



Australian Government
Attorney-General's Department

Targeted Review of
Modern Slavery Offences in
Divisions 270 and 271 of the
Criminal Code Act 1995 (Cth)



FINDINGS REPORT

Acknowledgement of Country

We acknowledge the traditional custodians of Australia and their continuing connection to land, sea and community. We pay our respects to the people, the cultures and their Elders, past and present, and thank them for their ongoing contributions to the culture and prosperity of our great Australian nation.

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Help and support

Help is available for any person experiencing, or at risk of, modern slavery.

If you have immediate concerns for your safety, the safety of another person, or there is an emergency, dial Triple Zero (000).

You can learn more about the possible indicators of human trafficking and other forms of modern slavery on the Australian Federal Police's (AFP) website (<https://www.afp.gov.au/what-we-do/crime-types/human-trafficking/human-trafficking-slavery-indicators>). If you suspect that you or another person is experiencing, or at risk of, human trafficking or modern slavery, call 131 AFP (237) or use the AFP's confidential online form (https://forms.afp.gov.au/online_forms/human_trafficking_form). The AFP can keep you safe, provide advice and refer you to other services that provide accommodation, financial support, counselling, and legal and immigration advice.

Anti-Slavery Australia provides free, confidential legal and migration services to people who have experienced or are at risk of modern slavery in Australia. If you have experienced modern slavery, or you are worried about someone in this situation, contact Anti-Slavery Australia for free and confidential legal advice and support. Call (02) 9514 8115 (9am–5pm AEST, Monday to Friday), or email ASALegal@uts.edu.au.

If you are in, or at risk of, forced marriage, you can contact My Blue Sky, Australia's national forced marriage service. Call (02) 9514 8115, text +61 481 070 844 (9am-5pm Monday to Friday), email help@mybluesky.org.au or visit www.mybluesky.org.au for support and free, confidential legal advice.

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Content warning

Modern slavery is a challenging issue and this Findings Report includes high-level case studies that may bring up strong feelings for some people. Please take care as you read this Report.

Note on terminology

This Report uses the term 'modern slavery' to describe trafficking in persons, slavery and slavery-like practices, such as the conduct criminalised in Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth) (Criminal Code). The Targeted Review acknowledges that the term modern slavery has a specific legal meaning under the *Modern Slavery Act 2018* (Cth) (Modern Slavery Act). This is considered later in this Report.

This Report uses the terms 'victim' and 'survivor' to describe an individual who has experienced trafficking in persons, slavery or slavery-like practices. The Targeted Review acknowledges that individuals who have experienced these crimes may not identify with these terms.

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Executive summary

This Report sets out findings from the Targeted Review of Divisions 270 and 271 of the Criminal Code, which criminalise trafficking in persons, slavery and slavery-like practices (collectively referred to as ‘modern slavery’) in Australia. The Targeted Review commenced in September 2022 with the release of Terms of Reference (at Appendix A), followed by a Discussion Paper in December 2022.

The Targeted Review considered the offences in Divisions 270 and 271 against the objectives set out in the Terms of Reference. As stated in the Terms of Reference, the Targeted Review is not intended to consider all aspects of Divisions 270 and 271. This Report therefore focuses on core questions and issues raised through the Targeted Review process, including in responses to the Discussion Paper and in consultations.

The Targeted Review identified areas for possible legislative change to strengthen Australia’s modern slavery offences in line with international good practice, to better reflect growing understanding about what modern slavery looks like and how it takes place in the Australian context, and to further future-proof Australia’s offences so they remain flexible to apply to new and emerging forms of modern slavery. Changes to Australia’s criminal legislative framework also provide an opportunity to streamline and simplify some aspects of Australia’s offences, particularly the trafficking in persons offences in Division 271.

The Targeted Review revealed a common thread in stakeholder feedback urging holistic consideration of the experience of victims and survivors, including avenues to seek assistance and report crimes, support through the criminal justice process, and compensation. Many submissions and consultations provided feedback on broader systemic issues beyond the scope of the Terms of Reference for this Targeted Review, rather than particular legislative changes to Divisions 270 and 271. This feedback provides useful insight into aspects of Australia’s criminal justice system, which are therefore reflected in this Report—even in the absence of specific findings on these matters.

The findings in this Report draw on stakeholder feedback (see Appendix B) and research and analysis of other information sources, including international and comparative law and practice, reports and guidance materials, academic research and literature and reports connected to parliamentary inquiries on modern slavery matters. The Targeted Review received 30 written submissions, and held 16 consultations with 49 organisations and 9 meetings with government officials in Australia and abroad.

The Targeted Review gathered information to inform findings about possible areas of focus to strengthen the operation of Divisions 270 and 271 (for a summary of offences, see Appendix C). For the most part, it did not consult on specific proposals for legislative or other reform. As such, further consultation on the findings presented in this Report and in the development of any subsequent legislation will be required.

Specific proposals arising from this Report should also be considered in the context of other reviews and inquiries that (as at June 2023) are in various stages of completion, reporting, response and implementation. These include but are not limited to the outcomes of the Review of the Modern Slavery Act, the Migration System Review, the Rapid Review into the Exploitation of Australia’s Visa System, the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) Inquiry into

the rights of women and children, and recommendations from the Migrant Workers' Taskforce.

The Targeted Review delivers Action Item 19 of Australia's *National Action Plan to Combat Modern Slavery 2020-25* (the National Action Plan). Other initiatives in the National Action Plan provide avenues to further consider and address feedback received through this Targeted Review relating to broader, non-legislative measures to support effective criminal justice responses to modern slavery. These include initiatives concerned with awareness raising, training for frontline officials, and reviewing the availability of compensation, support, legislative protections, defences and remedies for victims and survivors.

Key themes

Australia has a comprehensive legislative framework that criminalises trafficking in persons, slavery and slavery-like practices

Australia has a robust legislative framework to address trafficking in persons, slavery and slavery-like practices. There are some noteworthy strengths to Australia's approach, including that Australia's laws can apply to diverse forms of exploitation in any industry or setting. Australia's laws can also apply to a broad range of criminal actors involved in exploitation, and their conduct, at different stages—including before any exploitation has taken place. Australia has also separately criminalised specific forms of exploitation, establishing these as standalone offences of slavery-like practices in Division 270 of the Criminal Code.

Despite these strengths, as part of the Targeted Review, stakeholders supported refinement of Australia's laws to ensure they keep pace with the evolving nature of trafficking in persons, slavery and slavery-like practices globally and in Australia. Such updates would be timely, noting Australia's laws have not been significantly amended since 2013, during which time domestic and international understanding of modern slavery has evolved, as have the practices adopted to address this. Amending Australia's laws to take up these opportunities will further strengthen Australia's legislative framework—particularly with the introduction of additional guidance and training to support implementation.

There have been few convictions, giving rise to perceptions that this impedes the deterrent effect of the laws and adversely impacts justice outcomes

Since 2004, 30 people have been convicted of trafficking in persons, slavery and slavery-like practice offences in Divisions 270 and 271. These numbers likely reflect, to some degree, under-detection and reporting of this crime type.¹

The offences in Division 270 and 271 are serious crimes with high evidentiary thresholds to establish the alleged criminal conduct. Further, these crimes against the person or 'victim-based crimes' often rely on victim and survivor testimony as an important source of evidence. There are a range of corresponding challenges, with some of these outlined in the Australian Institute of Criminology's (AIC) report 'Attrition of human trafficking and slavery cases through the Australian criminal justice system' and in the

¹ Samantha Lyneham, Christopher Dowling and Samantha Bricknell, 'Estimating the dark figure of human trafficking and slavery victimisation in Australia' (2019) No. 16 *Statistical Bulletin* 1, 6 ('Estimating the dark figure of human trafficking').

Targeted Review Discussion Paper.²

While acknowledging the challenges of securing convictions for Division 270 and 271 offences, the Targeted Review heard that improving prosecution and conviction rates is important to achieve justice outcomes, including deterrence objectives. To some extent, however, the very existence of offences can have a deterrent effect and the Targeted Review heard specific feedback on this in relation to Australia's forced marriage offences.³

Members of the Government-funded pilot Survivor Advisory Council highlighted that holding perpetrators to account for their actions, making prosecutions possible, and protecting the community from perpetrators re-offending are important to justice outcomes in Australia. Some stakeholders also provided feedback to the Targeted Review that low conviction rates may reduce the deterrent effect of modern slavery offences.⁴

The Targeted Review received feedback in submissions and consultations about the importance of a victim and survivor-centred, trauma-informed and harm minimisation approach, that prioritises protection of victims and survivors and focuses on their recovery through referral to appropriate support services. Convictions are considered just one of several possible successful outcomes from an investigation, and law enforcement may instead seek to prevent or disrupt offending in the interests of the victim and survivor. For example, the AFP indicated to the Targeted Review that it uses Division 270 and 271 offences as the basis for guardianship orders and border alerts to prevent victims and survivors being taken offshore, as well as targeted education and awareness raising in cases where a person is identified to be at risk of modern slavery.

More guidance is needed to build a shared understanding of key terms

Consultations on the Targeted Review featured significant discussion and feedback on key terms, concepts, and definitions that underpin offences in both Division 270 and 271, particularly with respect to coercion. Many stakeholders held different understandings and views about both the current and desired scope of key terms.

Stakeholders expressed that the lack of clarity about key terms can preclude understanding of whether particular conduct would be captured under the Divisions 270 and 271 offences.⁵ While this may initially point to a need to further define or clarify key terms, the Targeted Review also heard from criminal justice practitioners that broadly defined terms and concepts can help ensure offences remain flexible and fit for the future. However, the lack of existing case law can also limit understanding of the interpretation of particular terms and concepts, and their application to complex circumstances.⁶

It was noted, therefore, that in addition to any strengthened or clarified definitions, there should be accompanying guidance materials and training to support consistent understanding of how Australia's

² Samantha Lyneham, 'Attrition of human trafficking and slavery cases through the Australian criminal system' (2021) No. 640 *Trends and issues in crime and criminal justice* 1.

³ Consultations.

⁴ Consultations.

⁵ Submission – Australian Federal Police pp 10-11; Submission – Cleaning Accountability Framework pp 7-8; Submission – ReThink Orphanages Australia pp 8-9.

⁶ Submission – Australian Federal Police pp 10-11.

offences can apply in different circumstances.⁷

Australia's trafficking in persons offences can be strengthened to ensure they remain future-proof and can apply to the conduct of Australians offshore

The Targeted Review heard from stakeholders that there are opportunities to strengthen the trafficking in persons offences in Division 271. In particular, the Targeted Review received feedback expressing support for amending offences in Division 271 to ensure they can capture the conduct of Australians offshore.

The Targeted Review also heard from stakeholders about the conceptualisation of trafficking in persons as a crime that does not need to be centred on the physical movement or transportation of a person. Currently, the framing of Australia's offences is concerned with physical movement or transportation—either across Australia's international borders or from one place in Australia to another. This means that trafficking actions (for example, recruiting or harbouring) that are not connected to organising or facilitating physical movement will not always be captured under Australia's existing trafficking in persons offences. Many stakeholders raised concerns about this limitation.

In some cases, there can be alternative charging and prosecution options under Division 270 offences, which do not require the physical movement or transportation of the victim and survivor. However, Division 270 offences only come into play at the point of, or after, exploitation, in contrast to Division 271 offences that can capture earlier conduct, whether or not exploitation actually occurs. There may also be alternative charging and prosecution options under other laws, including Commonwealth or state and territory laws. However, depending on the charges pursued, these may not always reflect the seriousness of the conduct that has occurred.

The Targeted Review also heard that a flexible definition of exploitation is important to ensuring Australia's trafficking in persons offences can apply to evolving criminal methodologies and new forms and settings of exploitation. This includes exploitation of children in orphanages and other institutional settings.

There is a strong desire to ensure Australia's laws can account for the unique circumstances that give rise to particular positions of vulnerability

An overarching concern raised in relation to the criminal justice system was its ability to acknowledge the unique circumstances of victims and survivors. Several stakeholders noted that a victim and survivor's background and personal circumstances may give rise to particular positions of vulnerability that are not sufficiently acknowledged or supported in the criminal justice process.

The unique circumstances of victims and survivors are relevant to determining how coercion, threat or deception manifest in different contexts. These circumstances are also central to juries' consideration of what a reasonable person in the position of a victim and survivor might believe or do, which is directly relevant to establishing servitude and forced labour offences in Division 270.⁸

The Targeted Review received feedback on a range of options to strengthen consideration of victims and

⁷ Submission – Confidential 5 p 1; Submission – Australian Human Rights Commission p 10; Submission – Law Council of Australia p 9; Submission – Scarlet Alliance p 26.

⁸ Submission – Project Respect p 7; Submission – Australian Human Rights Commission p 20.

survivors' circumstances in the criminal justice process, including legislative amendments and further awareness raising, guidance and training.⁹

Australia's laws are complex, and efforts to simplify and streamline legislation would be helpful

The Targeted Review heard from stakeholders, including criminal justice practitioners, that Australia's legislative framework is complex and that efforts to simplify and streamline legislation would be helpful. For example, Australia has 23 separate trafficking in persons offences in Division 271. This is unique. The United Kingdom (UK), the United States (US), New Zealand and Canada all have just one to two trafficking in persons offences.¹⁰

Complex offence frameworks can pose challenges, requiring police and prosecutors to neatly fit a victim and survivor's unique circumstance into a specific, narrow offence. While having multiple offences provides practitioners with options, one submission to the Targeted Review noted it may also complicate the decision-making process as to the appropriate charge, or result in inconsistent application.¹¹

The Targeted Review received some feedback, including from the AFP and Commonwealth Director of Public Prosecutions (CDPP), that suggested consideration should be given to the necessity of having multiple offence types, and whether any simplifications could be made to consolidate some of the offences into a broader offence.¹² Making amendments to streamline the offences would also present a useful opportunity to explain the legal elements, and many of the concepts that inform the offences, in new explanatory materials. Some stakeholders also proposed that consideration could be given to clarifying the intersections and distinctions between the offences, and that guidance could be developed for police and prosecutors on how to choose between them when a set of facts give rise to multiple options.¹³

Looking beyond Australia's criminal laws, there is support for consideration of other measures that can strengthen Australia's response to modern slavery that are outside the Terms of Reference for this Targeted Review

Compensation for victims and survivors

Stakeholders raised compensation for victims and survivors of modern slavery in submissions and consultations, reasoning that a Commonwealth compensation scheme would assist with embedding a victim and survivor-centred approach in Australia's modern slavery framework.¹⁴ One stakeholder noted that the existing framework for reparations orders under the *Crimes Act 1914* (Cth) is rarely accessed by victims and survivors, which has been attributed to the difficulties in securing a conviction that is

⁹ Submission – Australian Human Rights Commission p 10; Submission – Law Council of Australia p 9; Submission – Scarlet Alliance p 26.

¹⁰ *Modern Slavery Act 2015* (UK) ('UK MS Act'); 18 USC § 1591 (2018); *Crimes Act 1961* (NZ) ('NZ Crimes Act'); *Criminal Code 1985* (Canada) ('Canadian Criminal Code').

¹¹ Submission – Dr Marika McAdam p 11.

¹² Submission – Dr Marika McAdam p 11; Consultations.

¹³ Submission – Dr Marika McAdam p 11; Consultations.

¹⁴ Submission – Australian Human Rights Commission pp 4-5; Submission – Law Council of Australia pp 12-13; Submission – Anti-Slavery Australia pp 3-6; Consultations.

required to obtain an order.¹⁵ There are also gaps and inconsistencies in the application of state and territory victims of crime compensation schemes to Commonwealth modern slavery crimes.¹⁶ These schemes differ in eligibility criteria, categories of harm and levels of compensation.¹⁷ They are also generally limited to some form of ‘act of violence’ arising from state or territory jurisdiction, or offending within the jurisdiction.¹⁸ The schemes are not available to victims based overseas and inconsistently apply to victims of online Commonwealth crimes.¹⁹ Given the often transnational nature of modern slavery, and the increase in online offending, stakeholders also suggested that a Commonwealth compensation scheme would provide a more effective remedy for victims and survivors of modern slavery.²⁰

De-linking access to the support program from participation in the criminal justice process

Several stakeholders also expressed concerns in submissions and consultations that victims and survivors’ access to the Australian Government’s Support for Trafficked People Program (the STPP) is connected to their participation in the criminal justice process.²¹ Some stakeholders noted that victims and survivors may choose not to engage due to past negative experiences with law enforcement, justice actors, or with the criminal justice process itself. Additionally, victims and survivors may fear stigma and impacts on their relationships with family, friends and work colleagues, or their visa arrangements.²² One stakeholder noted that victims and survivors who commit offences while they are subject to exploitation may also fear their own prosecution if they make a report to police.²³ In consultations, one stakeholder noted victims and survivors who do not access government-funded support may continue to remain in circumstances of modern slavery or be more vulnerable to re-victimisation.²⁴

In the period between the close of Targeted Review consultations in March 2023 and the finalisation of this Report, the Australian Government announced it is providing \$24.3 million over 4 years to enhance support provided by the STPP. This includes increasing the duration of support, providing additional types of support, and improving referral pathways into the STPP. The measure also introduces an additional referral pathway to enable victims and survivors’ access to the STPP through a direct referral from a community service provider, without engagement with the AFP, and funds an initial pilot of this new pathway for up to 18 months (commencing in 2024).

Introduction of the additional referral pathway will increase access to the STPP for victims and survivors who do not wish to engage with the AFP. With rest and recovery under the STPP, victims and survivors initially reluctant to engage in the criminal justice process may feel empowered to contribute testimony

¹⁵ Submission – Law Council of Australia p 12.

¹⁶ Anti-Slavery Australia and the Law Council of Australia, *Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime* (Report, 2016) 4 (*‘Establishing a National Compensation Scheme’*).

¹⁷ Ibid.

¹⁸ Ibid 8.

¹⁹ Submission – Law Council of Australia p 13.

²⁰ ‘Justice for All: Establishing a National Compensation Scheme for Survivors of Modern Slavery’, *Anti-Slavery Australia* (Web Page) <<https://antislavery.org.au/justice-for-all/>>; *Establishing a National Compensation Scheme* (n 16) 4.

²¹ Submission – Law Council of Australia pp 11-13; Submission – Project Respect pp 12-13; Submission – Confidential 3 pp 5-7; Consultations.

²² Submission – Confidential 3 pp 5-7; Consultations.

²³ Submission – Dr Felicity Gerry KC, Jennifer Keene McCann and Cate Read p 25; Consultations.

²⁴ Consultations.

and support the prosecution of their perpetrator.

The voices of victims and survivors

A question that arises in considering the effectiveness of Australia's modern slavery laws is *for whom* the laws need to be effective. The Targeted Review heard from a range of different stakeholders that have an interest in Australia's legislation, including members of the Government-funded pilot Survivor Advisory Council, which comprises survivors of criminal labour exploitation. The Survivor Advisory Council shared reflections on the meaning and role of justice to help frame and encourage consideration of these issues during the consultation. Some of these reflections are shared below to help put the lived experience of victims and survivors at the centre of this Report. The Survivor Advisory Council also provided feedback on specific aspects of Australia's legislation, which has been considered and incorporated in subsequent sections of this Report.

Reflections on Justice

One reflection about the meaning of justice focused on the importance of ensuring there are consequences for perpetrators of modern slavery and ensuring that perpetrators do not re-offend.

'Regardless of the cost, I had to do everything in my power to stop it from happening to others.'

A number of reflections shared by the Survivor Advisory Council highlighted that justice is linked to the ability to be happy, to move forward, and to have a sense of purpose in life and true freedom.

'When justice is given, you can move forward.'

'When you receive justice, you feel glad from the bottom of your heart. You discover what your rights are in life, but more importantly other people receive the message of what the right thing is to do.'

'Until we taste that justice, until we get that, then it's true freedom. When you can stop looking over your back, and be able to stop worrying about what consequences it may have to your family back home.'

The Survivor Advisory Council also spoke about the importance of victim and survivor-centred criminal justice processes. This included through trauma-informed support and information from lawyers, police, and other criminal justice practitioners.

'Having police, lawyers and other people to help me get justice, helps me feel supported.'

The Survivor Advisory Council explained that the legal framework gave them clarity and assisted them in defining and understanding their experience.

'The definitions and the legal frameworks give us clarity and a framework for our trauma.'

Some members of the Survivor Advisory Council further expressed that when the legal system is unable to deliver consequences for the crimes of their perpetrator, it made them feel like their experience did not matter or was invalid.

'[Without justice it] makes me feel that I am not important, even to myself.'

'Society measures only by legal conviction.'

These reflections highlight that effective laws that support investigation and prosecution outcomes play an important role in delivering justice for victims and survivors. The Targeted Review acknowledges that this will not be true for all victims and survivors, that the Survivor Advisory Council does not speak for all victims and survivors, and that criminal laws are just one part of a holistic and effective response to modern slavery.

Australian Institute of Criminology Conference on Trauma Informed Practice: supporting survivors of modern slavery in the criminal justice system

During the Targeted Review, the AIC held a conference on *Trauma Informed Practice: supporting survivors of modern slavery in the criminal justice system*. This conference featured a presentation by the Australian Red Cross that included reflections from victims and survivors of modern slavery on their experiences with the criminal justice system. The victims and survivors who shared these reflections have given permission to be quoted in this Report so that their voices can be heard and to inform consideration of its findings.

'[People who work in the criminal justice system] need to understand the victim and their culture and trauma, and act in the right manner.'

'Have a lot of respect for the victim because it's not what they choose to go through ... when it comes to being a victim yourself, you don't want to go through the same process all over and over again.'

'The process is very, very long and it takes years to get to the final conclusion.'

'I guess for me even the initial engaging with police was quite difficult as maybe I didn't come to terms that I was a victim yet ... I had a sort of black and white understanding of trafficking. It was quite stereotypical. It was not until I had some more education around [it] I came to terms with everything.'

'The only experience I've gone through is sitting around with the feds who take my statement. My statement was 25 pages so I could imagine the amount of work the feds were doing trying to put together what I'm saying to elaborate on.'

'With me the final conclusion hasn't come yet, but I can see it's happening. It has started. It does make a lot of difference when you get a lot of witnesses, when the witness come forward and talk and when they are saying what they have seen is kind of same.'

'But here, when it comes to voice out your rights you can voice out your own opinion. That means whatever I am saying is being taken into account. My voice has been heard.'

'Us women need to be more supported, whether it's more, it's from the state police or the judge, they need to understand our trauma as well.'

'They made sure I didn't come into contact with him when I entered into the court room. I already mentioned to them that I'm very scared he might harm me or anything, so they were very aware of that and they did make sure I was safe.'

Similar to those of the Survivor Advisory Council, these reflections highlight the importance of trauma-informed support throughout the criminal justice process, the complexity and challenging nature of that process, and the importance of being heard.

Summary of findings

Finding 1

The terms ‘abuse of power’ and ‘taking advantage of a person’s vulnerability’ are within the definition of coercion in section 270.1A of the Criminal Code. Removing these terms from the definition of coercion, and establishing them as standalone means alongside coercion, threat and deception, would broaden the scope of the terms. Explanatory materials for any amendments to the definition could also support more consistent interpretation and application of the definition in the criminal justice process. Guidance could include examples of how coercion can manifest in different offences under Divisions 270 and 271.

Finding 2

Threats to third parties are not dealt with consistently in Divisions 270 and 271. Legislative amendments could clarify that threats to third parties are also captured in the Division 271 offences.

Finding 3

Amendments to the definition of deception in section 271.1 would clarify that it can include deception by omission where a person has intentionally or recklessly suppressed facts, or failed to provide information. Any such amendments should be appropriately targeted to mitigate risks of over criminalisation or of establishing new obligations that are not intended or already established in law. Options to target amendments could include introducing a fault element of intention (or recklessness) to both deceive by omission and to exploit.

Finding 4

Incorporating the term modern slavery into the titles of Divisions 270 and 271 of the Criminal Code could make it clearer that the offences in those Divisions are a key part of Australia’s response to modern slavery. Close consideration should be given to ensuring such changes complement and do not give rise to inconsistency with the Modern Slavery Act.

Finding 5

Guidance material on the principle of irrelevance of consent would support more consistent understanding and application of the principle through the criminal justice process.

The Australian Attorney-General’s Department (AGD), with other relevant Commonwealth agencies, could also monitor cases through the criminal justice system to support timely identification of consent issues arising through the court process, including in sentencing.

Finding 6

Reframing Australia’s trafficking in persons offences to focus less on the physical movement of the victim and survivor may better capture online-based and other offending that does not involve the movement of the victim and survivor. This could be achieved by addressing current framing that is concerned with entry or exit from Australia or movement within Australia.

Finding 7

Including all 5 acts from the *United Nations Convention against Transnational Organized Crime* (UNTOC) and its supplementary *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (Trafficking in Persons Protocol)²⁵ in Australia's trafficking in persons offences—being recruitment, transportation, transfer, harbouring and receipt—would capture additional offending, including new and emerging forms of trafficking conduct. Implementing this finding will need to be carefully considered to avoid or address unintended consequences arising from overlap with other laws, including offences at Division 270.

Finding 8

Streamlining Australia's large number of trafficking in persons offences would simplify Division 271. However, there would be benefit in retaining the 2-element trafficking in persons offences that do not include the means of trafficking in persons.

Finding 9

Amending the definition of exploitation to clarify that it includes exploitation through criminal activities or similar (for example, forced criminality or irregular labour and services) could give greater effect to the non-punishment principle and Australia's victim and survivor-centred approach. Similarly, specifying that exploitation also includes child sexual abuse would support greater understanding, identification, support and protection of child victims and survivors of Division 270 and 271 offences.

Further, amending the definition of exploitation to be non-exhaustive would provide flexibility to capture new and emerging, or less common, forms of exploitation. In establishing a non-exhaustive definition, a 'catch-all' phrase could be added to the definition to support statutory interpretation in line with its intended scope.

Finding 10

Retaining 2-element offences that do not include the purpose of exploitation would continue to offer benefit in capturing certain harmful conduct arising in the Australian context. Two-element offences provide investigation and prosecution options that are valued by Australian criminal justice practitioners.

These offences should otherwise remain targeted to avoid any unintended over-criminalisation. Findings in this Report that propose expanding Australia's trafficking offences should not be applied to these offences.

Investigations and prosecutions could be monitored to ensure the conduct captured by these offences is best addressed through the trafficking in persons framework in Division 271.

Finding 11

The term 'sexual services' in the context of the child trafficking offences is inappropriate. The term could be

²⁵ *United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, [2004] ATS 12 (entered into force 29 September 2003) ('UNTOC'); *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, [2005] ATS 27 (entered into force 25 December 2003) ('TIP Protocol').

replaced or removed altogether, with corresponding amendments to the definition of exploitation to ensure all relevant offending is still captured. Progressing these reforms could also provide an opportunity to consider removing the term ‘sexual services’ from the trafficking offences that apply to adults, making Australia’s offences industry neutral in line with international good practice.

Finding 12

Amending the offence names in Division 271 Subdivision BA to ‘trafficking in persons for the purpose of organ removal’ instead of ‘organ trafficking’ would clarify the scope and intent of these offences.

Finding 13

Consistent with Finding 6, there is benefit in reframing the trafficking in persons offences so they do not require movement of a person across an Australian border to establish an offence. This would ensure offshore conduct by Australian citizens, residents and bodies corporate can be captured and give greater effect to the extended jurisdiction (Category B) attached to the trafficking offences.

Finding 14

There is scope to clarify and/or expand the existing aggravating factors in Divisions 270 and 271 to encompass other relevant factors. These could include, for example, economic harm suffered by the victim and survivor, the accused’s use of violence (including sexual violence and weapons) during the commission of an offence, and the particular egregiousness of offences against people with disabilities. If amendments are developed, other relevant factors, on further review of similarly serious Commonwealth offences, should also be considered.

Finding 15

The term ‘significantly deprived of personal freedom’ in the servitude offence at section 270.4 is undefined in both legislation and case law, and could be clarified through a non-exhaustive list of factors in legislation that might indicate significant deprivation. Additional guidance could assist criminal justice practitioners in distinguishing between servitude and forced labour.

Finding 16

The ‘reasonable person in the position of the victim’ test used in Division 270 requires consideration of the state of mind of a reasonable person with the same situational and personal vulnerabilities of the victim and survivor—arguably subjective deliberations. The application of this test in Division 270 was raised in a number of consultations and submissions to the Targeted Review. In particular, stakeholders noted the difficulties that criminal justice practitioners and the courts may face in understanding the situational and personal vulnerabilities of victims and survivors.

Guidance could better support consideration of the unique circumstances, background and vulnerabilities of victims and survivors. One of the following options may also assist.

Option 1

Expand subsection 270.10(1) to make explicit that factors at subsection 270.10(2) can apply to deliberation of whether a reasonable person in the position of a victim and survivor would have felt free to cease providing labour or services or to leave the place where they are providing the labour or services. Further,

the list of matters at subsection 270.10(2) could be expanded.

Option 2

Remove the reasonable person test and reframe the forced labour and servitude offences to focus more on the conduct and intent of the offender and less on the impact of the conduct on the victim and survivor. This is consistent with the UK approach and with international good practice that encourages legislation to focus on the offender's conduct rather than the conduct or state of mind of the victim and survivor. This approach would be a significant departure from the current framing and would require further consultation on specific proposed amendments.

Finding 17

The deceptive recruitment offence retains sex industry-specific issues in its list of matters about which the victim and survivor could be deceived (that is, 'if the engagement is to involve the provision of sexual services—that fact, or the nature of sexual services to be provided'). This phrase could be replaced with industry-neutral language to remove the specific demarcation of the sex industry within this offence. If such changes are made, consideration should be given to ensuring the offence continues to target serious offending that meets the threshold of a slavery-like practice.

Finding 18

The debt bondage offence retains inconsistent language in the form of 'personal services'. This phrase could be replaced with a reference to 'labour or services' for consistency with other offences in Divisions 270 and 271. If such a change is made, consideration should be given to ensuring the offence continues to target serious offending that meets the threshold of a slavery-like practice.

The maximum penalty for debt bondage may require further consideration in light of legislative developments at the federal and state and territory levels to address worker exploitation. Further consideration to amending penalties could be given as part of a broader holistic assessment of legislation that addresses the spectrum of labour exploitation.

Finding 19

The definition of marriage at subsection 270.7A(2) is broad and is intended to capture all forms of marriage, including cultural and religious marriages. In practice, criminal justice practitioners are reporting evidentiary challenges establishing that a marriage has taken place, though few cases have progressed through the courts to test the definition. Continued monitoring of cases through the courts would inform further identification and consideration of definitional limitations.

Finding 20

Australia's forced marriage offences do not capture conduct relevant to preparing for a forced marriage or forcing a person to remain in a marriage. Preparatory conduct may or may not be captured upon reliance on an extension of criminal responsibility provision such as the attempt provision contained at subsection 11.1(1) of the Criminal Code. Consideration could be given to additional measures to address this conduct.

Finding 21

The list of elements and factors in section 270.10 (relevant evidence) is non-exhaustive. However, it could be amended to explicitly capture further conduct relevant to Division 270 offences, with a view to:

- including the reasonable person, freedom to cease labour or services/leave a place of labour or services, and significant deprivation of freedom elements. The list of factors that are relevant to these elements will also need to be explored;
- including the social and cultural relationships between the victim and survivor and the offender, and the victim and survivor and their family members, as relevant factors; and
- accounting for particular vulnerabilities of a person with a disability.

Finding 22

Implementation of the non-punishment principle is complex and multi-faceted. There are methods of implementation that already exist in Australia. Initial measures to strengthen application of the principle could be taken, including development of guidance for criminal justice practitioners. Further consideration of a new statutory defence should form part of the targeted review of support and legislative protections, defences and remedies available to modern slavery victims and survivors under Action Item 26 of the National Action Plan.

Part 1: Background and context

About the Targeted Review

Purpose and objectives of the Targeted Review

The Targeted Review recognises that strong criminal justice responses are an integral part of combatting modern slavery in Australia and seeks to ensure Australia's legislative framework continues to support effective disruption, investigation and prosecution actions.

The Terms of Reference for the Targeted Review (Appendix A) set out the matters that the Targeted Review was required to consider, which include:

- the number of reports, investigations and prosecutions under Divisions 270 and 271 of the Criminal Code;
- investigation challenges connected to offences under Divisions 270 and 271 of the Criminal Code;
- prosecution challenges connected to offences under Divisions 270 and 271 of the Criminal Code;
- the types and range of offences in Divisions 270 and 271 of the Criminal Code;
- framing of offences in Divisions 270 and 271 of the Criminal Code including elements of the offences, definitions, scope, extensions of criminal liability (including attempt), and jurisdiction;
- alignment of Divisions 270 and 271 with international laws, standards and good practice;
- appropriateness of penalties in Divisions 270 and 271 of the Criminal Code;
- applicability of Divisions 270 and 271 to contemporary manifestations of modern slavery and to current and projected criminal methodologies; and
- interactions between Divisions 270 and 271 and other laws and frameworks where those interactions have impeded, or have the potential to impede, effective investigations and prosecutions under Divisions 270 and 271.

The Terms of Reference further state that the Targeted Review would consider and have regard to reports from parliamentary inquiries on modern slavery matters, feedback from public consultations and statistics and data on referrals, investigations and prosecutions.

Process of the Targeted Review

The Targeted Review was undertaken by the Australian Attorney-General's Department (AGD) in collaboration with the AFP and the CDPP.

The Targeted Review involved significant consultation and collaboration across the Australian Government, and in particular with agencies that comprise the Government's Interdepartmental Committee on Human Trafficking and Slavery (the IDC).²⁶

²⁶ The IDC includes the AGD (Chair), AFP, CDPP, AIC, the Australian Criminal Intelligence Commission, the Office of the Fair Work Ombudsman, the Australian Border Force and the Departments of Foreign Affairs and Trade, Prime Minister and Cabinet, Home Affairs, Social Services, Education, and Employment and Workplace Relations.

The Targeted Review included a 3-month public consultation that took place from 7 December 2022, when the Attorney-General released the Targeted Review Discussion Paper. The consultation invited written submissions responding to the Discussion Paper, with 30 written submissions received. During this period, AGD also held targeted consultation sessions on matters connected to the Targeted Review and met with Commonwealth, state and territory, and international government agencies, businesses and civil society. AGD also consulted with the Government's pilot Survivor Advisory Council.

The Targeted Review developed findings drawing on feedback from stakeholders, and from research and analysis of relevant information, reports, literature and other written sources.

International laws and frameworks

Australia's response to trafficking in persons, slavery and slavery-like practices reflects our obligations as a State Party to a range of international instruments. In particular, the *International Convention to Suppress the Slave Trade and Slavery* (the Slavery Convention) and the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* set out Australia's international legal obligations to address slavery and slavery-like practices.

UNTOC and the Trafficking in Persons Protocol set out Australia's international legal obligations to address trafficking in persons.

Australia's response to trafficking in persons, slavery and slavery-like practices is also shaped by our obligations under other international instruments. These include the:

- *International Covenant on Civil and Political Rights*;
- *International Covenant on Economic, Social and Cultural Rights*;
- *Convention on the Elimination of All Forms of Discrimination against Women*;
- *Convention on the Rights of the Child, and its Optional Protocols on: the sale of children, child prostitution and child pornography, and on involvement of children in armed conflict*;²⁷
- *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*;
- *International Convention on the Elimination of All Forms of Racial Discrimination*;
- *Convention on the Rights of Persons with Disabilities*;
- *ILO Forced Labour Convention, 1930 (No. 29)*;
- *ILO Protocol of 2014 to the Forced Labour Convention, 1930*;
- *ILO Abolition of Forced Labour Convention, 1957 (No. 105)*;
- *ILO Worst Forms of Child Labour Convention, 1999 (No. 182)*; and
- *ILO Minimum Age Convention, 1973 (No. 138)*.

²⁷ In 2019, the Australian Government removed all references to the term 'child pornography' in Commonwealth legislation, replacing it with the term 'child abuse material' to reflect the seriousness of the harm, and to avoid conflating material depicting the sexual abuse of children with material depicting sexual activity between consenting adults. State and territory legislation may also refer to 'child exploitation material' or 'child sexual abuse material'.

Modern slavery and Australia's criminal laws

What is modern slavery?

In Australia, modern slavery refers to trafficking in persons, slavery and slavery-like practices including servitude, forced labour, forced marriage, deceptive recruiting and debt bondage. Modern slavery crimes are serious violations of human rights and deprive victims and survivors of fundamental freedoms.

Central to modern slavery crimes is the exploitation of others for profit, benefit or other gain.

Modern slavery practices concern serious forms of exploitation. For example, international guidance suggests failure to pay a mandated minimum wage will be exploitative conduct of a lesser kind, whereas practices such as slavery and servitude are at the more serious end of the spectrum.²⁸ Modern slavery can take place in any part of the world, and happen to any person, and in any industry or setting—including in commercial or private settings.

Prevalence

Reports and investigations of offending against Divisions 270 and 271 have increased over time. Global estimates have found that there are increasing numbers of victims and survivors globally, a trend which is reflected in Australia's rising case numbers.²⁹ In Australia, frontline officer training and awareness-raising initiatives may also account for some increased identification and reporting of suspected cases. There have also been significant government and non-government efforts to increase public awareness of these crimes and their indicators.³⁰ Five-year trends are represented in Table 1 and Graph 1 on the following pages.

²⁸ United Nations Office on Drugs and Crime, *The International Legal Definition of Trafficking in Persons: Consolidation of research findings and reflection on issues raised* (Issue Paper, December 2018) 14 ('*International Legal Definition of TIP*').

²⁹ International Labour Organization, Walk Free and International Organization for Migration, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (Final Report, September 2022) 59 ('*Global Estimates*').

³⁰ Initiatives include actions under Australia's National Action Plan.

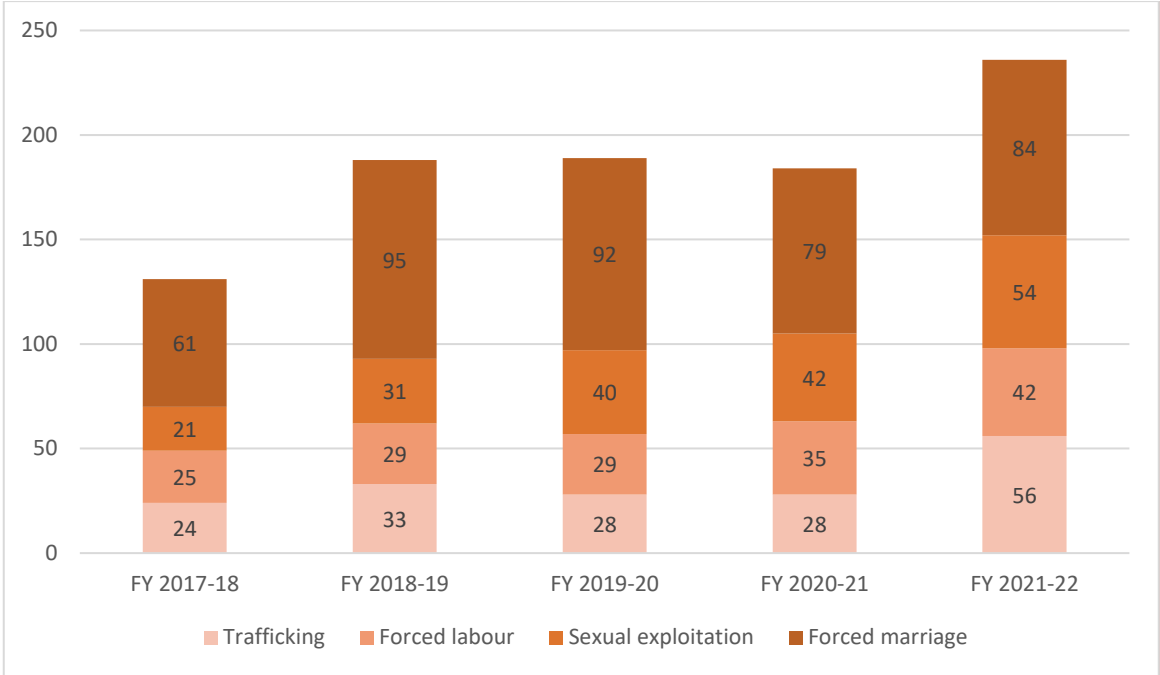
Table 1: Number of reports of trafficking in persons, slavery and slavery-like practices received by the AFP by financial year

Offence	2017/18 FY	2018/19 FY	2019/20 FY	2020/21 FY	2021/22 FY	Trend over time
Forced marriage	61	95	92	79	84	↑
Sexual exploitation	21	31	40	42	54	↑
Forced labour	25	29	29	35	42	↑
Child trafficking	12	7	<5	12	21	↑
Trafficking	24	33	28	28	56	↑
Exit trafficking*	13	13	24	16	37	↑
Debt bondage	<5	9	<5	<5	6	↔
Domestic servitude	9	9	20	15	18	↑
Slavery	<5	<5	<5	6	8	↑
Deceptive recruiting	<5	<5	6	<5	5	↔
Organ trafficking	0	<5	0	<5	0	↔
Harbouring	<5	0	0	0	0	↔
Other	0	0	0	0	0	↔
TOTAL	162	220	223	224	294	↑

* Exit trafficking is a subset of all trafficking data.

