by the AFP include:

- A personal or family history of unwanted or early pregnancy;
- Have communications monitored or restricted;
- Family with strong cultural or religious expectations;
- Pressured to support their partner's visa to Australia;
- A history of female genital mutilation/circumcision;
- Evidence of economic or dowry abuse, including:
  - Family members or others seeking to gain financially from a proposed marriage or engagement;
  - Ongoing demands for cash or material goods;
  - Threats made when financial obligations or arrangements are not met;
  - Demonstrate feelings of conflict or concern for the ramifications if they do not go ahead with an agreed marriage/engagement;
  - Have intergenerational and cultural conflict within the home; and
  - Expressed concern of physical or psychological violence for not fulfilling family/community expectations.<sup>396</sup>

## 7.3.4.2 Gendered nature of forced marriage

Forced marriage is generally understood as a form of 'gender-based violence perpetrated by immediate and extended family members and to a less extent broader community networks'.<sup>397</sup> Although men and boys can experience forced marriage, women and girls are disproportionately impacted.<sup>398</sup> 'Forced marriages are an appalling evil'.<sup>399</sup> The victims are commonly young women and they are used to ensure land, property, and wealth remain within a family or to meet a family commitment or appease an aggrieved party.<sup>400</sup>

## 7.3.4.3 Prevalence data

Since the criminalisation of forced marriage through the introduction of the forced marriage offences in the *Criminal Code* in 2013, forced marriage referrals to the AFP have increased.<sup>401</sup> The AFP reported 91 forced marriage referrals across Australia in the 2018-2019 financial year, compared to the 11 referrals in the 2013-2014 financial year.<sup>402</sup> Research in this area indicates that, while not the only circumstances in which forced marriage occurs, 'the common trend reported involves Australian residents or citizens under the age of 18 being forced into marriage overseas, with the expectation that the individual will sponsor their spouse for migration to Australia'.<sup>403</sup>

Although to date, there have been no successful prosecutions of the forced marriage offences under the *Criminal Code*, issues relating to forced marriage have come before Australian Courts. Forced marriage offences overlap with areas of family law, family violence and migration law.

<sup>396</sup> Australian Federal Police, '[Human trafficking](#)' ([Web Page](#)) <Human trafficking | Australian Federal Police (afp.gov.au)>.

<sup>397</sup> Laura Vidal, '[Opportunities to respond to forced marriage within Australia's domestic and family violence framework](#)' (Issues Paper, Good Shephard, 2019) 8 ('Opportunities to respond'). See also Office of the United Nations High Commissioner for Refugees, '[UNHCR Handbook for the Protection of Women and Girls \(2008\)](#)' 201; Frances Simmons and Jennifer Burn, '[Without consent: Forced marriage in Australia](#)' (2013) 36 Melbourne

*University Law Review* 970, 974 ('Without consent').

<sup>398</sup> [Without consent 975; Opportunities to respond 8.](#)

<sup>399</sup> [FMN17 \[29\].](#)

<sup>400</sup> [FMN17 \[28\]-\[29\].](#)

<sup>401</sup> Australian Federal Police, '[Forced marriage awareness campaign launched at Australia's busiest airport](#)', *News & Media* (Media release, 15 October 2019) <Forced marriage awareness campaign launched at Australia's busiest airport | Australian Federal Police (afp.gov.au) >.

<sup>402</sup> [Ibid.](#)

<sup>403</sup> [Opportunities to respond 4.](#)

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## 7.3.4.4 Overlap with other areas of law

### Overlap with family law

The [Family Law Act 1975 \(Cth\)](#) ('Family Law Act') allows for either or both parents,<sup>404</sup> the child,<sup>405</sup> the grandparent of the child or any other person concerned with the care, welfare or development of the child to bring an application for a parenting order.<sup>406</sup> An order that is 'becoming increasingly common'.<sup>407</sup>

In [Madley v Madley](#) ('Madley'),<sup>408</sup> an application was brought by a 16-year-old naming her mother and father as the respondents.<sup>409</sup> The parents had made arrangements for her to fly from Australia to a non-Hague convention country for the purposes of marrying a person she had met on one occasion.<sup>410</sup>

Interim orders were made that:

- Restrained the parents from removing, attempting, or causing the removal of the child from Australia,<sup>411</sup>
- Surrendered the passport of the child to the Registrar of the court (if not surrendered by the date specified, the child's passport was to be immediately cancelled),<sup>412</sup> and
- Requested the Commissioner of the AFP to take all necessary steps to place the child's name on the airport watch list, also known as the 'PACE Alert system', at all points of arrival and departure in Australia.<sup>413</sup>

In addition, the parents of the child were restrained from:

- Assaulting, molesting, harassing, threatening or otherwise intimidating the child;
- Questioning the child with respect to the proceedings, or requesting, permitting or allowing any other person to do so; or
- Causing the child's removal from any school which she presently attends and at which she is enrolled.<sup>414</sup>

<sup>404</sup> [Family Law Act 1975 \(Cth\) s 65C\(a\)](#). (FLA)

<sup>405</sup> [Ibid s 65C\(b\)](#).

<sup>406</sup> [Ibid s 65C\(ba\)](#).

<sup>407</sup> [Madley v Madley \[2011\] FMCAFam 1007, 2 \[4\]](#).

<sup>408</sup> [Ibid](#).

<sup>409</sup> [Ibid 2 \[3\]](#).

<sup>410</sup> [Ibid 2 \[5\]](#).

<sup>411</sup> [Ibid 2 \[1\]](#).

<sup>412</sup> [Ibid 2 \[2\]-\[3\]](#).

<sup>413</sup> [Ibid 2 \[5\]-\[7\]](#).

<sup>414</sup> [Ibid 3 \[11\]](#). See also [Family Law Act 1975 \(Cth\) s 68B](#) ('FLA').

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Unlike the UK, there is no specific regime of forced marriage protection orders in Australia.<sup>415</sup> However, as in the case of *Madley*, children at risk of forced marriage may apply for a parenting order under the *Family Law Act* to prohibit the ‘conduct that would enable the marriage’.<sup>416</sup> Similar orders were also made in *Department of Human Services v Brouker*, but with a State-based child protection agency as the applicant, which was found to have standing as a ‘person concerned with the care, welfare or development of the child’.<sup>417</sup>

There is no similar protection for vulnerable adults.<sup>418</sup> However, an adult at risk of or in a forced marriage may seek protection through State and Territory family violence protection orders.<sup>419</sup>

## Overlap with family violence

Academic research indicates that there are ‘significant parallels between the definitions, drivers and impacts of forced marriage and family violence’.<sup>420</sup> In Victoria, behaviour that may constitute family violence includes using coercion, threats, physical abuse or emotional or psychological abuse to cause or attempt to cause a person to enter into a marriage or to demand or receive dowry, either before or after a marriage.<sup>421</sup>

In response to situations of family violence, a victim may be able to receive protection through a family violence safety notice or an intervention order. Further details about these protection orders is available in the *Judicial College’s Family Violence Bench Book* and the *National Domestic and Family Violence Bench Book*.

## Overlap with migration law

Section 5H of the *Migration Act* states that a person is a refugee for the purposes of the application of the Act and regulations, if the person:

- In a case where the person has a nationality—is outside the country of their nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail themselves of the protection of that country;<sup>422</sup> or
- In a case where the person does not have a nationality—is outside the country of their former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.<sup>423</sup>

A person does not have a ‘well-founded fear of persecution’ if they could take reasonable steps to modify their behaviour so as to avoid persecution in a receiving country, other than a modification that would, among other things, require the person to enter into or remain in a marriage which they oppose, or accept the forced marriage of a child.<sup>424</sup>

<sup>415</sup> *Without consent* 998.

<sup>416</sup> *Ibid*; *FLA* s 65C.

<sup>417</sup> *Department of Human Services v Brouker* [2010] FamCA 742, [12]-[14].

<sup>418</sup> *Without consent* 998.

<sup>419</sup> *Ibid*.

<sup>420</sup> *Opportunities to respond* 5.

<sup>421</sup> *Family Violence Protection Act 2008 (Vic)* s 5 Example 1.

<sup>422</sup> *Migration Act* s 5H(1)(a).

<sup>423</sup> *Ibid* s 5H(1)(b).

<sup>424</sup> *Ibid* s 5J(3)(c)(v).

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## 7.4 – Managing victims and witnesses in court

Due to the largely hidden nature of modern slavery, the evidence of victims is ‘usually critical to criminal matters proceeding’.<sup>425</sup> However, there are a range of barriers that may prevent victims from reporting or cooperating in criminal investigations or proceedings.<sup>426</sup>

### 7.4.1 Vulnerability of victims

As is evident in the relevant case law, victims are often exploited due to their vulnerability. In *Ho* (*'Ho Trial'*), the victims were ‘in a situation of personal, social and cultural isolation’.<sup>427</sup> In *Kovacs*, the victim’s limited knowledge of the English language, lack of Australian friends and associates, and remote location were disadvantages.<sup>428</sup>

Research conducted in this area found that victims of human trafficking involving marriage and partner migration to Australia were ‘more likely to seek help from informal sources, such as neighbours and people in the community, than from formal sources, such as the police’.<sup>429</sup> Some victims may not want to cooperate in criminal investigations and proceedings due to a number of factors including fear of reprisal, fear of arrest or deportation by authorities or the perceived stigma of victimisation.<sup>430</sup>

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<sup>425</sup> Hannah Andrevski, Jacqueline Joudo Larsen and Samantha Lyneham, ‘[Barriers to trafficked persons involvement in criminal justice proceedings: An Indonesian case study](#)’ (2013) *Trends & issues in crime and criminal justice* 451, 6 (‘Barriers’)

<sup>426</sup> *Ibid* 1.

<sup>427</sup> *Ho Trial* [31].

<sup>428</sup> *Kovacs* 71 [48].

<sup>429</sup> Samantha Lyneham and Kelly Richards, ‘[Human trafficking involving marriage and partner migration to Australia](#)’ (2014) Australia Institute of Criminology (Research and Public Policy Series) 124, xi <<https://www.aic.gov.au/sites/default/files/2020-05/rpp124.pdf>>.

<sup>430</sup> *Barriers* 6.

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## 7.4.2 Impact of trauma

Traumatic experiences can have a long-lasting impact on individuals.<sup>431</sup> The Judicial College of Victoria's [Family Violence Bench Book](#) has a dedicated section that focuses on understanding trauma, how it can impact participation in the criminal justice process, and the impacts of vicarious trauma.<sup>432</sup>

Victims of Crime in the Courtroom identifies the following examples of barriers to effective participation in the legal process:

- Difficulties discussing or recounting traumatic events;
- Impaired recollection;
- Historical and/or cultural experiences;
- Fear of going to court;
- Fear of possible credibility issues;
- Mental health issues;
- Fear of being blamed;
- Negative perceptions of their capacity;
- Lack of support, access or engagement with support services;
- Feeling unable to perform;
- Lack of trust.

Research into victim's experiences of trafficking indicates that 'cultural disparities between countries of origin and destination, and cultural perceptions about gender' and marriage can contribute to how victims enter exploitative situations, the exploitation that is suffered and their 'ability to leave or even identify their situation as exploitative or abusive'.<sup>433</sup> Victims of forced marriage may also suffer 'psychological and physical injuries, sexual assault and domestic violence, false imprisonment, and estrangement from their family'.<sup>434</sup> Further, forced marriage 'is usually organised by family members'.<sup>435</sup> This can create additional barriers for victims to seek assistance due to 'social stigma, family pressure, financial constraints, fears of violence or deportation, and a lack of legal information about their options and/or concern about their children'.<sup>436</sup>

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<sup>431</sup> [Ibid 2](#).

<sup>432</sup> Judicial College of Victoria, '[Note 2: Understanding Trauma](#)', *Victims of Crimes in the Courtroom (Judicial Guide) 3* <Victims of Crime in the Courtroom\_Note 2.pdf ([judicialcollege.vic.edu.au](http://judicialcollege.vic.edu.au))>.

<sup>433</sup> Samantha Lyneham and Kelly Richards, '[Human Trafficking involving marriage and partner migration to Australia](#)' AIC Reports 124, 50.

<sup>434</sup> [Without consent 974-5](#).

<sup>435</sup> [Ibid 975; Opportunities to respond 5](#).

<sup>436</sup> [Without consent 975](#).