Alt text: Table comparing the number of reports of trafficking in persons, slavery and slavery-like practices received by the AFP by each financial year from 2017-18 to 2021-22.

Graph 1: Number of reports of forced marriage, sexual exploitation, forced labour and trafficking in persons received by the AFP by financial year



Alt text: Column chart comparing the number of reports of forced marriage, sexual exploitation, forced labour and trafficking in persons received by the AFP by each financial year from 2017-18 to 2021-22.

Prosecutions and convictions

The CDPP is an independent prosecution service established by the Australian Parliament to prosecute offences against Commonwealth law. The CDPP has no investigative function, with matters referred to the CDPP from the AFP and other investigative agencies. The Prosecution Policy of the Commonwealth guides the CDPP’s decision to proceed with trafficking in persons, slavery or slavery-like offences prosecutions.

In the 2021-22 financial year, the CDPP commenced 3 new prosecutions and continued with 22 prosecutions before the courts. Since 2004 (and to 30 June 2022), 30 people have been convicted of offences against Divisions 270 and 271 of the Criminal Code. A summary of convictions is at Appendix D.

Australia’s National Strategy to Fight Transnational Serious and Organised Crime

Trafficking in persons is a form of transnational serious and organised crime (TSOC). Internationally, the primary instrument guiding responses to trafficking in persons is the Trafficking in Persons Protocol.

Articles 2 and 3 of the UNTOC provide guidance on what constitutes a transnational serious and organised crime. Under the UNTOC, a serious crime is punishable by at least 4 years’ imprisonment, and is transnational if it is committed:

- in more than one State;
- in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- in one State but involved an organised criminal group that engages in criminal activities in more than one State; or

- in one State but has substantial effects in another State.

The UNTOC recognises the seriousness of transnational organised crime and sets out State Parties' obligations to address TSOC, including through criminal offences, international cooperation, training and technical assistance, and frameworks for mutual assistance and extradition.

Australia's National Strategy to Fight TSOC (the Strategy) guides Australia's collective response to transnational serious and organised crime. The Strategy outlines 5 high-level National Strategic Priorities. These provide guidance to Commonwealth, state and territory agencies on requirements to support a nationally consistent, full-spectrum approach in combatting TSOC by identifying areas for action and partnership opportunities.

1. Safeguarding the Australian community from TSOC harms.
2. Taking the fight offshore and hardening Australian borders.
3. Removing the profit from criminal networks.
4. Protecting institutions and public revenue.
5. Disrupting TSOC exploitation of emerging technologies.

The Targeted Review contributes in particular to Priorities 1, 2 and 5 by considering questions relating to the ongoing effectiveness of Australia's criminal offences and engaging with questions about extraterritorial application, alignment with international laws and standards and the role of technology in modern slavery crimes in Australia.

Australia's criminal laws

Australia's offences for trafficking in persons, slavery and slavery-like practices are set out in Divisions 270 and 271 of the Criminal Code.

Division 270 criminalises slavery and slavery-like practices including servitude, forced labour, deceptive recruiting, debt bondage and forced marriage. The slavery offences in Division 270 have universal jurisdiction and apply to conduct within or outside of Australia, and whether or not the offender is an Australian citizen, resident or body corporate. The slavery-like offences in Division 270 have extended geographical jurisdiction and can apply where the conduct occurred in Australia, or where the conduct occurred outside Australia but the offender was an Australian citizen, resident or body corporate.

Division 271 contains specific offences for trafficking in persons, including transnational and domestic trafficking, trafficking in children, organ trafficking, and harbouring a victim. With the exception of the domestic offences, the trafficking in persons offences have extended geographical jurisdiction and can apply where the conduct occurred in Australia, or where the conduct occurred outside Australia but the offender was an Australian citizen, resident or body corporate.

Previous reform

The offences in Divisions 270 and 271 were amended in 2013 by the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013 (Cth)*, which criminalised forced marriage and harbouring a victim, and established the standalone offences of forced labour and organ

trafficking. It also extended the application of the offences of deceptive recruiting and servitude to also apply to conduct occurring outside the sex industry.

In 2015, the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Act 2015* (Cth) provided that the slavery offences have universal jurisdiction. The *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth) increased penalties for forced marriage, and expanded the definition of forced marriage to make clear that the offences apply where a person cannot give their free and full consent to marry, including for reasons such as age or mental capacity.

In 2019, the *Combatting Child Sexual Exploitation Legislation Amendment Act 2019* (Cth) amended the definition of forced marriage to explicitly capture all marriage involving children under 16 years. This made clear that a person under the age of 16 cannot consent to marriage and specified that any offence involving a child under 16 would automatically attract the aggravated maximum penalty of 9 years imprisonment.

There have been no legislative reforms to offences against Divisions 270 and 271 of the Criminal Code since 2019, with the most significant previous reforms occurring in 2013—10 years ago. An overview of the evolution of Australia’s modern slavery criminal laws is at Appendix E.

Complementary laws and Frameworks

Modern Slavery Act

The Commonwealth Modern Slavery Act commenced on 1 January 2019 and complements Australia’s comprehensive criminal justice response to modern slavery. The Modern Slavery Act provides a transparency framework that aims to drive business and government action to address modern slavery in global supply chains and operations. It requires certain large entities with an annual consolidated revenue of over \$100 million to submit annual statements that outline modern slavery risks in supply chains and operations, and actions taken to mitigate these risks. The Modern Slavery Act also applies to the Australian Government, requiring the Government to submit an annual Commonwealth modern slavery statement.

The Government recently undertook a statutory review of the Modern Slavery Act, looking at the operation of the Act over its first 3 years. A review report was tabled in Federal Parliament on 25 May 2023 and made 30 recommendations for options to strengthen the Act. Government will consider the proposed recommendations.

The Modern Slavery Act is explicitly linked to Divisions 270 and 271 of the Criminal Code. Modern slavery is defined in section 4 of the Modern Slavery Act to include conduct that would constitute an offence under Divisions 270 and 271.

Migration Act 1958 (Cth)

The *Migration Act 1958* (Cth) creates offences of allowing a person to work, or referring a person for work, if the person is an unlawful non-citizen, or a lawful non-citizen working in breach of a visa condition. The offences are escalated to aggravated offences if the worker is being exploited and the person knows of, or is reckless to, that circumstance. The Migration Act also provides for civil employer sanctions in the form of infringement notices and non-fault civil penalties, supplementing Australia’s criminal offences.

Human Trafficking Visa Framework

Under the *Migration Regulations 1994* (Cth), Australia's Human Trafficking Visa Framework (HTVF) enables foreign nationals, who do not already hold a valid visa and are suspected of being victims and survivors of modern slavery to lawfully remain temporarily or permanently in Australia. Like Australian citizens and other valid visa holders, foreign nationals who hold a visa under the HTVF are then able to access support through the Government's dedicated Support Program for victims and survivors of modern slavery. A suspected victim and survivor may be eligible for a permanent visa under the HTVF to remain in Australia where they have contributed to an investigation or prosecution of an alleged offender and would be in danger if they returned to their home country.

Workplace laws

The *Fair Work Act 2009* (Cth) empowers the Fair Work Ombudsman (FWO) to enforce compliance with the Fair Work Act, and associated industrial instruments including awards and registered agreements. The minimum entitlements, conditions and protections provided under the Fair Work Act and associated instruments apply to all employees in the national workplace relations system, including migrant workers and international students. In June 2023, the Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023 was passed by Parliament. These amendments will increase protection for migrant workers by ensuring that all migrant workers working in Australia are entitled to the benefit of the Fair Work Act, regardless of their immigration status.

Assurance Protocol

In 2017, as an initiative of the Migrant Workers' Taskforce, the Department of Home Affairs and the FWO implemented the Assurance Protocol to encourage migrant workers to come forward with workplace complaints without fear of their visas being cancelled. In accordance with the Assurance Protocol, temporary visa holders who have breached work related conditions of their visa because of workplace exploitation will not have their visa cancelled if they:

- have sought advice or support from the FWO and are helping the FWO with its inquiries;
- commit to abiding by visa conditions in the future; and
- have no other grounds for visa cancellation (such as national security, character, fraud or health grounds).

Proceeds of Crime Act 2002 (Cth)

The *Proceeds of Crime Act 2002* (Cth) provides a scheme for tracing, restraining and confiscating the proceeds of crimes against Australian law, including trafficking in persons, slavery and slavery-like practices offences. These proceeds can then be returned to the Australian community to fund crime prevention and law enforcement initiatives, and diversionary measures relating to drug use and addiction.

Child sexual exploitation and abuse

Australia has a robust criminal justice framework to prevent, investigate and prosecute all forms of child sexual abuse and exploitation. State and territory criminal laws include child sexual abuse offences, and set an age of consent for sexual activities. The Criminal Code also includes offences for child sexual abuse committed via a carriage service (such as a mobile phone or the Internet) or postal service, as well as offences that are committed outside Australia by an Australian citizen or permanent resident. It is

against Commonwealth criminal and customs laws to import or export child abuse material, or to import or possess a childlike sex doll. The Criminal Code also restricts certain registered child sex offenders' ability to leave Australia without permission.

Other state and territory legislation

Most state and territory governments have also enacted legislation relating to sexual servitude and deceptive recruiting, which would allow for the prosecution of cases involving sexual exploitation. All jurisdictions have a range of offence provisions to cover related crimes, such as assault, female genital mutilation/cutting, sexual assault, forced prostitution, kidnapping and deprivation of liberty. New South Wales (NSW) has also criminalised forced marriage (of persons aged under 18 years) in the *Crimes Act 1900* (NSW).

The enforcement of Commonwealth offences relating to trafficking in persons, slavery and slavery-like practices is the responsibility of the AFP, while the enforcement of state and territory offences is generally the responsibility of the relevant state or territory policing services. However, state and territory offences may be used in conjunction with, or in place of, Commonwealth offences. In both historical and contemporary practice, state and territory policing services have referred trafficking in persons and slavery-related matters to the AFP as the lead investigative agency. Law enforcement agencies are reliant on the policing powers afforded to them by law, which may vary between jurisdictions.

National Plan to End Violence Against Women and Children (2022-2032)

The *National Plan to End Violence Against Women and Children (2022-2032)* is the overarching national policy framework guiding actions towards ending violence against women and children. It highlights how all parts of society must work together to achieve the shared vision of ending gender-based violence, including relevant modern slavery offences, in one generation. Clear actions to implement the National Plan will be outlined in underpinning Action Plans, that will detail the Commonwealth, state and territory government investments and efforts towards implementation.

Australia's family, domestic and sexual violence laws and policies have relevant intersections with modern slavery offences. However, they are outside the scope of the Terms of Reference for this Targeted Review.

Part 2: Trends and practices

The Targeted Review heard feedback about the evolving nature of trafficking in persons, slavery and slavery-like practices both globally and in Australia. Criminals have embraced technology and opportunities presented by globalisation, the COVID-19 pandemic, conflicts, and other significant events and developments to devise new and innovative means of profiting from human exploitation. Governments must keep pace, and look beyond the horizon, by maintaining responsive and flexible legislative frameworks that protect communities and economies from the damaging impacts of modern slavery.

This section highlights some of the trends and practices on which the Targeted Review received feedback through consultations and submissions. It is not intended to be a comprehensive discussion of all trends and practices raised during the Targeted Review.

The role of technology

Many submissions to the Targeted Review noted that technology now plays a significant and growing role in trafficking in persons, slavery and slavery-like practices.³¹ The United Nations Office on Drugs and Crime (UNODC) has stated that perpetrators ‘misuse technology during all the stages of trafficking in persons and for all forms of exploitation: sexual exploitation; forced labour; and organ removal, among others’.³² Submissions to the Targeted Review observed that perpetrators of these crimes have invested in sophisticated technologies and infrastructure, as well as complex international coordination, to commit these offences online.³³ The Australian Human Rights Commission explained that the use of technology allows criminals and criminal organisations ‘to both avoid detection and maximise their profits’, allowing perpetrators to buy, sell and exploit victims through social media, the dark web, smartphones and encrypted communications.³⁴ International Justice Mission also highlighted that technology can be used in every stage of the trafficking process, including recruitment, control, exploitation and in financial transactions.³⁵

One submission also provided examples about how devices and platforms are used by traffickers. This included recruiting and deceiving people into trafficking, capturing and creating sexual and other abuse material for the purpose of manipulating victims, capturing and disseminating abuse material to extort money from families of victims, disseminating and selling abuse material to consumers, and transferring profits made from trafficked and enslaved persons including through cryptocurrencies.³⁶

Submissions further cited both empirical and anecdotal evidence from victims and survivors that social media platforms and gaming platforms are being used in human trafficking and other modern slavery

³¹ Submission – Destiny Rescue Australia pp 12-13; Submission – International Justice Mission pp 3-6; Submission – Australian Human Rights Commission pp 6-8; Submission – Dr Marika McAdam p 2; Submission – Confidential 3 p 9.

³² United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2022* (Report, January 2023) 70 (‘GLOTIP 2022’).

³³ Submission – Destiny Rescue Australia p 13; Submission – Australian Human Rights Commission p 6.

³⁴ Submission – Australian Human Rights Commission p 6.

³⁵ Submission – International Justice Mission p 3.

³⁶ Submission – Dr Marika McAdam p 2.

crimes.³⁷ For example, perpetrators may control victims through location tracking, or exert psychological control by gaining compromising information about the victim.³⁸ They may also threaten victims and survivors that images of them will be shared through social media platforms in order to keep them in an exploitative situation.³⁹ Perpetrators may also restrict a victim and survivor's access to social media as a way to maintain control over them and isolate them.⁴⁰

Submissions also observed that perpetrators are luring victims and survivors by advertising seemingly legitimate employment opportunities online, then trafficking and forcing them to work in online scam operations.⁴¹ International Justice Mission explained that these operations seek to generate illicit profit through internet-based fraud and deception, including romance or investment-related fraud.⁴² In these cases, victims and survivors trafficked to conduct such fraud are often deceived about the nature of their employment and may have their passports and identification documents confiscated.

Perpetrators use technology for their advantage in numerous ways. Some of these were set out in the Australian Human Rights Commission's submission and included perpetrators engaging with victims and survivors remotely, luring victims and survivors into exploitation through social media and other online platforms, anonymisation and encryption.⁴³

One submission noted that technology has not only provided perpetrators with new tools and methods, but also allowed modern slavery practices to take place completely online.⁴⁴ This is illustrated in the example below, submitted by Destiny Rescue Australia.⁴⁵

Case Study

Two co-conspirators meet online through social media platforms and agree to sexually exploit a vulnerable person in exchange for payment. The contact offender sexually exploits the victim and survivor, under direction of the 'customer', and the exploitation material is electronically transmitted to the customer. In exchange, the customer sends payment through electronic money remittance to the contact offender abroad, sometimes in the form of cryptocurrencies. In this form of trafficking in persons, the recruitment, exploitation and compensation are all facilitated through technology.

Scarlet Alliance, the Australian Sex Workers Association, noted that the Criminal Code already contains extensive provisions targeting cases where technology is a major feature. It cautioned that extending Divisions 270 and 271 to specify the use of technology may risk over-capturing the usual business of sex workers, restrict sex workers' access to technology that allows them to safely conduct business, and create unintended consequences. It emphasised that the use of technology is an important part of allowing sex

³⁷ Submission – Dr Damien Huffer and Dr Nilda Garcia p 1; Submission – Destiny Rescue Australia pp 12-13; Submission – International Justice Mission p 6; Submission – Australian Human Rights Commission pp 6-7; Submission – Be Slavery Free p 6; Submission – Dr Marika McAdam p 4.

³⁸ Submission – International Justice Mission p 3.

³⁹ Submission – Confidential 3 p 9.

⁴⁰ Submission – Dr Damien Huffer and Dr Nilda Garcia p 1; Submission – Destiny Rescue Australia p 13; Submission – International Justice Mission pp 4-5; Submission – Dr Marika McAdam p 2.

⁴¹ Submission – Dr Damien Huffer and Dr Nilda Garcia p 1; Submission – Destiny Rescue Australia p 13; Submission – International Justice Mission pp 4-5; Submission – Dr Marika McAdam p 2.

⁴² Submission – International Justice Mission p 4; see also Submission – Australian Federal Police p 6.

⁴³ Submission – Australian Human Rights Commission pp 6-7.

⁴⁴ Submission – Destiny Rescue Australia p 12.

⁴⁵ Submission – Destiny Rescue Australia p 12.

workers to conduct business safely, and legislative amendments need to be designed carefully to ensure that sex workers are not subjected to more dangerous and exploitative situations.⁴⁶

Online sexual exploitation of children

Submissions also raised specific concerns about technology being used by traffickers to facilitate online sexual exploitation of children (OSEC).⁴⁷ As noted in the Discussion Paper, there is overlap between child sexual exploitation and abuse and modern slavery offences. The UNODC noted that during the pandemic, ‘online recruitment, child grooming and exploitation were widely used by traffickers’.⁴⁸ The Organization for Security and Co-operation in Europe and UN Women also noted a significant increase in trafficking for the purpose of online sexual exploitation (including child sexual exploitation) during the COVID-19 pandemic, exacerbated by the impacts of restrictive state measures and economic instability in increasing the vulnerability of women and children.⁴⁹

International Justice Mission has observed a form of OSEC in which ‘an offender/facilitator (A) who has access to children will exploit or abuse them and transmit that abuse via live-streaming video communication platforms, for payment, to another offender (B), who commissions and directs the abuse’.⁵⁰ Technology facilitates the commission of this crime at all stages, including communication, financial payment, and exploitation, whilst affording the perpetrator a level of anonymity.

The Criminal Code criminalises a range of conduct involving the online sexual abuse and exploitation of children, including the use of a carriage service for child abuse material (section 474.22), and the use of a carriage service for sexual activity with a person under 16 years of age (section 474.25A). These offences carry maximum penalties of 15 years and 20 years imprisonment respectively.

Additionally, under [Measure 13 of the First Commonwealth Action Plan](#) of the *National Strategy to Prevent and Respond to Child Sexual Abuse 2021-2030*, the Australian Government will review existing Commonwealth child sexual abuse offences, and may look at legislative reforms to make sure offences remain current and reflect emerging trends.

Modern slavery in a disability context

The Targeted Review received some feedback in consultations and submissions expressing that modern slavery risks and vulnerabilities should be considered in the context of people with disability.⁵¹

One submission noted that people with disability may face unique vulnerabilities that increase the risk of modern slavery. These vulnerabilities include dependency on care givers, barriers to getting help and a lack of awareness of the right to refuse unwanted touch and exploitive labour.⁵² Further, international

⁴⁶ Submission – Scarlet Alliance pp 9-10.

⁴⁷ Submission – Integrated Family & Youth Service and Project Paradigm pp 2-4; Submission – International Justice Mission pp 5-6; Submission – Australian Human Rights Commission pp 6-7; Submission – Destiny Rescue Australia pp 8, 12-13; Submission – Dr Marika McAdam pp 6-7.

⁴⁸ *GLTIP 2022* (n 32) 71.

⁴⁹ Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights and United Nations Women, *Guidance Addressing Emerging Human Trafficking Trends and Consequences of the COVID-19 Pandemic* (Report, 30 July 2020) 29.

⁵⁰ Submission – International Justice Mission p 5.

⁵¹ Submission – Dr Linda Steele; Submission – People with Disability Australia; Submission – Inclusion Australia pp 2-4; Consultations.

⁵² Submission – People with Disability Australia.

research has identified that perpetrators of trafficking in persons exploit a variety of factors in relation to people with disability, including functional difficulties; need for assistive devices; socio-economic difficulties; and social and therapeutic needs.⁵³ This research also suggests that traffickers may exploit service needs (such as therapy, rehabilitation, healthcare) and promise people with disability the opportunity to earn a living.⁵⁴ These vulnerabilities are considered further in subsequent sections of this Report.

Australia's Disability Strategy 2021-31 is Australia's overarching policy framework that provides leadership towards greater inclusion of people with disability across all levels of government. The Safety, Rights and Justice Outcome Area of the Strategy aims to ensure the rights of people with disability are promoted, upheld and protected, and people with disability feel safe and enjoy equality before the law. This includes a policy priority that people with disability are safe and feel safe from violence, abuse, neglect and exploitation. To drive action under the Outcome Area, the Safety Targeted Action Plan sets out actions being taken by the Commonwealth and states and territories.

Migrant worker exploitation

Two submissions to the Targeted Review emphasised the particular vulnerabilities of migrant workers to exploitation and abuse in the workplace, including debt bondage and other forms of modern slavery.⁵⁵ The issue of migrant worker exploitation has prominently featured in Australian discourse over recent years, including in the media and in submissions to the 2017 Joint Standing Committee on Foreign Affairs, Defence and Trade inquiry into establishing a Modern Slavery Act in Australia '*Hidden in Plain Sight*'.⁵⁶ The Grattan Institute's 2023 report on the exploitation of migrant workers in Australia found that 'recent migrants are twice as likely as long-term residents to be underpaid, and up to 16 per cent of recent migrants are paid less than the national minimum wage.'⁵⁷ The particular vulnerabilities of migrant workers in Australia, such as temporary visa status, rural, regional and remote locations with limited access to support, and a lack of awareness of Australian workplace laws and legal protections amongst some workers, have been reported internationally.⁵⁸

The Coalition Against Trafficking in Women Australia's submission highlighted examples of migrant workers being trafficked into the sex work industry—particularly women from southeast Asian nations or the Republic of Korea.⁵⁹ The submission further referred to studies that suggest 'vulnerable populations of women are targeted by the sex industry, raising concerns around debt-bondage, consent, and a lack of

⁵³ Caroline Jagoe, Pei Ying Natalie Toh and Gillian Wylie, 'Disability and the Risk of Vulnerability to Human Trafficking: An Analysis of Case Law' (2022) *Journal of Human Trafficking* 1, 1 and 9.

⁵⁴ Ibid.

⁵⁵ Submission – Australian Human Rights Commission p 10; Submission – Be Slavery Free p 4.

⁵⁶ Brendan Coates and Tyler Reysenbach, 'Migrant workers should also get a fair day's pay', *The Daily Telegraph* (Sydney, 6 June 2023); Nassim Khadem, 'One in six migrants workers are 'exploited', but many Australians are also paid below the national minimum wage', *ABC News* (online, 23 May 2023) <<https://www.abc.net.au/news/2023-05-23/one-in-six-migrant-workers-paid-below-the-national-minimum-wage/102383332>>; Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia* (Final Report, December 2017) 58 [3.103] ('*Hidden in Plain Sight*').

⁵⁷ Brendan Coates, Trent Wiltshire, and Tyler Reysenbach, *Short-changed: How to stop the exploitation of migrant workers in Australia* (Report, 23 May 2023) 13.

⁵⁸ United States of America Department of State, *2022 Trafficking in Persons Report* (Report, July 2022) 98 ('*US TIP Report 2022*').

⁵⁹ Submission – Coalition Against Trafficking in Women Australia p 3.

support for victims to exit the sex industry'.⁶⁰

Federal, state and territory governments across Australia have responded with a range of reforms and measures to prevent and respond to migrant worker exploitation. At the federal level, the Australian Government is implementing commitments made at the 2022 Jobs and Skills Summit to bring forward a package of reforms to address migrant worker exploitation. In June 2023, the Government announced a package of measures to target employers who seek to exploit temporary visa holders, and to ensure workers can speak up without fear of reprisal. These measures include making it a criminal offence to coerce a person into breaching a visa condition, introducing prohibition notices to stop employers from further hiring people on temporary visas where they have exploited migrants, increasing penalties and new compliance tools to deter exploitation, and repealing section 235 of the Migration Act, which actively undermines people reporting exploitative behaviour.⁶¹ The Government also announced a new Deed and Guidelines for the Pacific Australia Labour Mobility (PALM) scheme, designed to enhance safeguards that support regular income, including 'minimum hours requirements, ensuring pay parity with domestic workers and greater transparency around accommodation costs and other deductions'.⁶²

Under the National Action Plan, the Australian Government is also undertaking a Targeted Review of Australia's visa framework to identify and reduce vulnerabilities to modern slavery. This will be complemented by broader reviews and reforms to Australia's migration system that are underway. In April 2023, the Government released an outline of its migration strategy, *A Migration System for a More Prosperous and Secure Australia*, for consultation, including with state and territory governments and key stakeholders such as unions, business groups and civil society, with a view to releasing the final strategy later in 2023.

At the state and territory level, the Queensland and Victorian governments have implemented a range of law reforms relating to wage theft, including in relation to unfair payment practices such as unlawful deductions, which can constitute debt bondage in certain circumstances. Two submissions to the Targeted Review noted that duplication and overlap between laws can complicate investigation, prosecution and sentencing, as well as inconsistent penalties and other issues, suggesting further consideration of Division 270 should take place as part of a broader assessment of all legislation addressing labour exploitation in Australia.⁶³

Forced marriage

The AFP received 84 reports of forced marriage in the 2021-22 financial year, making it the most reported offence type under Divisions 270 and 271.⁶⁴ The Global Estimates of Modern Slavery also reported that the number of men, women and children living in forced marriages has risen globally, with an overall increase of 6.6 million persons between 2016 and 2021.⁶⁵

⁶⁰ Submission – Coalition Against Trafficking in Women Australia p 4.

⁶¹ The Hon Clare O'Neil MP, the Hon Tony Burke MP and the Hon Andrew Giles MP, 'Albanese Government to tackle worker exploitation' (Media Release, 5 June 2023).

⁶² The Hon Tony Burke MP and the Hon Pat Conroy MP, 'Enhanced Protections and Safeguards for PALM Scheme Workers' (Media Release, 5 June 2023).

⁶³ Submission – Australian Human Rights Commission pp 11-12; Submission – Dr Marika McAdam p 11.

⁶⁴ Submission – Australian Federal Police p 3.

⁶⁵ *Global Estimates* (n 29) 61.

A number of submissions to the Targeted Review discussed forced marriage practices in Australia and highlighted some of the distinct features of forced marriage.⁶⁶ These included the age and vulnerability of victims and survivors, the types of coercion that can take place, the family and cultural dimensions at play, and the support and protection needs of victims and survivors.

The Targeted Review also received feedback about practices connected to forced marriage that are not currently criminalised in Australian law. Stakeholders raised concerns about people being forced to remain in a marriage and highlighted the ongoing coercion and harm that can occur in a forced marriage.⁶⁷ These submissions noted that Australia's forced marriage offences are point-in-time offences that focus on the act of marriage, and may not apply to conduct at other points in time. The AFP's submission further raised questions about the ability of Australia's current criminal offence framework to apply to acts in preparation for a forced marriage.⁶⁸

Australia's forced marriage offences are discussed in further detail in the section titled 'Forced marriage' in Part 5: Division 270—Slavery and slavery-like practices.

Exit trafficking

In recent years, reports of exit trafficking, which the AFP classifies as a subset of trafficking in persons, have increased at a faster pace than many other forms of modern slavery. In 2021-22, reports of exit trafficking increased 131% from the previous financial year (37 reports in 2021-22 compared to 16 in 2020-21).

Australia is primarily understood to be a destination country for trafficking—meaning that victims and survivors are trafficked into Australia. Australia's destination country status reflects a range of factors including Australia's high standard of living, wages and employment opportunities relative to many places in the world. Victims and survivors can be coerced, threatened or deceived to come to Australia with false promises about work and a better life.

While Australia remains a destination country for trafficking, the rise in exit trafficking cases demonstrates a shift in reported cases, with victims and survivors being coerced, threatened or deceived into leaving Australia and subsequently being exploited. A number of exit trafficking reports to the AFP relate to forced marriage cases, where a victim and survivor is taken offshore to be forcibly married. However, the AFP has also reported other circumstances where a victim and survivor is taken out of Australia, including for purposes not currently within Australia's definition of exploitation (such as forced genital mutilation/cutting, forced conversion therapy, to abandon a spouse or child offshore as a way of ending a relationship or avoiding caring duties, and more). The below case study provides an example of this.

Case study⁶⁹

A man from regional Australia allegedly deceived his wife into travelling overseas in mid-2021. While overseas, the woman allegedly received a series of text messages from her husband informing her that he

⁶⁶ Submission – Confidential 3 pp 9-10; Submission – Confidential 4, pp 4-11; Submission – Australian Federal Police pp 13-15; Submission – Australian Human Rights Commission pp 9-10; Submission – Lighthouse Foundation.

⁶⁷ Submission – Confidential 4 pp 4-5, Submission – Australian Federal Police p 14.

⁶⁸ Submission – Australian Federal Police pp 13-14.

⁶⁹ Australian Federal Police, 'Victorian man charged over exit trafficking, blackmail offences' (Media Release, Thursday 8 June 2023).

was divorcing her and that she was not permitted to return to Australia. The woman allegedly had no indication when she departed Australia that the man wished to end their marriage.

In December 2021, the alleged victim managed to fund her return travel to Australia. When she returned to the home she had shared with her husband, she allegedly found all of her belongings had been removed. It is also alleged that, after the woman returned to Australia, the man tried to blackmail her by sending her messages demanding money for visa costs and threatening to have her deported if she did not comply.

The AFP's submission explained that, in these cases, a person may be coerced to travel outside Australia, lured under the pretext that the trip is a holiday, but they are then prevented from returning.⁷⁰ Once overseas, the person may also be exploited, or moved to a third location.⁷¹ Perpetrators may use these strategies to circumvent liability under Australian legislation and to limit AFP's investigative options.

Part 4: Division 271—Trafficking in persons discusses Australia's trafficking in persons offences in more detail.

⁷⁰ Submission – Australian Federal Police pp 12-13.

⁷¹ Submission – Australian Federal Police pp 12-13.

Part 3: Key terms

Part 3 of this Report discusses key terms relevant to offences in both Division 270 and 271, focusing primarily on ‘coercion, threat and deception.’ This section considers the definitions of these terms, with subsequent sections of this Report considering their use and operation in specific offences.

The terms ‘coercion, threat and deception’ together have their origins in the Trafficking in Persons Protocol.⁷² Article 3 of the Trafficking in Persons Protocol provides 3 elements that combine to form a trafficking in persons offence. These are:

- **the act**—being the recruitment, transportation, transfer, harbouring or receipt of a person;
- **the means** through which the act is accomplished—being the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person (emphasis added); and
- **the purpose** of the act—which must be exploitation and include at a minimum the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

These terms do not appear together in any other international treaty. However, the *ILO Convention (No.29) concerning Forced or Compulsory Labour* (ILO Forced Labour Convention) reflects similar considerations in respect of labour performed as a result of a threat or absent genuine consent. In Article 2(1) it defines ‘forced compulsory labour’ as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.⁷³

The terms coercion, threat and deception are present across both Divisions 270 and 271 as undue means that are used by perpetrators to control victims and survivors for the purpose of exploiting them.

Coercion

International guidance and comparative approaches on the definition of coercion

The term coercion is not defined in the Trafficking in Persons Protocol. However, the UNODC’s *Legislative Guide to the Trafficking in Persons Protocol* (Legislative Guide) suggests that coercion can be understood as an umbrella term that encompasses the use of physical or psychological pressure, force, or threat thereof, and includes blackmail, extortion, and other forms of unjustified demand.⁷⁴

Coercion has been defined differently in comparable jurisdictions. The US definition of coercion includes ‘threats of serious harm or physical restraint against any person’, ‘any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical

⁷² *TIP Protocol* (n 25) art 3(a).

⁷³ *ILO Convention (No.29) concerning Forced or Compulsory Labour*, opened for signature 28 June 1930, [1933] ATS 21 (entered into force 1 May 1932) art 2(1) (‘*ILO Convention*’).

⁷⁴ United Nations Office on Drugs and Crime, *Legislative Guide for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2020) 30 [99] (‘*UNODC Legislative Guide*’).

restraint against any person’ and ‘the abuse or threatened abuse of the legal process’.⁷⁵

The New Zealand definition includes abducting the person, using force in respect of the person, harming the person, or threatening the person (expressly or by implication) with the use of force in response of, or the harming of, the person or some other person.⁷⁶

Canada’s legislation does not include a definition of coercion (or other means). However, the Canadian case of *R v Sinclair* (2020) considered the type of conduct that may reasonably cause a victim and survivor to fear for their safety.⁷⁷ While not directly concerned with the definition of coercion, *R v Sinclair* highlights the range of coercive means that are relevant to establishing a trafficking case in the Canadian context. These include ‘isolation of a complainant’, ‘control of finances’, ‘limitation of movement’, ‘influence exercised over the nature and location services provided’, ‘control over advertising services’ and ‘use of social media to assert control or monitor communications with others’.⁷⁸

The UK does not use the term coercion in the *Modern Slavery Act 2015* (UK). Instead, the UK uses the terms ‘threat, force and deception’ to describe the means by which an act of trafficking in persons may be accomplished.⁷⁹

Australia’s approach

Coercion is defined in section 270.1A of the Criminal Code and includes coercion by any of the following:

- force;
- duress;
- detention;
- psychological oppression;
- abuse of power; or
- taking advantage of a person’s vulnerability.⁸⁰

Clarifying the definition of coercion—subtle forms of coercion

The Targeted Review received feedback in consultations and submissions about the subtle and nuanced forms of coercion that can take place in offending against Divisions 270 and 271. For example, the pilot Survivor Advisory Council spoke of grooming practices and the subtle ways in which perpetrators can take advantage and exploit vulnerabilities. Lighthouse Foundation and Project Respect noted that coercion can be understood as a pattern of behaviour over time and that this can be just as effective as a one-off act of force.⁸¹ The submission from Cleaning Accountability Framework also discussed subtle forms of coercion experienced in low-skilled occupations, such as pressure to work additional unpaid hours, perform work tasks in personal time, and ignore workplace and safety concerns.⁸² In particular,

⁷⁵ 18 USC § 1591(e)(2) (2018).

⁷⁶ *NZ Crimes Act* (n 10) s 98B.

⁷⁷ *R v Sinclair* (2020) ONCA 61.

⁷⁸ *Ibid.*

⁷⁹ *UK MS Act* (n 10) s 3(5).

⁸⁰ *Criminal Code Act 1995* (Cth) s 270.1A (*‘Criminal Code’*)

⁸¹ Submission – Lighthouse Foundation; Submission – Project Respect p 9.

⁸² Submission – Cleaning Accountability Framework p 7.

the submission noted that the pressure is greater and more acute for migrant workers whose immigration status may depend on their employment.

These observations are similarly reflected in the AFP's submission, which noted the difficulties in establishing a single act of threat, coercion or deception as the cause of entering into a condition of forced labour, servitude or forced marriage.⁸³ The AFP further explained that these specific events are often reinforced by prior subtle coercive actions which can have an ongoing influence over the mind.⁸⁴

This feedback highlights a desire by stakeholders to ensure Australia's definition of coercion is flexible and broad enough to capture different manifestations of coercion, including where they are subtle, nuanced and take place over time.

Australia's definition of coercion is intended to capture these subtle and nuanced forms of coercion, as highlighted in the relevant Explanatory Memorandum, which states:

Investigations into slavery and slavery-like offences have revealed that the exploitation of many victims in Australia does not involve abduction, violence or physical restraint. Rather, offenders often use **subtle, non-physical means** to obtain a victim's compliance, such as **psychological oppression**, the **abuse of power** or **taking advantage of a person's vulnerability**. In these circumstances, it has proved challenging to convince juries that the offender's conduct constitutes the offence. The new definition of coercion is intended to be a **non-exhaustive list** capturing both **physical and non-physical coercive conduct**, including more **subtle means** by which offenders obtain a victim's compliance (emphasis added).⁸⁵

The definition is intended to be broad enough to capture the subtle and nuanced acts highlighted in submissions to the Targeted Review, including grooming, intimidation, bullying and controlling behavior that diminishes autonomy. The use of the term 'including' in the definition of coercion also supports a broad reading of the different ways a person can be coerced.

While Australia's definition of coercion is flexible and broad, the Targeted Review received feedback in both consultations and submissions that indicated varied interpretations of the definition. While the definition of coercion can capture subtle and nuanced forms of coercion, cases that have progressed through the criminal justice process to the point of conviction have also involved overt and obvious forms of coercion. Further, there is a concern that frontline officials and criminal justice practitioners may not recognise subtle or nuanced forms of coercion as falling within the scope of the definition of coercion for the purpose of establishing an offence. Additional guidance and training on the meaning of coercion may help build a more consistent interpretation and application of the term.

Coercion is also being considered by the Australian Government in other contexts. In a family and domestic violence context, coercive control involves perpetrators using abusive behaviours in a pattern over time in a way that creates and maintains power and dominance over another person or persons. Perpetrators may use physical or non-physical abusive behaviours, or a combination of both.

There is currently no shared national understanding of coercive control and the Australian Government and

⁸³ Submission –Australian Federal Police p 12.

⁸⁴ Submission –Australian Federal Police p 12.

⁸⁵ Explanatory Memorandum, Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (Cth) 9-10 ('Explanatory Memorandum Crimes Legislation Amendment 2012')

state and territory governments are working together to develop National Principles to Address Coercive Control (the National Principles), which will outline a common understanding of coercive control and its impacts. The National Principles are aimed at raising awareness of coercive control, informing more effective responses to family and domestic violence, and promoting more consistent support and safety outcomes for victims and survivors. Work to develop the National Principles may also inform strengthened understanding of how coercion can manifest in trafficking in persons, slavery and slavery-like practices, in certain circumstances.

However, coercive conduct in the modern slavery context can differ, as modern slavery crimes also involve relationship dynamics beyond those in a familial or domestic setting. For example, an employer may use coercive conduct to keep a victim and survivor in conditions of servitude or forced labour. Any guidance and training material developed should adopt a nuanced understanding of coercion and how it applies and manifests in the context of Divisions 270 and 271.

Clarifying the definition of coercion—‘abuse of power’ or ‘taking advantage of a person’s vulnerability’

In the Trafficking in Persons Protocol, ‘abuse of power’ or of a ‘position of vulnerability’ are standalone concepts, rather than a subset of coercion.⁸⁶ The UNODC has expressed the view that these terms can capture conduct involving ‘less direct “means” by which individuals are moved into or maintained in situations of exploitation’.⁸⁷

Fiona David and Olivia Hicks’ submission raised a concern that Australia’s approach of subsuming ‘abuse of power’ and ‘taking advantage of a person’s vulnerability’ into the definition of coercion narrows the meaning of these terms.⁸⁸

The Targeted Review has considered this issue and agrees that locating ‘abuse of power’ and ‘taking advantage of a person’s vulnerability’ within the definition of coercion means that the statutory interpretation of these terms will be limited by the ordinary meaning of the term ‘coercion’. It would still be necessary to demonstrate that the victim and survivor was coerced, which takes the ordinary meaning of ‘restrain or constrain by force, law, or authority; force or compel, as to do something.’ Taking ‘abuse of power’ and ‘taking advantage of a person’s vulnerability’ out of the definition of coercion and separately including them as standalone means would broaden their application in the legislation.