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## 7.4.3 Strategies for managing the questioning of victims and witnesses

Many of the indicators and factors listed above may impact a victim's ability to give evidence. The Judicial College of Victoria has compiled a number of resources to assist judicial officers to manage the questioning of vulnerable witnesses in the courtroom:

- [How to work with vulnerable witnesses](#)
- [Victims of Crime in the Courtroom](#)
  - [Note 2: Understanding Trauma](#)
  - [Note 4: Victims as Witnesses: Facilitating Best Evidence](#)
  - [Note 6: Culturally and Linguistically Diverse Backgrounds](#)
  - [Note 8: Diverse Religious Backgrounds](#)
  - [Note 11: Victims of Family Violence](#)
  - [Note 12: Victims of Sexual Offences](#)

Similarly, the UNODC has compiled a range of materials to create an [Anti-Human Trafficking Manual for Criminal Justice Practitioners](#).<sup>437</sup> The Manual has a number of modules which deal with different aspects of human trafficking and provides guidance for those involved in the criminal justice system. They include:

- [Module 1: Definition of trafficking in persons and smuggling of migrants](#)
- [Module 2: Indicators of trafficking in persons](#)
- [Module 3: Psychological reaction of victims of trafficking in persons](#)
- [Module 4: Control methods in trafficking in persons](#)
- [Module 5: Risk assessment in trafficking in persons investigations](#)
- [Module 6: International cooperation in trafficking in persons cases](#)
- [Module 7: Crime scene and physical evidence examinations in trafficking in persons investigations](#)
- [Module 8: Interviewing victims of trafficking in persons who are potential witnesses](#)
- [Module 9: Interviewing child victims of trafficking in persons](#)
- [Module 10: Interpreters in trafficking in persons](#)
- [Module 11: Victims' needs in criminal justice proceedings in trafficking in persons cases](#)
- [Module 12: Protections and assistance to victims-witnesses in trafficking in persons cases](#)
- [Module 13: Compensation for victims of trafficking in persons](#)
- [Module 14: Considerations in sentencing in trafficking in persons cases](#)

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<sup>437</sup> United Nations Office on Drugs and Crime, '[Anti-Human Trafficking Manual for Criminal Justice Practitioners](#)' (Manual) <anti-human trafficking manual (unodc.org)>

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## Appendix – offences and penalties

This table identifies modern slavery offences and maximum penalties identified by the [Criminal Code Act 1995 \(Cth\)](#).

| Section               | Offence | Aggravated Offence | Extended Jurisdiction   | Maximum Penalty                                   |
|-----------------------|---------|--------------------|---|---|
| <a href="#">270.3</a> | Slavery | -                  | <p>Category D (<a href="#">s 270.3A</a>)</p> <p>Proceedings for an offence against section <a href="#">270.3</a>, where the conduct constituting the alleged offence occurs wholly outside Australia, must not take place except with the consent in writing of the Attorney-General (<a href="#">s 270.3B(1)</a>).</p> <p>If consent in accordance with <a href="#">s 270.3B(1)</a> is not given:</p> <ul style="list-style-type: none"><li>– a person may be arrested for the offence, and a warrant for the arrest of a person for the offence may be issued and executed (<a href="#">s 270.3B(2)(a)</a>); and</li><li>– a person may be charged with the offence (<a href="#">s 270.3B(2)(b)</a>); and</li><li>– a person so charged may be remanded in custody or on bail (<a href="#">s 270.3B(2)(a)</a>).</li></ul> <p>No further step in proceedings referred to in subsection (1) is to be taken until such a consent has been given (<a href="#">s 270.3B(2)</a>).</p> <p><a href="#">Section 270.3B(2)</a> does not prevent the discharge of the accused if proceedings are not continued within a reasonable time (<a href="#">s 270.3B(3)</a>).</p> | 25 years (intentional)<br><br>17 years (reckless) |

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|                           | SERVITUDE OFFENCES  |  |   |   |
|---------------------------|---|--|---|---|
| <a href="#">270.5(1)</a>  | Causing a person to enter into or remain in servitude     | See Note 1 below   | Category B ( <a href="#">s 270.9</a> )  | 20 years (aggravated offence)<br>15 years (in any other case) |
| <a href="#">270.5(2)</a>  | Conducting a business involving servitude                 | See Note 1 below   | Category B ( <a href="#">s 270.9</a> )  | 20 years (aggravated offence)<br>15 years (in any other case) |
|                           | FORCED LABOUR OFFENCES                                    |  |   |   |
| <a href="#">270.6A(1)</a> | Causing a person to enter into or remain in forced labour | See Note 1 below   | Category B ( <a href="#">s 270.9</a> )  | 12 years (aggravated offence)<br>9 years (in any other case)  |
| <a href="#">270.6A(2)</a> | Conducting a business involving force labour              | See Note 1 below   | Category B ( <a href="#">s 270.9</a> )  | 12 years (aggravated offence)<br>9 years (in any other case)  |
| <a href="#">270.7</a>     | Deceptive recruiting for labour or services               | See Note 1 below   | Category B ( <a href="#">s 270.9</a> )  | 9 years (aggravated offence)<br>7 years (in any other case)   |
|                           | FORCED MARRIAGE OFFENCES <sup>438</sup>                   |  |   |   |
| <a href="#">270.7B(1)</a> | Causing a person to enter into a forced marriage          | See Note 1 below   | Category B ( <a href="#">s 270.9</a> )  | 9 years (aggravated offence)<br>7 years (in any other case)   |
| <a href="#">270.7B(2)</a> | Being a party to a forced marriage                        | See Note 1 below   | Category B ( <a href="#">s 270.9</a> )  | 9 years (aggravated offence)<br>7 years (in any other case)   |
| <a href="#">270.7C</a>    | Debt bondage  | See Note 1 below   | Category B ( <a href="#">s 270.9</a> )  | 7 years (aggravated offence)<br>4 years (in any other case)   |
|                           | TRAFFICKING OFFENCES                                      |  |   |   |
| <a href="#">271.2</a>     | Trafficking in persons                                    | Under <a href="#">s 271.3</a> if:<br>– offender intends that the victim will be exploited by | Category B ( <a href="#">s 270.10</a> ) | 20 years (aggravated offence)                                 |

<sup>438</sup> If the defendant was under 18 at the time the defendant allegedly engaged in the conduct constituting the offence, proceedings must not be commenced without the consent of the Attorney-General. [Criminal Code s 270.7B\(5\)](#). However, a person may be arrested for, charged with or remanded in custody or on bail in connection with, such an offence before the necessary consent has been given. Ibid [s270.7B\(6\)](#).

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|                              |                                  |  |  |   |
|------------------------------|----------------------------------|--|--|---|
|                              |                                  | <p>offender or another after entry or exit from Australia</p> <ul style="list-style-type: none"> <li>– offender subjects victim to cruel, inhumane or degrading treatment</li> <li>– offender recklessly engages in conduct that gives rise to danger of death or serious harm to victim or another person</li> </ul>  |  | 12 years (in any other case)                                  |
| <a href="#"><u>271.4</u></a> | Trafficking in children          | None   | Category B ( <a href="#"><u>s 270.10</u></a> ) | 25 years  |
| <a href="#"><u>271.5</u></a> | Domestic trafficking in persons  | <p>Under <a href="#"><u>s 271.6</u></a> if:</p> <ul style="list-style-type: none"> <li>– offender intends that the victim will be exploited by offender or another after arrival at place to which victim has been transported</li> <li>– offender subjects victim to cruel, inhumane or degrading treatment</li> <li>– offender recklessly engages in conduct that gives rise to danger of death or serious harm to victim or another person</li> </ul> | <a href="#"><u>s 271.11</u></a> requirements   | 20 years (aggravated offence)<br>12 years (in any other case) |
| <a href="#"><u>271.7</u></a> | Domestic trafficking in children | None   | <a href="#"><u>s 271.11</u></a> requirements   | 25 years  |