Vulnerability in the context of Division 270 and 271 has been considered by the courts and can include both personal and situational vulnerability. The below case study provides an example of this.

Case study

In *R v Pulini* [2019] QCA 258, the Queensland Court of Appeal considered the meaning of ‘coercion’ in the Criminal Code. Ms RM was a Fijian woman who had come to Australia to work as a ‘domestic servant’ of the Pulinis. The Pulinis had taken her passport, on the purported basis that Mr Pulini’s ‘contact in the Immigration Department needed it to try and arrange [a] long term visa’. Ms RM’s tourist visa expired, but

⁸⁶ *TIP Protocol* (n 25) art 3(a).

⁸⁷ United Nations Office on Drugs and Crime, *Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons* (Issue Paper, April 2013) 19 (*‘Abuse of a position of vulnerability and other “means”’*).

⁸⁸ Submission – Fiona David and Olivia Hicks p 3.

her passport was not returned, on the basis the Pulinis were concerned that if Ms RM had to leave Australia she would not be allowed back. She was paid very low amounts (\$150 to \$250 per fortnight) for her work.⁸⁹

Justice Morrison stated the relevant component of the definition of ‘coercion’ was ‘taking advantage of a person’s vulnerability’.⁹⁰ His Honour noted ‘both situational ([Ms RM’s] unlawful status, continued deception and absence of a visa) and personal vulnerabilities (her fears of the authorities and the Pulinis, poor financial resources and personal vulnerability)’.⁹¹ Justice Morrison found that the acts of the Pulinis ‘involved coercion through an abuse of power and by taking advantage of Ms RM’s vulnerability’.⁹²

The Targeted Review suggests that the terms ‘abuse of power’ and ‘taking advantage of a person’s vulnerability’ could be included as separate forms of means alongside coercion, threat and deception to give fuller effect to the terms.

Finding 1

The terms ‘abuse of power’ and ‘taking advantage of a person’s vulnerability’ are within the definition of coercion in section 270.1A of the Criminal Code. Removing these terms from the definition of coercion, and establishing them as standalone means alongside coercion, threat and deception, would broaden the scope of the terms. Explanatory materials for any amendments to the definition could also support more consistent interpretation and application of the definition in the criminal justice process. Guidance could include examples of how coercion can manifest in different offences under Divisions 270 and 271.

Threat

Threat is included in a number of the modern slavery offences in Division 270 including servitude, forced labour and forced marriage. Threat is also expressly included in the trafficking offences in Division 271, in subsections 271.2(1) and (1A), and 271.5(1).

Threat is defined in section 270.1A of the Criminal Code to mean ‘a threat of coercion, or a threat to cause a person’s deportation or removal from Australia, or a threat of any other detrimental action, unless there are reasonable grounds for the threat of that action in connection with the provision of labour or services by the person’.⁹³ This includes a threat ‘made by any conduct, whether express or implied and whether conditional or unconditional’.⁹⁴

The definition of threat is linked to the definition of coercion. Reading a ‘threat of coercion’ with the definition of coercion at section 270.1A means that the definition includes a threat of force, duress, detention, psychological oppression, abuse of power, or taking advantage of a person’s vulnerability.

Prior to amendment in 2013, threat was defined as ‘as a threat of force, a threat to cause a person’s removal from Australia, or a threat of any detrimental action, unless there are reasonable grounds for the threat of that action’.⁹⁵ The amended definition of threat is intended to capture the more subtle and

⁸⁹ *R v Pulini* [2019] QCA 258 [71] (*‘Pulini’*)

⁹⁰ *Ibid* [72].

⁹¹ *Ibid* [73].

⁹² *Ibid* [80]. See his Honour’s analysis of the facts: [74]–[79].

⁹³ *Criminal Code* (n 80) s 270.1A.

⁹⁴ *Ibid*.

⁹⁵ Explanatory Memorandum Crimes Legislation Amendment 2012 (n 85) 12.

non-subtle means to obtain a victim's compliance.⁹⁶

Threats to third parties

International guidance highlights that in the context of trafficking in persons, threats can be both to a person (the victim and survivor) or to third parties (such as a family member of the victim and survivor).⁹⁷ For example, a person may be recruited through threats of violence to a family member or other person.⁹⁸

In line with this guidance, Dr Marika McAdam's submission highlighted the importance of capturing threats to third parties.⁹⁹ Dr Marika McAdam provided examples of threats made to denounce a friend or family member to authorities, to show sexual abuse material to a victim and survivor's family, and to cause the deportation of a third party related to the victim and survivor.¹⁰⁰

Divisions 270 and 271 do not take a uniform approach to defining threat to include threats to third parties. Servitude, forced labour and forced marriage offences in Division 270 contain explicit provisions that clarify threats can be directed at the victim and survivor or another person.¹⁰¹ However, there is no equivalent provision for the trafficking offences in Division 271.

The definition of threat in Division 271 (see section 270.1A) includes a threat of *any other detrimental action*, unless there are reasonable grounds for the threat of that action in connection with the provision of labour or services by a person. This only requires proof that the defendant made a threat and that the threat resulted in the defendant procuring the victim and survivor's compliance. The definition does not require the threat to be directed to the victim and survivor.

Nonetheless there may be benefit in clarifying that the definition of threat includes threats made to third parties in relation to the Division 271 offences. As highlighted in the examples provided above, trafficking offenders can direct threats to the family members or other third parties related to the victim and survivor in order to obtain the victim and survivor's compliance.

Finding 2

Threats to third parties are not dealt with consistently in Divisions 270 and 271. Legislative amendments could clarify that threats to third parties are also captured in the Division 271 offences.

Deception

Divisions 270 and 271 of the Criminal Code contain a number of offences that include deception as an element of the offence. The definition of deceive (and corresponding meaning of deception) at section 271.1 currently requires a person to engage in conduct (whether by words or other actions) that deceives another person, meaning to 'mislead as to fact (including the intention of any person) or as to

⁹⁶ Ibid.

⁹⁷ *UNODC Legislative Guide* (n 74) 30 [98].

⁹⁸ Ibid.

⁹⁹ Submission – Dr Marika McAdam p 4.

¹⁰⁰ Submission – Dr Marika McAdam p 4.

¹⁰¹ *Criminal Code* (n 80) ss 270.4(2), 270.6(2) and 270.7A(3).

law, by words or other conduct'.¹⁰²

Deception by omission, where a person deceives another by failing to provide them with particular critical and/or relevant information, is not explicitly captured in this definition. In some (though likely limited) circumstances, this may result in a person deceiving another person by failing to provide critical information (such as whether proposed entry into Australia is legal, or the extensive costs involved) without attracting criminal liability.

While the exact wording and language differs, there is a relatively consistent understanding of what actions constitute 'deception' in Australian law, being a misleading of one person by another through deliberate misrepresentation. The exclusion of omissions from the definition of deception in Division 270 and 271 is in accordance with the usual approach to omissions in Australian criminal law. In common law systems, omissions to act do not generally create criminal liability. This is distinct from civil law systems, where omissions are more frequently criminalised. A legal obligation to act, however, may be created in Australian law either by explicitly stating that a person must do something, or by laws stating that a particular omission is a criminal offence. For example, in section 81 of the *Crimes Act 1958* (Vic), deception is defined in the context of obtaining property from a computer system by deception as including 'an act or thing done or *omitted to be done*' (emphasis added).¹⁰³

There was support in submissions for the explicit inclusion of omissions in the definition of deception for the purposes of Divisions 270 and 271, with 7 submissions supporting inclusions along these lines.¹⁰⁴ One submission did not support such a change.¹⁰⁵

Submissions to the Targeted Review provided a number of examples of how victims and survivors may be deceived through the omission of information, including failing to inform them of:

- a location of work;
- a clear job description or conditions of work;
- accumulative costs that are expected to be repaid;
- expectations they will pay running /travel costs;
- relevant rights and entitlements under Australian law;
- the duration or legality of work;
- living conditions;
- wages or interest rates on loans; or
- visa eligibility, requirements or conditions.¹⁰⁶

Ensuring deceptive omissions are effectively criminalised ensures that methods commonly employed by

¹⁰² *Criminal Code* (n 80) s 271.1.

¹⁰³ *Crimes Act 1958* (Vic) s 81.

¹⁰⁴ Submission – Dr Marika McAdam p 3; Submission – Dr Damien Huffer and Dr Nilda Garcia p 2; Submission – Cleaning Accountability Framework pp 8-9; Submission – Destiny Rescue Australia p 16; Submission – Project Respect p 9; Submission – Australian Federal Police p 15; Submission – Fiona David and Olivia Hicks p 2.

¹⁰⁵ Submission – Scarlet Alliance p 12.

¹⁰⁶ Submission – Confidential 5 p 5; Submission – Dr Marika McAdam p 3; Submission – Fiona David and Olivia Hicks p 2; Submission – Dr Damien Huffer and Dr Nilda Garcia p 2.

perpetrators to obtain compliance and circumvent the law are brought fully within the purview of the criminal law.

Explicitly including omissions in the definition of deception would capture circumstances where there is insufficient evidence that an offender's words or conduct alone have deceived the victim and survivor. For example, as above, in the course of recruitment a person may consciously omit key information about an employment arrangement, such as a person's restriction of movement. Difficulties may arise in establishing whether this conduct falls within the definition of 'deception', particularly if the offender did not provide false information and/or infer that the person's movement would be restricted. The inclusion of deception by omission would assist with capturing conduct that is known and intentionally (or recklessly) not communicated by the offender.

However, it should be noted that the explicit inclusion of deception by omission in the context of the Division 270 and 271 offences would not capture cases where a person has had no interaction with the victim and survivor but is aware of critical information concerning the victim and survivor (for example, the person overhears information that the victim and survivor will be subjected to forced labour but had no prior or other interaction with the victim and survivor and does not tell the victim and survivor this information). This is because all the offences include an 'act' or 'conduct' element that involve actions being performed or words being spoken by the offender in respect of the victim and survivor. For example, deception by omission may capture circumstances where a person has provided some information to the victim and survivor, but also intentionally (or recklessly) omitted critical information to deceive the victim and survivor for the purpose of exploitation.

While a number of submissions supported expanding the definition of deception to include deception by omission, some risks should be considered. One submission noted the difficulties in trying to prove and prosecute deception by omission and the potential to re-traumatise victims and survivors during the prosecution process.¹⁰⁷ Further, there could be a risk of over-criminalisation as there is only limited guidance material available regarding what information does or does not actually need to be provided for the purposes of each relevant offence under Division 270 and 271.

However, these risks could be mitigated through the inclusion of relevant safeguards. For example, the offences could include a requisite fault element—that is, that the person actually intended (or was reckless) to deceive in failing to provide information. Similarly, the inclusion of an 'intention to exploit' element would require that the person intended to exploit another person in failing to provide them with information. These safeguards would mean that inadvertent failures to provide critical information are not criminalised, but the general onus to otherwise provide all critical information would remain.

Finding 3

Amendments to the definition of deception in section 271.1 would clarify that it can include deception by omission where a person has intentionally or recklessly suppressed facts, or failed to provide information. Any such amendments should be appropriately targeted to mitigate risks of over-criminalisation or of establishing new obligations that are not intended or already established in law. Options to target amendments could include introducing a fault element of intention (or recklessness) to both deceive by omission and to exploit.

¹⁰⁷ Submission – Scarlet Alliance p 13.

Modern slavery

The Modern Slavery Act defines modern slavery as conduct which would constitute an offence under Division 270 or 271 of the Criminal Code, an offence against one of those Divisions if the conduct took place in Australia, trafficking in persons as defined in the Trafficking in Persons Protocol, or the worst forms of child labour as defined in the *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*.¹⁰⁸ The term modern slavery is not used in Divisions 270 or 271 of the Criminal Code.

The recent statutory review of the Modern Slavery Act noted that the title of the Act could give the misleading impression that it deals with modern slavery more broadly, rather than related supply chain transparency.¹⁰⁹ The review report also recommended that the Government initiate discussion with domestic and international governments on options for defining ‘modern slavery’ for the purpose of mandatory reporting laws, with a view to increasing consistency.¹¹⁰ The review did not consider the lack of reference to the term ‘modern slavery’ in the Criminal Code.

The Targeted Review does not consider there is benefit in inserting a definition of modern slavery into the Criminal Code at this time, particularly given the lack of agreed meaning across jurisdictions. The Targeted Review also did not receive any submissions suggesting such a change. However, to make clearer that Divisions 270 and 271 form Australia’s core criminal law response to modern slavery, there could be merit in incorporating the term into the titles of those Divisions. Such a change would also be consistent with use of the term in the National Action Plan, which refers to conduct criminalised in those Divisions.

Finding 4

Incorporating the term modern slavery into the titles of Divisions 270 and 271 of the Criminal Code could make it clearer that the offences in those Divisions are a key part of Australia’s response to modern slavery. Close consideration should be given to ensuring such changes complement and do not give rise to inconsistency with the Modern Slavery Act.

Irrelevance of consent

The Targeted Review Discussion Paper sought feedback on whether the principle of irrelevance of consent was adequately enshrined in Divisions 270 and 271 of the Criminal Code. Nine submissions responded to this question, with a broad range of views and recommendations on measures to further enshrine the principle.¹¹¹ However, the major concern amongst submitters on the irrelevance of consent is that consent is being considered as a factor in sentencing. This issue was also raised during consultations.

¹⁰⁸ *Modern Slavery Act 2018 (Cth)* s 4.

¹⁰⁹ Professor John McMillan AO, *Report of the statutory review of the Modern Slavery Act 2018 (Cth): The first three years* (Report, 25 May 2023) 40-41.

¹¹⁰ *Ibid* 49.

¹¹¹ Submission – Dr Marika McAdam; Submission – Dr Peta-Jane Secrett; Submission – Dr Damien Huffer and Dr Nilda Garcia; Submission – Coalition Against Trafficking in Women Australia; Submission – Confidential 4; Submission – Australian Human Rights Commission; Submission – Maritime Union of Australia; Submission – Integrated Family & Youth Service and Project Paradigm; Submission – Project Respect.

International guidance on the principle

Article 3(b) of the Trafficking in Persons Protocol provides that where an offender uses means such as coercion, threat or deception (the means element), any apparent consent by victims to their own exploitation shall be irrelevant.¹¹² In cases of trafficking in children, the ‘means’ element of the offence does not apply and so the apparent consent of a child is always irrelevant to establishing that an offence has taken place.¹¹³

The UNODC’s Legislative Guide outlines how the principle was borne out of concerns expressed regarding the relevance of consent where, for example, the victim did consent to an aspect of the trafficking process such as to ‘migrate to work in another country, carry false documents, enter a country illegally or to engage in prostitution’.¹¹⁴ The Legislative Guide outlines that during negotiations of the text of the Trafficking in Persons Protocol, most delegations agreed that consent should not be relevant to whether the victim had, in fact, been trafficked.¹¹⁵

Australia’s approach

Divisions 270 and 271 specifically address the issue of consent. For example, section 270.11 provides that ‘it is not a defence in a proceeding for an offence against this Division that a person against whom the offence is alleged to have been committed consented to, or acquiesced in, conduct constituting any element of the offence.’ This is repeated at section 271.11B, applying to offences in Division 271.

The UNODC notes that consent is not stated to be irrelevant in Australian law in its *Issue Paper on the Role of Consent in the Trafficking in Persons Protocol* (UNODC Issue Paper on Consent).¹¹⁶ However, the UNODC further states the ‘consent is not a defence’ approach was justified in Australia’s context and did not derogate from the application of an objective test as to whether the person had been exploited.¹¹⁷

Since the introduction of these sections in 2013, the issue of consent in Divisions 270 and 271 has been considered in only a few cases and in very little detail. In *Grey v The Queen (No 2)*, Loukas-Karlsson J referred to consent not being a mitigating factor in sentencing. However, a lack of consent may have led to the offender facing more serious charges:

With regard to the first item above, the Agreed Facts do not suggest that the victim was an unwilling participant. However, as the Crown submitted to the sentencing judge, the question of consent is not an element of the offence and is in no way a mitigating factor. It is expressly excluded as a defence by section 271.11B of the Cth *Criminal Code* and had there been a lack of consent, the appellant may have been facing more serious charges.¹¹⁸

¹¹² TIP Protocol (n 25) art 3(b).

¹¹³ Ibid art 3(c).

¹¹⁴ UNODC Legislative Guide (n 74) 39 [145].

¹¹⁵ Ibid 39 [146].

¹¹⁶ The UNODC Issue Paper on Consent states ‘consent is not stated to be irrelevant; rather the provisions make clear that a victim’s consent or acquiescence is not a defence to conduct that would otherwise constitute an element of any relevant offence’: United Nations Office on Drugs and Crime, *The Role of ‘Consent’ in the Trafficking in Persons Protocol* (Issue Paper, 2014) 40.

¹¹⁷ Ibid 43.

¹¹⁸ *Grey v The Queen (No 2)* [2022] ACTCA 2.

In *R v Pulini*, Morrison JA (with McMurdo JA and Bradley J in concurrence) considered that the victim and survivor's original consent (via employment agreement) was overcome by the coercive circumstances imposed by the accused.¹¹⁹

Prior to the introduction of sections 270.11 and 271.11B, that consent should be irrelevant, in principle, to Division 270 offences was briefly touched upon in the High Court of Australia case of *R v Tang*, wherein Gleeson CJ stated:

The Appeals Chamber was right to point out that consent is not inconsistent with slavery. In some societies where slavery was lawful, a person could sell himself into slavery. Peonage could be voluntary as well as involuntary, the difference affecting the origin, but not the character, of the servitude. Consent may be factually relevant in a given case, although it may be necessary to make a closer examination of the circumstances and extent of the consent relied upon, but absence of consent is not a necessary element of the offence.¹²⁰

Similarly, Hayne J considered that whether or not the victim and survivor's consent was genuine, and whether or not it had been negated by the perpetrator, was irrelevant, as the factor for consideration was whether the victim was or was not subjected to the 'dominion' of the perpetrator so as to engage Division 270:

Accepting, as the prosecution did at the outset of the trial, that each of the women came to Australia voluntarily did not preclude the conclusion that each was possessed and used by the respondent as if owned by her ... assuming that each of the women was to be taken to have voluntarily agreed to be the subject of sale and purchase, her assent does not deny that the result of the transaction to which each agreed was her subjection to the dominion of her purchasers.¹²¹

Views expressed in submissions

One submission to the Targeted Review highlighted that consent forms an element of certain Division 270 and 271 offences.¹²² Dr Peta-Jane Secrett advocated for the replacement of references to 'consent' in Divisions 270 and 271 with other more appropriate wording.¹²³ She highlighted how 'consent' is referred to explicitly in the:

- forced marriage offence (subsection 270.7A(1)) because it must be shown that the victim and survivor entered into the marriage without 'freely and fully consenting'; and
- organ trafficking offences (paragraphs 271.7A(b), 271.11A(1)(b)) because it must be shown that neither victim nor their guardian consented to the removal of the organ.¹²⁴

She also argued that consent is considered implicitly in the Division 271 offences that refer to the use of 'coercion, threat or deception' to obtain the 'compliance of the victim'.¹²⁵

Dr Peta-Jane Secrett stated that the consideration of consent in the abovementioned offences is

¹¹⁹ *Pulini* (n 89) [65]-[69].

¹²⁰ *R v Tang* (2008) 237 CLR 1, [35].

¹²¹ *Ibid* [166]-[167].

¹²² Submission – Dr Peta-Jane Secrett pp 4-9.

¹²³ Submission – Dr Peta-Jane Secrett p 4.

¹²⁴ Submission – Dr Peta-Jane Secrett pp 4-5.

¹²⁵ Submission – Dr Peta-Jane Secrett pp 7-8.

contradictory to the irrelevance of consent principle outlined in sections 270.11 and 271.11B and, further, that defining ‘consent’ is a fraught exercise because a person deciding or choosing to do something does not equate to consenting to doing that thing.¹²⁶

The Coalition Against Trafficking in Women Australia referred to an article by Andreas Schloenhardt and Hannah Bowcock that indicates that consent continues to be raised and discussed in the case law despite its supposed irrelevance.¹²⁷ The Coalition Against Trafficking in Women Australia argued that the consideration of consent has led to potential victims of trafficking in persons not being recognised in the first instance because they are seen as consenting sex workers.¹²⁸

Some submissions also raised that greater guidance should be provided on the application of the irrelevance of consent.¹²⁹ For example, the Australian Human Rights Commission suggested that updated guidance be provided to judges about jury directions on the irrelevance of consent. In particular, it suggested such directions should note that although a victim and survivor may initially consent to certain acts in the course of being trafficked, this does not negate the culpability of the offender. The Australian Human Rights Commission also advocated for an amendment that expressly prohibits the consideration of consent, and previous sex work, as a mitigating or aggravating factor when sentencing offenders.¹³⁰

Project Respect similarly recommended that greater guidance be provided to judges, juries and police about the principle, including during the process of sentencing.¹³¹ Project Respect argued that the principle does not seem in general to be understood by police, because victims are still questioned about whether they could have left the situation or the extent to which they have consented to the exploitation.¹³²

Integrated Family & Youth Service and Project Paradigm advocated for providing greater clarity that the principle captures cases where consent may have initially been given but was not informed, and therefore is rendered meaningless by the actions or intent of the traffickers.¹³³

Dr Marika McAdam’s submission also highlighted that the irrelevance of consent principle does not address the issue that, in practice, law enforcement officials do not recognise situations of trafficking where a victim has consented.¹³⁴

A way forward

Submissions highlighted some inconsistencies in the extent to which the principle of the irrelevance of consent is understood. However, the majority did not indicate that the principle should be replaced or amended. Further, the principle continues to reinforce that an offence has been

¹²⁶ Submission – Dr Peta-Jane Secrett pp 5-6.

¹²⁷ Submission – The Coalition Against Trafficking in Women Australia p 4 referring to Andreas Schloenhardt and Hannah Bowcock, ‘Sex slaves and shrewd business women: the role of victim consent in trafficking in persons in Australia’ (2015) 39(2) *Melbourne University Law Review* 592-628.

¹²⁸ Submission – The Coalition Against Trafficking in Women Australia p 4.

¹²⁹ Submission – Australian Human Rights Commission pp 19-24; Submission – Project Respect pp 6-7.

¹³⁰ Submission – Australian Human Rights Commission pp 19-24.

¹³¹ Submission – Project Respect pp 6-7.

¹³² Submission – Project Respect p 6.

¹³³ Submission – Integrated Family & Youth Service and Project Paradigm p 5.

¹³⁴ Submission – Dr Marika McAdam p 5.

committed regardless of whether a victim and survivor agrees at any point to a form of exploitation or trafficking. Although certain submissions indicated that consent has been discussed during the sentencing of offenders, there is not a significant volume of case law that treats consent as a mitigating or aggravating factor.

At its heart, the primary issue raised in submissions has been the understanding of the principle and its application by criminal justice practitioners. In line with the recommendations in submissions, the creation of guidance material that provides clarity on the principle would be beneficial.

Finding 5

Guidance material on the principle of irrelevance of consent would support more consistent understanding and application of the principle through the criminal justice process.

AGD, with other relevant Commonwealth agencies, could also monitor cases through the criminal justice system to support timely identification of consent issues arising through the court process, including in sentencing.

Part 4: Division 271—Trafficking in persons

Part 4 of this Report is concerned with Australia’s trafficking in persons offences in Division 271, which include:

- section 271.2—trafficking in persons (8 offences);
- section 271.3—trafficking in persons—aggravated offence (one offence);
- section 271.4—trafficking in children (2 offences);
- section 271.5—domestic trafficking in persons (4 offences);
- section 271.6—domestic trafficking in persons—aggravated offence (one offence);
- section 271.7—domestic trafficking in children (one offence);
- subdivision 271-BA—organ trafficking, including domestic and aggravated offences (4 offences); and
- subdivision 271-BB—harbouring a victim, including an aggravated offence (2 offences).

In total, Australia has 23 separate offence provisions in Division 271. Despite a robust framework of offences, there have been only 8 trafficking in persons convictions between 2004 and 30 June 2022.¹³⁵

Trafficking in persons

The international framework that guides domestic responses to trafficking in persons is set out in the Trafficking in Persons Protocol. The Trafficking in Persons Protocol, which supplements the UNTOC, was adopted by the United Nations General Assembly on 15 November 2000 and opened for signature on 12 December 2000.¹³⁶ The Trafficking in Persons Protocol entered into force on 25 December 2003.¹³⁷

The purpose of the Trafficking in Persons Protocol, as set out in article 2, is to:

- prevent and combat trafficking in persons, paying particular attention to women and children;
- protect and assist the victims of such trafficking, with full respect for their human rights; and
- promote cooperation among State Parties in order to meet those objectives.¹³⁸

Article 3(a) of the Trafficking in Persons Protocol defines trafficking in persons as follows.

[T]he recruitment, transportation, transfer, harbouring or receipt of a person by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include at a minimum the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services,

¹³⁵ Attorney-General’s Department, *Targeted Review of Divisions of 270 and 271 of the Criminal Code Act 1995 (Cth) Discussion Paper*, (2022) 61 (*‘Discussion Paper’*).

¹³⁶ *TIP Protocol* (n 25) art 16(1).

¹³⁷ *TIP Protocol* (n 25).

¹³⁸ *Ibid* art 2.

slavery or practices similar to slavery, servitude or the removal of organs.¹³⁹

State Parties to the Trafficking in Persons Protocol are required, under Article 5, to ‘adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.’¹⁴⁰ Under international law, Australia is obliged to implement obligations imposed upon it by treaties to which it is a party through its domestic law and practice. There is often a margin of discretion with respect to how a State Party implements its obligations. The UNODC’s Legislative Guide states that the Protocol ‘was drafted for general purposes and addressed to governments. Thus, the level of abstraction is higher than that necessary for domestic legislation. Therefore, when drafting legislation, care should be taken not to incorporate verbatim parts of the text but to reflect the spirit and meaning of the various articles.’¹⁴¹

Australia signed the Trafficking in Persons Protocol on 11 December 2002. The Protocol entered into force for Australia on 14 October 2005. Prior to ratification, Australia made amendments to the Criminal Code to introduce new offences in Division 271 to criminalise trafficking in persons to give effect to the obligations under Articles 3 and 5 of the Protocol.¹⁴²

In 2013, the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking Act 2013* (Cth) was passed. The Act broadened the definition of exploitation to provide broad coverage for exploitation in all forms, and amended existing definitions in the Criminal Code to capture more subtle forms of coercion, including psychological oppression and the abuse of power or of a person’s vulnerability.¹⁴³

Current offences

Australia’s transnational trafficking offences at section 271.2 (trafficking in persons) criminalise organising or facilitating the entry or proposed entry, or receipt, of another person into Australia and organising or facilitating the exit or proposed exit of another person from Australia, where:

- coercion, threat or deception is used, and that use of coercion, threat or deception results in the first person (the offender) obtaining the other person’s (the victim’s) compliance in respect of the entry or exit or proposed entry or exit (subsections 271.2(1) and 271.2(1A));
- in organising or facilitating the entry or exit or proposed entry or exit, the offender is reckless as to whether the victim will be exploited (subsections 271.2(1B) and 271.2(1C));
- the offender deceives the victim about the fact that their entry or exit or proposed entry or exit will involve the provision of sexual services or exploitation or confiscation of their travel or identity documents (subsections 271.2(2)) and 271.2(2A)); or
- there is an arrangement for the victim to provide sexual services and the offender deceives the victim about a range of matters as prescribed (subsections 271.2(2B) and 271.2(2C)).¹⁴⁴

¹³⁹ *TIP Protocol* (n 25) art 3(a).

¹⁴⁰ *Ibid* art 5.

¹⁴¹ *UNODC Legislative Guide* (n 74) 12 [25].

¹⁴² *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth).

¹⁴³ Explanatory Memorandum *Crimes Legislation Amendment 2012* (n 85) 9, 34-35.

¹⁴⁴ These matters are set out at ss 271.2(2B)(c) and 271.2(2C) of the *Criminal Code*. They are: (i) the nature of the sexual services to be provided; (ii) the extent to which the other person will be free to leave the place or area where

The offences at section 271.4 similarly criminalise organising or facilitating entry or proposed entry, or receipt, of the victim into Australia and organising or facilitating the exit or proposed exit of another person from Australia, where the victim is under the age of 18 and the offender intends, or is reckless as to, whether that the other person will be used to provide sexual services or will be otherwise exploited (subsections 274.4(1) and 274.4(2)).

Section 271.5 of the Criminal Code criminalises organising or facilitating the transportation or proposed transportation of persons from one place in Australia to another. Section 271.7 criminalises organising or facilitating the transportation of children from one place in Australia to another. Other than a change in the physical element of the offence (movement within Australia as opposed to entry and exit from Australia), the circumstances in which there will be an offence under sections 271.5 and 271.7 are identical to the provisions in sections 271.2 and 271.4 respectively.

The act of trafficking in persons

The Trafficking in Persons Protocol defines trafficking with reference to 3 elements: the *act*, the *means* used to accomplish the act, and the *purpose* of the act.¹⁴⁵ The Trafficking in Persons Protocol includes 5 conduct elements that may constitute the *act* of trafficking—recruitment, transportation, transfer, harbouring, or receipt of persons.¹⁴⁶ The UNODC’s Legislative Guide describes these 5 actions as disjunctive or alternatives to one another, meaning the presence of any one suffices. The natural meaning of the terms enables a broad range of physical actions to be relevant to a trafficking in persons offence—including actions that occur online.¹⁴⁷

Trafficking in persons and the requirement for physical movement

International guidance and comparative approaches

International guidance is clear that the physical movement of a victim and survivor is not an essential requirement of trafficking in persons.¹⁴⁸ For example, the United Nations Conference of the Parties to the UNTOC noted that the ‘presence of any of those acts could mean that the offence of trafficking has been committed, even in the absence of transit or transportation’.¹⁴⁹ Published guidance from the Office of the United Nations High Commissioner for Human Rights similarly advises that trafficking in persons does not always require movement, and that movement is just one possible way that the *act* element can be satisfied.¹⁵⁰

The UK has chosen to retain movement as an essential element of the trafficking in persons offence.¹⁵¹ In the UK, a person commits an offence of human trafficking if the person ‘arranges or facilitates the travel

the other person provides sexual services; (iii) the extent to which the other person will be free to cease providing sexual services; (iv) the extent to which the other person will be free to leave his or her place of residence; (v) if there is a debt owed or claimed to be owed by the other person in connection with the arrangement for the other person to provide sexual services – the quantum, or the existence, of the debt owed or claimed to be owed.

¹⁴⁵ *TIP Protocol* (n 25) art 3.

¹⁴⁶ *Ibid* art 3(a); *UNODC Legislative Guide* (n 74) 29 [90].

¹⁴⁷ *UNODC Legislative Guide* (n 74) 29 [91]-[92].

¹⁴⁸ *Ibid* 29 [90] and 45 [168].

¹⁴⁹ United Nations Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Activities of the Working Group on Trafficking in Persons, UN Doc CTOC/COP/2010/6 (10 August 2010) 10 [55].

¹⁵⁰ United Nations Human Rights Office of the High Commissioner, *Human rights and human trafficking*, Fact sheet No. 36, 3.

¹⁵¹ *UK MS Act* (n 10) s 2(1)

of another person (“V”) with a view to V being exploited’.¹⁵² In 2018, the UK undertook a review of its *Modern Slavery Act 2015* (UK Review) and considered whether the emphasis on travel limited the application of the trafficking offence. The UK Review acknowledged that the trafficking offence did not mirror the Trafficking in Persons Protocol or the EU Directive on Human Trafficking.¹⁵³ However, the UK Review also noted the UK Government’s position that the Trafficking in Persons Protocol implicitly recognises movement in its definition of human trafficking, and the Crown Prosecution Service’s broad interpretation of travel – which could include movement over a very small space.¹⁵⁴ As such, the UK Review did not recommend amending the trafficking offence to remove the emphasis on travel.

In contrast, other comparable jurisdictions such as the US, New Zealand and Canada do not require any form of physical movement to establish trafficking offences.¹⁵⁵ Similarly, the trafficking in persons laws of Singapore, Malaysia, Indonesia and the Philippines do not require movement as an element.¹⁵⁶ The US is a particularly strong advocate for the removal of physical movement as a requirement of trafficking in persons offences. Successive US *Trafficking in Persons Reports* have recommended that Australia amend its legislation so that trafficking in persons offences do not require movement of the victim and survivor as an element of the crime.¹⁵⁷ This recommendation has also been highlighted in submissions to the Targeted Review.¹⁵⁸

Framing of Australia’s offences

Australia’s transnational trafficking offences criminalise organising or facilitating the entry or proposed entry, or receipt, of another person into Australia and organising or facilitating the exit or proposed exit of another person from Australia. Similarly, Australia’s domestic offences criminalise organising or facilitating the transportation or proposed transportation of another person from one place in Australia to another. The framing of both the transnational and domestic offences therefore makes inherent the requirement for real or proposed physical movement of a person. The relevant Explanatory Memorandum is silent on why the offences were limited to situations where a person is physically moved. However, it indicates that the offences were intended to comprehensively criminalise every aspect of trafficking in persons and fulfil Australia’s legislative obligations under the Trafficking in Persons Protocol.¹⁵⁹

Limitations of Australia’s approach

Australia’s focus on physical movement in the trafficking in persons offences may restrict the applicability

¹⁵² Ibid.

¹⁵³ Secretary of State for the Home Department, *Independent Review of the Modern Slavery Act 2015: Final Report* (Final Report, 22 May 2019) 64 [2.3.6] (*‘UK Independent Review of MS Act’*); *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA* [2011] OJ L 101/1 (*‘EU Directive 2011/36/EU’*).

¹⁵⁴ *UK Independent Review of MS Act* (n 153) 63 [2.3.5].

¹⁵⁵ *Canadian Criminal Code* (n 10) s 279.01(1); 18 USC § 1590-1 (2018); *NZ Crimes Act* (n 10) s 98D.

¹⁵⁶ *Prevention of Human Trafficking Act 2014* (Singapore) s 3; *Anti-Trafficking in Persons and Smuggling of Migrants Act 2007* (Malaysia) s 17A; *The Eradication of the Criminal Act of Trafficking in Persons Law 21 of 2007* (Indonesia) art 2(1) requires that the trafficking conduct is done for the purpose of exploiting the person in Indonesia but does not require physical movement; *Expanded Anti-Trafficking in Persons Act 2012* (Philippines) s 4(a).

¹⁵⁷ *US TIP Report* (n 58) 95 and 570.

¹⁵⁸ Submission – Project Respect p 14; Submission – Australian Human Rights Commission p 15; Submission – ZOE Foundation Australia p 4.

¹⁵⁹ Explanatory Memorandum, Criminal Code Amendment (Trafficking in Persons Offences) Bill 2005 (Cth) 2.

of the offences to situations where a person is exploited online or where they are otherwise not physically moved for the purpose of exploitation. The current framing also limits the range of conduct and actors that can be captured by the trafficking offences, by focusing on conduct that is connected to organising or facilitating physical movement. Further, the transnational trafficking in persons offences require physical movement across an Australian border. The conduct of organising or facilitating the trafficking of a victim and survivor between foreign countries or within a foreign country is not currently captured, even if the perpetrator is an Australian citizen, resident or body corporate. Australia's trafficking in persons offences have extended geographical jurisdiction (Category B) which covers conduct that occurs outside of Australia by an Australia citizen, resident or body corporate.¹⁶⁰ However, this jurisdiction is limited by the current cross-border requirement. This is further discussed in the section titled 'Jurisdiction' in this Part.

These limitations were raised in submissions and consultations for the Targeted Review, with a number of stakeholders particularly questioning the application of offences in Division 271 to online offending.¹⁶¹ For example, ZOE Foundation Australia highlighted the consequences of the physical movement requirement with reference to 3 cases involving the exploitation of children: *State of Tasmania v Devine* [2010] TASSC 17205, *State of Tasmania v DEL* [2010] TASSC 13764, and *SCN v The State of Western Australia* [2017] WASCA 138.¹⁶² Despite these cases 'looking like or reading like' child trafficking, they were prosecuted as other crimes.¹⁶³

International Justice Mission similarly stated that 'traffickers are increasingly taking advantage of new and increased accessibility of technologies to move their activities online, limiting the need for physical movement while at the same time carrying out their activities across multiple jurisdictional boundaries.'¹⁶⁴ Dr Damien Huffer and Dr Nilda Garcia further observed that many offenders find and coerce victims through social media platforms, and that this is not specifically captured in Australian law.¹⁶⁵ Similarly, Integrated Family & Youth Service and Project Paradigm highlighted that traffickers can use sophisticated schemes to exploit persons while they remain in their own neighbourhoods.¹⁶⁶

Points raised in submissions to the Targeted Review align with growing international recognition of the role of technology in trafficking in persons cases. For example, in his 2020 report, the Special Rapporteur on contemporary forms of slavery observed that technologies such as the internet, social media and smartphone apps have been used by traffickers and exploiters to buy, sell and enslave people around the world.¹⁶⁷

The UNODC has also highlighted that technology intersects with every element of the definition of

¹⁶⁰ *Criminal Code* (n 80) s 15.2.

¹⁶¹ Submission – Dr Marika McAdam pp 6-7; Submission – Dr Damien Huffer and Dr Nilda Garcia p 2; Submission – Destiny Rescue Australia p 17; Submission – International Justice Mission p 10; Submission – Project Respect p 14; Submission – Be Slavery Free pp 7-8; Consultations.

¹⁶² Submission – ZOE Foundation Australia pp 9-15.

¹⁶³ Submission – ZOE Foundation Australia p 5.

¹⁶⁴ Submission – International Justice Mission p 10.

¹⁶⁵ Submission – Dr Damien Huffer and Dr Nilda Garcia p 2.

¹⁶⁶ Submission – Integrated Family & Youth Service and Project Paradigm p 4.

¹⁶⁷ United Nations General Assembly, *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences: Contemporary forms of slavery, including its causes and consequences, 75th sess, A/75/166* (16 July 2020) [63].

trafficking in the Trafficking in Persons Protocol.¹⁶⁸ In particular, the UNODC outlines how traffickers can now access a large volume of personal information about potential victims and survivors online, in particular on social media platforms and dating applications, that enables traffickers to thoroughly profile their victims and develop targeted grooming strategies before commencing contact.¹⁶⁹ Additionally, information and communications technology can offer a mask of anonymity to traffickers who can hide behind different identities when communicating with or deceiving victims and survivors.¹⁷⁰

The UNODC's *Global Report on Trafficking in Persons 2020* describes a case in which a trafficker used separate fake identities to convey both abusive and compassionate messages to a victim and survivor to coerce them and build their trust.¹⁷¹ It also highlights cases where traffickers organised and managed the exploitation of victims and survivors through coerced performances in front of webcams that were streamed to paid customers all over the world.¹⁷²

The 2017 the Parliamentary Joint Committee on Law Enforcement inquiry into Human Trafficking, Slavery and Slavery-like Practices received submissions from International Justice Mission and the UNDOC on the increased prevalence of cybersex trafficking.¹⁷³ In its report, the Committee recommended that the Government investigate the 'adequacy of current legislative provisions and criminal offences to address cybersex trafficking' and make 'legislative amendments as necessary where current arrangements, including the provisions of the Criminal Code, are ineffectual'.¹⁷⁴

While Australia's current trafficking in persons offences capture the use of technology to organise or facilitate the physical movement of a person, they are unlikely to capture exploitation that occurs online without the proposed or actual physical movement of the victim and survivor. Technology-facilitated online child sexual exploitation and abuse may be captured by Divisions 272 and 273 of the Criminal Code, which contain child sex offences and child abuse material offences for conduct committed outside of Australia by an Australian citizen or permanent resident. Further, Division 474 contains offences for online conduct, including the use of a carriage service (such as a mobile phone or the internet) for sexual activity with a person under 16 years.