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|                               |                            |  |  |  |
|-------------------------------|----------------------------|--|--|--|
| <a href="#"><u>271.7B</u></a> | Organ trafficking          | <p>Under <a href="#"><u>s 271.7C</u></a> if while committing the offence:</p> <ul style="list-style-type: none"> <li>– victim under 18</li> <li>– offender or another person intends to remove organ after or during entry or exit of victim to/from Australia</li> <li>– offender subjects victim to cruel, inhumane or degrading treatment</li> <li>– offender recklessly engages in conduct that gives rise to danger of death or serious harm to victim or another person</li> </ul> | Category B ( <a href="#"><u>s 270.10</u></a> ) | <p>25 years (aggravated offence where victim under 18)</p> <p>20 years (aggravated offence any other case)</p> <p>12 years (in any other case)</p> |
| <a href="#"><u>271.7D</u></a> | Domestic organ trafficking | <p>Under <a href="#"><u>s 271.7E</u></a> if while committing the offence:</p> <ul style="list-style-type: none"> <li>– victim under 18</li> <li>– offender or another person intends to remove organ after or during transportation of victim to a place</li> <li>– offender subjects victim to cruel, inhumane or degrading treatment</li> <li>– offender recklessly engages in conduct that gives rise to danger of death or serious harm to victim or another person</li> </ul>       | <a href="#"><u>s 271.11</u></a> requirements   | <p>25 years (aggravated offence where victim under 18)</p> <p>20 years (aggravated offence any other case)</p> <p>12 years (in any other case)</p> |
| <a href="#"><u>271.7F</u></a> | Harbouring a victim        | <p>Under <a href="#"><u>s 271.7G</u></a> if:</p> <ul style="list-style-type: none"> <li>– the victim is under 18</li> </ul>  | Category B                                     | <p>7 years (aggravated offence)</p> <p>4 years (in any other case)</p>   |

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Note 1: A slavery-like offence committed by the offender against the victim is an aggravated offence if any of the following applies:

- the victim is under 18;<sup>439</sup>
- the offender, in committing the offence, subjects the victim to cruel, inhuman or degrading treatment;<sup>440</sup>
- the offender, in committing the offence:
  - engages in conduct that gives rise to a danger of death or serious harm to the victim or another person; and
  - is reckless as to that danger.<sup>441</sup>

If the prosecution intends to prove an aggravated offence, the charge must allege the relevant aggravated offence.<sup>442</sup>

If, on a trial for an aggravated offence, the trier of fact is not satisfied that the defendant is guilty of the aggravated offence, but is otherwise satisfied that the defendant is guilty of the corresponding slavery-like offence, it may find the defendant not guilty of the aggravated offence, but guilty of the corresponding slavery-like offence.<sup>443</sup> This subsection only applies if the defendant has been afforded procedural fairness in relation to the finding of guilt for the corresponding slavery-like offence.<sup>444</sup>

<sup>439</sup> [Criminal Code s 270.8\(1\)\(a\)](#).

<sup>440</sup> [Ibid s 270.8\(1\)\(b\)](#).

<sup>441</sup> [Ibid s 270.8\(1\)\(c\)](#).

<sup>442</sup> [Ibid s 270.8\(2\)](#).

<sup>443</sup> [Ibid s 270.8\(3\)](#).

<sup>444</sup> [Ibid s 270.8\(4\)](#).

# Modern slavery: Guidance for Australian courts.

This table provides a summary of modern slavery offences in the different Australian States and Territories, with the exception of Queensland and Tasmania which have not enacted any relevant legislation.

| Section   | Offence  | Aggravated Offence  | Maximum Penalty   |
|---|--|---|---|
| <b>Australian Capital Territory</b>                       |  |   |   |
| <a href="#"><u>Crimes Act 1900 (ACT) s 79</u></a>         | Sexual servitude                               | Where the victim is under 18  | 19 years (aggravated offence)<br>15 years (in any other case)   |
| <a href="#"><u>Crimes Act 1900 (ACT) s 80</u></a>         | Deceptive recruiting for sexual services       | Where the victim is under 18  | 9 years (aggravated offence)<br>7 years (in any other case)   |
| <b>New South Wales</b>                                    |  |   |   |
| <a href="#"><u>Crimes Act 1900 (NSW) s 80D</u></a>        | Causing sexual servitude                       | If the victim is under 18 or has a cognitive impairment                           | 20 years (aggravated offence)<br>15 years (in any other case)   |
| <a href="#"><u>Crimes Act 1900 (NSW) s 80E</u></a>        | Conduct of business involving sexual servitude | If the victim is under 18 or has a cognitive impairment                           | 19 years (aggravated offence)<br>15 years (in any other case)   |
| <b>Northern Territory</b>                                 |  |   |   |
| <a href="#"><u>Criminal Code Act 1983 (NT) s 202B</u></a> | Sexual servitude                               | Where the victim is a child:<br>– over the age of 12; or<br>– under the age of 12 | Life (where victim is under 12)<br>20 years (where victim is over 12)<br>15 years (in any other case) |
| <a href="#"><u>Criminal Code Act 1983 (NT) s 202C</u></a> | Conducting business involving sexual servitude | Where the victim is a child:<br>– over the age of 12; or<br>– under the age of 12 | Life (where victim is under 12)<br>20 years (where victim is over 12)<br>15 years (in any other case) |
| <a href="#"><u>Criminal Code Act 1983 (NT) s 202D</u></a> | Deceptive recruiting for sexual services       | Where the victim is a child   | 15 years (aggravated offence)<br>10 years (in any other case)   |