However, while this type of conduct is classed as child abuse offending in Australia, it is typically considered to be child trafficking by other jurisdictions. Further, Division 272 and 273 offences do not apply to the same conduct against adult victims and survivors, which is also often considered trafficking in persons by other jurisdictions. It is possible that state-based offences may apply to this type of conduct. However, there is currently no offence that would capture this conduct in Australia's trafficking in persons framework. Consider, for example, the below case study.

¹⁶⁸ United Nations Office on Drugs and Crime, *Successful strategies for addressing the use of technology to facilitate trafficking in persons and to prevent and investigate trafficking in persons*, UN Doc CTOC/COP/WG.4/2021/2 (23 July 2021) [9].

¹⁶⁹ *Ibid* [10].

¹⁷⁰ *Ibid* [11].

¹⁷¹ United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2020* (Report, January 2021) 121.

¹⁷² *Ibid* 122.

¹⁷³ Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *An inquiry into human trafficking, slavery and slavery-like practices* (Report, 18 July 2017) 68-69 [4.40] – [4.48].

¹⁷⁴ *Ibid* 70 [4.50]. This recommendation was supported by the Joint Standing Committee on Foreign Affairs, Defence and Trade in *Hidden in Plain Sight* (n 56) 222 [7.160].

Case study

In May 2022, a Western Australian man was convicted of 58 offences after paying over \$443,000 to sexually abuse children from Australia via live webcam in the Philippines.¹⁷⁵ He pleaded guilty to offences relating to persistent sexual contact with a child overseas (section 272.11); procuring a child for sexual activity overseas (section 272.14); engaging in sexual activity with a child overseas (section 272.9); using a carriage service to access/solicit and transmit child pornography material (section 474.19); soliciting child abuse material (section 474.22); and, possessing child abuse material obtained through a carriage service (section 474.22A).

While very serious offences did apply in this case, the conduct did not fall within the scope of Australia's trafficking in persons offences because the offender did not organise or facilitate entry or exit or transportation within the Australia. In the event the victim and survivor were an adult, there would be no Commonwealth offence available to capture the conduct. This illustrates a gap that could be addressed through amending Australia's current trafficking in persons offences in Division 271 to capture exploitation (including of adults) that occurs online without proposed or actual physical movement.

The Targeted Review also received feedback from Scarlet Alliance cautioning against new offences specifically targeting technology-facilitated conduct. Issues raised included the potential for over-criminalisation and unintended consequences that could result in the loss of digital and real-world tools that can keep individuals safe and protected from exploitation and harm.¹⁷⁶ The Targeted Review does not propose amendments that explicitly target technology-facilitated conduct or that criminalise specific forms or uses of technology, and instead suggests amendments to ensure offences are not limited to the physical movement of a victim and survivor. This will provide flexibility and ensure the offences can apply to online offending, including the online recruitment and exploitation of adults.

Addressing physical movement limitations

Reframing Australia's trafficking offences to address the current physical movement requirement would enable the offences to better capture online-based offending that does not involve the movement of the victim and survivor. Key international bodies such as the UNODC have highlighted how this form of offending has become more prevalent with advances in technology.

However, it is important that reframing of the domestic trafficking offences continues to support the jurisdictional requirements essential to their constitutional basis. The Commonwealth's power to legislate in relation to domestic trafficking in persons is limited by the legislative powers of the Australian Parliament, including those set out in section 51 of the Australian Constitution. Accordingly, section 271.11 of the Criminal Code sets out a list of jurisdictional requirements for the domestic trafficking offences.¹⁷⁷ This section provides that a person commits an offence against sections 271.5 (domestic trafficking in persons), 271.6 (aggravated domestic trafficking in persons), 271.7 (domestic trafficking in children), 271.7D (domestic organ trafficking) or 271.7E (aggravated domestic organ

¹⁷⁵ Australian Federal Police, '71 year old man jailed for live distance child abuse' (Media Release, 31 May 2022).

¹⁷⁶ Submission – Scarlet Alliance pp 9-11.

¹⁷⁷ Revised Explanatory Memorandum, Criminal Code Amendment (Trafficking in Persons Offences) Bill 2005 (Cth) 15 ('Revised EM Trafficking in Persons Bill 2005').

trafficking) only if one or more of the following conditions applies:

- the conduct constituting the offence occurs to any extent outside Australia;
- the conduct constituting the offence involves transportation across State borders, either for reward or in connection with a commercial arrangement;
- the conduct constituting the offence occurs within a Territory or involves transportation to or from a Territory;
- 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;
- some of the conduct constituting the offence is engaged in by communication using a postal, telegraphic or telephonic service within the meaning of s 51(v) of the Constitution; or
- the victim of the conduct constituting the offence is an alien for the purposes of s 51(xix) of the Constitution.

The second and third points above are particularly relevant to consideration of Australia's focus on physical movement in its trafficking in persons offences. In the context of domestic trafficking, conduct constituting the offence must involve transportation across state borders, unless it fulfils one of the other requirements in section 271.11. This excludes conduct occurring entirely within one state that might otherwise demonstrate the elements of domestic trafficking. However, as it relates to territories, the legislation captures domestic trafficking conduct that occurs both within a territory or across territory borders.

Distinguishing Division 270 from Division 271

Limited feedback to the Targeted Review did not support expanding Division 271 offences to address the current focus on physical movement. One view was that the physical movement requirement distinguishes the trafficking in persons offences from the offences of slavery and slavery-like practices in Division 270.¹⁷⁸ This view reflects the current conceptualisation of the role of the Division 271 as only targeting the transportation of a victims and survivors to a place of exploitation, and Division 270 offences as criminalising exploitation in situ.

However, trafficking in persons is concerned with the *intended* exploitation of a victim and survivor, through relevant acts and means, without that exploitation actually needing to occur. In contrast, the Division 270 offences focus on the exploitation itself and the means used to achieve this (that is, exploitation that does occur). Expanding offences in Division 271 so that they are not focused on physical movement means that more actions conducted for the purpose of exploitation would be captured—irrespective of whether the intended exploitation takes place. To the extent that this expansion captures more purpose-based (as compared to outcomes-based) exploitation, reframing offences in Division 271 would capture more conduct, including conduct that is not currently captured by Division 270 offences.

Potential overlap between Division 270 and 271 offences is discussed further in the following section, which considers that 'acts' of trafficking and proposes additional acts be included in Division 271

¹⁷⁸ Submission – Scarlet Alliance p 19.

offences.

Finding 6

Reframing Australia's trafficking in persons offences to focus less on the physical movement of the victim and survivor may better capture online-based and other offending that does not involve the movement of the victim and survivor. This could be achieved by addressing current framing that is concerned with entry or exit from Australia or movement within Australia.

Expanding the acts of trafficking in persons in Division 271

The 5 conduct elements that form the act of trafficking in the Trafficking in Persons Protocol are recruitment, transportation, transfer, harbouring, and receipt.¹⁷⁹ Australia's trafficking offences include 2 of these terms: 'transportation' and 'receipt'.

The trafficking in persons offences were inserted into the Criminal Code in 2005. The relevant Explanatory Memorandum indicates that the inclusion of the offences was motivated by Australia fulfilling its obligations under the Trafficking in Persons Protocol.¹⁸⁰ However, the Explanatory Memorandum does not expressly address why only the acts of transport and receipt were included in the offences.

Including only 2 of the terms may limit the range of conduct that can form a trafficking in persons offence in Division 271 and represents a narrower adoption of the *act* element of the Trafficking in Persons Protocol.

Recruitment

The UNODC's Legislative Guide suggests that recruitment can refer to the act of drawing a person into a process using methods including orally, through advertisements, or online through the internet.¹⁸¹ In transnational cases, recruitment can involve activities in the country of origin, of transit or of destination, involving legal or semi-legal private recruitment agencies.¹⁸²

Australia's trafficking in persons offences do not explicitly criminalise acts of recruitment. They capture conduct that involves the 'organisation or facilitation' of the victim and survivor's entry into, exit from or transportation within Australia. Certain acts of 'recruitment' will be captured in the acts of 'organising or facilitating' the transport of a victim and survivor. However, this provides only a narrow scope to consider recruitment in a trafficking in persons context.

Additional recruiting acts are captured by the Division 270 offence of deceptive recruiting for labour or services. However, this offence is intended to capture conduct relating to labour or services and is not intended to capture recruitment for the broader purposes of exploitation as defined in Division 271. It also carries a much lower maximum penalty of 7 years imprisonment, as compared to the 12-year maximum penalty attached to the Division 271 trafficking in persons offences, and 25 years where the victim and survivor is a child.

¹⁷⁹ *TIP Protocol* (n 25) art 3(a).

¹⁸⁰ Revised EM Trafficking in Persons Bill 2005 (n 177) 2.

¹⁸¹ *UNODC Legislative Guide* (n 74) 29 [92].

¹⁸² *Ibid.*

Transportation

The UNODC's Legislative Guide states that transportation covers acts by a carrier by land, sea, or air by any means or kinds of transportation. Transportation may occur over short or long distances, and within one country or across national borders.¹⁸³

Australia's trafficking in persons offences already address the act of transportation. The current offences cover entry or proposed entry, receipt, exit or proposed exit, or transportation or proposed transportation within Australia. This aligns with the UNODC's Legislative Guide.

Transfer

Transfer can refer to the transportation of a person but can also mean the handing over of effective control over a person to another.¹⁸⁴

The current Division 271 offences do not address the transfer of a victim and survivor of trafficking. The UNODC's Legislative Guide indicates that the act of 'transfer' differs from 'transportation' as it additionally refers to the handing over of effective control over a person to another.¹⁸⁵ This is particularly important in certain cultural environments where control over individuals (for example family members) may be transferred to other people.¹⁸⁶ Therefore, the act of 'transfer' can occur without the physical movement of the victim and survivor.

If the addition of 'transfer' to the Division 271 offences were intended to address any transfer of possessory or ownership rights asserted over a person, there is likely to be a degree of overlap with the concept of slave trading in section 270.3. The slavery offences criminalise intentionally engaging in slave trading or recklessly entering into a commercial transaction involving a slave or exercising control or direction over, or providing financing for, slave trading.

'Slave trading' is defined in subsection 270.3(3) of the Criminal Code to include the capture, transport or disposal of a person with the intention of reducing the person to slavery, or the purchase or sale of a slave. Slavery is defined in section 270.1 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. A possible distinction between the concepts of 'slavery' and 'transfer' of control over a person is the seriousness of conduct captured by the terms. A relationship of control between 2 individuals involving coercive behaviour may not amount to slavery because it does not involve a person exercising possessory rights or ownership over someone.

Therefore, there would be benefit to incorporating the act of 'transfer' into the trafficking offences to the extent it captures transfers of victims beyond the physical transportation of victims and survivors or the

¹⁸³ Ibid 29 [93].

¹⁸⁴ Ibid 29 [94]. We consider that the term 'effective control', as used in the UNDOC Legislative Guide, is intended to refer to a relationship of control between *individuals*. We assume that this term has a different meaning to the term 'effective control' as used in international human rights law, which refers to a relationship of control as between a *State* and an individual.

¹⁸⁵ Ibid 29 [94]. As above, we assume that the term 'effective control' as used in the UNODC Legislative Guide refers to a relationship of control between individuals, and therefore carries a distinct meaning to the term 'effective control' as used in international human rights law.

¹⁸⁶ Ibid.

act of slave trading.

Harbouring

The UNODC highlights that harbouring may refer to accommodating or holding a person at the point of departure, transit, or destination, before or at the place of exploitation. It may also refer to steps taken to conceal a person's whereabouts.¹⁸⁷

Harbouring a victim is currently criminalised in subsections 271.7F(1) and 271.7G(1) of the Criminal Code. The harbouring offences criminalise harbouring, receiving or concealing a victim while being reckless as to assisting a third person to commit (or furthering the third person's purpose in committing) a Division 270 or 271 offence. The current harbouring offences in Division 271 therefore only capture harbouring for the purposes of assisting a third party. They do not capture harbouring a victim and survivor where the offender is the person harbouring the victim and survivor and is also the person intending to exploit the victim and survivor. This could be addressed by either expanding the harbouring offence or by including harbouring as an act in the trafficking in persons offences.

Receipt

Receipt of a person is the correlative of 'transfer' and can refer to facilitating the arrival of the person, the meeting of a person at an agreed place, or the gaining of control over a person. It can also include receiving persons into employment or for the purposes of employment, including forced labour, and can apply to situations in which there was no preceding process, such as inter-generational bonded labour or where a working environment changes from acceptable to coercively exploitative.¹⁸⁸

The 'receipt' of a person is currently criminalised in Division 271 to the extent there is cross-border movement of the victim and survivor *into* Australia and the perpetrator organises or facilitates the receipt of the victim and survivor. The term receipt is not included in the exit offences or the domestic offences. Receipt is also criminalised in the harbouring offence at subsection 271.7F(1), where the perpetrator receives the victim and survivor and is reckless as to assisting or furthering a purpose of a third person who commits another offence under Divisions 270 or 271.

As set out above, the UNODC's Legislative Guide promotes a broad understanding of 'receipt' that extends beyond the physical arrival or receiving of the victim and survivor. It includes gaining control of a person, obtaining their employment, inter-generational bonded labour, and where a working environment changes from acceptable to coercively exploitative. If the trafficking offences are reframed to remove the current focus on the physical movement of the victim and survivor, the understanding of the term 'receipt' could also be expanded to include these other forms of receipt.

Overlap between the acts of trafficking—does Australia need all of the terms?

There may be overlap between certain acts of trafficking. For example, the acts of transfer and transport may overlap to the extent that they both refer to the travel or physical movement of a person. Similarly, receipt and harbouring might overlap to the extent that both terms could capture the collection of a

¹⁸⁷ Ibid 30 [95].

¹⁸⁸ Ibid 30 [96].

person after their arrival and keeping them at a place.

However, as outlined in the UNODC’s Legislative Guide, the acts are not mutually exclusive even though they are disjunctive or alternatives to one another.¹⁸⁹ Despite these overlaps, each term covers particular actions that the others do not. For example, as outlined above, the term ‘transfer’ differs from ‘transport’ as it additionally captures the handing over of *effective control* over a person. The term ‘harbour’ differs from ‘receipt’ as it additionally refers to accommodating or concealing a person prior to or during their transport to the place where they will be exploited. There is benefit to considering inclusion of all 5 acts, as they will collectively cover a broader range of conduct.

The Targeted Review acknowledges that including additional acts in the Division 271 trafficking offences will result in some overlap with Division 270 offences. For example, the expansion of the trafficking offences to include the act of ‘recruitment’ may cause a degree of overlap with the deceptive recruiting offence in section 270.7. Any expansion of the offences at Division 271 would need to be carefully considered to avoid or address unintended consequences arising from overlap with other laws, including offences at Division 270. Any potential overlap between expanded trafficking offences and existing child sexual abuse offences in the Criminal Code would also need to be considered. For example, conduct such as live streaming of child sexual abuse may fall in scope of both reframed trafficking offences and existing child sexual abuse offences.

Overlap between offences also raises questions about the practical implications for criminal justice practitioners, including police and prosecutors. Depending on the conduct, amendments to reframe Australia’s trafficking offences may result in more choice for police and prosecutors about charges to take forward. However, consultation with the AFP and CDPP indicated that multiple charging options are common in many crime types, and that this should not be an impediment to progressing reforms to strengthen Australia’s trafficking in persons offences.

International examples – other jurisdictions that include additional acts

There are examples of other jurisdictions including all 5 acts in their trafficking offences. The UK, Canada and New Zealand explicitly refer to recruiting, transferring, transporting, harbouring and receiving in their respective offences.¹⁹⁰ The offences in the US cover the 5 acts as well, although ‘provision’ is used instead of transfer and ‘obtaining’ instead of receipt.¹⁹¹ The trafficking in persons laws of Singapore, Indonesia and the Philippines also refer to all 5 acts.¹⁹²

Finding 7

Including all 5 acts from the UNTOC and its supplementary Trafficking in Persons Protocol¹⁹³ in Australia’s trafficking in persons offences—being recruitment, transportation, transfer, harbouring and receipt—would capture additional offending, including new and emerging forms of trafficking

¹⁸⁹ Ibid 29 [90]–[91].

¹⁹⁰ UK MS Act (n 10) s 2; Canadian Criminal Code (n 10) s 279.01(1); NZ Crimes Act (n 10) s 98D.

¹⁹¹ 18 USC § 1591(a) (2018).

¹⁹² Prevention of Human Trafficking Act 2014 (Singapore) s 3; The Eradication of the Criminal Act of Trafficking in Persons Law 21 of 2007 (Indonesia) art 2(1); Expanded Anti-Trafficking in Persons Act 2012 (Philippines) s 4(a).

¹⁹³ UNTOC (n 25); TIP Protocol (n 25)

conduct. Implementing this finding will need to be carefully considered to avoid or address unintended consequences arising from overlap with other laws, including offences at Division 270.

The means of trafficking in persons

Article 3 of the Trafficking in Persons Protocol outlines the 3 elements that combine to form a trafficking in persons offence—the *act*, the *means* and the *purpose*.¹⁹⁴ The second element of trafficking in persons is the means by which perpetrators accomplish the physical act.¹⁹⁵ In Australia, the trafficking in persons offences include the means of coercion, threat and deception.

Part 3 of the Targeted Review discusses the definitions of these terms. This section considers 2 additional matters. First, whether the means is an essential element of the trafficking in persons offences and second, whether the terms ‘coercion’, ‘threat’, and ‘deception’ comprehensively capture the means contemplated by the Trafficking in Persons Protocol.

Means as an element of the trafficking in persons offence

International law and guidance

The Trafficking in Persons Protocol includes the following means through which the act may be accomplished:

- threat or use of force or other forms of coercion;
- abduction;
- fraud;
- deception;
- abuse of power;
- abuse of a position of vulnerability; and
- the giving or receiving of payments to achieve the consent of a person having control over another person.¹⁹⁶

The means is a core part of the definition of trafficking in persons in international law—except where the trafficked person is a child, in which case no means are required to establish a trafficking offence.¹⁹⁷

The UNODC affirms the importance of the means element in the *UNODC Issue Paper on the International Definition of Trafficking in Persons*.¹⁹⁸ The UNODC explains that while exploitation is widely considered to be the key element of the trafficking in persons offence, the means are also an essential aspect of the definition of trafficking in adults, and exploitative conditions alone are insufficient to establish trafficking in persons.¹⁹⁹

Notwithstanding the above, State Parties to the Trafficking in Persons Protocol and UNTOC are required to

¹⁹⁴ *TIP Protocol* (n 25) art 3.

¹⁹⁵ *Ibid* 30 [97].

¹⁹⁶ *TIP Protocol* (n 25) art 3(a) and (c)

¹⁹⁷ *Ibid*.

¹⁹⁸ *International Legal Definition of TIP* (n 28).

¹⁹⁹ *Ibid* 14, 24.

adopt such legislative and other measures as may be necessary to establish the conduct set forth in article 3—that of trafficking in persons—as criminal offences.²⁰⁰ As such, States have a margin of discretion in determining which ‘legislative and other measures’ they may take to meet this obligation. When implementing the Trafficking in Persons Protocol into domestic law, State Parties have differed in their approaches to legislating the means requirement.²⁰¹ In particular, some State Parties do not expressly include the means as an element of their trafficking offence.²⁰² This approach has the effect of capturing a broader range of conduct.²⁰³

Comparative approaches

In formulating the definition of trafficking in persons in domestic law, many States have reproduced or otherwise recognised the 3 elements of the international legal definition of trafficking in persons, requiring that a trafficking act be committed by specific undue means for an exploitative purpose.²⁰⁴ However, jurisdictions including Canada, New Zealand and the UK have taken differing approaches to incorporating means into their trafficking offences.

New Zealand has included the means both in the definition of exploitation and as a core element of some of its trafficking in persons offences. For instance, paragraphs 98D(1)(a)(i) and 98D(1)(b)(i) of the *Crimes Act 1961* (NZ) do not include the means as a core element of the offence. Instead, the definition of exploitation in subsection 98D(4) requires the exploitative conduct to occur through an act of deception or coercion. However, paragraphs 98D(1)(a)(ii) and 98D(1)(b)(ii) do require the means element to establish the offence.²⁰⁵

The UK and Canada have not included means as a core element of their trafficking in persons offences. For these jurisdictions, the means are included (at least partially) in their definitions of exploitation. For example, section 2(1) of the *Modern Slavery Act 2015* (UK) provides that a ‘person commits an offence if the person arranges or facilitates the travel of another person (“V”) with a view to V being exploited.’²⁰⁶ Exploitation is then defined in subsection 3(5) as ‘securing services etc by force, threats or deception.’²⁰⁷ In this case, the means element has been incorporated into the definition of exploitation, instead of forming a separate element of the trafficking in persons offence.

The UNODC has considered the omission of the means element in domestic legislation and commented on the approach of Canada in particular. According to the UNODC, the ‘legislative purpose behind the omission of the “means” element [in the Canadian Criminal Code] is said to have been to minimise the evidentiary burden and to focus the offence on the conduct which is critical to proving trafficking in persons, namely the intent to exploit another.’²⁰⁸ The UNODC also noted that the ‘lack of legislative specificity regarding the conduct that can be relied upon to prove whether a person has exploited another person could be considered a major strength of the Canadian system, in that it can adapt to the

²⁰⁰ *TIP Protocol* (n 25) art 5(1).

²⁰¹ *International Legal Definition of TIP* (n 28) 22.

²⁰² United Nations Office on Drugs and Crime, *Model Legislative Provisions Against Trafficking in Persons* (2020) 36 (*‘Model Legislative Provisions’*); *International Legal Definition of TIP* (n 28) 22.

²⁰³ *Model Legislative Provisions* (n 202) 36.

²⁰⁴ *International Legal Definition of TIP* (n 28) 22.

²⁰⁵ *NZ Crimes Act* (n 10) ss 98D(1)(a)(ii) and 98D(1)(b)(ii).

²⁰⁶ *UK MS Act* (n 10) s 2(1).

²⁰⁷ *Ibid* s 3(5).

²⁰⁸ *Abuse of a position of vulnerability and other “means”* (n 87) 50.

facts of any given case.’²⁰⁹

Australia’s current approach

Division 271 includes means as a core element of the trafficking in persons offences at subsections 271.2(1), 271.2(1A), 271.2(2), 271.2(2A) and 271.2(2B). These offences explicitly require the presence of coercion, threat and/or deception. However, Division 271 also contains trafficking offences that only require the act and purpose, and do not include the means as an element of the offence (subsections 271.2(1B), 271.2(1C) and 271.5(2)).

While these offences do not expressly include the means element, they do include the purpose of exploitation, with exploitation then defined at section 271.1A to include undue means. The definition of exploitation at section 271.1A provides that ‘for the purposes of this Division, exploitation, of one person (the victim) by another person, occurs if the other person’s conduct causes the victim to enter into any of the following conditions’:

- slavery, or a condition similar to slavery;
- servitude;
- forced labour;
- forced marriage; or
- debt bondage.²¹⁰

These conditions (with the exception of slavery and debt bondage) are then separately defined to include coercion, threat and/or deception.²¹¹ Therefore, even where Australia’s trafficking offences do not expressly include means as an element of the offence, Australia’s definition of exploitation will still require the presence of undue means. These offences take a similar approach to the UK, Canada and New Zealand.

The organ trafficking offences at subsections 271.7B(1) and 271.7B(2) do not explicitly require the establishment of coercion, threat or deception, or any other means. However, the organ trafficking offences require the removal of the organ to be done either contrary to state or territory laws or where the victim and survivor or their guardian does not consent and the removal would not meet a medical or therapeutic need.²¹² As it relates to the removal of an organ without consent, the presence of undue means is likely. However, organ removal contrary to state and territory legislation may not require the presence of undue means. State and territory legislation regulates the removal of organs for transplantation and criminalises transplant commercialism in Australia.²¹³ All states and territories criminalise organ transplant commercialism, and provide that a contract or arrangement entered into

²⁰⁹ *Ibid.*

²¹⁰ *Criminal Code* (n 80) s 271.1A.

²¹¹ See 270.1A for the definitions of slavery, servitude, forced labour, forced marriage and debt bondage.

²¹² *Criminal Code* (n 80) ss 271.7A(a)-(b).

²¹³ *Transplantation and Anatomy Act 1978* (ACT) s 44; *Human Tissue Act 1983* (NSW) s 32; *Transplantation and Anatomy Act 1979* (NT) ss 22E-22F; *Transplantation and Anatomy Act 1979* (Qld) ss 39-42AB; *Transplantation and Anatomy Act 1983* (SA) s 35; *Human Tissue Act 1985* (Tas) s 27 and 30; *Human Tissue Act 1982* (Vic) ss 38-40; *Human Tissue and Transplant Act 1982* (WA) ss 29-30.

for this purpose will be void.²¹⁴

Means as an element of Division 271 trafficking in persons offences

The Targeted Review considered the means element as a component of the trafficking in persons offences, noting Division 271 currently includes offences that have only the act and purpose as elements of the offences, and do not include means.

Establishing the means element can be challenging, particularly where subtle forms of coercion are used. As noted in the Discussion Paper:

Investigations into trafficking in persons, slavery and slavery-like practices in Australia have shown that coercion can be subtle and nuanced (particularly psychological forms of coercion). Australian investigators have also observed that psychological forms of coercion are more common than physical forms of coercion in cases identified in Australia. However, there is limited case law to clearly indicate the thresholds at which coercion (including psychological forms of coercion) may be made out in a prosecution. There can also be limited physical evidence when psychological forms of coercion have taken place, which increases reliance on witness accounts.²¹⁵

Similarly, internationally, practitioners have experienced evidentiary challenges in prosecuting trafficking in persons offences, with challenges in part attributed to the ‘ambiguities, vagueness and imprecision’ of the definition of trafficking in persons, including the means element.²¹⁶

As already described, international guidance suggests that trafficking in persons offences that do not include the means element may still allow State Parties to meet their obligations under the Trafficking in Persons Protocol.²¹⁷ However, the international definition of trafficking in persons consists of the 3 elements of ‘act’, ‘means’ and ‘purpose.’²¹⁸ Trafficking in persons is a serious crime that undermines the dignity and liberty of its victims.²¹⁹ While State Parties may go beyond the minimum standard set in the Trafficking in Persons Protocol, it is essential to respect its purpose and spirit.²²⁰

Australia currently has offences that include all 3 elements as set out in the Trafficking in Persons Protocol, as well as separate offences that include only the act and purpose (and no means). This approach provides both a 3-element option that aligns more closely with international law, as well as the 2-element option that goes further than what is contemplated by the Trafficking in Persons Protocol.

Submissions to the Targeted Review did not raise the issue of whether the means element should be included as a core element of all Division 271 trafficking in persons offences. Further, feedback from

²¹⁴ *Transplantation and Anatomy Act 1978 (ACT) s 44; Human Tissue Act 1983 (NSW) s 32; Transplantation and Anatomy Act 1979 (NT) ss 22E-22F; Transplantation and Anatomy Act 1979 (Qld) ss 39-42AB; Transplantation and Anatomy Act 1983 (SA) s 35; Human Tissue Act 1985 (Tas) s 27 and 30; Human Tissue Act 1982 (Vic) ss 38-40; Human Tissue and Transplant Act 1982 (WA) ss 29-30.*

²¹⁵ *Discussion Paper* (n 135) 26.

²¹⁶ *International Legal Definition of TIP* (n 28) 23.

²¹⁷ *Model Legislative Provisions* (n 202) 36.

²¹⁸ *TIP Protocol* (n 25) art 3(a).

²¹⁹ *UNODC Legislative Guide* (n 74) 9 [1].

²²⁰ *International Legal Definition of TIP* (n 28) 18.

criminal justice practitioners did not raise concerns with Australia’s current approach.

Finding 8

Streamlining Australia’s large number of trafficking in persons offences would simplify Division 271. However, there would be benefit in retaining the 2-element trafficking in persons offences that do not include the means of trafficking in persons.

The different forms of ‘means’ in trafficking in persons offences

As outlined previously, the Trafficking in Persons Protocol includes the following means through which the act may be accomplished:

- threat or use of force or other forms of coercion;
- abduction;
- fraud;
- deception;
- abuse of power;
- abuse of a position of vulnerability; and
- the giving or receiving of payments to achieve the consent of a person having control over another person.²²¹

International guidance suggests there may be an overlap between some of the means in the Trafficking in Persons Protocol. For example, the UNODC’s Legislative Guide suggests that very often ‘abduction’ will involve the ‘threat or use of force’, indicating that the various means listed in the Trafficking in Persons Protocol will often overlap in practice.²²² Further, the UNODC suggests it is unclear how the ‘giving or receiving of payments to achieve consent of a person having control over another person’ differs from the ‘abuse of a position of vulnerability’ as the former involves the control over another person, which could be included in the latter.²²³ The UNODC also notes that the terms fraud and deception in some jurisdictions may be synonymous with each other.²²⁴

States have differed on the forms of means included in their trafficking in persons offences, with many not incorporating all the means stipulated in the Trafficking in Persons Protocol.²²⁵ Table 2 lists the means included in the trafficking in persons offences by Australia, Canada, New Zealand, the UK and the US.

Table 2: Means included in trafficking in persons offences

Country	Means included in trafficking in persons offences
Australia	<ul style="list-style-type: none">• threat;• coercion, which includes:

²²¹ TIP Protocol (n 25) art 3(a).

²²² UNODC Legislative Guide (n 74) 30 [100].

²²³ Abuse of a position of vulnerability and other “means” (n 87) 18.

²²⁴ UNODC Legislative Guide (n 74) 31 [101].

²²⁵ Abuse of a position of vulnerability and other “means” (n 87) 28.

	<ul style="list-style-type: none"> ○ force, duress, detention, psychological oppression, abuse of power, taking advantage of a person’s vulnerability; or ● deception.²²⁶
Canada	<ul style="list-style-type: none"> ● threat to use force or another form of coercion; ● force; ● coercion; ● deception; or ● abuse of trust, power or authority.²²⁷
New Zealand	<ul style="list-style-type: none"> ● deception, which includes: <ul style="list-style-type: none"> ○ fraudulent action; or ● coercion, which includes: <ul style="list-style-type: none"> ○ abducting the person; using force in respect of the person; harming the person; threatening the person (expressly or by implication) with the use of force in respect of, or the harming of, the person or some other person.²²⁸
United Kingdom	<ul style="list-style-type: none"> ● force; ● threats; or ● deception.²²⁹
United States	<ul style="list-style-type: none"> ● force; ● fraud; or ● coercion, which includes: <ul style="list-style-type: none"> ○ threats of serious harm to or physical restraint against any person; any scheme, plan, or pattern intended to cause a person to believe their failure to perform an act would result in serious harm or physical restraint against any person; or the abuse or threatened abuse of the legal process.²³⁰

Australia’s approach

As discussed in Part 3 of this Report, Australia uses the terms ‘coercion’, ‘threat’ and ‘deception’ to describe the means of trafficking in persons. The terms are also used in the Division 270 offences. Section 270.1A provides specific definitions for these terms, which are applicable to the offences in both Divisions 270

²²⁶ *Criminal Code* (n 80) ss 271. 2(1)-(2); see definition of coercion in *Criminal Code Act 1995* (Cth) ss 270.1A.

²²⁷ *Canadian Criminal Code* (n 10) s 279.04 (2).

²²⁸ *NZ Crimes Act* (n 10) ss 98B, 98D(1)(a)(ii) and 98D(1)(b)(ii).

²²⁹ *UK MS Act* (n 10) s 3.

²³⁰ 18 USC § 1591(e)(2) (2018); 22 U.S.C. § 7102(11)(B); 22 U.S.C. § 7102(11)(A).

and 271.

The non-exhaustive definition of coercion in section 270.1A captures both the physical and non-physical coercive means provided for in the Trafficking in Persons Protocol (use of force, abduction, abuse of power or of a position of vulnerability). The definition of 'threat' in the same section captures the threat of physical and non-physical coercive means in addition to the threat to cause a person's deportation or of any other action. The term deception is also captured in section 271.1. There is no reference to fraud as a means element in Divisions 270 or 271. However, having regard to the dictionary definition of 'fraud', the Targeted Review does not consider this a significant gap as it is largely captured by the broad definition of 'deception'.²³¹ As discussed in Part 3 of this Report, the terms 'abuse of power' and 'taking advantage of a person's vulnerability' are included within the definition of coercion, though Finding 1 of this Report contemplates establishing these as separate means for the purpose of Divisions 270 and 271.

As pointed out by one stakeholder, the means of 'giving or receiving of payments or benefits to achieve the consent of a person having control over another person' in the Trafficking in Persons Protocol is not explicitly mentioned in Division 271.²³² The UNODC's *Issue Paper on the abuse of a position of vulnerability and other "means" within the definition of trafficking in persons* provides limited guidance on the phrase. The UNODC indicates the phrase is intended to address the buying and selling of adults and children, though concludes that the precise meaning of the phrase is unclear.²³³

One submission suggested this means covers a situation where a person who has control over the victim and survivor is paid or otherwise incentivised as a means of placing them in exploitation.²³⁴ For example, a trafficked domestic worker who is transferred from one household to another on the basis of payments between households.²³⁵ The submission suggested that, in such situations, the victim and survivor themselves may not be coerced, threatened or deceived.²³⁶

In order to exert control over a person, some form of undue means would likely be present. While this conduct may involve more subtle means, Australia's broad definition of coercion, which is non-exhaustive and includes subtle forms of coercion, such as grooming, intimidation, bullying, and controlling behavior that diminishes authority, is likely capable of capturing this conduct. Therefore, the Targeted Review does not consider it necessary to explicitly include the phrase 'giving or receiving of payments or benefits to achieve the consent of a person having control over another person' as a means in Australia's trafficking in persons offences, or as part of the definition of coercion.

While some of the offences in Division 271 include all 3 terms 'coercion, threat and deception', the 3-element offences in subsections 271.2(2), (2A), (2B) and (2C) only include deception as a possible means. In refining the 3-element options, consideration should be given to including coercion, threat and deception as possible means (and any further standalone means such as abuse of power and taking

²³¹ Fraud is defined in the Macquarie dictionary online as 'deceit, trickery, sharp practice, or breach of confidence, by which it is sought to gain some unfair or dishonest advantage'.

²³² Submission – Dr Marika McAdam p 4.

²³³ *Abuse of a position of vulnerability and other "means"* (n 87) 19.

²³⁴ Submission – Dr Marika McAdam p 4.

²³⁵ Submission – Dr Marika McAdam p 4.

²³⁶ Submission – Dr Marika McAdam p 4.

advantage of a person's vulnerability, subject to the outcome of Finding 1).

The purpose of trafficking in persons

The purpose of exploitation is the third constituent element in the Trafficking in Persons Protocol.²³⁷

A number of submissions considered the role of exploitation in the current legislation.²³⁸ Submissions considered a range of issues including expanding the definition of exploitation, exploitation as a constituent element of the trafficking in persons offences, and the current terminology of sexual services.²³⁹

Definition of exploitation

The Trafficking in Persons Protocol sets out a non-exhaustive list of types of exploitation to be addressed by State parties. Article 3(a) states that exploitation shall 'include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.'²⁴⁰

In Australia, exploitation is defined in section 271.1A of the Criminal Code as slavery, or a condition similar to slavery, servitude, forced labour, forced marriage or debt bondage. The most notable difference between the definition of exploitation in the Criminal Code and the Trafficking in Persons Protocol is that the definition in the Criminal Code is exhaustive. This means that exploitative conduct that is not listed as a form of exploitation in the definition in section 271.1A will not be considered a form of exploitation for the purpose of establishing a trafficking in persons offence in Division 271.

A non-exhaustive definition of exploitation

A number of submissions recommended that the definition of exploitation be amended to a non-exhaustive definition.²⁴¹ Advocates for a non-exhaustive definition pointed to the importance of future-proofing the trafficking in persons offences to ensure the definition of trafficking can accommodate new and emerging forms of exploitation.²⁴²

Dr Marika McAdam highlighted that a non-exhaustive definition is particularly useful in capturing forms of exploitation that do not neatly fit into the specifically listed forms in the current definition and allows the definition to adapt to new and emerging forms of exploitation, without necessitating legislative amendment.²⁴³ The International Justice Mission also recommended that the definition of 'exploitation'

²³⁷ *TIP Protocol* (n 25) art 3(a).

²³⁸ Submission – Dr Marika McAdam; Submission – ReThink Orphanages Australia; Submission – Dr Damien Huffer and Dr Nilda Garcia; Submission – Cleaning Accountability Framework; Submission – Confidential 5; Submission – Integrated Family & Youth Service and Project Paradigm; Submission – The Maritime Union of Australia; Submission – Destiny Rescue Australia; Submission – Project Respect; Submission – International Justice Mission; Submission – Australian Federal Police; Submission – Fiona David and Olivia Hicks.

²³⁹ Submission – Dr Marika McAdam; Submission – ReThink Orphanages Australia; Submission – Dr Damien Huffer and Dr Nilda Garcia; Submission – Cleaning Accountability Framework; Submission – Confidential 5; Submission – Integrated Family & Youth Service and Project Paradigm; Submission – The Maritime Union of Australia; Submission – Destiny Rescue Australia; Submission – Project Respect; Submission – International Justice Mission; Submission – Australian Federal Police; Submission – Fiona David and Olivia Hicks.

²⁴⁰ *TIP Protocol* (n 25) art 3(a).

²⁴¹ Submission – Dr Marika McAdam p 5; Submission – Dr Damien Huffer and Dr Nilda Garcia p 3; Submission – International Justice Mission p 3; Submission – Project Respect p 6.

²⁴² Submission – Dr Marika McAdam p 5; Submission – Dr Damien Huffer and Dr Nilda Garcia p 3.

²⁴³ Submission – Dr Marika McAdam p 5.

be non-exhaustive to allow flexibility to capture new and emerging forms of conduct.²⁴⁴ Similarly, Project Respect advocated for a non-exhaustive definition as a way to future proof the legislation, noting present forms of trafficking may not be caught by the current definition.²⁴⁵

Amending the definition of ‘exploitation’ to make it non-exhaustive would better align Australia’s trafficking offences with international guidance, which notes that exploitation can be difficult to establish and can manifest in different ways, highlighting a need for flexibility in determining what constitutes exploitation.²⁴⁶

Including specific forms of exploitation

A number of submissions also described specific forms of exploitation that are not captured in the current definition.²⁴⁷ For example, this could include ‘exploitation of criminal activities’.²⁴⁸ This form of exploitation is explicitly included in the European Union Directive on Human Trafficking, where it is defined as being ‘the exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain.’²⁴⁹

Australia’s definition of exploitation likely already captures ‘exploitation of criminal activities’ because the forms of labour exploitation that are relevant to the definition can include both legal and illegal or irregular forms of labour and services. However, explicitly including a phrase that specifies exploitation can include exploitation in criminal activities may give greater effect to the non-punishment principle, which is discussed further in Part 6: Victim and survivor protection and support. For example, explicit inclusion may help raise awareness amongst frontline officials that victims and survivors who are forced to conduct criminal activities should be identified and treated as victims and survivors, and receive appropriate support and protection.