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| South Australia  |  |   |  |
|--|--|---|--|
| <a href="#"><u>Criminal Law Consolidated Act 1935 (SA) s 66(1)</u></a> | Compels sexual servitude   | Where the victim is a child:<br>– between the age of 14 and 18; or<br>– under the age of 14 | Life (where victim under 14)<br>19 years (where victim under 18)<br>15 years (in any other case) |
| <a href="#"><u>Criminal Law Consolidated Act 1935 (SA) s 66(2)</u></a> | Uses undue influence to induce sexual servitude                                    | Where the victim is a child:<br>– between the age of 14 and 18; or<br>– under the age of 14 | Life (where victim under 14)<br>12 years (where victim under 18)<br>7 years (in any other case)  |
| <a href="#"><u>Criminal Law Consolidated Act 1935 (SA) s 67</u></a>    | Deceptive recruiting for sexual services   | Where the victim is a child   | 12 years (aggravated offence)<br>7 years (in any other case)                                     |
| <a href="#"><u>Criminal Law Consolidated Act 1935 (SA) s 68(1)</u></a> | Employs, engages, causes, or permits a child to provide commercial sexual services | Where the child is under the age of 14  | Life (aggravated offence)<br>9 years (in any other case)   |
| <a href="#"><u>Criminal Law Consolidated Act 1935 (SA) s 68(2)</u></a> | Ask a child to provide commercial sexual services                                  | Where the child is under the age of 14  | 9 years (aggravated offence)<br>3 years (in any other case)                                      |
| <a href="#"><u>Criminal Law Consolidated Act 1935 (SA) s 68(3)</u></a> | Receive proceeds from child providing commercial sexual services                   | Where the child is under the age of 14  | 5 years (aggravated offence)<br>2 years (in any other case)                                      |

# Modern slavery: Guidance for Australian courts.

| Victoria  |  |   |   |
|---|--|---|---|
| <a href="#"><u>Crimes Act 1958 (Vic) s 53B</u></a>                        | Using force, threat etc. to cause another person to provide commercial sexual services                   | Where a person knows that the victim is, or probably is, under 18 | 20 years (aggravated offence)<br>15 years (in any other case) |
| <a href="#"><u>Crimes Act 1958 (Vic) s 53C</u></a>                        | Causing another person to provide commercial sexual services in circumstances involving sexual servitude | Where a person knows that the victim is, or probably is, under 18 | 20 years (aggravated offence)<br>15 years (in any other case) |
| <a href="#"><u>Crimes Act 1958 (Vic) s 53D</u></a>                        | Conducting a business in circumstances involving sexual servitude  | Where a person knows that the victim is, or probably is, under 18 | 20 years (aggravated offence)<br>15 years (in any other case) |
| <a href="#"><u>Crimes Act 1958 (Vic) s 53F</u></a>                        | Deceptive recruiting for commercial sexual services  | Where a person knows that the victim is, or probably is, under 18 | 10 years (aggravated offence)<br>5 years (in any other case)  |
| Western Australia   |  |   |   |
| <a href="#"><u>Criminal Code Act Compilation Act 1913 (WA) s 331B</u></a> | Sexual servitude   | Where the victim is under 18 or an incapable person               | 20 years (aggravated offence)<br>14 years (in any other case) |
| <a href="#"><u>Criminal Code Act Compilation Act 1913 (WA) s 331C</u></a> | Conducting a business involving sexual servitude   | Where the victim is under 18 or an incapable person               | 20 years (aggravated offence)<br>14 years (in any other case) |
| <a href="#"><u>Criminal Code Act Compilation Act 1913 (WA) s 331D</u></a> | Deceptive recruiting for commercial sexual service   | Where the victim is under 18 or an incapable person               | 20 years (aggravated offence)<br>7 years (in any other case)  |

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