One submission raised concerns that the current legislation does not cover instances of sex trafficking.²⁵⁰ While sexual exploitation is not explicitly listed in Australia’s definition of exploitation, it is captured within the Division 270 offences that are listed in the definition of exploitation. These listed offences use industry-neutral language to reflect that exploitation can occur in any industry or setting. For example, the Explanatory Memorandum of the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 explains the term ‘sexual servitude’ was replaced with the term ‘servitude’ to broaden the application of the servitude offence and ensure conduct involving servitude in any industry is captured and criminalised.²⁵¹ Further, Division 271 currently includes offences that specifically criminalise trafficking where there is deceit about whether the victim and survivor will be required to provide sexual services, or the nature or extent of those services.

ReThink Orphanages Australia and Project Respect advocated for an amendment to the definition of

²⁴⁴ Submission – International Justice Mission p 3.

²⁴⁵ Submission – Project Respect p 6.

²⁴⁶ *UNODC Legislative Guide* (n 74) 33 [117].

²⁴⁷ Submission – Dr Marika McAdam p 5; Submission – Integrated Family & Youth Service and Project Paradigm p 1; Submission – Confidential 5 p 6; Submission – ReThink Orphanages Australia p 4-7.

²⁴⁸ Submission – Dr Marika McAdam p 5.

²⁴⁹ *EU Directive 2011/36/EU* (n 153).

²⁵⁰ Submission – Confidential 5 p 6.

²⁵¹ Explanatory Memorandum Crimes Legislation Amendment 2012 (n 85) 62-63.

exploitation to include, at a minimum, child sexual exploitation and abuse.²⁵² Integrated Family & Youth Service and Project Paradigm also raised concerns with the definition of exploitation, arguing that the current definition does not accurately contextualise the unique experience of child sexual exploitation and calling for a nationally consistent definition of child sexual exploitation in the child trafficking offences.²⁵³

ReThink Orphanages Australia highlighted that the sexual and economic exploitation of children is particularly prevalent in the context of orphanage trafficking and suggested the definition of exploitation should explicitly capture these forms.²⁵⁴ For example, children may be economically exploited in orphanages through their use in the solicitation of donations, child sponsorships, orphanage tourism and volunteering, or the facilitation of illicit adoptions.²⁵⁵ They may also be sexually exploited by directors and founders of orphanages who bring children into the closed environment of an institution to perpetrate sexual exploitation and abuse.²⁵⁶

Submissions raised particular concerns that the term 'sexual services' in the context of child trafficking is inappropriate, as the term is used to describe sexual services provided by an adult in a commercial context—conduct which can be lawful.²⁵⁷ One submission suggested the term 'sexual services' should be removed altogether and that sexually exploitative conduct instead could be captured within the definition of exploitation.²⁵⁸ This is further discussed in the section titled 'Child trafficking and the provision of 'sexual services'' in this Part. For similar reasons, supporting inclusion of a reference in the definition of exploitation to 'exploitation in criminal activities', explicitly including a reference to 'child sexual abuse' (or a similar appropriate term) would support awareness amongst frontline officials that victims and survivors of child sexual abuse could in fact be victims and survivors of child trafficking or offences in Division 270.

It is important that the definition of exploitation is sufficiently flexible to capture serious forms of exploitation. The Targeted Review notes that it may be impractical to amend the definition of exploitation each time a new form of exploitation emerges, and instead it is preferable to ensure the definition of exploitation is sufficiently broad to capture emerging forms of exploitation. The UK Review raised similar concerns on amending the definition of exploitation to include specific forms of exploitation. The Review noted:

'While we are in no doubt about the seriousness of new types of exploitation that have come to light since the passing of the Act, such as county lines and orphanage trafficking, it is not practical to amend legislation every time a new form of exploitation is identified'.²⁵⁹

Australia's definition of exploitation could be amended to include a non-exhaustive definition and/or a broad definition of exploitation (as discussed below) to ensure the definition is sufficiently flexible to

²⁵² Submission – ReThink Orphanages Australia pp 6-7; Submission – Project Respect p 4.

²⁵³ Submission – Integrated Family & Youth Service and Project Paradigm pp 1-4.

²⁵⁴ Submission – ReThink Orphanages Australia pp 4-7.

²⁵⁵ Submission – ReThink Orphanages Australia p 5; Submission – Confidential 1.

²⁵⁶ Submission – ReThink Orphanages Australia pp 6-7.

²⁵⁷ Submission – Dr Marika McAdam p 8; Submission – Destiny Rescue Australia p 18; Submission – Project Respect pp 14-15.

²⁵⁸ Submission – Scarlet Alliance pp 20-24.

²⁵⁹ *UK Independent Review of MS Act* (n 153) 62 [2.1.5].

capture new and emerging forms of modern slavery.

Broadening the definition of exploitation

Even if ‘exploitation’ is defined non-exhaustively, the precise interpretation of the term, beyond the specific examples listed, may be unclear without further guidance. The ordinary meaning of ‘exploitation’ may apply or it may be narrowed with reference to the context of the trafficking offences and the Criminal Code. This may create difficulties with ensuring the forms of exploitation raised by stakeholders are captured in the definition as well as capturing new and emerging forms of exploitation. The inclusion of a broad ‘catch-all’ phrase describing exploitation could provide greater flexibility and clarify how the non-exhaustive definition is intended to operate.

The UK’s definition of exploitation in subsection 3(5) of the *Modern Slavery Act 2015* (UK) provides that for the purposes of the trafficking in persons offence, a person is exploited if:

The person is subjected to force, threats or deception designed to induce him or her—

- (a) to provide services of any kind,
- (b) to provide another person with benefits of any kind, or
- (c) to enable another person to acquire benefits of any kind.²⁶⁰

In the UK Review, the UK Crown Prosecution Service reported that the ‘definition of exploitation is flexible enough to enable them to bring prosecutions in a broad range of cases.’²⁶¹ The UK Review agreed with this assessment and found that policy guidance should be used to clarify that new forms of trafficking (such as county lines and orphanage trafficking) fall within the broad definition.²⁶² The UK Anti-Slavery Commissioner’s report on the 17 types of exploitation that are being captured under the UK’s legislation indicates that a wide variety of exploitative conduct falls within the UK’s legal framework including forms of labour exploitation, domestic servitude, sexual exploitation and criminal exploitation.²⁶³

However, if a broad definition of exploitation is applied to the trafficking offences, further consideration should be given to other frameworks that target exploitative conduct to evaluate the degree of overlap and to ensure the definition of exploitation in Division 270 and 271 targets very serious forms of exploitation. For example, the UNODC’s Legislative Guide highlights a difference between criminal exploitative conduct and other exploitative conduct that ‘may be more akin to bad working conditions and thus best addressed through other non-criminal measures.’²⁶⁴ Although there is a need for flexibility in what constitutes exploitation, ‘clear parameters need to be established in order to uphold the principle of legality and to also ensure that criminal law responses to human trafficking are focused on sufficiently serious behaviour.’²⁶⁵ If a broad definition is adopted, comprehensive inter-agency consultation and further research are required to ensure the definition appropriately captures the type

²⁶⁰ *UK MS Act* (n 10) s 3.

²⁶¹ *UK Independent Review of MS Act* (n 153) 61-2 [2.1.3-2.1.4].

²⁶² *Ibid* 62 [2.1.5].

²⁶³ Christine Cooper, Olivia Hesketh, Nicola Ellis and Adam Fair, *A Typology of Modern Slavery Offences in the UK* (Report No 93, 2017) 10-46 and 54.

²⁶⁴ *UNODC Legislative Guide* (n 74) 29 [116].

²⁶⁵ *Ibid* 29 [117].

of conduct that should be penalised under this criminal framework.

Finding 9

Amending the definition of exploitation to clarify that it includes exploitation through criminal activities or similar (for example, forced criminality or irregular labour and services) could give greater effect to the non-punishment principle and Australia's victim and survivor-centred approach. Similarly, specifying that exploitation also includes child sexual abuse would support greater understanding, identification, support and protection of child victims and survivors of Division 270 and 271 offences.

Further, amending the definition of exploitation to be non-exhaustive would provide flexibility to capture new and emerging, or less common, forms of exploitation. In establishing a non-exhaustive definition, a 'catch-all' phrase could be added to the definition to support statutory interpretation in line with its intended scope.

Exploitation as an element of the trafficking in persons offence

As already noted, exploitation is an element of the definition of trafficking in persons under international law.²⁶⁶ However, exploitation is not an element of all the trafficking in persons offences in Division 271. Specifically, subsections 271.2(1), 271.2(1A) and 271.5(1) do not require the element of exploitation to establish the offence. The omission of exploitation as a base element in some trafficking in persons offences was noted in one submission, which recommended exploitation be an element of all trafficking in persons offences in Division 271.²⁶⁷

Dr Marika McAdam's submission noted that departing from the core elements of trafficking in persons in international law may raise operational challenges with respect to mutual legal assistance and dual criminality requirements in extradition.²⁶⁸ The requirement of dual criminality under Australian law does not require specific textual alignment of offences, but rather involves consideration of whether equivalent conduct would constitute an offence in Australia. Therefore, the absence of exploitation in some offences is not determinative when it comes to assessing dual criminality. Dual criminality assessments are case specific to the conduct in question, so it is difficult to form a conclusive assessment in this regard.

The Explanatory Memorandum for subsections 271.2(1), 271.2(1A) and 271.5(1) does not specify an intention to remove or exclude the purpose of exploitation, or to capture offences committed for any other purpose. It indicates that subsections 271.2(1) and 271.2(1A) were established to capture circumstances where a person is not involved in the final exploitation of the trafficking victim, but organises or facilitates the transport of a victim and survivor through coercion, threat or deception.²⁶⁹ The Explanatory Memorandum describes the domestic trafficking in persons offence in section 271.5 as intended to complement section 271.2 and to ensure that that offences in section 271.2 are fully effective.²⁷⁰ Further, the Explanatory Memorandum states that the domestic trafficking in persons offences 'will assist in ensuring each and every participant in the "chain" of exploitation of the victim can

²⁶⁶ *TIP Protocol* (n 25) art 3(a).

²⁶⁷ Submission – Dr Marika McAdam p 8.

²⁶⁸ Submission – Dr Marika McAdam p 8.

²⁶⁹ Revised EM Trafficking in Persons Bill 2005 (n 177) 8.

²⁷⁰ *Ibid* 12.

be prosecuted for that participation'.²⁷¹

International comparisons

The UK, Canada and the US all include an exploitative purpose in their respective offences.²⁷² For example, subsection 2(1) of the *Modern Slavery Act 2015* (UK) requires an offender to have arranged or facilitated a victim and survivor's travel 'with a view to the victim being exploited'. Similarly, in subsection 279.01(1) of Canada's Criminal Code, particular types of trafficking conduct must be 'for the purpose of exploiting or facilitating the exploitation of' the victim and survivor. US law similarly requires trafficking conduct to be 'for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery' or 'for the purpose of a commercial sex act'.²⁷³

However, New Zealand's laws include offences that do not have the purpose of exploitation as an element.²⁷⁴ Subparagraphs 98D(1)(a)(ii) and (b)(ii) of the *Crimes Act 1961* (NZ) criminalise particular trafficking acts committed through coercion or deception. As an alternative to demonstrating these means, the offences in subparagraphs 98D(1)(a)(i) and (b)(i) require proof that the trafficking acts were done 'for the purpose of exploiting or facilitating the exploitation of' the victim and survivor. This approach provides 2 options—establishing the act and the means (without the purpose of exploitation), or establishing the act and the purpose (with coercion or deception required as a part of the purpose of exploitation).

Way forward—Australia's approach

In consultations, the AFP raised the value of preserving subsections 271.2(1) and 271.2(1A) (trafficking in persons) and 271.5(1) (domestic trafficking in persons) due to difficulties establishing that an offender's conduct is done for an exploitative purpose, especially where the exploitation has not yet occurred. These difficulties are particularly prominent in exit trafficking cases.

These offences enable trafficking conduct to be captured even where the offender anticipates the victim and survivor would be subjected to forms of exploitation or harmful practices that may not constitute exploitation under Australia's current definition of exploitation (which is limited to conditions of slavery and slavery-like practices in Division 270).

Australia's domestic context gives rise to considerations that arguably warrant the current approach. In particular, Australia's geographical isolation and size present unique risks to vulnerable people who are coerced, threatened or deceived into travelling overseas or within Australia, including for the purposes of female genital mutilation/cutting and spousal or child abandonment.²⁷⁵ Subsections 271.2(1) and 271.2(1A) (trafficking in persons) and 271.5(1) (domestic trafficking in persons) are responsive to this risk, and enable law enforcement to protect Australians, permanent residents and visa holders who may be vulnerable to being moved and harmed offshore or interstate. These cases might not be captured by Australia's trafficking offences should the offences be amended to include an element of exploitation, even if the definition of exploitation is expanded or made flexible in line with Finding 9.

²⁷¹ Ibid.

²⁷² *UK MS Act* (n 10) s 2(1); *Canadian Criminal Code* (n 10) s 279.01(1); 18 USC § 1590-1 (2018).

²⁷³ 18 USC § 1590-1 (2018); 22 U.S.C. § 7102(11)(B); 22 U.S.C. § 7102(11)(A).

²⁷⁴ *NZ Crimes Act* (n 10) ss 98D(1)(a)(ii) and (b)(ii).

²⁷⁵ Examples provided by the AFP.

As highlighted, the Trafficking in Persons Protocol includes the purpose of exploitation as an element of the definition of trafficking in persons. Criminalising trafficking for a purpose other than exploitation, even if it causes significant harm to the victim and survivor, would appear to go beyond the scope of the definition of trafficking set out in the Trafficking in Persons Protocol. However, State Parties can implement trafficking in persons offences that are broader in scope or that go beyond what is required by the Trafficking in Persons Protocol.²⁷⁶

On this basis, the Targeted Review supports maintaining Australia's 2-element trafficking offences that do not include the intent of exploitation as a core element of the offence. However, these offences should remain targeted to address conduct that involves organising or facilitating the entry or exit of a person to or from Australia or transport within Australia to avoid any unintended over-criminalisation.

Currently, the 2-element and 3-element trafficking in persons offences have the same maximum penalty. For example, subsections 271.2(1B), 271.2(1C) and 271.5(2) consist of the 'act' and 'purpose' elements of trafficking. These offences have the same maximum penalty of 12 years imprisonment as subsections 271.2(2) and 271.2 2A(b), which require all 3 elements of trafficking—the act, means and purpose.

The Australian Government's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides that a maximum penalty 'should reflect the seriousness of the offence within the relevant legislative scheme.'²⁷⁷ Similarly, the UNODC's International Framework for Action to Implement the Trafficking in Persons Protocol states that 'penalties and sanctions are appropriate and proportionate to the gravity of the crime.' If offences that require only 2 of the 3 elements are retained, consideration should be given to reflecting this distinction in the penalties for these offences.

Implementing some of the other proposals set out in this Report will provide opportunities to streamline and simplify offences in Division 271. This is discussed further in a subsequent section of this Report. If Division 271 is substantially re-developed to consolidate the trafficking in persons offences, it may not be practicable to retain both 2- and 3-element approaches. In this event, the Targeted Review recommends following the 3-element approach set out in the Trafficking in Persons Protocol.

Finding 10

Retaining 2-element offences that do not include the purpose of exploitation would continue to offer benefit in capturing certain harmful conduct arising in the Australian context. Two-element offences provide investigation and prosecution options that are valued by Australian criminal justice practitioners.

These offences should otherwise remain targeted to avoid any unintended over-criminalisation. Findings in this Report that propose expanding Australia's trafficking offences should not be applied to these offences.

Investigations and prosecutions could be monitored to ensure the conduct captured by these offences is best addressed through the trafficking in persons framework in Division 271.

²⁷⁶ UNODC *Legislative Guide* (n 74) 20 [53].

²⁷⁷ Australian Government, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 38.

Child trafficking and the provision of ‘sexual services’

Australia’s trafficking in persons offences use the term ‘sexual services’ in both the adult and child trafficking offences. The use of the term ‘sexual services’ recognises that, in some circumstances, the provision of sexual services in a commercial context by an adult will be legal. This is reflected in the terms of subsection 271.2(2B), which refers to circumstances in which there is an arrangement to provide sexual services and the offender deceives the victim about a range of matters as prescribed (subsections 271.2(2B) and 271.2(2C)). However, some submissions suggested the term ‘sexual services’ has a commercial connotation that is inappropriate in the context of child trafficking.²⁷⁸

Three submissions suggested the term ‘sexual exploitation’ could be an alternative to ‘sexual services’ in the child trafficking offences.²⁷⁹ Dr Marika McAdam noted that the term sexual exploitation is broad enough to capture sexual abuse and exploitation, production of child abuse material, and any other sexual acts a child is forced to commit, whilst avoiding commercial connotations.²⁸⁰ Dr Marika McAdam suggested that this definition would also capture the production and dissemination of material that is not inherently sexual, but is sexualised by traffickers and consumers. As such this would capture material that may not amount to providing sexual services, but may amount to sexual exploitation.²⁸¹ ZOE Foundation Australia put forward that references to ‘sexual services’ should be removed from these offences, noting that the term risks stigmatising children who are exploited through prostitution.²⁸²

Scarlet Alliance and Destiny Rescue Australia went further, recommending the term ‘sexual services’ be removed from the adult trafficking offences as well as the child trafficking offences.²⁸³ Scarlet Alliance suggested that the relevant conduct could be targeted by existing language (such as ‘exploitation’ and ‘labour and services’).²⁸⁴

Ultimately, the submissions agreed that the existing phrase should no longer be used, at least in the context of child trafficking, but that forms of sexual exploitation will still need to be captured. The replacement or removal of the term ‘sexual services’ in the child trafficking offences and possibly the adult trafficking offences would better align the offences with community views and with international good practice that calls for the de-sexualisation of trafficking in persons laws.

Finding 11

The term ‘sexual services’ in the context of the child trafficking offences is inappropriate. The term could be replaced or removed altogether, with corresponding amendments to the definition of exploitation to ensure all relevant offending is still captured. Progressing these reforms could also provide an opportunity to consider removing the term ‘sexual services’ from the trafficking offences that apply to adults, making Australia’s offences industry-neutral in line with international good practice.

²⁷⁸ Submission – Dr Marika McAdam p 8; Submission – Destiny Rescue Australia p 18; Submission – ZOE Foundation Australia p 8.

²⁷⁹ Submission – Dr Marika McAdam p 8; Submission – Destiny Rescue Australia p 18; Project Respect pp 14-15.

²⁸⁰ Submission – Dr Marika McAdam p 8.

²⁸¹ Submission – Dr Marika McAdam p 8.

²⁸² Submission – ZOE Foundation Australia p 8.

²⁸³ Submission – Scarlet Alliance pp 20, 24; Destiny Rescue Australia p 18.

²⁸⁴ Submission – Scarlet Alliance pp 20-24.

Trafficking in persons for the purpose of organ removal

Trafficking in persons for the purpose of organ removal has been criminalised in the Criminal Code since 2005. In 2013, the Government strengthened its response to this crime by introducing 4 standalone offences in the Criminal Code:

- section 271.7B: Offence of organ trafficking – entry into and exit from Australia;
- section 271.7C: Organ trafficking – aggravated offence;
- section 271.7D: Offence of domestic organ trafficking; and
- section 271.7E: Domestic organ trafficking – aggravated offence.

Organ transplant tourism is captured by these offences where a person organises or facilitates the transport, or proposed transport, of the donor to, from or within Australia and where that person is reckless as to whether the conduct will result in the removal of an organ of the victim and survivor without their consent or without the consent of the victim and survivor’s guardian, and where it would not meet a medical or therapeutic need of the victim.²⁸⁵

Clarifying terminology

The term ‘organ trafficking’ is used internationally to describe different types of conduct in different contexts. The Targeted Review is concerned with conduct that would constitute an offence under sections 271.7B to 271.7E of the Criminal Code. These offences criminalise trafficking in persons for the purpose of organ removal, in line with the Trafficking in Persons Protocol.

Trafficking in persons for the purpose of organ removal and trafficking in organs are 2 distinct crimes, which international guidance suggests are governed by separate but complementary legal frameworks.²⁸⁶ For example, the UNODC’s Legislative Guide notes that ‘trafficking in persons for the purpose of organ removal is technically and legally distinct from trafficking in organs, cells and tissues’, and that a distinction has been drawn in international law between trafficking in persons for the purpose of organ removal, which is covered by the Trafficking in Persons Protocol, and trafficking in organs, which is not.²⁸⁷

Trafficking in organs is addressed through other frameworks, most notably the *2014 Council of Europe Convention against Trafficking in Human Organs* (Trafficking in Human Organs Convention). A joint study by the Council of Europe and the United Nations noted that the 2 crimes are frequently confused in public debate and in the legal and scientific community, and that one of the major aims of the joint study was to distinguish between them.²⁸⁸ A key difference between the crimes of trafficking in organs and trafficking in persons for the purpose of organ removal is that in the former case, the object of the crime is the organs, tissues and cells, while in the latter case it is the trafficked person.²⁸⁹

²⁸⁵ *Criminal Code* (n 80) Sub-div 271.BA.

²⁸⁶ *UNODC Legislative Guide* (n 74) 38 [142]; Council of Europe and United Nations, *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs* (Report, 2009) 93 (*‘COE Report on Organ Trafficking’*); Inter-Agency Coordination Group against Trafficking in Persons, *Trafficking in Persons for the Purpose of Organ Removal* (Issue Brief 11, 2021), 3.

²⁸⁷ *UNODC Legislative Guide* (n 74) 38-39 [143].

²⁸⁸ *COE Report on Organ Trafficking* (n 286) 93.

²⁸⁹ *Ibid.*

One submission to the Targeted Review suggested using the term ‘trafficking in persons for the purpose of organ removal’ for Australia’s offences, to make this distinction clear.²⁹⁰ Other submissions, including from the Law Council of Australia, advocated for the introduction of additional offences criminalising trafficking in organs, in line with the Trafficking in Human Organs Convention.²⁹¹ Australia is not a party to the Trafficking in Human Organs Convention and accordingly has no obligation to give it effect.

The Targeted Review notes that calls to criminalise trafficking in organs align with Recommendation 7 of the Joint Standing Committee on Foreign Affairs, Defence and Trade inquiry *Compassion, Not Commerce: An Inquiry into Human Organ Trafficking and Organ Transplant Tourism* (JSCFADT Organ Trafficking Inquiry), with this recommendation having been ‘noted’ in the Government Response.²⁹²

However, as discussed, trafficking in persons for the purpose of organ removal is distinct from trafficking in organs. This is also reflected in the approaches of jurisdictions including the UK and Canada. For example, the UK’s *Human Organ Transplants Act 1989* (UK) is an ‘Act to prohibit commercial dealings in human organs intended for transplanting; to restrict the transplanting of such organs between persons who are not genetically related’.²⁹³ The UK does not address trafficking in organs in its *Modern Slavery Act 2015*, which is instead concerned with trafficking in persons for the purpose of organ removal (and other trafficking and modern slavery conduct). Similarly, Canada has explicitly criminalised trafficking in human organs, with this offence separate to the trafficking in persons offence framework in the Canadian Criminal Code.²⁹⁴

While there may be merit in considering new offences in Australia to criminalise trafficking in organs, this is outside to scope of this Targeted Review, which is concerned with trafficking in persons (and other modern slavery crimes). Further consideration of the JSCFADT Organ Trafficking Inquiry’s recommendation that Australia accede to the Trafficking in Human Organs Convention is similarly out of scope for this Targeted Review. Other recommendations from the JSCFADT Organ Trafficking Inquiry are discussed in the following section on extraterritorial jurisdiction.

Extraterritorial jurisdiction—Trafficking in persons for the purpose of organ removal

The JSCFADT Organ Trafficking Inquiry also recommended that the Government ensure that offences relating to organ trafficking (including trafficking in persons for the purpose of organ removal) have extraterritorial application.²⁹⁵ The JSCFADT Organ Trafficking Inquiry noted that the extraterritorial application of the trafficking in persons for the purpose of organ removal offences are limited by the

²⁹⁰ Submission – Dr Marika McAdam p 10.

²⁹¹ Submission – Dr Damien Huffer and Dr Nilda Garcia p 5; Submission – Confidential 5 p 7; Submission – Law Council of Australia p 19.

²⁹² Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Compassion not Commerce: An Inquiry into Human Organ Trafficking and Organ Transplant Tourism* (Report, 2018) 87 (‘JSCFADT Organ Trafficking Inquiry’); Australian Government, *Australian Government Response to the Joint Standing Committee on Foreign Affairs, Defence and Trade report: Compassion, Not Commerce: An Inquiry into Human Organ Trafficking and Organ Transplant Tourism* (September 2021) 11 (‘Australian Government Response to JSCFADT Organ Trafficking Inquiry’).

²⁹³ *Human Organ Transplants Act 1989* (UK).

²⁹⁴ *Canadian Criminal Code* (n 10), s 240.1.

²⁹⁵ JSCFADT Organ Trafficking Inquiry (n 292) 81.

physical element of the offences (the movement or proposed movement *across Australia's international border* in order to establish the offence), rather than the extent of geographic jurisdiction.²⁹⁶

The Government Response accepted that recommendation in principle and noted:

The Australian Government will explore options to strengthen the Criminal Code offences to address this crime to capture conduct by Australians overseas that does not involve the trafficking of a person into or from Australia for the purpose of removal—for example, a situation where an Australian citizen trafficked a person within a foreign country for the purpose of organ removal.²⁹⁷

Australia's offences for trafficking in persons for the purpose of organ removal have extended jurisdiction (Category B) that covers conduct that occurs outside Australia by an Australia citizen, resident or body corporate.²⁹⁸ In theory, these offences should be able to capture trafficking in persons conduct that occurs within a foreign country by an Australian citizen, resident or body corporate. However, as highlighted in the JSCFADT Organ Trafficking Inquiry, the jurisdiction of the offences is limited by the current framing, which is centred on the physical movement of the victim and survivor across an Australian border.

Finding 13 of this Review suggests reframing Australia's trafficking in persons offences, including trafficking in persons for the purpose or organ removal, to ensure the full application of Category B extended jurisdiction. The proposed change would ensure that conduct occurring wholly or partly offshore by an Australian citizen, resident or body corporate would be captured. The jurisdiction of trafficking in persons offences, including trafficking in persons for the purpose of organ removal, will be discussed further in the following section.

The JSCFADT Organ Trafficking Inquiry's recommendation for organ-related trafficking provisions to 'apply regardless of the existence, or lack thereof, of equivalent laws in the jurisdiction in which the offending conduct occurred' would require the offences to have universal jurisdiction.²⁹⁹ The principle of universal jurisdiction in international law confers on every State the ability to exercise criminal jurisdiction over those individuals responsible for the most serious crimes of international concern, irrespective of where the conduct occurs, the nationality of the perpetrator or any other links between the crime and prosecuting State.³⁰⁰ Australia has implemented the principle of universal jurisdiction into Australian law through section 15.4 (Extended Geographical Jurisdiction Category D) of the Criminal Code, which applies whether or not the conduct constituting the alleged offence, or a result of the conduct constituting the alleged offence, occurs in Australia.³⁰¹

In Australia, extended jurisdiction (Category D) is limited to a small set of recognised serious crimes, including genocide, crimes against humanity, war crimes, slavery and torture.³⁰² Notably, of the offences in Division 270 and 271, only slavery has extended jurisdiction (Category D). All of the trafficking in persons offences, with the exception of the domestic trafficking in persons offences, have extended

²⁹⁶ *Ibid* 77.

²⁹⁷ *Australian Government Response JSCFADT Organ Trafficking Inquiry* (n 292) 12.

²⁹⁸ *Criminal Code* (n 80) s 15.2.

²⁹⁹ *JSCFADT Organ Trafficking Inquiry* (n 292) 87.

³⁰⁰ Australian Government, *Australian Views on the Scope and Application of the Principle of Universal Jurisdiction* (2016) p 1.

³⁰¹ Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners* (2002), 364-365.

³⁰² *Criminal Code* (n 80) ss 268.117, 270.3A, 274.2 (5).

jurisdiction (Category B).³⁰³ On this basis the Targeted Review suggests that the trafficking in persons offences for the purpose of organ removal retain extended jurisdiction (Category B).

Finding 12

Amending the offence names in Division 271 Subdivision BA to ‘trafficking in persons for the purpose of organ removal’ instead of ‘organ trafficking’ would clarify the scope and intent of these offences.

Jurisdiction

Transnational trafficking in persons

Australia’s transnational trafficking in persons offences have extended geographical jurisdiction. Part 2.7 of the Criminal Code concerns the geographical application of offences in the Code. In general, offences in the Criminal Code have standard jurisdiction, which means jurisdiction only extends to conduct wholly or partly in Australia or where the result of the conduct was wholly or partly in Australia.³⁰⁴ However, given their seriousness, Australia has applied extended geographical jurisdiction (Category B) to certain trafficking in persons offences.

In general terms, Category B covers:

- conduct that occurs wholly or partly in Australia;
- conduct that occurs outside Australia by an Australian citizen, Australian resident or a body corporate incorporated by or under a law of the Commonwealth or a State or Territory; or
- conduct that has a result in Australia.

Australia’s transnational trafficking offences at sections 271.2 and 271.3 (trafficking in persons), 271.4 (trafficking in children) and 271.7B and 271.7C (organ trafficking) criminalise organising or facilitating the entry or proposed entry, or receipt, of another person into Australia and organising or facilitating the exit or proposed exit of another person from Australia. These offences require movement or proposed movement *across Australia’s international border* in order to establish the offence. This limits the application of the offences, meaning that an Australian citizen, resident or body corporate that is located offshore and trafficking people offshore would not be captured by Australia’s trafficking offences, despite the offences having Category B extended jurisdiction.

The UNODC’s Legislative Guide states that State Parties should not require transnationality as an element of the domestic offences implementing these treaties.³⁰⁵ This view was also reflected in a number of submissions to the Targeted Review, which recommended reframing the cross-border element of the trafficking in persons offences and highlighted the limitations resulting from the cross-border element. Some of these submissions to the Targeted Review noted that due to the cross-border requirement, Australia’s trafficking in persons offences do not align with international standards, particularly the UNTOC and the Trafficking in Persons Protocol.³⁰⁶ Dr Marika McAdam stated that the requirement is ‘an

³⁰³ Ibid s 271.10.

³⁰⁴ Ibid s 14.1.

³⁰⁵ UNODC *Legislative Guide* (n 74) 47 [178].

³⁰⁶ Submission – Dr Marika McAdam p 7; Submission – Integrated Family & Youth Service and Project Paradigm p 4; Submission – Fiona David and Olivia Hicks p 1.

additional element contrary to the obligations set out in the UNTOC and its Protocols. Critically, the obligation set out in Article 34(2) of UNTOC, to criminalize domestic offenses irrespective of transnationality.³⁰⁷

In its submission, International Justice Mission highlighted that the trafficking provisions would not cover cases where an Australian citizen is trafficked outside Australia by a foreign citizen, such as might occur in the current trend of trafficking in persons for online scam operations.³⁰⁸ The AFP took a similar position, stating that the current offences prevent the police from pursuing an Australian citizen or resident who trafficks a person between 2 foreign countries despite the application of extended geographical jurisdiction under section 15.2 of the Criminal Code.³⁰⁹

ReThink Orphanages Australia also raised concerns with the cross-border element in the child trafficking offence. ReThink Orphanages Australia noted that ‘in orphanage trafficking, the transnational element is found in Australian citizens’ participation in the recruitment, receipt and harbouring of children in overseas orphanages and/or their subsequent exploitation. At present, these activities do not meet the elements of human trafficking offences under Australian law.’³¹⁰ However, as discussed earlier under ‘The role of technology’ in Part 2 and ‘The act of trafficking in persons’ in Part 4 of this Report, some of this offending may be captured by existing Criminal Code offences related to child sexual abuse committed outside Australia by an Australian citizen or permanent resident (Divisions 272 and 273 of the Criminal Code), or online using a carriage service (Division 474 of the Criminal Code). If the child trafficking offences are reframed to remove the requirement to cross an Australian border, consideration should be given to any overlap with existing offences.

Domestic trafficking in persons

Australia’s domestic trafficking in persons offences currently capture conduct related to organising or facilitating transportation or proposed transportation of another person from one place in Australia to another.³¹¹ The framing of the domestic trafficking in persons offences involves the real or proposed movement of a person. The domestic trafficking in persons offences will only apply if the offence falls within the scope of a Commonwealth head of power, including under section 51 of the Australian Constitution. This jurisdictional requirement is reflected in section 271.11 of the Criminal Code, which provides that a person commits an offence only if one or more of the following applies:

- the conduct occurs to any extent outside Australia (supported by the external affairs power, under s 51(xxix) of the Constitution);
- the conduct involves transportation across State borders, either for reward or in connection with a commercial arrangement (supported by the trade and commerce power, under s 51(i));
- the conduct occurs within a Territory or involves transportation to or from a Territory (supported by the territories power, under s 122);
- the conduct 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

³⁰⁷ Submission – Dr Marika McAdam p 7.

³⁰⁸ Submission – International Justice Mission p 13.

³⁰⁹ Submission – Australian Federal Police p 12.

³¹⁰ Submission – ReThink Orphanages Australia p 3.

³¹¹ *Criminal Code* (n 80) ss 271.5, 271.7, 271.7D.

corporation (supported by the corporations power, under s 51(xx));

- some of the conduct is engaged in by communication using a postal, telegraphic or telephonic service within the meaning of s 51(v) of the Constitution (the postal and telecommunications power); or
- the victim of the conduct constituting the offence is an alien for the purposes of s 51(xix) of the Constitution (the aliens power).

As the Federal Parliament's legislation making power is limited by the Australian Constitution, any potential reframing of Australia's domestic trafficking in persons offences will therefore be limited to capturing conduct that is linked to a constitutional head of power.

Finding 13

Consistent with Finding 6, there is benefit in reframing the trafficking in persons offences so they do not require movement of a person across an Australian border to establish an offence. This would ensure offshore conduct by Australian citizens, residents and bodies corporate can be captured and give greater effect to the extended jurisdiction (Category B) attached to the trafficking offences.

Aggravated offences

There is an aggravated offence for each of the following 5 categories of offences under Division 271:

- transnational trafficking of persons—subsection 271.3(1);
- domestic trafficking of persons—subsection 271.6(1);
- transnational trafficking of organs—subsection 271.7C(1);
- domestic trafficking of organs—subsection 271.7E(1); and
- harbouring victims—subsection 271.7G(1).

These aggravated offences apply when the offender intends the victim and survivor to be exploited, subjects the victim and survivor to cruel, inhuman or degrading treatment, or engages in conduct reckless as to the danger of the victim and survivor dying or being seriously harmed.³¹²

The aggravating circumstances as set out in Division 271 align with international guidance, including:

- the UNODC Combatting Trafficking in Persons Handbook, which provides a list of possible aggravating circumstances, and
- the UNODC Model Law Against Trafficking in Persons, which provides that aggravating circumstance provisions are optional, and can be added in so far as they are in line with aggravated circumstances in other similar crimes.³¹³

However, one submission highlighted that the aggravating circumstance of intended exploitation is not

³¹² Ibid ss 271.3, 271.6, 271.7C, 271.7E and 271.7G.

³¹³ United Nations Office on Drugs and Crime, Inter-Parliamentary Union and United Nations Global Initiative to Fight Human Trafficking, *Combating Trafficking in Persons: A Handbook for Parliamentarians* (Report, 2009) 28-30; United Nations Office on Drugs and Crime and United Nations Global Initiative to Fight Human Trafficking, *Model Law against Trafficking in Persons* (Model Law, 5 August 2009) 38-40 ('Model Law').

consistent with exploitation as a core element of trafficking in persons offences.³¹⁴ This aggravating circumstance was introduced into the transnational and domestic trafficking in persons aggravated offences by the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth). The revised Explanatory Memorandum for the relevant Bill indicates that these aggravating circumstances were included to reflect the aggravated extraterritorial people smuggling offence in section 73.2 of the Criminal Code, which in turn were derived from the *Protocol Against The Smuggling Of Migrants By Land, Sea And Air, Supplementing The United Nations Convention Against Transnational Organized Crime*.³¹⁵

Australia has 2-element trafficking in persons offences that comprise the ‘act’ and ‘means’ of trafficking only, and as such, the aggravated circumstance of intended exploitation may be relevant to these offences. Further, offences that comprise the ‘act’ and ‘purpose’ of trafficking in persons such as subsections 271.2(1B) and (1C) only require that the perpetrator is reckless as to whether another person will be exploited. The aggravating circumstance of intended exploitation could capture more serious conduct.

Although no other specific issues were raised in submissions, there is scope to provide greater clarity on, and to expand, the list of aggravating factors in recognition of particular vulnerabilities and harms relevant to human trafficking and other modern slavery crimes, and to align with aggravating factors in other Commonwealth crimes against the person.

For example, the Criminal Code does not define ‘cruel, inhuman or degrading treatment.’ However, the Explanatory Memorandum for the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking Bill 2012 (Cth) provides an example of a victim and survivor being forced to work while they are severely ill.³¹⁶ Along such lines, greater clarity could be provided on the other types of conduct that would constitute cruel, inhuman or degrading treatment such as depriving the victim of access to sufficient food, water or proper sanitation.³¹⁷

The types of harm that fall within ‘serious harm’ are also undefined and in particular, there is a lack of clarity around whether economic harm could be considered in addition to physical harm.³¹⁸ Economic harm can often form a part of the circumstances of exploitation experienced by victims and survivors of modern slavery.

Another factor absent from the list of aggravating factors is violence (including sexual violence) inflicted by the offender on the victim and survivor in the course of committing a Division 270 or 271 offence. For example, there is no accounting for the use of violence (particularly the use of weapons) in the course of threatening or coercing someone into a situation of human trafficking, slavery or a slavery-like practice.

Finally, there is no factor recognising the vulnerability of, and consequent egregiousness of offending

³¹⁴ Submission – Dr Marika McAdam p 8.

³¹⁵ Revised EM Trafficking in Persons Bill 2005 (n 177) 10.

³¹⁶ Explanatory Memorandum Crimes Legislation Amendment 2012 (n 85) 27.

³¹⁷ These examples are outlined in the Explanatory Memorandum for the same aggravating factor in organ trafficking: Explanatory Memorandum Crimes Legislation Amendment 2012 (n 85) (45).

³¹⁸ However, we note that the Model Criminal Code Officers Committee in its 1998 Report on the Model Criminal Code more broadly, indicated that the risk of catching a disease may give rise to a danger of death or serious harm: Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 5: Non-fatal Offences Against the Person* (Report, 1998) 75-87.

against, people with disabilities.³¹⁹

Finding 14

There is scope to clarify and/or expand the existing aggravating factors in Divisions 270 and 271 to encompass other relevant factors. These could include, for example, economic harm suffered by the victim and survivor, the accused's use of violence (including sexual violence and weapons) during the commission of an offence, and the particular egregiousness of offences against people with disabilities. If amendments are developed, other relevant factors, on further review of similarly serious Commonwealth offences, should also be considered.

³¹⁹ As acknowledged by Inclusion Australia in consideration of other aspects relevant to this Targeted Review: Submission – Inclusion Australia pp 2-4.

Part 5: Division 270—Slavery and slavery-like practices

Slavery

Article 1 of the Slavery Convention defines slavery as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.³²⁰ The prohibition against slavery is also a peremptory norm of customary international law, from which no derogation is permitted. The *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* expands on the Slavery Convention by setting out a range of slavery-like practices including debt bondage, serfdom, forced marriage and certain forms of child exploitation.

Slavery has been a criminal offence in Australia since 1824, with the application of the *Slave Trade Act 1824* (UK). Slavery offences were subsequently inserted into Division 270 of the Criminal Code in 1999, and were strengthened through the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth).

Broadly consistent with Article 1 of the Slavery Convention, slavery is defined in Division 270 as the condition of a person over whom any or all of the powers attaching the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.

There are 2 slavery offences at section 270.3 of the Criminal Code. The offences carry maximum penalties of 25 years and 17 years imprisonment respectively. The Targeted Review did not receive any submissions nor were issues raised in consultations that reflected concerns with the current scope or application of Australia's slavery offences.

Servitude and forced labour

Australia's servitude and forced labour offences are discussed together in this section because of the similarities between the elements of the offences.

Servitude

Servitude offences (previously limited to sexual servitude) were introduced in the Criminal Code in 1999. Section 270.4 defines servitude as the condition of a person (the victim) who provides labour or services, if, because of the use of coercion, threat or deception:

- a reasonable person in the position of the victim would not consider himself or herself to be free:
 - to cease providing the labour or services; or
 - to leave the place or area where the victim provides the labour or services, and
- the victim is significantly deprived of personal freedom in respect of aspects of their life other than the provision of the labour or services.

The coercion, threat or deception can be made against a person who is not the victim and survivor, such as a victim and survivor's family or friends. The victim and survivor may also be in a condition of servitude,

³²⁰ *International Convention to Suppress the Slave Trade and Slavery*, opened for signature 25 September 1926, [1927] ATS 11 (entered into force 9 March 1927) art 1.

whether or not escape from the condition is practically possible for the victim and survivor, or the victim and survivor has attempted to escape from the condition.³²¹ It is an offence both to cause a person to enter into or remain in servitude, and to conduct a business involving servitude. The maximum penalty is 15 years imprisonment, or up to 20 years imprisonment for an aggravated offence.

The framing of the servitude offence largely mirrors the UNODC's definition of the offence as being 'the labour conditions and/or the obligation to work or to render services from which the person in question cannot escape and which he or she cannot change'.³²² Similarly, the concept was defined by the European Court of Human Rights in 2005 as 'an obligation to provide one's services that is imposed by the use of coercion, and is linked to the concept of slavery'.³²³

Significant deprivation

The definition of servitude under section 270.4 of the Criminal Code has many similarities to the definition of forced labour. However, the definition of servitude has an additional element of requiring 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'.³²⁴ The Explanatory Memorandum accompanying the introduction of this definition states:

This is intended to reflect the degree of difference between the offences of slavery and servitude. To establish slavery, it must be proved that the accused exercised a power of ownership over the victim. Servitude falls short of ownership, but occurs when the offender's domination over the victim through coercion, threat or deception is such that the victim is effectively denied her or his freedom in some fundamental respect.³²⁵

One challenge with the definition is that there is little guidance or case law that establishes the threshold of 'significantly deprived' or that provides guidance on the types of factors or circumstances that might constitute significant deprivation. These terms would therefore be defined by their ordinary meaning in the context of the Division 270 offences. In practice, this can result in a lack of clarity about when to proceed with a charge or prosecution against servitude offences (as compared with slavery or forced labour offences that have clearer definitions and thresholds).

This lack of clarity was raised as an issue in 3 submissions to the Targeted Review.³²⁶ Inclusion Australia submitted that it would be desirable to provide additional guidance about factors relevant to people with an intellectual disability that might indicate significant deprivation of personal freedom to clarify the distinction between servitude and forced labour.³²⁷ Inclusion Australia also recommended this guidance include systemic factors that 'significantly impinge on peoples' opportunities for genuine choice, provision of consent and personal freedom regarding their employment'.³²⁸

³²¹ Explanatory Memorandum Crimes Legislation Amendment 2012 (n 85) 16.

³²² *Model Law* (n 313) 20.

³²³ *Siliadin v France* [2005] VII Eur Court HR 333 [124] ('*Siliadin*').

³²⁴ Criminal Code (n 80) s 270.4 (1)(b).

³²⁵ Explanatory Memorandum Crimes Legislation Amendment 2012 (n 85) 16.

³²⁶ Submission – Inclusion Australia pp 2-3; Submission – ReThink Orphanages Australia p 8; Submission – Fiona David and Olivia Hicks pp 5-6.

³²⁷ Submission – Inclusion Australia p 2.

³²⁸ Submission – Inclusion Australia p 2.

ReThink Orphanages Australia, recognising that children subject to orphanage trafficking may also experience servitude, noted that additional guidance should clarify the threshold for meeting significant deprivation in the context of minors in orphanages or other alternative care arrangements. This could include addressing how the factors of physical custody and/or guardianship and the closed nature of residential care environments can intersect to meet the stipulated conditions of ‘significant deprivation’ and ‘not consider[ing] himself or herself to be free to cease or leave’.³²⁹

Fiona David and Olivia Hicks put forward the European servitude case of *Siliadin v France* as providing potential examples of conduct that could be included in guidance on determining significant deprivation.³³⁰ In finding that the victim and survivor was subject to ‘servitude,’ the European Court of Human Rights noted the following features: excessive hours of work, restrictions on movement, family obligation and lack of autonomy in personal decision making, vulnerability for reasons including young age and immigration status, and precarious living arrangements.³³¹

How this additional guidance might be reflected in the legislation is further discussed in a subsequent section of this Part titled ‘Relevant evidence’.

Finding 15

The term ‘significantly deprived of personal freedom’ in the servitude offence at section 270.4 is undefined in both legislation and case law, and could be clarified through a non-exhaustive list of factors in legislation that might indicate significant deprivation. Additional guidance could assist criminal justice practitioners in distinguishing between servitude and forced labour.

Forced labour

Forced labour is defined at section 270.6 as the condition of a victim and survivor who provides labour or services if, because of the use of coercion, threat or deception, a reasonable person in the position of the victim and survivor would not consider himself or herself to be free to cease providing labour or services or to leave the place or area where the victim and survivor provides the labour or services.³³²

As with the servitude offences, the coercion, threat or deception can be made against a person who is not the victim and survivor, such as a victim and survivor’s family or friends. The victim and survivor may also be in a condition of forced labour whether or not escape from the condition is practically possible for the victim and survivor, or the victim and survivor has attempted to escape from the condition.³³³

It is an offence to engage in conduct that causes another person to enter into or remain in forced labour, as well as to conduct any business that involves the forced labour of another person. The maximum penalty is 9 years imprisonment, or 12 years for an aggravated offence.

Reasonable person in the position of a victim and survivor

A feature of both the servitude and forced labour offences is the requirement that because of coercion,

³²⁹ Submission – ReThink Orphanages Australia pp 8-9.

³³⁰ Submission – Fiona David and Olivia Hicks p 5.

³³¹ *Siliadin* (n 323).

³³² *Criminal Code* (n 80) s 270.6.

³³³ Explanatory Memorandum Crimes Legislation Amendment 2012 (n 85) 19.

threat or deception, a reasonable person in the position of the victim and survivor would not consider himself or herself to be free to cease providing labour or services, or to leave the place or area where the victim and survivor provides the labour or services.

The phrase ‘reasonable person in the position of the victim’ establishes an objective and hypothetical test, with a subjective element that requires consideration of the position of the victim and survivor. This ‘reasonable person’ test requires the court to consider whether a reasonable person of the same background and in the same circumstances would have felt free to withdraw their labour or services, or to leave the workplace (regardless of whether the victim is in fact ‘free’ to cease providing labour or services, or whether they have attempted to escape).³³⁴

While the reasonable person test is a common objective test in Australian law, its manifestation in the Division 270 offences incorporates an element of subjectivity (being a reasonable person *in the position of the victim*). Accordingly, there may be challenges applying this test in practice. For example, juries may face challenges understanding the type of trauma that has been experienced by victims and survivors. Several studies have highlighted that criminal justice practitioners and the public more generally find it difficult to identify and understand the impact of coercive controlling behaviours on victims and survivors of modern slavery.³³⁵ Where, for instance, coercive behaviours develop within the context of an ongoing relationship between the perpetrator and the victim and survivor, the impact of those behaviours could be difficult to understand outside of this context.³³⁶ This may make it challenging for juries to account for related trauma when deliberating whether a reasonable person in the victim and survivor’s position would have felt free to cease providing labour or services or to leave the place where they are providing the labour or services. This is particularly concerning where a reasonable person test may require the victim and survivor to conform to tropes associated with ‘ideal victimhood’—tropes to which they may not conform in practice.³³⁷ For instance, the victim and survivor may have engaged in perceived ‘irreputable’ acts that are not consistent with the ideal victim notion, such as entering Australia illegally or violating visa conditions, and so may be seen by juries as being less deserving of victim and survivor status.

One potential solution may be to provide additional guidance about factors that could be relevant to applying the reasonable person test. Section 270.10 concerns relevant evidence for proceedings for slavery-like offences. The factors set out in section 270.10 do not prevent the leading of any other evidence, or limit the manner in which evidence may be given or the admissibility of evidence. However, they do provide some guidance to the court on matters that may be relevant in determining aspects of offences at Division 270.

The relevant matters specified at section 270.10 are:

- the economic relationship between the alleged victim and survivor and alleged offender;
- the terms of any contract or agreement between the alleged victim and survivor and alleged

³³⁴ Ibid.

³³⁵ Coral J Dando, David Walsh and Robin Brierley, ‘Perceptions of Psychological Coercion and Human Trafficking in the West Midlands of England: Beginning to Know the Unknown’ (2016) 11(5) *PLOS ONE* 1, 8-9.

³³⁶ Hayley Boxall and Anthony Morgan, ‘Experiences of coercive control among Australian women’ [2021] No. 30 *Statistical Bulletin* 1, 2.

³³⁷ Nils Christie, ‘The Ideal Victim’ in Ezzat A. Fattah (ed), *From Crime Policy to Victim Policy: Reorienting the Justice System* (Palgrave Macmillan UK, 1986) 17.

offender; and

- the personal circumstance of the alleged victim and survivor, including but not limited to their lawful presence in Australia, their understanding of the English language and the extent of their social and physical dependence on the alleged offender.

However, these matters are specified as being relevant only to the deliberation of specific aspects of offences at Divisions 270, which are listed in subsection 270.10(1) as being:

- for slavery-like offences, whether the alleged victim and survivor has been coerced, threatened or deceived;
- for the offence of servitude, whether the alleged victim and survivor was significantly deprived of personal freedom;
- for the offence of forced marriage, whether the alleged victim was incapable of understanding the nature and effect of a marriage ceremony; or
- for the offence of debt bondage, whether another person has caused the alleged victim and survivor to enter into debt bondage.

The matters specified do not include whether a reasonable person in the position of the victim and survivor would have felt free to cease providing labour or services or to leave the place where they are providing the labour or services.

The *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth) inserted the definitions of forced labour and servitude into Divisions 270 and 271. Prior to this amendment, the original definitions of 'sexual servitude' and 'forced labour' did not include a reasonable person test.³³⁸ However, the Explanatory Memorandum for the amendment does not detail why the reasonable person test was introduced.

The Explanatory Memorandum explains that the reasonable person test as formulated in Division 270 requires 'that the court consider whether a reasonable person of the same background and in the same circumstances would have been free to withdraw his or her labour or services or leave the workplace'.³³⁹

The test is 'intended to be an objective test'.³⁴⁰ More broadly, the reasonable person test 'does not depend on any finding that the accused's state of mind was blameworthy in itself' beyond recklessness.³⁴¹ This objectivity is important as the Explanatory Memorandum explains that it is 'not intended to apply in circumstances that arise from standard relationships between an employee and an employer'.³⁴²

Given the seriousness of these offences, the reasonable person test must contain an objective element to ensure that it does not over-capture 'normal' working relationships. The Explanatory Memorandum specifies that 'the fact a person may suffer a penalty under the terms of a typical employment contract

³³⁸ *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) s 270.4; *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002* (Cth) s 73.2(3).

³³⁹ Explanatory Memorandum Crimes Legislation Amendment 2012 (n 85) 15-6.

³⁴⁰ *Ibid* 15.

³⁴¹ Eric Colvin, 'Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility' (2001) 27(2) *Monash University Law Review* 197, 197.

³⁴² Explanatory Memorandum Crimes Legislation Amendment 2012 (n 85) 16.

would not of itself amount to being “not free”³⁴³. Instead, ‘it is only if the use of coercion, threat or deception effectively denies the person her or his freedom’.³⁴⁴

The reasonable person test is used in many contexts in Australian criminal law, particularly in relation to self-defence, provocation, duress and necessity. The purpose and importance of an objective test is underpinned by the concept that ‘equality is taken to require that the same standard of conduct applies to everyone’ and that the standard of the offence is in line with community expectations.³⁴⁵

This construction of objectivity is linked to conceptions of fairness, the rule of law and natural justice. During consultations, one stakeholder emphasised that objective tests play an important role in delivering natural justice.³⁴⁶ These considerations are particularly important in the criminal justice system in order to ensure a procedurally fair hearing and an unbiased decision.

Central to the reasonable person test is that the behaviour of a reasonable person should capture a range of conduct.³⁴⁷ Reasonable behaviour will vary between individuals depending on factors including age, mental health, and vulnerability.³⁴⁸ This means that if the reasonable person test is to be used as an objective test, ‘a point within the range must be selected as the standard’.³⁴⁹

However, as noted earlier, the reasonable person test as formulated in Division 270 differs from the standard reasonable person test in other sections of the Criminal Code, as it brings in a subjective element by adding ‘in the position of a victim’.³⁵⁰ In *Pulini, Morrison J* expressed the view that this manifestation of the reasonable person test ‘requires a construction that defines the reasonable person as having the situational and personal vulnerabilities of the victim’.³⁵¹

The jury in this case was given explanation that ‘the phrase “not consider herself to be free” was ... not necessarily requiring the person to be physically locked up, nor that the person must have wanted to stop or leave’.³⁵² Instead, ‘it referred to the existence of circumstances of such a type that a reasonable person in the same position would not consider herself to be free to stop or leave’.³⁵³

The jury was not directed to refer to what the victim and survivor themselves thought, ‘but what a reasonable person standing in the same position would consider’.³⁵⁴ In this case, Justice Morrison determined that ‘the relevant conduct is taking advantage of the victim’s vulnerability, which would cause a reasonable person in the same position as the victim to not consider herself free to act in either way provided in subsections 270.6(1)(a) or (b)’.³⁵⁵

The particular situational and personal vulnerabilities in this case included the victim’s unlawful

³⁴³ Ibid.

³⁴⁴ Ibid.

³⁴⁵ Colvin (n 341) 226.

³⁴⁶ Consultations.

³⁴⁷ Colvin (n 341) 200.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ *Criminal Code* (n 80) s 270.4(1).

³⁵¹ *Pulini* (n 89) [72].

³⁵² Ibid [60].

³⁵³ Ibid.

³⁵⁴ Ibid [61].

³⁵⁵ Ibid [72].

immigration status, continued deception, absence of a visa, fear of the authorities and her perpetrators, poor financial resources and personal vulnerability.³⁵⁶ This reinforces that the reasonable person test in Division 270 contains a subjective element and can take into account the victim and survivor's own vulnerabilities.

Comparative law—Canada

Canada's Criminal Code currently contains a reasonable person test in section 279.04:

- (1) For the purposes of sections 279.01 to 279.03, a person exploits another person if they cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service.
- (2) In determining whether an accused exploits another person under subsection (1), the Court may consider, among other factors, whether the accused
 - (a) used or threatened to use force or another form of coercion;
 - (b) used deception; or
 - (c) abused a position of trust, power or authority.³⁵⁷

Private Senator's Bill S-224 was introduced in November 2021 to amend the Criminal Code by removing the reasonable person test. The Bill would replace subsections 279.04(1) and (2) with the following:

- (1) For the purposes of sections 279.01 to 279.03, a person exploits another person if they engage in conduct that
 - (a) causes the other person to provide or offer to provide labour or a service; and
 - (b) involves, in relation to any person, the use or threatened use of force or another form of coercion, the use of deception or fraud, the abuse of a position of trust, power or authority, or any other similar act.³⁵⁸

The Bill was passed by the Senate on 6 October 2022 and as at June 2023 was being considered by the Standing Committee on Justice and Human Rights in the House of Commons.³⁵⁹

The Bill's sponsors argue that the current provision 'puts the responsibility on victims or survivors to provide compelling testimony to prove the validity of their experience' and the Bill aims to focus on the conduct of perpetrators instead of the experience of victims, to reduce reliance on victim and survivor

³⁵⁶ Ibid [73].

³⁵⁷ *Canadian Criminal Code* (n 10) s 279.04.

³⁵⁸ Bill S-224, An Act to amend the Criminal Code (trafficking in persons), 1st Session, 42nd Parliament, 2021 – 2022 (Canada).

³⁵⁹ Ibid.

testimony.³⁶⁰ Sponsors suggest that by reducing the reliance on victim and survivor testimony and associated burden and trauma, the proposed change will encourage more victims and survivors to come forward.³⁶¹ Some parliamentarians and stakeholders argued that the current test requires the prosecution to prove the state of mind of the victim, specifically that they were afraid for their own or another's safety, and that the Bill is necessary to remove that burden.³⁶²

Some parliamentarians expressed concerns with or caution about removing the reasonable person test, including:

- that the current provisions have operated as intended and have accommodated proof of both physical and psychological forms of coercion;
- ensuring that whatever definition of trafficking in persons is adopted covers the full range of nefarious practice; and
- ensuring that the definition of trafficking in persons does not have unintended consequences, particularly for sex workers.³⁶³

The Parliamentary Secretary to the Minister of Justice and Attorney General and a representative of Department of Justice Canada also pointed out that it is incorrect to claim that the current law requires prosecutors to prove that a victim and survivor was actually afraid.³⁶⁴ The officer explained that instead, what needs to be proved is that a reasonable person in the particular circumstances would believe that their physical or psychological safety would be threatened if they failed to do what was being required of them. The officer also noted that Statistics Canada had stated that there are many challenges involved in prosecuting human trafficking cases, including the reluctance of victims coming forward. The officer said she expected those challenges would continue, and that training for those investigating and prosecuting would be important, regardless of how the offences are framed.³⁶⁵

Canada's reconsideration of the reasonable person test provides some support for similar reconsideration by Australia and provides an example of how relevant Australian offences could be constructed to remove the test.

Comparative law—United Kingdom

The UK's *Modern Slavery Act 2015* does not contain a reasonable person test. Instead, it states in section 1

³⁶⁰ Canada, Parliament, *Debates of the Senate*, 44th Parl, 1st Session, Vol 153, No 26 (22 March 2022) 861-863 ('Canadian Debates of the Senate 22 March'); Canada, Parliament, *House of Commons Debates*, 44th Parl, 1st Session, Vol 151, No 140 (2 December 2022) 10375-10377 ('Canadian House of Commons Debates 2 December').

³⁶¹ Canadian Debates of the Senate 22 March (n 360) at 861-863; Canadian House of Commons Debates 2 December (n 360) 10375-10377.

³⁶² See for example: Canada, Parliament, *Debates of the Senate*, 44th Parl, 1st Session, Vol 153, No 29 (29 March 2022) 943 – 934; Canadian House of Commons Debates 2 December (n 360) 10375-10377, 10379 -10380; Evidence to Senate Standing Committee on Human Rights, Parliament of Canada, Ottawa, 6 June 2022, 11:18-11:19 (Julia Drydyk); Canadian Centre for Child Protection, Submission to Standing Committee on Justice and Human Rights, Parliament of Canada, *Bill S-224 An Act to amend the Criminal Code (trafficking in persons)*, 31 March 2023.

³⁶³ Canada, Parliament, *House of Commons Debates*, 44th Parl, 1st Session, Vol 151, No 168 (10 March 2023) at 12228-12229, 12231 ('Canadian House of Commons Debates 10 March').

³⁶⁴ Canadian House of Commons Debates 10 March (n 363) 12228-12229; Evidence to Senate Standing Committee on Human Rights, Parliament of Canada, Ottawa, 6 June 2022, 11:12-11:13 (Nathalie Levman) ('Evidence of Nathalie Levman').

³⁶⁵ Evidence of Nathalie Levman (n 364) 11:12-11:13.

(slavery, servitude and forced or compulsory labour):

- (1) A person commits an offence if—
 - (a) the person holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is held in slavery or servitude, or
 - (b) the person requires another person to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform forced or compulsory labour.
- (2) In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention.
- (3) In determining whether a person is being held in slavery or servitude or required to perform forced or compulsory labour, regard may be had to all the circumstances.
- (4) For example, regard may be had—
 - (a) to any of the person’s personal circumstances (such as the person being a child, the person’s family relationships, and any mental or physical illness) which may make the person more vulnerable than other persons;
 - (b) to any work or services provided by the person, including work of services provided in circumstances which constitute exploitation within section 3(3) to (6).³⁶⁶

The Explanatory Notes to the Modern Slavery Act explain that paragraph (4)(a) ‘highlights personal circumstances, which may make the individual more vulnerable, and which may be relevant’. It is clarified that the list that may be considered in subsection (4) is non-exhaustive.³⁶⁷ The Explanatory Notes also make clear that ‘the court can consider any work or services provided by the person’, covering ‘a broad range of types of work and services including types, such as begging or pick-pocketing, which could amount to exploitation under subsections 3(5) or 3(6)’.³⁶⁸

Originally, clause 1 of the Modern Slavery Bill was drafted as:

- (1) A person (“P”) commits an offence if—
 - (a) P holds another person in slavery or servitude and the circumstances are such that P knows or ought to know that the person is held in slavery or servitude, or
 - (b) P requires another person to perform forced or compulsory labour and the circumstances are such that P knows or ought to know that the person is being required to perform forced or compulsory labour.

However, during pre-legislative drafting, the Draft Modern Slavery Bill Joint Committee raised concerns

³⁶⁶ *UK MS Act* (n 10) ss 1(3)-(4).

³⁶⁷ Explanatory Notes to the Modern Slavery Act 2015 (UK) [20].

³⁶⁸ *Ibid* [21].

that Clause 1 needed further clarity. The Committee was specifically concerned that Clause 1 maintained weaknesses in relation to child victims.³⁶⁹

In response, the UK Government amended Clause 1 of the Bill to ‘ensure that, in assessing whether a person has been the victim of slavery, servitude or forced or compulsory labour, the court can have regard to any of the alleged victim’s characteristics that make them more vulnerable than other people’, such as:

- age;
- any physical or mental illnesses or disability; and
- where relevant, family relationships.³⁷⁰

This allowed Clause 1 to ‘ensure that when prosecutors and the courts look at whether a vulnerable person (such as a child) has been subject to an offence, they will be absolutely clear that they can consider the vulnerability of that child, in looking at the type or level of coercion that they have been subject to’.³⁷¹

The Explanatory Notes clarify that adding ‘regard may be had to any of the person’s personal circumstances’ also reflected the position in case law.³⁷² This case law was developed in the European Court of Human Rights, in which the court heard cases regarding violations of Article 4 of the European Convention on Human Rights.³⁷³ During these cases, the court made clear that it ‘will have regard to all the circumstances of the case in the light of the underlying objectives of Article 4 when deciding whether a service required to be performed falls within the prohibition of “forced or compulsory labour”’.³⁷⁴ In the case of *Chowdury and Others v Greece*, the European Court of Human Rights reiterated that ‘[t]he question whether an individual offers himself for work voluntarily is a factual question which must be examined in the light of all the relevant circumstances of a case’.³⁷⁵

When evaluating what is considered ‘normal’ in employment duties, the court takes into account:

- a. whether the services rendered fall outside the ambit of the normal professional activities of the person concerned;
- b. whether the services are remunerated or not or whether the service includes another compensatory factor;
- c. whether the obligation is founded on a conception of social solidarity; and

³⁶⁹ The Joint Committee on the Draft Modern Slavery Bill, *Report – Draft Modern Slavery Bill* (2013–14, HL 166, HC 1019).

³⁷⁰ Home Department, *Draft Modern Slavery Bill* (UK) (Cmd 8889, 2014) 6.

³⁷¹ *Ibid.*

³⁷² Explanatory Notes to the Modern Slavery HL Bill (2013-14) 51.

³⁷³ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 4.

³⁷⁴ Council of Europe and European Court of Human Rights, *Guide on Article 4 of the European Convention of Human Rights – Prohibition of slavery and forced labour* (Guide, 31 August 2022) 11 [33] (*‘Guide on Article 4’*).

³⁷⁵ *Chowdury and others v Greece* (European Court of Human Rights, Chamber, Application No 21884/15, 30 March 2017) [96].

d. whether the burden imposed is disproportionate.³⁷⁶

Since the introduction of the *Modern Slavery Act 2015* (UK), the UK has had a strong record of prosecutions and convictions. In the first year of the Act, 117 offenders were prosecuted for modern slavery offences in the UK, 19% higher than in 2014.³⁷⁷ This has steadily risen, with completed prosecutions for offences flagged as modern slavery increasing to 451 in 2021, and reported convictions increasing to 331.³⁷⁸

The UK legislation provides an example of provisions that could replace the reasonable person test in Division 270. This model focuses more on the conduct and intent of the perpetrator, while also making clear to courts that a victim and survivor's personal circumstances may be relevant to determining whether an offence was committed.

Comparative law—United States

The US forced labour offence states:

Whoever knowingly provides or obtains the labor or services of a person -

- (1) by threats of serious harm to, or physical restraint against, that person or another person;
- (2) by means of any scheme plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or
- (3) by means of the abuse or threatened abuse of law or the legal process, shall be defined under this title or imprisoned not more than 20 years, or both.³⁷⁹

The definition of 'serious harm' includes a reasonable person test, defined as:

[A]ny harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.³⁸⁰

This formulation of the reasonable person test goes further than the test in Division 270, by making clear that it considers the victim and survivor's background and circumstances.

Including 'of the same background and in the same circumstances' could be a relatively simple amendment made to Division 270 to further clarify that the court can take into account the victim and survivor's background and circumstances. However, as described earlier, such an amendment would not strictly be necessary in order for the court to take into account such background or circumstances post-*Pulini*.

³⁷⁶ *Guide on Article 4* (n 374) 11 [33]

³⁷⁷ Independent Anti-Slavery Commissioner, *Annual Report for the period 1 August 2015 to 30 September 2016* (Report, October 2016) 2.

³⁷⁸ Independent Anti-Slavery Commissioner, *Independent Anti-Slavery Commissioner's annual report 2021 to 2022* (Report, 2022) [2.3.1].

³⁷⁹ 18 USC § 1589(a) (2018).

³⁸⁰ *Ibid* § 1589(c)(2) (2018).

International guidance

Article 2(1) of the International Labour Organisation's Forced Labour Convention defines the term 'forced or compulsory labour' as 'all work or service that is exacted from any person under the threat of any penalty and for which the person concerned has not offered himself voluntarily'.³⁸¹ A similar definition is adopted in the UNODC's Model Law against Trafficking in Persons.³⁸²

The commentary to the UNODC Model Law cites an example of Australia's original definition of forced labour contained in subsection 73.2(3) of the Criminal Code, which did not include the reasonable person test:

Forced labour means the condition of a person who provides labour or services (other than sexual services) and who, because of the use of force or threats:

(a) is not free to cease providing labour or services; or

(b) is not free to leave the place or area where the person provides labour or services.³⁸³

The UNODC acknowledges that 'victim behaviour during the crime is one of the most common circumstances used by defence advocates to try to weaken the prosecution's case'.³⁸⁴ This is why it is imperative that the trier of fact understands the victim and survivor's specific state of mind.

While the UNODC did not specifically comment on the reasonable person test, its guidance and commentary make clear that the victim and survivor's background is relevant, as 'cultural beliefs and practices of victims may provide an explanation for their behaviour'.³⁸⁵

The UNODC expressed that 'an assessment of what is irrational and what is rational may depend on the eye of the beholder and require a subjective assessment of the beliefs of the victim, particularly where cultural or religious beliefs are involved'.³⁸⁶ This may suggest that the UNODC considers that a subjective element should be considered when determining the victim and survivor's state of mind.

The UNODC noted that seemingly 'unreasonable' behaviour such as failure to escape or seek help, or returning to an abusive relationship, can undermine the victim and survivor's credibility in court. However, it explains that analyses of cases globally reveal that these kinds of behaviours can be typical to victims and survivors of trafficking.³⁸⁷

The UNODC concluded that 'while in some cases courts do view this behaviour as weakening victim credibility, in most they carefully examine all the surrounding circumstances in order to assess its significance'.³⁸⁸ This may suggest that the UNODC considers that the court should be able to consider all

³⁸¹ *ILO Convention* (n 73).

³⁸² *Model Law* (n 313) 14.

³⁸³ *Ibid.*

³⁸⁴ United Nations Office on Drugs and Crimes, *Evidential Issues in Trafficking in Persons Cases – Case Digest* (2017) 104.

³⁸⁵ *Ibid.*

³⁸⁶ *Ibid* 122.

³⁸⁷ *Ibid* 122-123.

³⁸⁸ *Ibid* 113.

the circumstances when attempting to determine the victim and survivor's state of mind.

Submissions and consultations

Some stakeholders suggested that the reasonable person test is not well defined in Division 270 and it is not entirely clear who a 'reasonable person in the position of a victim' would be. This led to some concern among stakeholders that judges and juries would find it difficult to take into account the victim and survivor's particular circumstances.³⁸⁹

The AFP made the following observations about the operation of the reasonable person test in Divisions 270 and 271:

In practice, this test can act as a barrier to progressing matters because it can be difficult to provide evidence to the courts demonstrating the unique mind set of human trafficking victims, who may experience psychological oppression or 'learned helplessness' after experiencing stressful situations repeatedly. Further, it can be difficult for jury members to understand the actions of victims in this context.

Further, this test can undermine victim's experiences, discredit the stressful scenarios they were under, undervalue the impact that cultural expectations and norms had upon the victim. As above, the framework should be trauma informed so that it does not dissuade victims from coming forward and ensure it does not cause further trauma.³⁹⁰

Further, there was agreement from some stakeholders that the test is not subjective enough to capture the unique background of the victim and survivor, including cultural and religious differences and understandings.³⁹¹

Stakeholders also suggested that, if the list of factors in subsection 270.10(2) were to apply to the forced labour and servitude offences, it may need to be extended.³⁹² This would help judges and juries with the subjective element of the test and could provide further guidance on what should be considered about the victim and survivor's background.

For example, one stakeholder suggested that the NSW Parliamentary Report about coercive control in domestic relations provided an example of a non-exhaustive list of behaviours that could be considered abusive, although they are unique to particular groups in the community and were developed for a different context.³⁹³ The list, which was developed through extensive community consultation, includes:

- identity-based abuse in lesbian, gay, bisexual, transgender and queer (LGBTQ) relationships, such as intentionally mis-gendering a partner, or threatening to disclose a person's sexual orientation, HIV status, or other medical condition without consent;
- dowry abuse and threats to visa status for women in culturally and linguistically diverse

³⁸⁹ Submission – Project Respect pp 11-12; Submission – Confidential 4 pp 4-5; Submission – Australian Federal Police p 11.

³⁹⁰ Submission – Australian Federal Police p 11.

³⁹¹ Submission – Project Respect pp 11-12; Submission – Confidential 4 pp 4-5; Submission – Integrated Family & Youth Service and Project Paradigm pp 6-7.

³⁹² Submission – Project Respect p 12.

³⁹³ Submission – Be Slavery Free pp 3 and 9.

communities;

- abuse of women with disability and older women, such as depriving them of access to medication or support services, or inducing consent to a financial action that is to their detriment; and
- denying a person’s right to practise their culture or spiritual beliefs, for example, stopping them from visiting country, belittling cultural practices, or downplaying or mocking their Aboriginality (or the Aboriginality of their children).³⁹⁴

It was suggested that a similar approach could be taken to expanding the list of factors in subsection 270.10(2) to specifically address the personal circumstances of particular groups in the community.³⁹⁵ This could help the court to consider the ‘reasonableness’ of the victim and survivor’s behaviour by considering specific factors based on their background.

Paths forward

Notwithstanding case law which confirms the reasonable person test used in Division 270 ‘requires a construction that defines the reasonable person as having the same situational and personal vulnerabilities of the victim’, expanding the factors and matters at section 270.10 could better support consideration.³⁹⁶ Specifically, amendments could be made to section 270.10 to make clear that the trier of fact can have regard to matters in subsection 270.10(2) in the case of an offence against section 270.5 (servitude offences) and section 270.6A (forced labour offences), and to expand the matters listed in subsection 270.10(2).

However, noting international practice, particularly the proposed approach in Canada and the current UK approach, there would be merit in considering how Australia’s servitude and forced labour offences might be reframed to focus more on the conduct and intent of the perpetrator and less on the victim and survivor’s state of mind. This could alleviate reliance on victim and survivor testimony and remove the difficulty of expressing (and the jury genuinely understanding) the victim and survivor’s unique background and circumstances, as is currently required by the reasonable person test in Division 270. Such changes will require careful consideration to ensure the offences continue to appropriately meet the threshold of slavery-like practices.

Finding 16

The ‘reasonable person in the position of the victim’ test used in Division 270 requires consideration of the state of mind of a reasonable person with the same situational and personal vulnerabilities of the victim and survivor—arguably subjective deliberations. The application of this test in Division 270 was raised in a number of consultations and submissions to the Targeted Review. In particular, stakeholders noted the difficulties that criminal justice practitioners and the courts may face in understanding the situational and personal vulnerabilities of victims and survivors.

Guidance could better support consideration of the unique circumstances, background and vulnerabilities of victims and survivors. One of the following options may also assist.

³⁹⁴ Joint Select Committee on Coercive Control, Parliament of New South Wales, *Coercive control in domestic relationships* (Report 1/57, June 2021) 97.

³⁹⁵ Submission – Project Respect pp 11-12; Submission – Confidential 4 pp 4-5.

³⁹⁶ *Pulini* (n 89) [72].

Option 1

Expand subsection 270.10(1) to make explicit that factors at subsection 270.10(2) can apply to deliberation of whether a reasonable person in the position of a victim and survivor would have felt free to cease providing labour or services or to leave the place where they are providing the labour or services. Further, the list of matters at subsection 270.10(2) could be expanded.

Option 2

Remove the reasonable person test and reframe the forced labour and servitude offences to focus more on the conduct and intent of the offender and less on the impact of the conduct on the victim and survivor. This is consistent with the UK approach and with international good practice that encourages legislation to focus on the offender's conduct rather than the conduct or state of mind of the victim and survivor. This approach would be a significant departure from the current framing and would require further consultation on specific proposed amendments.

Deceptive recruiting for labour or services

Section 270.7 contains an offence of deceptive recruiting for labour or services. A person commits this offence if they engage in conduct with the intention of inducing another person to enter into an engagement to provide labour or services, when that conduct causes the victim and survivor to be deceived about:

- the extent to which they will be free to leave the place or area where they provide labour or services;
- the extent to which they will be free to cease providing labour or services;
- the extent to which they will be free to leave their place of residence;
- if there is or will be a debt owed or claimed to be owed in connection with the engagement—the quantum or existence of the debt owed or claimed to be owed;
- the fact that the engagement will involve exploitation or the confiscation of the victim and survivor's travel or identity document; or
- if the engagement is to involve the provision of sexual services—that fact, or nature of the sexual services to be provided.

The deceptive recruiting offence forms part of a tiered suite of offences intended to address serious forms of labour exploitation. However, there have been no prosecutions against this offence since its introduction into the Criminal Code.

In submissions, stakeholders outlined cases that involved a person's recruitment while being deceived as to the conditions of work and the ability to leave the arrangement.³⁹⁷ Some of these cases involved a person being required to travel to an unfamiliar location and being accommodated by the employer, which created a further relationship of dependency on the employer that prevented the victim and

³⁹⁷ Submission – Anti-Slavery Australia pp 1-3; Submission – Confidential 5 p 2; Submission – Be Slavery Free p 8; Submission – Confidential 2 pp 3-5.

survivor from leaving the arrangement, even after they uncovered that they were deceived.³⁹⁸

Fiona David and Olivia Hicks observed that the absence of prosecutions suggests the offence is not a realistic alternative to more serious labour exploitation offences in Division 270, and suggested that consideration should be given to introducing a broader deceptive recruiting offence that captures conduct falling below the current threshold.³⁹⁹ They posited that, as drafted, the conduct that is currently called deceptive recruiting (section 270.7) could perhaps be better described as ‘aggravated’ deceptive recruiting because the current framing of the offence goes beyond a person being deceived about the nature of the work they will do or their conditions in dealing with their freedom to stop working, freedom of movement, and freedom to leave their place of residence. In broadening the deceptive recruiting offence, David and Hicks suggest consideration being given to introducing forms including:

- deception about the nature of the work to be undertaken;
- deception about working conditions related to safety and health; and
- deceiving a person about the likelihood of securing permanent residency or other immigration outcomes.⁴⁰⁰

However, expanding the offence to capture conduct that falls below the current threshold risks further blurring the distinction between conduct constituting a modern slavery offence and offences intended to address less serious forms of labour exploitation and/or deceptive practices in consumer, workplace and other law. In view of broader commentary on this issue (see also the section titled ‘Debt bondage’ in Part 5: Division 270—Slavery and slavery-like practices), there is a strong argument to be made against expanding the offence in this way.

A different view was put forward by Dr Damien Huffer and Dr Nilda Garcia, who submitted that the deceptive recruiting offence could continue to be fit for purpose for labour exploitation offences as long as online offending could be captured.⁴⁰¹

As noted above, the offence of deceptive recruitment for labour or services specifically refers to conduct which causes the victim to be deceived about whether the engagement is to involve the provision of sexual services, or the nature of sexual services to be provided (for example, whether those services will require the victim to have unprotected sex). Scarlet Alliance submitted that this represents an inappropriate focus on the sex industry.⁴⁰²

In line with the recommendation from Scarlet Alliance, broadening subparagraph 270.7(c)(vi) to be sector-agnostic could be achieved by instead referring to ‘the nature of the labour or services to be provided’.⁴⁰³ This would be consistent with the use of ‘labour or services’ throughout Division 270, which acknowledges that deception about the nature of labour or services to be provided could occur in

³⁹⁸ Submission – Anti-Slavery Australia pp 1-3; Submission – Confidential 5 p 2; Submission – Be Slavery Free p 8; Submission – Confidential 2 pp 3-5.

³⁹⁹ Submission – Fiona David and Olivia Hicks p 4-5.

⁴⁰⁰ Submission – Fiona David and Olivia Hicks p 5.

⁴⁰¹ Submission – Dr Damien Huffer and Dr Nilda Garcia p 3.

⁴⁰² Submission – Scarlet Alliance pp 16-17.

⁴⁰³ Submission – Scarlet Alliance p 17.

any industry, and remove the specific demarcation of the sex industry within this offence.

Finding 17

The deceptive recruitment offence retains sex industry-specific issues in its list of matters about which the victim and survivor could be deceived (that is, ‘if the engagement is to involve the provision of sexual services—that fact, or the nature of sexual services to be provided’). This phrase could be replaced with industry-neutral language to remove the specific demarcation of the sex industry within this offence. If such changes are made, consideration should be given to ensuring the offence continues to target serious offending that meets the threshold of a slavery-like practice.

Debt bondage

Australia’s debt bondage offence is at section 270.7C of the Criminal Code. To date, there have been no convictions for this offence. Debt bondage is defined as the condition of a victim and survivor arising from a pledge by the victim and survivor of their own personal services or of the personal services of another person under the victim’s control, or by another person with control over the victim and survivor for personal services of the victim and survivor. The pledge must be made as security for a debt owed, or claimed to be owed, by the person making the pledge. This includes both debt incurred and debt claimed to be incurred after the pledge is given. At least one of the following must also apply:

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

The current definition of debt bondage was inserted into the Criminal Code in 2018, and expanded the former definition to include the condition of a person whose personal services are pledged by another person as security for that person’s debt.

The offence forms part of a tiered suite of offences intended to address serious forms of exploitation and provides an investigation and prosecution option where a more serious offence cannot be made out. It is, however, a serious offence in itself. In situations of debt bondage, the power imbalance between the employer (or creditor) and the worker enables employers and creditors to perpetuate deeply exploitative situations through adjustment of interest rates, making further deductions arbitrarily as penalties for perceived poor performance, and/or charging high prices for basic goods or working tools resulting in an increase of the debt.⁴⁰⁴

In her 2017 report investigating the issue of debt bondage, the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, found that the practice of debt bondage remained prevalent worldwide in numerous sectors of the economy and particularly affecting people belonging to minority groups, including women, children and migrant workers.⁴⁰⁵ In Australia, debt bondage has been

⁴⁰⁴ United Nations Human Rights Council, *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences* UN Doc. A/HRC/33/46 (4 July 2016), [7] (‘Report of Special Rapporteur’). See also Submission – Destiny Rescue Australia pp 16-17, which describes a case where victims were paid approximately AUD\$50 per week but charged AU\$70 per week for compulsory lodging, food and amenities required for basic life.

⁴⁰⁵ Report of Special Rapporteur (n 404) [53].

highlighted in both the media and in parliamentary inquiries.⁴⁰⁶

Key issues raised in submissions to the Targeted Review centered on the intersection between relevant criminal and labour legislation, with the Australian Human Rights Commission stating that effective duplication of offences under Division 270.7C and federal, state and territory fair work legislation ‘unnecessarily complicates investigation, prosecution and sentencing’.⁴⁰⁷

To address this, the Australian Human Rights Commission recommended greater education, awareness-raising and training be provided to practitioners, investigators and vulnerable workers to inform them about their rights and about legal pathways under both criminal and employment law, and that the FWO (as the body with the most relevant expertise in this area) be further empowered through increased funding, capabilities and legislative scope to assist in the pursuit of allegations against perpetrators of debt bondage.⁴⁰⁸

Scarlet Alliance put forward that migrant sex workers would be better served by removing the debt bondage offence at section 270.7C entirely.⁴⁰⁹ For reasons including the lack of recourse for migrant sex workers (specifically to address any debt which remains on their return home with reduced opportunities to repay), Scarlet Alliance instead recommended dealing with debt bondage through industrial rights and protection mechanisms such as the Fair Work Commission and jurisdictional tribunals.⁴¹⁰

Penalties

The submission of the Australian Human Rights Commission detailed a range of law reforms relating to wage theft in Australian jurisdictions in recent years (including those aimed at unfair payment practices such as unlawful deductions, which can constitute debt bondage in certain circumstances). As observed by the Commission, penalties for the offence of debt bondage at section 270.7C (up to 4 years imprisonment, or 7 for an aggravated offence) are not aligned with penalties for similar conduct in Queensland and Victoria, which is punishable by up to 10 years imprisonment. In the Commission’s view, the Criminal Code should be amended to increase the maximum penalty for debt bondage to reflect both growing public sentiment that worker exploitation in Australia needs to be addressed, and to align with similar penalties in Victoria and Queensland.⁴¹¹

Scarlet Alliance considered that increasing penalties for offences in Divisions 270 and 271 would not reduce instances of trafficking, slavery or slavery-like practices or act as a deterrent on the basis that the drivers of these crimes outweigh the ability of penalties to provide general or specific deterrence.⁴¹²

⁴⁰⁶ *Hidden in Plain Sight* (n 56) 58 [3.103]; Sarina Locke, ‘Debt bondage for workers in Australian horticulture akin to slavery, inquiry hears’, *ABC News* (online, 19 October 2017) <<https://www.abc.net.au/news/rural/2017-10-19/debt-bondage-in-horticulture-sector-akin-to-slavery-in-australia/9057108>>; Nick McKenzie, Amelia Ballinger and Joel Tozer, ‘Trafficked: Women shunted ‘like cattle’ around Australia for sex work’, *The Age* (online, 30 October 2022) <<https://www.theage.com.au/politics/federal/trafficked-women-shunted-like-cattle-around-australia-for-sex-work-20221018-p5bqnd.html>>.

⁴⁰⁷ Submission – Australian Human Rights Commission p 12.

⁴⁰⁸ Submission – Australian Human Rights Commission p 14.

⁴⁰⁹ Submission – Scarlet Alliance p 18.

⁴¹⁰ Submission – Scarlet Alliance p 18.

⁴¹¹ Submission – Australian Human Rights Commission pp 10-12.

⁴¹² Submission – Scarlet Alliance p 26.

Consistency of terminology

In the event that the debt bondage offence is retained, Scarlet Alliance recommended the term ‘personal services’ in the definition of ‘debt bondage’ be replaced with ‘labour or services’ for the purposes of section 270.7C, in order to align this section with the rest of Divisions 270 and 271.⁴¹³

Streamlining debt bondage and other offences

Incorporating conduct separately constituting servitude, deceptive recruiting and debt bondage into the forced labour offences may serve to simplify Australia’s offences and address broader issues, including more clearly delineating between conduct constituting modern slavery and wage theft or other labour violations.

Noting the similarity between the servitude and forced labour offences, the distinguishing ‘significant deprivation’ element of servitude could be treated as an aggravated offence factor for the forced labour offence (noting that guidance would still need to be provided on what factors constitute ‘significant deprivation of personal freedom’). This would not be inconsistent with international practice, with some jurisdictions incorporating servitude into other offences or not criminalising the practice at all.⁴¹⁴

As with servitude, streamlining of deceptive recruitment and debt bondage offences would not necessarily be out of sync with international practice. For example, New Zealand captures debt bondage in its offence for dealing in slaves, and debt bondage may be captured by the UK’s slavery, servitude and forced or compulsory labour offence.⁴¹⁵

Any streamlining of offences would need to be carefully considered and managed to avoid creating gaps in the criminal law or inadvertently altering maximum penalties. This consideration could usefully extend to all legislation addressing the spectrum of labour exploitation, including relevant Commonwealth consumer, corporation, customs, migration, employment/workplace health and safety and sea law, and relevant state and territory law.⁴¹⁶ Holistic examination of the varying actors and range of exploitative conduct would support identification of any remaining gaps (particularly ‘less serious’ and/or precursor conduct) and enable better alignment of penalties.

Holistic examination would also provide an opportunity to conduct a fulsome assessment of criminal liability and penalties specific to bodies corporate and company directors and whether the existing

⁴¹³ Submission – Scarlet Alliance p 18.

⁴¹⁴ In s 1(1) of the *Modern Slavery Act 2015* (UK), there is a single offence that covers slavery, servitude and compulsory labour, with ‘slavery’, ‘servitude’ and ‘forced or compulsory labour’ to be construed in accordance with Article 4 of the European Convention on Human Rights. There does not appear to be any separate offence for servitude in New Zealand (though it may form part of the exploitation element of a trafficking in persons offence under s 98D of the *NZ Crimes Act*). While ‘serfdom’ is included in the definition of ‘slave’ for the purposes of s 98, this additionally requires a ‘tenant who is by law, custom or agreement bound to live and labour on land belonging to another person’ and is therefore distinct from servitude generally. In Canada, there does not appear to be any legislation in place that creates a specific offence of servitude. However, freedom from servitude is arguably guaranteed under ss 1, 7, 9 and 24 of the *Constitution Act 1982* (Canada). In the United States, the 13th amendment to the US Constitution prohibits involuntary servitude (with the exception of punishment for a criminal offence). There are also separate offences for kidnapping and sale relevant to servitude at 18 USC § 1583 and 1584.

⁴¹⁵ *NZ Crimes Act* (n 10) s 98; *UK MS Act* (n 10) s 1.

⁴¹⁶ See, for example, Submission – Maritime Union of Australia p 7, which urges consideration of a range of legislation in the context of exploitation of seafarers in international shipping, and Submission – Cleaning Accountability Framework pp 5-6.

criminal offences adequately attribute criminal liability to corporations for their involvement in modern slavery offences. On this point, Annabel Anderson and Dr Hannah Harris outlined in their submission that the Criminal Code should better account for the role of corporations in such crimes, given the particular mechanics of modern slavery.⁴¹⁷ Anderson and Harris expressed concerns that, due to the decentralisation of authority in contemporary transnational supply chains, managers and directors of corporations are usually several jurisdictions removed from being held accountable.⁴¹⁸ They therefore advocated for new offences to be introduced into the Criminal Code to capture failure by corporations to prevent modern slavery.

Finding 18

The debt bondage offence retains inconsistent language in the form of ‘personal services’. This phrase could be replaced with a reference to ‘labour or services’ for consistency with other offences in Divisions 270 and 271. If such a change is made, consideration should be given to ensuring the offence continues to target serious offending that meets the threshold of a slavery-like practice.

The maximum penalty for debt bondage may require further consideration in light of legislative developments at the federal and state and territory levels to address worker exploitation. Further consideration to amending penalties could be given as part of a broader holistic assessment of legislation that addresses the spectrum of labour exploitation.

Forced marriage

Forced marriage is defined at section 270.7A of the Criminal Code, and occurs where one or both parties do not fully and freely consent to the marriage because of coercion, threat or deception, or because the victim and survivor 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.

It is an offence under section 270.7B both to cause a person to enter into a forced marriage and to be a party to a forced marriage (except where the person party to the marriage is the victim and survivor). The maximum penalty for Australia’s forced marriage offences is 7 years imprisonment, or 9 where it is an aggravated offence. If the conduct involves taking a child to be married offshore, then an offence of trafficking in children may also apply with a maximum penalty of up to 25 years imprisonment (see section 271.4). Forced marriage is different to arranged marriage: in an arranged marriage, other people may be involved in bringing about the marriage, but both parties freely and fully consent. Arranged marriages are legal in Australia.

There have been no convictions for Australia’s forced marriage offences since their establishment in 2013. This is understood to be for a range of reasons. Forced marriage is distinct from other trafficking in persons, slavery and slavery-like offences, including because of the age and vulnerability of the victims and survivors and their relationship to the perpetrators. For example, it is common in forced marriage cases for perpetrators to be family members of the victim and survivor. Victims and survivors may be reluctant to pursue a criminal justice process that could result in family members being incarcerated,

⁴¹⁷ Submission – Annabel Anderson and Dr Hannah Harris p 7.

⁴¹⁸ Submission – Annabel Anderson and Dr Hannah Harris p 5.

particularly victims and survivors who are financially or otherwise dependent on their families.

The Government places a strong emphasis on efforts to prevent and disrupt forced marriages from taking place. Working in partnership with state and territory governments, the Government is developing options for a model to enhance civil protections and remedies for victims and survivors of forced marriage for consideration of the Standing Council of Attorneys-General. Options for a model will seek to complement Commonwealth criminal offences by enhancing civil protections available to prevent forced marriages and support victims and survivors.

Definition of marriage

Australia's forced marriage offence applies a definition of marriage at subsection 270.7A(2). This definition includes:

- marriages (including those recognised under a law of a foreign country);
- registered relationships (including those registered under a law of a foreign country); and
- marriages that are void, invalid or not recognised by law for any reason including where a party to the marriage has not freely or fully consented to the marriage and where a party to the marriage is married to more than one person.

This definition is intended to capture all forms of marriage, including cultural and religious ceremonies. In practice, there are significant difficulties gathering evidence that demonstrates that a marriage has taken place in line with the definition of marriage at subsection 270.7A(2), particularly where marriages have taken place offshore and evidence of that marriage (such as a form of marriage registration or certificate) is not available. There are also challenges applying Australia's forced marriage laws to cultural or religious ceremonies that are not technically a marriage, but that bind 2 people together as in marriage, until a formal marriage ceremony can take place.

The Targeted Review received feedback from stakeholders that confirmed there are significant challenges investigating and prosecuting forced marriage cases, and locating evidence to establish that a marriage has taken place. However, the Targeted Review did not receive significant feedback to suggest that the definition of marriage at subsection 270.7A(2) was a key impediment to successful investigations and prosecutions, noting the definition is broad and captures both legal and registered marriages and relationships and also cultural and religious marriages. However, establishing that a marriage has taken place in practice has posed difficulties for criminal justice practitioners, including collecting evidence of the union and finding suitably qualified experts to advise whether a marriage is complete in accordance with specific cultural norms.

The Targeted Review is aware of one forced marriage matter in which there was a first instance ruling on the application of the definition of marriage at subsection 270.7A(2) to a form of temporary marriage known as nika mut'ah. In this case, the court accepted that this form of marriage could fall within the definition of marriage at subsection 270.7A(2).

International reports and literature also point to other marriage practices that can be considered a forced marriage and should be tested against Australia's definition of marriage at subsection 270.7A(2). Practices of wife inheritance, levirate and sororate marriages have been raised in international forums,

with reports describing these as forms of forced marriage.⁴¹⁹ For example, the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) has called for laws that prohibit and punish all forms of wife inheritance, sororate and levirate marriages, and for laws that both prohibit these practices and punish those that aid or authorise them.⁴²⁰

There is no data regarding these forms of marriages in Australia. However, one stakeholder suggested that this might be because these marriages are not explicitly discussed in the Australian context and with relation to Australia's forced marriage laws, and that awareness of these practices in Australia is limited.⁴²¹ This stakeholder recommended that consideration be given to these practices and the extent to which they might fall within the scope of Australia's forced marriage offences.

The definition of marriage at subsection 270.7A(2) is likely sufficient to capture practices of wife inheritance, levirate and sororate marriages. The Explanatory Memorandum to the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 states:

The provision will capture a relationship which for all intents and purposes is considered to be a marriage by the parties and their community. This will ensure the new forced marriage offences (introduced below) are not limited to circumstances involving marriages recognised by Australian law, but extend to other marriage-like relationships, where similar harmful conduct is involved.⁴²²

The Explanatory Memorandum further states:

The definition of forced marriage would include marriages ... involving persons who have been transferred, sold or inherited into marriage with no right to refuse.⁴²³

However, without judicial authority testing the scope of the definition of marriage at subsection 270.7A(2), it is difficult to make conclusive findings about potential limitations to the definition. The Targeted Review suggests ongoing monitoring of forced marriage cases as they progress through the courts to ensure that the operation of the definition of marriage at subsection 270.7A(2) meets the intention of the definition as set out in the Explanatory Memorandum.

Finding 19

The definition of marriage at subsection 270.7A(2) is broad and is intended to capture all forms of marriage, including cultural and religious marriages. In practice, criminal justice practitioners are reporting evidentiary challenges establishing that a marriage has taken place, though few cases have progressed through the courts to test the definition. Continued monitoring of cases through the courts would inform further identification and consideration of definitional limitations.

⁴¹⁹ The Macquarie Dictionary defines 'levirate' as '*a custom of the ancient Hebrews, requiring a man under certain circumstances to marry the widow of his brother or nearest kinsman*', and 'sororate' as '*marriage with a wife's sister*'.

⁴²⁰ UN Women, 'Defining other forms of forced marriage: wife inheritance, levirate and sororate marriages', UN Women Virtual Knowledge Centre to End Violence against Women and Children (Web Page, 28 January 2011) <<https://www.endvawnow.org/en/articles/621-defining-other-forms-of-forced-marriage-wife-inheritance-levirate-and-sororate-marriages-.html>>

⁴²¹ Submission – Confidential 3, p 10.

⁴²² Explanatory Memorandum Crimes Legislation Amendment 2012 (n 85) 24.

⁴²³ Ibid 25.

Protections for children aged 16 and 17

In Australia, a person is of marriageable age if they have attained the age of 18 years, but a child aged 16 or 17 may be married if there are circumstances that are ‘exceptional and unusual’ to justify an order being made by a Judge or magistrate to permit marriage, provided there is the required consent (usually parental).⁴²⁴

Australia’s forced marriage definition makes clear that a child under the age of 16 cannot consent to be married in any circumstance. However, there are a significant number of reported cases in Australia that involve children aged 16 or 17. For example, between 1 July 2017 and 30 June 2022, approximately 23% of reports of forced marriage to the AFP related to a child aged 16 or 17 at the time of the report.

Australia’s forced marriage laws only explicitly criminalise child marriage under the age of 16, meaning that in cases involving child victims and survivors aged 15 and younger, there is no requirement for prosecutors to show that child’s lack of consent resulted from the use of coercion, threat or deception, or incapacity to understand the nature and effect of the marriage ceremony. The Explanatory Memorandum for the amendment that introduced this explicit criminalisation in 2019 noted that the age of 16 years is in line with the marriageable age provisions in Part I of the *Marriage Act 1961* (Cth).⁴²⁵

International law requires that no marriage shall be entered into without the free and full consent of the intending spouses.⁴²⁶ International law recognises that limitations based on age may be placed on the right to marry, so as to protect children, who do not have the capacity to consent to marriage. For example, Article 16(2) of the *Convention on the Elimination of All Forms of Discrimination Against Women* further provides that the betrothal and marriage of a child shall have no legal effect. The United Nations 2030 Agenda for Sustainable Development, adopted in 2015, calls on UN member countries to ‘eliminate all harmful practices, such as child, early and forced marriage’ by 2030.⁴²⁷

Australia also has a range of obligations under the *Convention on the Rights of the Child*.⁴²⁸ In 2019, Australia’s implementation of its obligations under this treaty was considered by the United Nations Committee on the Rights of the Child. The Committee recommended that Australia review the Marriage Act to eliminate any exception to the minimum age of marriage of 18 years for girls and boys.⁴²⁹

However, the Targeted Review did not receive significant feedback on this issue in consultations or

⁴²⁴ *Marriage Act 1961* (Cth) ss 11-12.

⁴²⁵ Explanatory Memorandum, Combatting Child Sexual Exploitation Legislation Amendment Bill 2019, 49 (‘EM for Child Sexual Exploitation Amendment 2019’)

⁴²⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] ATS 23 (entered into force 23 March 1976) art 23(3); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, [1976] ATS 5 (entered into force 3 January 1976) art 10(1); *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, [1983] ATS 9 (entered into force 3 September 1981) art 16(1)(b).

⁴²⁷ United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, GA Res 70/1, UN Doc A/RES/70/1 (21 October 2015, adopted 25 September 2017), 18.

⁴²⁸ *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990) arts 2 (2), 24 (3), 28, 32.

⁴²⁹ Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, CRC/C, 2402nd and 2403rd mtg, UN DOC CRC/C/AUS/CO/5-6 CRC (1 November 2019) 4 [18]. See also: United Nations Human Rights Office of the High Commissioner, ‘Committee on the Rights of the Child reviews the report of Australia’ (Media Release 10 September 2019).

submissions. As stated in the 2019 Explanatory Memorandum, Australia's forced marriage offences align with Part II of the Marriage Act.⁴³⁰ Consideration of Australia's Marriage Act is outside the scope of this Targeted Review.

Forcing a person to remain in a marriage

The Targeted Review received feedback in submissions and consultations about situations where a person is forced to remain in a marriage.⁴³¹ Feedback included observations that Australia's forced marriage offence is a point in time offence that targets the marriage itself. For example, the Australian Human Rights Commission noted:

The current definition of forced marriage focuses on consent at the time the marriage was entered into. It is important to recognise that forced marriage is best described as 'a process rather than an event'.⁴³²

It is arguable that the particular focus and construction of Australia's forced marriage offences has shaped the broader conception and response to forced marriage. Indeed, contemporary research on forced marriage in Australia finds that forced marriage is primarily understood and responded to as 'at risk' behaviour where interventions are focused on children and young people.⁴³³

Stakeholders reported exploitative practices where coercion, threat and deception are used to force individuals to remain in a marriage, highlighting that individuals forced to remain in a marriage have choice and control taken away from them, and are prevented from exercising their human rights and freedoms.⁴³⁴

Case study

Anika* was referred to the STPP due to a forced marriage. Upon referral, the AFP reported a history of family violence perpetrated by one of Anika's immediate family members, who was identified as the person responsible for the forced marriage. Anika's main priority was to get assistance to leave her husband. Whilst Anika reported she felt unsafe in the relationship, had experienced ongoing marital rape, was no longer permitted to work or study, and that her mental health continued to deteriorate, Anika felt she could not leave due to detrimental consequences for her and her family.

Despite Anika informing a family member about the problems in the marriage and her intention to end it, that family member not only encouraged her to remain in the forced marriage but exerted ongoing pressure on Anika to conceive a child against her wishes.

While forcing a person to remain in a marriage is not an explicit offence in Divisions 270 and 271, some forms of exploitation experienced within a marriage might be captured by slavery and slavery-like practice offences in Division 270. For example, forcing a person to remain in a marriage for the purpose of providing labour or services could fall with the scope of forced labour or servitude offences in Division 270. The Explanatory Memorandum for these offences makes clear that labour or services can

⁴³⁰ EM for Child Sexual Exploitation Amendment 2019 (n 425) 49.

⁴³¹ Consultations; Submission – Australian Federal Police p 14; Submission - Confidential 3 pp 9-10.

⁴³² Submission – Australian Human Rights Commission p 10.

⁴³³ Shih Joo Tan and Laura Vidal, Monash Gender and Family Violence Prevention Centre, *Forced Marriage as a Form of Family Violence in Victoria* (Report, 2023) 9.

⁴³⁴ Submission – Confidential 3 pp 9 – 10; Submission – Australian Federal Police p 14.

occur in any setting, and is not specific about the type or nature of the labour or services.⁴³⁵ Convictions for forced labour and servitude offences have included cases where the labour or services were domestic in nature and included work like cooking, cleaning, caring and similar.⁴³⁶ However, feedback from targeted consultations suggests that proving such offences within the context of a marriage would likely be very difficult.

Gaps arise where the purpose of forcing a person to remain in a marriage falls outside of existing Division 270 offences. This could include where forcing a person to remain in a marriage is for the purpose of a benefit or gain that is not linked to labour or services, such as a financial gain (for example, a dowry) or a benefit linked to control of sexual or reproductive rights. Further gaps exist where forcing a person to remain in a marriage is not for exploitative purposes, for instance, where a person forces another person to remain in a marriage to avoid the stigma or shame of separation or divorce, or due to other drivers or motivations. In these circumstances, there remain significant consequences for the freedom and mobility of the person forced to remain in the marriage, as well as family violence risk factors.

It is not just about the absence of consent or coercion into marriage; nor is marriage the only site of contestation or negotiation. Instead, coercive pressures to marry should be understood as a dynamic process shaped and precipitated by multiple factors ... The dynamics and coercive pressures that lead to marriage may also prevent its termination.⁴³⁷

Where a person is forced to remain in a marriage, it may also indicate a historic forced marriage. Recent research based on interviews with family violence practitioners in Victoria indicates cases of women seeking support for family violence that reveal forced marriages that took place some time ago:

They come to us for their family violence, and ... over time with their case manager, we find out that she's experienced historic forced marriage ... actually 10 years ago was forced to marry someone or deceived into the marriage.⁴³⁸

The challenges associated with investigating and prosecuting a forced marriage are compounded by the passage of time, with evidence and witnesses harder to locate and testimony less reliable due to the hazards of memory. Explicitly recognising that forcing a person to remain in a marriage is a form of forced marriage would enable investigation and prosecution of conduct that has the ongoing effect of limiting a person's freedom and mobility, and potential for exploitation and family violence, without needing to establish a historic 'event' of forced marriage took place.

It could also form the basis of increased awareness raising and deterrence of such conduct, strengthening both Australia's response to forced marriage and broader efforts to prevent and respond to family violence. As raised in discussion about the definition of coercion, the Australian Government and state and territory governments are working together to develop a common understanding of coercive control in the family and domestic violence context. This work may help inform and strengthen understanding about how coercion manifests in forced marriage and other forms of modern slavery.

⁴³⁵ Explanatory Memorandum Crimes Legislation Amendment 2012 (n 85) 19

⁴³⁶ *Pulini* (n 89); *R v Kovacs* [2008] QCA 417; *DPP (Cth) v Kannan & Anor* [2021] VSC 429.

⁴³⁷ Tan and Vidal (n 433) 26.

⁴³⁸ *Ibid.*

However, significant additional consultation would be required before any proposal to expand the forced marriage offences is progressed. The Targeted Review received feedback that criminal justice approaches to forced marriage are often not the right solution for victims and survivors and communities, with stakeholders advocating for approaches centred on education and awareness-raising and civil protections and remedies.⁴³⁹ As noted above, the Government places a strong emphasis on efforts to prevent and disrupt forced marriages, and it is progressing work to enhance civil protections with state and territory governments. Nevertheless, where a victim and survivor wishes to pursue a criminal justice outcome, it is important that the forced marriage offences appropriately capture all relevant conduct and are fit for purpose.

Further consideration of the potential overlap between any expanded forced marriage offences relevant to forcing a person to remain in a marriage, and family and domestic violence offences under state and territory legislation, would also be required before progressing such a proposal.

Acts in preparation for a forced marriage

Linked to submissions questioning the application of Australia's forced marriage offences to subtle forms of coercion over time is a suggestion by the AFP to consider amending forced marriage offences to include 'acts in preparation' for a forced marriage.⁴⁴⁰ The AFP highlighted that under the existing framework, there is limited ability to intervene in the initial stages of offending.

Operational teams are aware of strategies taken to avoid being captured by the Australian offences. This can include having an underage victim commit to an 'engagement only' until reaching adulthood, or participating in a cultural ceremony or promise of marriage.⁴⁴¹

In principle, acts in preparation of a forced marriage should to some extent be addressed by Chapter 2 of the Criminal Code, which states general principles of criminal liability, including, at section 11.1, that 'a person who attempts to commit an offence commits the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.' The Explanatory Memorandum for the forced marriage offences also clarifies that because Chapter 2 of the Criminal Code operates in relation to the forced marriage offences, the conduct of individuals who aid, abet, counsel or procure the marriage, or who conspire with another person to bring about the marriage, are captured under the Criminal Code.⁴⁴² However, consultations indicated that these provisions are not typically used in relation to forced marriage and other modern slavery offences.

In targeted consultations, the AFP and CDPP pointed to other areas of Commonwealth criminal law—for instance, serious drug and precursor offences, OSEC and counter-terrorism offences—that contain offences specific to acts in preparation. However, (for example) drug and forced marriage offences are inherently different crimes with distinct challenges and complexities. Criminalising acts in preparation of a forced marriage is likely to require consideration of whether the intended marriage (for which the acts in preparation were being undertaken) was to be forced or consensual. Significant further consideration would be required to determine how such an offence might be constructed, including to ensure the evidentiary burden is commensurate with an offence of a less serious nature (compared to the forced

⁴³⁹ Submission – Confidential 4 pp 3, 8-9; Submission – Australian Federal Police p 14.

⁴⁴⁰ Submission – Australian Federal Police p 13.

⁴⁴¹ Submission – Australian Federal Police p 13.

⁴⁴² Explanatory Memorandum Crimes Legislation Amendment 2012 (n 85) 27.

marriage offence itself).

In contrast, criminalising acts in preparation of a forced marriage in cases involving a victim and survivor aged under 16 might be less complex due to the explicit criminalisation of child marriages in this age group (discussed above). Any acts in preparation for a marriage of a child aged under 16 would indisputably constitute acts in preparation for a forced marriage, as there is no need to consider the use of coercion, threat or deception, or incapacity to understand the nature and effect of the marriage ceremony, to establish a forced marriage in these circumstances.

The Targeted Review did not receive further feedback from stakeholders about criminalising acts in preparation for a forced marriage. Amending the offences to include preparatory acts would enable the AFP to intervene in earlier stages of offending, but would require significant additional consultation before such a proposal was progressed.

Finding 20

Australia's forced marriage offences do not capture conduct relevant to preparing for a forced marriage or forcing a person to remain in a marriage. Preparatory conduct may or may not be captured upon reliance on an extension of criminal responsibility provision such as the attempt provision contained at subsection 11.1(1) of the Criminal Code. Consideration could be given to additional measures to address this conduct.

Causation and coercion in forced marriage offences

One element of Australia's forced marriage offence involves causing another person to enter into a forced marriage as the victim of the marriage. The first element of the offence is conduct, requiring intention to engage in the conduct.⁴⁴³ The second element is a result of conduct, requiring recklessness.⁴⁴⁴ A person is reckless with respect to a result if:

- (a) he or she is aware of a substantial risk that the result will occur; and
- (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.⁴⁴⁵

The question whether taking a risk is unjustifiable is one of fact.⁴⁴⁶ Chapter 2 of the Criminal Code does not impose any test for determining when something is taken to be a result of conduct: that is left to the definition of the particular offences or common law principles.⁴⁴⁷

While the Criminal Code does not specify a test for causation for the purpose of section 270.7B, it does in other parts. For example, section 146.2 specifies that, for the purposes of Part 7.8 of the Code (Causing harm to Commonwealth public officials), a person's conduct is taken to cause harm if it substantially contributes to harm. Accordingly, it is likely that causation in Division 270 would be viewed on the common law test set out in *Royall v R* (1991) 172 CLR 378. Justice Walton in *Grasso Consulting Engineers*

⁴⁴³ *Criminal Code* (n 80) s 5.6.

⁴⁴⁴ *Ibid*.

⁴⁴⁵ *Ibid* s 5.4(2).

⁴⁴⁶ *Ibid* s 5.4(3).

⁴⁴⁷ Stephen Odgers, *Principles of Federal Criminal Law* (Thomson Reuters, 4th ed, 2019).

Pty Ltd v SafeWork NSW; Grasso v SafeWork NSW summarised:

Causation is to be viewed in a common sense and a practical way, appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter: *Royall v R* (1991) 172 CLR 378; [1991] HCA 27 (*Royall*) at [17] (per Mason CJ), [19] (per Deane and Dawson JJ) and [15] and [21] (per Toohey and Gaudron JJ). As Allsop P stated in *Whelan, Heath Andrew v R* [2012] NSWCCA 147 at [2], whilst causation is an issue that has been the subject of much debate in some legislation in the civil sphere, in crime, it remains, in many contexts a jury question and is governed by the test in *Royall*. The question is one of fact, dealt with by common sense, appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter and so the causal connection must be sufficiently substantial to permit a conclusion of criminal responsibility.⁴⁴⁸

Stakeholders provided feedback to the Targeted Review that forced marriage victims and survivors often experience subtle forms of coercion in a pattern of behaviour over time and that together these behaviours create a situation where a person is forced into a marriage.⁴⁴⁹ The AFP's submission raises concern that the threshold of causation is not fit for purpose in a forced marriage context because it does not appropriately apply to subtle and coercive actions that take place over time. The AFP's submission stated:

Although a specific event (such as a threat or act of violence) may appear to occur in isolation, it is often reinforced by a lifetime of subtle coercive actions by the offender, which have ongoing influence in the mind of the victim. Such circumstances are not currently contemplated by or accounted for within the legislation. Instead, the causation principle has been interpreted in a manner that requires significant and sustained examples of a victim being coerced into complying with the requests/requirements of the offender.⁴⁵⁰

Causation can result from a series of acts, but it will depend on the facts alleged. In order to satisfy the physical element of the forced marriage offence in paragraph 270.7B(1)(b), it is necessary to demonstrate that:

- the accused intentionally engaged in conduct;
- the conduct of the accused resulted in the victim entering into the forced marriage; and
- the accused was aware of a substantial risk that the forced marriage would have occurred and having regard to the circumstances, it was unjustifiable to take the risk.

Conduct can be an act or series of acts. Demonstrating causation beyond reasonable doubt may be more easily achieved if the conduct is an obvious or overt act, but it is not necessary to restrict the evidence to single or obvious acts. Subtle patterns of behaviour over a period of time can conceivably satisfy the elements of the offence.

The Targeted Review did not receive further submissions or feedback from stakeholders that commented specifically on the term 'causation' in Australia's forced marriage offences. There is also a lack of judicial authority that might demonstrate either the strengths or limitations of the causation approach.

⁴⁴⁸ *Grasso Consulting Engineers Pty Ltd v SafeWork NSW; Grasso v SafeWork NSW* [2021] NSWCCA 288, 28 (Walton J).

⁴⁴⁹ Submission – Australian Federal Police p 12; Submission – Australian Human Rights Commission p 10; Submission – Lighthouse Foundation.

⁴⁵⁰ Submission – Australian Federal Police p 12.

Some stakeholders expressed views about the forms of coercion that take place in a forced marriage context and encouraged consideration of the applicability of Australia’s offences to these forms of coercion. For example, the Australian Human Rights Commission—citing Frances Simmons and Grace Wong⁴⁵¹—noted in its submission:

A forced marriage ‘can involve a spectrum of coercive and controlling behaviours’ and ‘the coercion or threats that cause a non-consenting party to enter into a marriage can encompass conduct that began long before the marriage’.⁴⁵²

Similarly, Fiona David and Olivia Hicks observed that one of the characteristics of forced labour offences in Australia ‘has been the use of subtle means to create a climate of fear and thereby ensure effective control over a person.’⁴⁵³ In consultations, stakeholders expressed similar views on the nature of coercion in forced marriage cases.

Feedback about the manifestation of coercion in forced marriage cases may be addressed, in part, by the Targeted Review findings regarding the definition of coercion.

Relevant evidence

Section 270.10 of the Criminal Code sets out relevant evidence that a trier of fact may have regard to when determining:

- for slavery-like offences, whether the alleged victim and survivor has been coerced, threatened or deceived;
- for the offence of servitude, whether the alleged victim and survivor was significantly deprived of personal freedom;
- for the offence of forced marriage, whether the alleged victim and survivor was incapable of understanding the nature and effect of a marriage ceremony; or
- for the offence of debt bondage, whether another person has caused the alleged victim and survivor to enter into debt bondage.

The relevant evidence specified in this section includes:

- the economic relationship between the alleged victim and survivor, the alleged offender or a family member of the alleged victim or alleged offender, and any other person;
- the terms of any written or oral contract or agreement between the alleged victim and survivor, the alleged offender or a family member of the alleged victim and survivor or alleged offender, and any other person; and
- the personal circumstances of the alleged victim and survivor, including but not limited to:
 - whether the victim and survivor is entitled to be in Australia under the Migration Act;
 - the victim and survivor’s ability to speak, write and understand English or another

⁴⁵¹ Frances Simmons and Grace Wong, ‘Learning from Lived Experience: Australia’s Legal Responses to Forced Marriage’ (2021) 44(4) *UNSW Law Journal* 1619, 1624-1635.

⁴⁵² Submission – Australian Human Rights Commission p 10. See also Submission – Lighthouse Foundation.

⁴⁵³ Submission – Fiona David and Olivia Hicks p 6.

language; and

- the extent of the victim and survivor's social and physical dependence on the alleged offender or any other person.

The relevant evidence listed at subsection 270.10(2) does not prevent or exclude the leading of any other relevant evidence or limit the manner in which evidence may be given or the admissibility of evidence.

According to the Explanatory Memorandum for the introduction of the relevant evidence section:

The list of matters at subsection 270.10(2) is not intended to be exhaustive. That is, the trier of fact in a particular case may have regard other things in determining a matter relating to the alleged victim of an offence against Division 270 of the Criminal Code, not only those matters listed in new subsection 270.10(2) of the Criminal Code.

New subsection 270.10(3) provides that new subsection 270.10(1) does not prevent the prosecution or the defence leading other evidence in the proceedings, limit the manner in which evidence may be given, or limit the admissibility of evidence.⁴⁵⁴

Further, the use of the word 'may' in subsection 270.10(1) also indicates that the relevant evidence section is not intended to be prescriptive of the types of factors or evidence that can be accounted for.

Possible changes to the relevant evidence provision

Consistent with the non-prescriptive and non-exhaustive manner in which section 270.10 is intended to operate, the relevant evidence provision could be expanded to provide greater clarity on any other ambiguous elements of the slavery-like offences. This would provide the trier of fact with some guidance for their assessment of these elements, and clarify the types of evidence that may be appropriate for the prosecution to lead.

In consultations, suggestions from stakeholders of matters that could also be listed in subsection 270.10(2) included:

- the social, cultural, religious, political, economic and personal context of the victim-survivor and/or their relationships with others, including with the alleged offender;⁴⁵⁵
- specific locations or workplaces that impinge freedom to cease or leave a place of labour or services;⁴⁵⁶ and
- systemic factors that impinge on the decision-making abilities and opportunities for people with an intellectual disability, and consideration of 'acquiescence'.⁴⁵⁷

⁴⁵⁴ Explanatory Memorandum Crimes Legislation Amendment 2012 (n 85) 30.

⁴⁵⁵ Submission – Confidential 4 pp 4-6.

⁴⁵⁶ Submission – Maritime Union of Australia p 6.

⁴⁵⁷ Submission – Inclusion Australia p 3. 'Acquiescence' describes the way many people with an intellectual disability are likely to say 'yes' to questions or accept and agree with things, regardless of what has been asked, and often without really wanting to. Acquiescence often happens as a result of people masking their communication difficulties to avoid the stigma of being labelled as having disability, or to adhere to the status quo.

Social, cultural and economic relationships context of the victim-survivors and/or their relationships with others, including with the alleged offender

Submissions highlighted the complex social and cultural relationships often involved in the context of a forced marriage offence.⁴⁵⁸ One confidential submission highlighted how in certain cultures, the decision to enter into a marriage is made collectively by the victim and survivor and other members in their community.⁴⁵⁹ It stated that whether the victim felt free to refuse the marriage without fear of repercussions is a relevant factor that should be captured.⁴⁶⁰

There may be benefit to expanding subsection 270.10(2)(a) to account for social and cultural relationships in addition to economic relationships between the victim and others. Such an expansion would clarify that a relationship of dependence and exploitation can occur through the control of other aspects of the victim's life beyond their finances.

Freedom to cease labour or services/leave a place of labour or services

Consideration of the unique vulnerabilities of seafarers, as described by Maritime Union of Australia,⁴⁶¹ could be supported by expanding:

- the list of elements in subsection 270.10(1) to which the matters in subsection 270.10(2) can apply to encompass freedom to cease labour or services/leave a place of labour or services, and
- the non-exhaustive list of personal circumstances in subsection 270.10(2)(c) to include the geographic location or physical circumstances of the victim.

Persons with intellectual disabilities

Inclusion Australia argued that the relevant evidence provision should provide guidance for the treatment of persons with intellectual disabilities that affect their decision-making.⁴⁶² In particular, it suggested there should be consideration of the fact that persons with intellectual disabilities are more likely to acquiesce and agree with things that are said to them even where they do not in fact agree.⁴⁶³

This suggestion could be implemented by expanding the non-exhaustive list of personal circumstances in subsection 270.10(2)(c). A person's decision-making capacity would also be connected to the reasonable person element as a relevant factor about the victim. It would also be relevant to a person's amenability to coercion or deception.

Significant deprivation of freedom—servitude

As outlined above, Fiona David and Olivia Hicks stated that further guidance should be provided on the 'significant deprivation of freedom' element in the servitude offence.⁴⁶⁴ To avoid narrowing the offence, they suggested these could be drafted as discretionary and non-exhaustive considerations. David and Hicks pointed to factors as outlined in the *Siliadin* case as relevant examples: excessive hours of work,

⁴⁵⁸ Submission – Confidential 4 p 4; Submission – Lighthouse Foundation; Submission – Australian Federal Police p 13.

⁴⁵⁹ Submission – Confidential 4 p 4.

⁴⁶⁰ Submission – Confidential 4 p 5.

⁴⁶¹ Submission – Maritime Union of Australia p 6

⁴⁶² Submission – Inclusion Australia p 3-4.

⁴⁶³ Submission – Inclusion Australia p 3-4.

⁴⁶⁴ Submission – Fiona David and Olivia Hicks p 5.

restrictions on movement, family obligation and lack of autonomy in personal decision making, vulnerability for reasons including young age and immigration status, and precarious living arrangements.⁴⁶⁵

ReThink Orphanages Australia submitted that additional guidance should seek to address how the factors of physical custody and/or guardianship and the closed nature of residential care environments intersect to meet the stipulated conditions of ‘significant deprivation’ and ‘not consider[ing] himself or herself to be free to cease or leave’.⁴⁶⁶

Reasonable person element—servitude and forced labour offences

As acknowledged earlier in this Report, the ‘reasonable person’ element in both the servitude and forced labour offences is absent from the list in subsection 270.10(1) to which the matters in subsection 270.10(2) can apply. Therefore, no factors are currently outlined in the section to help the trier of fact to assess whether a reasonable person in the position of the victim would consider themselves to be free to cease providing labour or services.

The absence of the ‘reasonable person’ element may also unintentionally signal to the trier of fact that the list of factors in subsection (2) would not be relevant to the reasonable person test.

On its face, a number of the factors in subsection (2) may be relevant to the reasonable person assessment. For example, the victim’s economic dependence on the offender or a family member, or any contract between the victim and offender, would provide relevant context to whether objectively the victim considered themselves free to leave the arrangement.

Finding 21

The list of elements and factors in section 270.10 (relevant evidence) is non-exhaustive. However, it could be amended to explicitly capture further conduct relevant to Division 270 offences, with a view to:

- including the reasonable person, freedom to cease labour or services/leave a place of labour or services, and significant deprivation of freedom elements. The list of factors that are relevant to these elements will also need to be explored;
- including the social and cultural relationships between the victim and survivor and the offender, and the victim and survivor and their family members, as relevant factors; and
- accounting for particular vulnerabilities of a person with a disability.

⁴⁶⁵ Submission – Fiona David and Olivia Hicks p 5.

⁴⁶⁶ Submission – ReThink Orphanages Australia pp 8-9.

Part 6: Victim and survivor protection and support

A study conducted by the AIC in 2021 revealed an overall prosecution attrition rate for modern slavery cases of 73%.⁴⁶⁷ Attrition was most evident during the initial phases of prosecution, when the decision to lay charges was being considered. For cases that did proceed to prosecution, there was a 60% likelihood of conviction (with the defendant either pleading or being found guilty). Defendants were more likely to be convicted for ancillary charges (for example, migration offences) than the most serious charges of human trafficking and slavery. The prosecution attrition rate for the most serious charges was 80%, compared to 54% for lesser charges.

Compelling reasons underpin these statistics. Victims and survivors of modern slavery have often endured sustained traumatic abuse including coercion, physical and sexual assaults, deprivation of food and breaches of other human rights. This trauma can inhibit survivors' ability to assist with investigations and to bear witness through the criminal justice process. Compounding this trauma is victims and survivors' fear or distrust of authorities and concern for their own safety and/or the safety of family members.

Australia's victim-centric, trauma-informed and harm minimisation approach prioritises the protection of victims and survivors and focuses on their recovery through referral to appropriate support services. In line with good practice in victim management, Australian frontline responders, law enforcement officers and criminal justice practitioners ensure victims and survivors are supported, treated with respect and provided information about the investigation and court process. Victims and survivors' views are considered a key factor in determining if it is in the public interest to proceed with a prosecution. Law enforcement officers and criminal justice practitioners are trained in working with vulnerable witnesses and apply a trauma-informed approach through the criminal justice process so that victims and survivors feel supported and empowered not only to provide testimony but also to assist efforts around education, disruption and crime prevention should they wish.

Victim and survivor testimony

Australian law provides protections for vulnerable witnesses giving evidence in Commonwealth criminal proceedings, including victims and survivors of trafficking in persons and slavery-related offences. The Crimes Act enables victims and survivors to give evidence by closed-circuit television, video-link or video-recording, have their contact with the defendant or members of the public limited, and have a support person with them while they give evidence. The Crimes Act also makes it an offence to publish material identifying a trafficked person, and allows trafficked people to make victim impact statements to the court outlining the harm they have experienced.

Important amendments are being made to the provisions in the Crimes Act that support vulnerable witnesses to strengthen protections and criminal justice outcomes for vulnerable witnesses and victims and survivors of sexual violence at the Commonwealth level by implementing outstanding recommendations from the *2017 Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse*.

Despite these protections, there are some aspects of the offences at Divisions 270 and 271 that can be

⁴⁶⁷ Lyneham, 'Estimating the dark figure of human trafficking' (n 2) 1.

considered through the lens of reducing reliance on victim and survivor testimony. See, for instance, earlier discussion in the section titled ‘Reasonable person in the position of a victim and survivor’ in Part 5: Division 270—Slavery and slavery-like practices.

Victim and survivor protections

Defences

There is currently no specific provision in Australian legislation for the treatment of trafficked persons who have engaged in criminal activity, and no other crime types that have specific defences in the Criminal Code for victims who engage in criminal activity as a result of a crime being committed against them.

The Criminal Code includes a number of general defences. This includes the defence of duress at section 10.2 of the Criminal Code, which provides that a person is not criminally responsible for a Commonwealth offence if he or she carries out the conduct constituting the offence under duress. A person carries out conduct under duress only if the person reasonably believes:

- a threat has been made that will be carried out unless an offence is committed;
- there is no reasonable way that the threat can be rendered ineffective; and
- the conduct is a reasonable response to the threat.⁴⁶⁸

Other general defences may be available where the conduct constituting the offence is in response to a sudden or extraordinary emergency (section 10.3 of the Criminal Code), or where the conduct constituting the offence is in self defence (section 10.4 of the Criminal Code).

The Joint Standing Committee on Foreign Affairs, Defence and Trade report, *Hidden in Plain Sight*, recommended the introduction of defences for victims of modern slavery offences who are compelled to commit a crime due to exploitation, including a pathway for appeal and/or expungement of criminal convictions for victims of modern slavery who have legitimate defences, together with sentencing guidance (recommendation 22).⁴⁶⁹ The Government Response noted that recommendation and pointed to general defences that may be relevant as outlined above.⁴⁷⁰

Non-punishment principle

The non-punishment principle has emerged in international guidance and commentary on responses to trafficking in persons.⁴⁷¹ While the principle is not explicitly contained within the UNTOC or the Trafficking in Persons Protocol, it has been recognised and subsequently incorporated in several regional agreements and documents of international organisations, including by the United Nations, European

⁴⁶⁸ *Criminal Code* (n 80) s 10.2(2).

⁴⁶⁹ *Hidden in Plain Sight* (n 56) 163.

⁴⁷⁰ Australian Government, *Australian Government Response to the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade inquiry reports: Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia and the Modern Slavery and Global Supply Chains: Interim report of the Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry into establishing a Modern Slavery Act in Australia* (October 2020) 44.

⁴⁷¹ See, for example, Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* UN Doc. E/2002/68/Add. 1 (2002); Inter-Agency Coordination Group against Trafficking of Persons, ‘Non-Punishment of Victims of Trafficking’, Issue Brief 8 (Report, 2021).

Union, Association of South-East Asian Nations, Council of Europe, Organization of American States and the Organization for Security and Co-operation in Europe.⁴⁷²

The non-punishment principle recognises that victims and survivors should not be punished for conduct that they commit as a direct result of being a victim and survivor.⁴⁷³ The principle is not intended to provide immunity to victims and survivors, but instead recognises that criminal liability should be based on voluntary conduct.

The UNODC's Legislative Guide notes that the Working Group on Trafficking in Persons of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime views the non-punishment principle as an extension of State Party obligations in Article 2 of the Trafficking in Persons Protocol, which calls on States to 'protect and assist the victims of such trafficking, with full respect for their human rights'.⁴⁷⁴

The Committee on the Elimination of Discrimination against Women has similarly called on States to implement the non-punishment principle in legislation to assist responders with identifying victims and survivors of trafficking for relief from criminal consequences directly arising from their trafficking (General Recommendation No. 38).⁴⁷⁵

The ASEAN Convention Against Trafficking In Persons, Especially Women and Children⁴⁷⁶ – signed by all ASEAN Member States – states that victims of trafficking should not be punished for unlawful acts committed because of being trafficked.⁴⁷⁷ The ASEAN-Australia Counter Trafficking Program (ASEAN-ACT) has supported a study that considers how the non-punishment principle is reflected in laws, policies and practice and discusses some of the barriers to implementing the principle.⁴⁷⁸ The study highlighted a range of approaches in ASEAN countries, including that:

- in most ASEAN States, the principle only applies to set a range of offences (for example immigration offences);
- in Thailand, written permission must be sought from the Minister of Justice to prosecute a victim and survivor for a specified list of offences; and
- in some States, the principle is not limited to only specified offences.⁴⁷⁹

Complementary measures can include provisions allowing for victims and survivors to clear their criminal records in certain circumstances.⁴⁸⁰

⁴⁷² UN Human Rights Council, *Report of the Special Rapporteur on trafficking in persons, especially women and children: Implementation of the non-punishment principle* UN Doc. A/HRC/47/34 (17 May 2021) 4-6.

⁴⁷³ UNODC *Legislative Guide* (n 74) 48 [97]-[114].

⁴⁷⁴ *Ibid* 49 [188].

⁴⁷⁵ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 38 on trafficking in women and girls in the context of global migration*, UN Doc. CEDAW/C/GC/38 (20 November 2020) 98.

⁴⁷⁶ *The ASEAN Convention Against Trafficking in Persons, Especially Women and Children*, signed 25 November 2015, (entered into force 8 March 2017).

⁴⁷⁷ Note – Australia is not an ASEAN Member State.

⁴⁷⁸ Marika McAdam, *Implementation of the Non-Punishment Principle for Victims of Human Trafficking in ASEAN Member States* (Report, 2022) ('*Implementation of the Non-Punishment Principle*').

⁴⁷⁹ *Ibid* 4-5.

⁴⁸⁰ *Hidden in Plain Sight* (n 56) 163 [6.101]; Submission – Dr Felicity Gerry KC, Jennifer Keene McCann and Cate Read p 7.

States take a range of approaches in establishing the relationship between a victim's unlawful conduct with his or her trafficking in their national legislation. For example, some States require that a victim and survivor is directly compelled to participate in the criminal conduct (compulsion models), whereas others require that conduct be a direct consequence of the trafficking (causation models).⁴⁸¹

Stakeholders in Australia have raised the non-punishment principle for consideration in the context of Divisions 270 and 271 to better support and protect victims and survivors and to aid victim and survivor identification by mitigating fear of experiencing negative consequences (in some circumstances) in coming forward to authorities.⁴⁸² Dr Felicity Gerry KC, Jennifer Keene McCann and Cate Read raised this in their submission and argued that unless laws, policies and procedures allow for safe confession by trafficked persons to crimes with a non-liability outcome, the focus remains on criminal punishment, victims are not protected, and those who exploit them are unlikely to be made accountable.⁴⁸³

To date, Australia has not implemented the non-punishment principle in law through a legislative defence for victims and survivors. However, in practice, the AFP and CDPP give effect to the principle of non-punishment of victims and survivors, including through the *Prosecution Policy of the Commonwealth*, which requires close consideration of the interests of the victim and survivor, and that prosecutions are to be in the public interest.⁴⁸⁴ Further, the CDPP may issue an undertaking not to prosecute in circumstances where a person is giving evidence in proceedings against another person.

The National Action Plan includes an initiative to undertake a targeted review of supports, as well as legislative protections, defences and remedies available to victims and survivors. This initiative provides a further opportunity to consider the defences available to victims and survivors of modern slavery.

Internationally, there has been some limited implementation of the non-punishment principle in domestic law—the United Nations Working Group on Trafficking in Persons in 2009 provided examples from Argentina, the Philippines, the US and the Dominican Republic.⁴⁸⁵ More recently, as discussed above, there has been some implementation of the principle (whether explicitly or implicitly) by ASEAN member states.⁴⁸⁶

Despite this, it does not appear that there are a significant number of other jurisdictions in which the non-punishment principle has been explicitly (or obviously) implemented. It is particularly challenging to analyse implementation of the principle given the broad range of possible methodologies—countries might have implemented elements of the principle in a way which is not obviously targeted at human trafficking (as above, examples of this in Australia might include prosecutorial and sentencing discretion, as well as existing defences to criminal charges).

⁴⁸¹ McAdam, *Implementation of the Non-Punishment Principle* (n 478) 33-39; Submission – Dr Felicity Gerry KC, Jennifer Keene McCann and Cate Read p 23-26.

⁴⁸² Submission – Dr Felicity Gerry KC, Jennifer Keene McCann and Cate Read 20-21; Submission – Australian Human Rights Commission pp 25-26; Submission – Scarlet Alliance pp 27-28; Submission – Australian Federal Police p 15; Submission – International Justice Mission pp 8, 14-16; Submission – Cleaning Accountability Framework pp 11-12.

⁴⁸³ Submission – Dr Felicity Gerry KC, Jennifer Keene McCann and Cate Read p 10.

⁴⁸⁴ Commonwealth Director of Public Prosecutions, *Prosecution policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process* (2021).

⁴⁸⁵ United Nations Office of Drugs and Crime, Working Group on Trafficking in Persons, *Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking*, UN Doc CTOC/COP/WG.4/2010/4 (9 December 2009) 5-6.

⁴⁸⁶ McAdam, *Implementation of the Non-Punishment Principle* (n 478) 40-100.

Approaches

The extent to which the non-punishment principle is to be applied to offences in a jurisdiction is a matter for each jurisdiction to determine.

Broadly, there are 2 distinct approaches that can be taken. In *Implementation of the Non-Punishment Principle for Victims of Human Trafficking in ASEAN Member States*, these are described as the ‘compulsion model’ and the ‘causation model’ (the compulsion model is also sometimes called the ‘duress model’).⁴⁸⁷

The **causation model** is narrow in scope, and focuses on offences committed by the victim and survivor ‘in the process of being trafficked’.⁴⁸⁸ These include ‘the violation of immigration law, giving of false information to obtain travel documents, work permits and residence permits, illegal crossing of state frontiers and overstaying beyond the period of the visa’.⁴⁸⁹ Under a causation model approach, the non-punishment principle only extends to the offences committed by the victim and survivor as a direct result of the act of being trafficked.

The **compulsion/duress model**, on the other hand, is broader and focuses on offences committed by victims and survivors ‘not connected with the act of trafficking but which they have been compelled to commit, as trafficked persons lacking autonomy in their acts’.⁴⁹⁰ These are non-exhaustive and include a wide range of offences, including:

- those committed in the course of being trafficked (that is, offences under the causation model);
- offences related to the type of exploitation for which the victim and survivor has been trafficked (for example, theft, violent crime, illegal work, drug production or cyber-crime such as online fraud);
- offences linked to the trafficking experience, such as offences committed in trying to escape (or to maintain safety/distance from) the human trafficker; and
- offences committed by a victim and survivor in the trafficking or exploitation of another victim.⁴⁹¹

It is possible for a country to implement various strategies in implementing the non-punishment principle, using the causation model, the compulsion model, or both to varying extents. For example, a country might choose only to implement the principle in relation to protecting victims and survivors from prosecution for offences committed in the act of being trafficked, or might choose to offer a greater level of protection, with lesser or no protection being offered to victims and survivors for offences they commit outside of the trafficking itself.

⁴⁸⁷ Ibid 33-39.

⁴⁸⁸ OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (Report, 2013) 50.

⁴⁸⁹ Ibid 52.

⁴⁹⁰ Ibid 50.

⁴⁹¹ Ibid 53-57.

Finding 22

Implementation of the non-punishment principle is complex and multi-faceted. There are methods of implementation that already exist in Australia. Initial measures to strengthen application of the principle could be taken, including development of guidance for criminal justice practitioners. Further consideration of a new statutory defence should form part of the targeted review of support and legislative protections, defences and remedies available to modern slavery victims and survivors under Action Item 26 of the National Action Plan.

Appendix A: Terms of reference

Overview

Strong criminal justice responses are an integral part of combating modern slavery in Australia to ensure our justice framework supports effective disruption, investigation and prosecution actions.

The Australian Government will undertake a Targeted Review of Australia's modern slavery offences in Divisions 270 and 271 of the *Commonwealth Criminal Code Act 1995* (the Criminal Code).

This initiative contributes to delivering Australia's *National Action Plan to Combat Modern Slavery 2020-25*.

Context

In Australia, modern slavery refers to a range of serious exploitative practices including trafficking in persons, slavery and slavery-like practices such as deceptive recruiting, debt bondage, forced labour and forced marriage. Modern slavery occurs in every country and across all sectors and segments of society, and Australia is not immune.

Australia has comprehensively criminalised modern slavery practices in Divisions 270 and 271 of the Commonwealth Criminal Code and our offences reflect Australia's obligations under international law. The first offences under Divisions 270 and 271 were established in 1999 and 2005 respectively. Since the introduction of offences, a range of legislative reforms have taken place to strengthen Divisions 270 and 271. Australia remains committed to continuing to look closely at its legislative framework and ensuring it continues to support Australia's strong stance against modern slavery.

Global contexts have developed since the introduction of offences in Divisions 270 and 271. Our understanding of modern slavery, and the many forms it can take, continues to mature. Technology has also changed how modern slavery is perpetrated and how it is detected, disrupted and investigated. It is important to consider how these developments impact the operation of Divisions 270 and 271 to ensure they remain fit for purpose, now and into the future.

The review is not intended to consider all aspects of Divisions 270 and 271. It will be targeted in nature and focus on core questions and issues with Australia's legislative framework, including those already raised through parliamentary inquiries on Australia's modern slavery response.

Objectives

The Targeted Review will report to Government on the following:

- the number of referrals, investigations and prosecutions under Divisions 270 and 271 of the Criminal Code
- investigation challenges connected to offences under Divisions 270 and 271 of the Criminal Code
- prosecution challenges connected to offences under Divisions 270 and 271 of the Criminal Code
- the types and range of offences in Divisions 270 and 271 of the Criminal Code
- framing of offences in Divisions 270 and 271 of the Criminal Code including elements of the offences, definitions, scope, extensions of criminal liability (including attempt), and jurisdiction

- alignment of Divisions 270 and 271 with international laws, standards and best-practice
- appropriateness of penalties in Divisions 270 and 271 of the Criminal Code
- applicability of Divisions 270 and 271 to contemporary manifestations of modern slavery and to current and projected criminal methodologies, and
- interactions between Divisions 270 and 271 and other laws and frameworks where those interactions have impeded, or have the potential to impede, effective investigations and prosecutions under Divisions 270 and 271.

Scope

The Targeted Review will draw on a range of sources, including gathering information and data from existing reports, papers and research, and conducting a nation-wide consultation process. It will consider and have regard to:

- Reports from parliamentary inquiries on modern slavery matters including:
 - the Parliamentary Joint Committee on Law Enforcement inquiry *An Inquiry into Human Trafficking, Slavery and Slavery-like Practices*
 - the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) inquiry *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia*, and
 - the JSCFADT inquiry *Compassion Not Commerce: An Inquiry into Human Organ Trafficking and Organ Transplant Tourism*.
- Feedback from consultations, including:
 - a public consultation process that invites submissions in response to a Discussion Paper linked to the objectives of the Review, and
 - discussions with stakeholders on specific issues.
- Statistics and data on referrals, investigations and prosecutions conducted to date for offences in Divisions 270 and 271 of the Criminal Code.

Reviewer

The Targeted Review will be conducted by the Australian Attorney-General's Department in collaboration with the Australian Federal Police, and the Commonwealth Director of Public Prosecutions.

Timing

A Review Paper containing findings from the Review will be provided to the Government by June 2023.

The Review Paper will be made public after government consideration, and in accordance with the term of the National Action Plan.

Appendix B: Schedule of submissions

Submissions (in alphabetical order)

Submission 1 – Annabel Anderson and Dr Hannah Harris

Submission 2 – Anti-Slavery Australia

Submission 3A – Australian Federal Police (OFFICIAL)

Submission 3B – Australian Federal Police (PROTECTED)

Submission 4 – Australian Human Rights Commission

Submission 5 – Be Slavery Free

Submission 6 – Cleaning Accountability Framework

Submission 7 – Coalition Against Trafficking in Women Australia

Submission 8 – Fiona David and Olivia Hicks

Submission 9 – Destiny Rescue Australia

Submission 10 – Dr Felicity Gerry KC, Jennifer Keene McCann and Cate Read

Submission 11 – Dr Damien Huffer and Dr Nilda Garcia

Submission 12 – Inclusion Australia

Submission 13 – Integrated Family & Youth Service and Project Paradigm

Submission 14 – International Justice Mission

Submission 15 – Law Council of Australia

Submission 16 – Lighthouse Foundation

Submission 17 – Maritime Union of Australia

Submission 18 – Dr Marika McAdam

Submission 19 – People with Disability Australia

Submission 20 – Project Respect

Submission 21 – ReThink Orphanages Australia

Submission 22 – Scarlet Alliance

Submission 23 – Dr Peta-Jane Secrett

Submission 24 – Dr Linda Steele

Submission 25 – ZOE Foundation Australia

Submission 26 – Confidential 1

Submission 27 – Confidential 2

Submission 28 – Confidential 3

Submission 29 – Confidential 4

Submission 30 – Confidential 5

Appendix C: Summary of offences

Division 270 offences

Offence	Section	Elements	Maximum penalty
Slavery	270.3(1)	Intentionally reduce a person to slavery, ⁴⁹² possess or exercise rights of ownership over a slave, engage in slave trading, ⁴⁹³ enter into a commercial transaction involving a slave, or exercise control or direction over, or provide finance for, slave trading or a commercial transaction involving a slave	25 years
	270.3(2)	Recklessly enter into a commercial transaction involving a slave, or exercise control or direction over, or provide finance for, slave trading or a commercial transaction involving a slave	17 years
Servitude	270.5(1)	Cause another person to enter into or remain in servitude ⁴⁹⁴	15 years, or 20 years for an aggravated offence ⁴⁹⁵
	270.5(2)	Conduct a business ⁴⁹⁶ involving the servitude of another person or persons	15 years, or 20 years for an aggravated offence
Forced Labour	270.6A(1)	Cause another person to enter into or remain in forced labour ⁴⁹⁷	9 years, or 12 years for an aggravated offence

⁴⁹² 'Slavery' is defined in section 270.1 of the *Criminal Code* 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.

⁴⁹³ 'Slave trading' is defined in subsection 270.3(3) of the *Criminal Code* as including the capture, transport or disposal of a person with the intention of reducing the person to slavery; or the purchase or sale of a slave.

⁴⁹⁴ 'Servitude' is defined in subsection 270.4(1) of the *Criminal Code* as the condition of a person (the victim) who provides labour or services, if, because of the use of coercion, threat or deception: a reasonable person in the position of the victim would not consider himself or herself to be free to cease providing labour or services or to leave the place or area where he or she (the victim) provides labour or services; and 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.

⁴⁹⁵ Under subsection 270.8(1) of the *Criminal Code*, a servitude, forced labour, deceptive recruiting, forced marriage or debt bondage offence is aggravated where: the victim is under 18; the offender subjected the victim to cruel, inhuman or degrading treatment; or the offender engaged in conduct that gave rise to a danger of death or serious harm to the victim or another person.

⁴⁹⁶ 'Conducting a business' is defined in section 270.1A of the *Criminal Code* to include taking any part in the management of the business; exercising control or direction over the business; or providing finance for the business.

⁴⁹⁷ 'Forced labour' is defined in subsection 270.6(1) of the *Criminal Code* as the condition of a person (the victim) who provides labour or services if, because of the use of coercion, threat or deception, a reasonable person in the position of the victim would not consider himself or herself to be free to cease providing labour or services; or to leave the place or area where he or she (the victim) provides labour or services.

	270.6A(2)	Conduct a business involving the forced labour of another person or persons	9 years, or 12 years for an aggravated offence
Deceptive recruitment	270.7	Intentionally induce another person to enter into an engagement to provide labour or services, where the other person is deceived ⁴⁹⁸ about: the extent to which the person will be free to leave, or to cease providing labour or services; the quantum or existence of a debt owed or claimed to be owed; the fact the engagement will involve exploitation or the confiscation of travel or identity documents; or, if the engagement is to involve the provision of sexual services, ⁴⁹⁹ that fact, or the nature of sexual services to be provided	7 years, or 9 years for an aggravated offence
Forced Marriage	270.7B(1)	Cause another person to enter into a forced marriage ⁵⁰⁰	7 years, or 9 years for an aggravated offence
	270.7B(2)	Be a party to a forced marriage, where they are not a victim of the forced marriage	7 years, or 9 years for an aggravated offence
Debt bondage	270.7C	Intentionally cause another person to enter into debt bondage ⁵⁰¹	4 years, or 7 years for an aggravated offence

⁴⁹⁸ 'Deceive' is defined in section 271.1 of the *Criminal Code* as to mislead as to fact (including the intention of any person) or as to law, by words or other conduct.

⁴⁹⁹ 'Sexual service' is defined in the Dictionary to the *Criminal Code* as the use or display of the body of the person providing the service for the sexual gratification of others.

⁵⁰⁰ 'Forced marriage' is defined in subsection 270.7A(1) of the *Criminal Code* as a marriage where, because of the use of coercion, threat or deception, one party to the marriage (the victim) entered into the marriage without freely and fully consenting.

⁵⁰¹ 'Debt bondage' is defined in section 270.1A of the *Criminal Code* as the status or condition that arises from a pledge by a person of his or her personal services, or of the personal services of another person under his or her control, as security for a debt owed, or claimed to be owed, (including any debt incurred, or claimed to be incurred, after the pledge is given), by that person if: the debt owed or claimed to be owed is manifestly excessive; or the reasonable value of those services is not applied toward the liquidation of the debt or purported debt; or the length and nature of those services are not respectively limited and defined.

Division 271 offences

Offence	Section	Elements	Maximum penalty
Trafficking in Persons	271.2(1), (1A)	Organise or facilitate the entry, proposed entry, exit, proposed exit, or receipt of another person, using coercion, threat or deception ⁵⁰² to obtain that person's compliance	12 years, or 20 years for an aggravated offence ⁵⁰³
	271.2(1B), (1C)	Organise or facilitate the entry, proposed entry, exit, proposed exit, or receipt of another person, reckless as to whether the other person will be exploited ⁵⁰⁴	12 years, or 20 years for an aggravated offence
	271.2(2), (2A), (2B), (2C),	Organise or facilitate the entry, proposed entry, exit, proposed exit, or receipt of another person, deceiving the other person about: the provision, or nature of the provision, of sexual services; the extent to which the person will be free to leave, or to cease providing sexual services; the quantum or existence of a debt owed or claimed to be owed; or the fact the engagement will involve exploitation or the confiscation of travel or identity documents	12 years, or 20 years for an aggravated offence
Trafficking in Children	271.4(1), (2)	Organise or facilitate the entry, proposed entry, exit, proposed exit, or receipt of a person who is under 18, intending or reckless as to whether the person will be used to provide sexual services or will be otherwise exploited	25 years
Domestic trafficking in persons	271.5(1)	Organise or facilitate the transportation or proposed transportation of a person from one place in Australia to another, using coercion, threat or deception to obtain that person's compliance	12 years, or 20 years for an aggravated offence ⁵⁰⁵
	271.5(2)	Organise or facilitate the transportation or proposed transportation of a person from	12 years, or 20 years for an

⁵⁰² 'Coercion' and 'threat' are defined in section 270.1A of the *Criminal Code*. Coercion is defined as including coercion by any of the following: force; duress; detention; psychological oppression; abuse of power; or taking advantage of a person's vulnerability. Threat means: a threat of coercion; or a threat to cause a person's deportation or removal from Australia; or a threat of any other detrimental action, unless there are reasonable grounds for the threat of that action in connection with the provision of labour or services by a person. Threat includes a threat made by any conduct, whether express or implied and whether conditional or unconditional.

⁵⁰³ Under subsection 271.3(1) of the *Criminal Code*, a trafficking in persons offence is aggravated where: the offender intended for the victim to be exploited; the offender subjected the victim to cruel, inhuman or degrading treatment; or the offender engaged in conduct that gave rise to a danger of death or serious harm to the victim or another person.

⁵⁰⁴ 'Exploitation' is defined in section 271.1A of the *Criminal Code* as conduct which causes the victim to enter into any of the following conditions: slavery, or a condition similar to slavery; servitude; forced labour; forced marriage; or debt bondage.

⁵⁰⁵ Under subsection 271.6(1) of the *Criminal Code*, a domestic trafficking in persons offence is aggravated where: the offender intended for the victim to be exploited; the offender subjected the victim to cruel, inhuman or degrading treatment; or the offender engaged in conduct that gave rise to a danger of death or serious harm to the victim or another person.

		one place in Australia to another, reckless as to whether the other person will be exploited	aggravated offence
	271.5(2A), (2B)	Organise or facilitate the transportation of a person from one place in Australia to another, and deceives the person about: the provision, or nature of the provision, of sexual services; the extent to which the person will be free to leave, or to cease providing sexual services; the quantum or existence of a debt owed or claimed to be owed; or the fact the arrangement will involve exploitation or the confiscation of travel or identity documents	12 years, or 20 years for an aggravated offence
Domestic Trafficking in children	271.7	Organise or facilitate the transportation of a person who is under 18 from one place in Australia to another, intending or reckless as to whether the person will be used to provide sexual services or will be otherwise exploited.	25 years
Organ trafficking	271.7B(1), (2)	Organise or facilitate the entry, proposed entry, exit, proposed exit, or receipt of another person, reckless as to whether the other person's organ will be removed. ⁵⁰⁶	12 years, or 20 years for an aggravated offence, or 25 years for an aggravated offence where the victim is under 18 ⁵⁰⁷
	271.7D	Organise or facilitate the transportation or proposed transportation of a person from one place in Australia to another, reckless as to whether the other person's organ will be removed.	12 years, or 20 years for an aggravated offence, or 25 years for an aggravated offence where the victim is under 18 ⁵⁰⁸
Harbouring a victim	271.7F(1)	Harbour, receive or conceal a victim, where it assists or furthers the purpose of another person's human trafficking, slavery or slavery-like offence.	4 years, or 7 years for an aggravated offence ⁵⁰⁹

⁵⁰⁶ Under section 271.7A of the *Criminal Code*, the removal of a person's organ is captured by the organ trafficking offence if: the removal, or entering into an agreement for the removal, would be contrary to the law of the state or territory where it is to be carried out; or neither the victim, nor the victim's guardian, consented to the removal, and it would not meet a medical or therapeutic need of the victim.

⁵⁰⁷ Under subsection 271.7C(1) of the *Criminal Code*, an organ trafficking offence is aggravated where: the victim is under 18; the offender intended for the victim's organ to be removed; the offender subjected the victim to cruel, inhuman or degrading treatment; or the offender engaged in conduct that gave rise to a danger of death or serious harm to the victim or another person and is reckless as to that danger.

⁵⁰⁸ Under subsection 271.7E(1) of the *Criminal Code*, a domestic organ trafficking offence is aggravated where: the victim is under 18; the offender intended for the victim's organ to be removed; the offender subjected the victim to cruel, inhuman or degrading treatment; or the offender engaged in conduct that gave rise to a danger of death or serious harm to the victim or another person and is reckless as to that danger.

⁵⁰⁹ Under subsection 271.7G(1) of the *Criminal Code*, a harbouring a victim offence is aggravated where the victim is under 18.

Appendix D: Summary of convictions

Convictions by Criminal Code provision	270.3(1) Slavery	270.5 (1) Servitude	Previously 270.6(2) Sexual servitude	270.6A(1) Forced labour	270.6A(2) Forced labour	271.2(1A) Trafficking in persons	271.2 (1B) Trafficking in persons	271.2 (2B) Trafficking in persons	271.2(2) Trafficking in persons	271.4(1) Trafficking in children	271.7 Trafficking in children (domestic)
DOBIE, Keith											
DS											
HO, Ho Kam											
HO, Kam Tin											
K											
KOVACS, Melita											
KOVACS, Zoltan											
LEECH, Sarisa											
McIVOR, Trevor											
NANTAKHUM, Watcharaporn											
NETTHIP, Namthip											
SEIDERS, Johan											
TANG, Wei											
TANUCHIT, Kanokporn											
TRIVEDI, Divye											
WONG, Chee Mei											
YOTCHOMCHIN (KENT), Somsri											
McINTOSH (a pseudonym)											
HUANG, Yu-Hao											
CHEN, Bo-Syun											
KHOO, Lay Foon											
PULINI, Malavine											
PULINI, Isikeli Feleatoua											
SHAIK, Farok											
GREY, Bradley Lester*											
LOHAN, Pardeep											
MCALEER, Sheila											
MCALEER, Joshua											
KANNAN, Kumuthini**											
KANNAN, Kandasamy***											

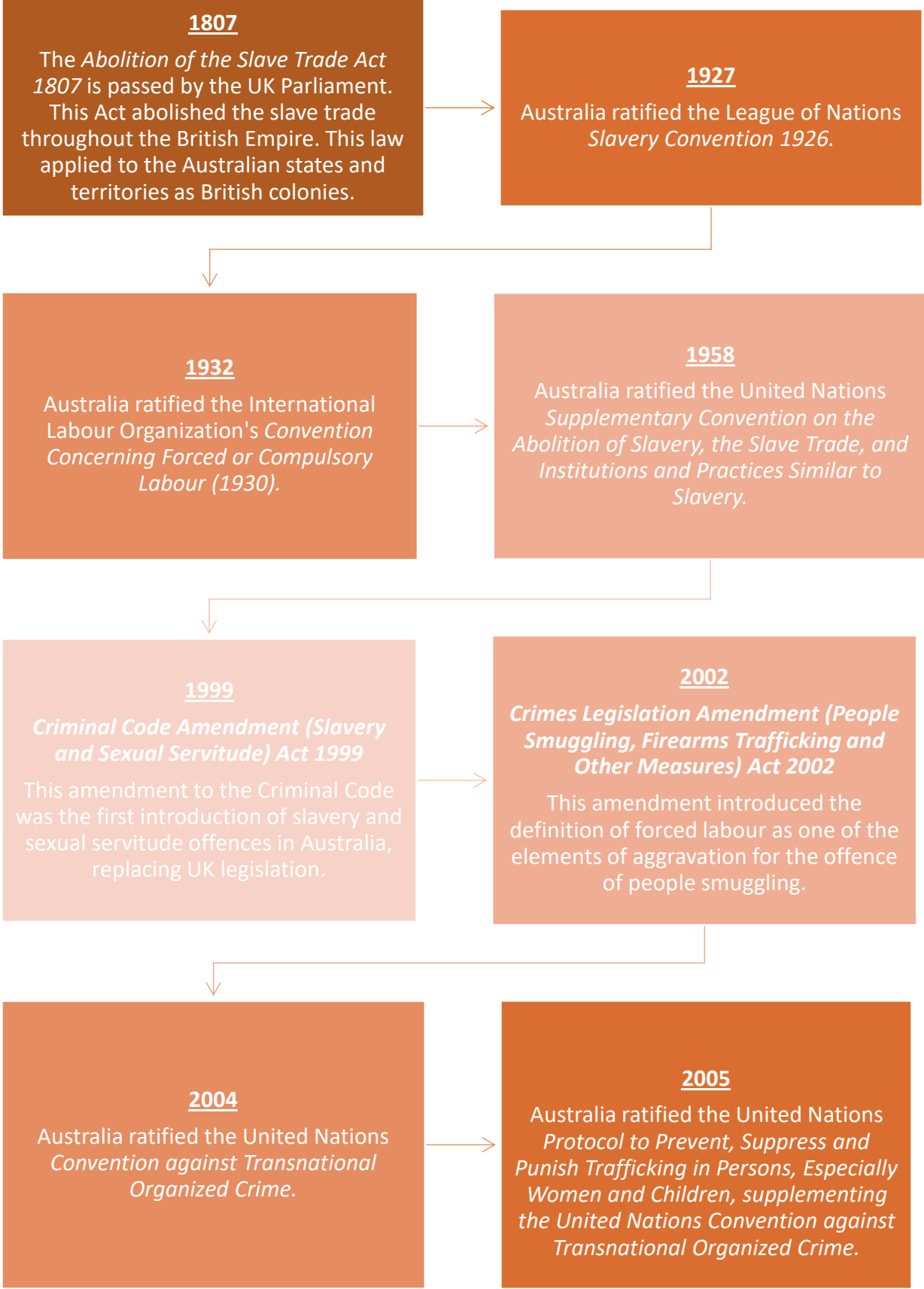
Notes:

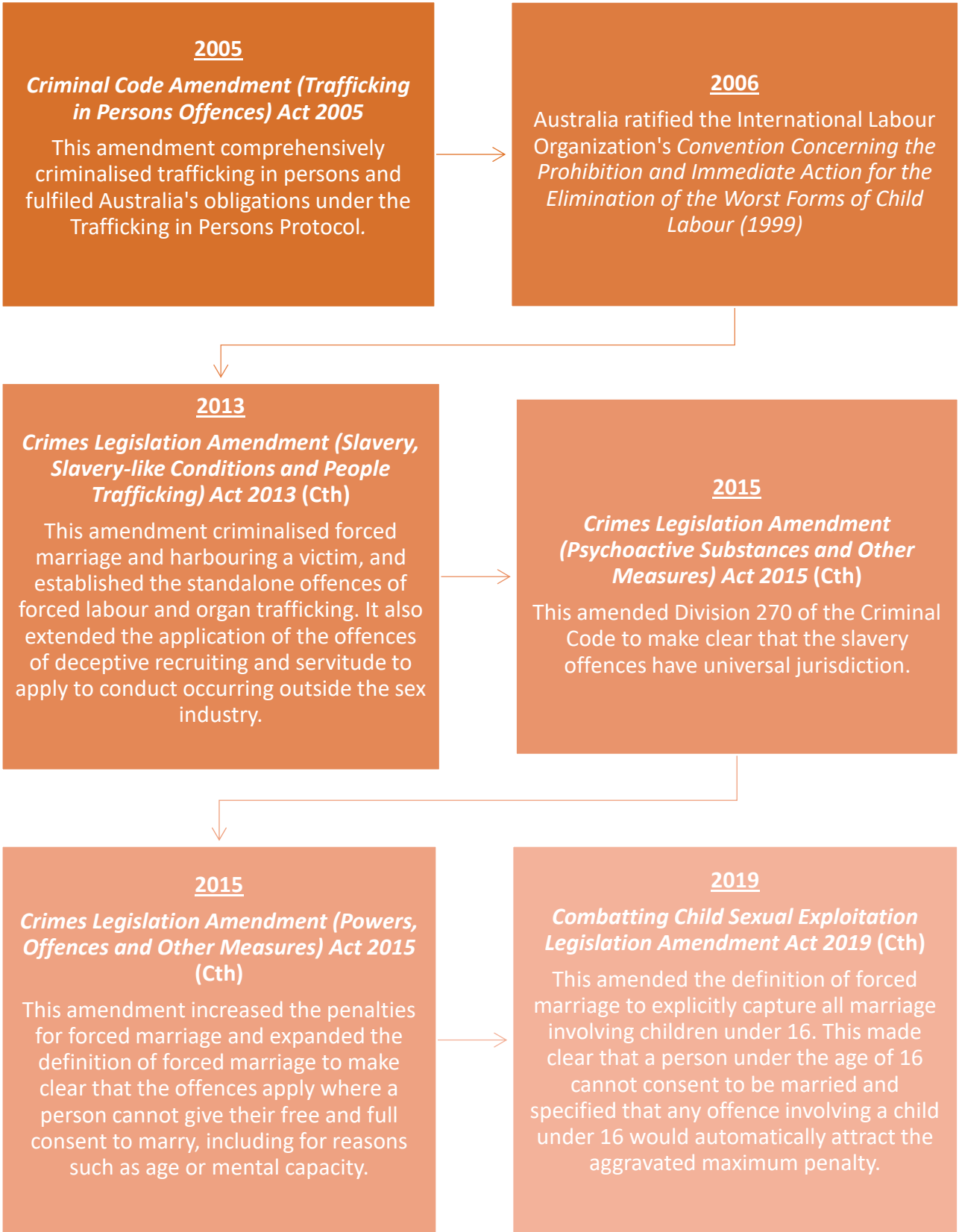
* This offender was convicted in the 2019-2020 reporting period but not reported, and also has additional charges in progress.

** This offender has lodged an appeal against conviction and sentence and also has additional charges in progress.

*** This offender has lodged an appeal against conviction and sentence.

Appendix E: Overview of the development of Australia’s modern slavery offences





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