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Abstract
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Keywords
punishing, trafficking, Australia, international standards, sentencing, Criminal Code Act 1995

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PUNISHING TRAFFICKING IN PERSONS: INTERNATIONAL STANDARDS AND AUSTRALIAN EXPERIENCES

MATTHEW CAMERON* & ANDREAS SCHLOENHARDT**

This article explores and analyses the punishment of trafficking in persons offenders in Australia. The article examines the criminalisation and punishment requirements of international law and best practice guidelines. It outlines the relevant slavery, sexual servitude and trafficking in persons offences in Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth) ('*Criminal Code*') and analyses the sentences imposed by Australian courts. The article concludes with a number of recommendations designed to improve the sentencing process when dealing with trafficking in persons offenders.

I INTRODUCTION

International and Australian responses to trafficking in persons have generally been characterised by a criminalisation approach that focuses on the prosecution of offenders,[1] the ultimate goal of which is punishment and deterrence. The United Nations Office on Drugs and Crime (UNODC) has highlighted the significance of adequate and consistent punishment of trafficking in persons worldwide:

> The penalties provided for similar crimes in various jurisdictions diverge significantly, reflecting different national traditions, priorities and policies. It is essential, however, to ensure that at least a minimum level of deterrence is applied by the international community to avoid the perception that certain types of crimes 'pay', even if the offenders are convicted. … Therefore, in addition to harmonising substantive provisions, States need to engage in a

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1 Marie Segrave, 'Surely Something is Better Than Nothing? The Australian Response to the Trafficking of Women Into Sexual Servitude in Australia' (2004) 16(1) *Current Issues in Criminal Justice* 85, 89.

> parallel effort with respect to the issues of prosecution, adjudication and punishment.[2]

The implementation of this critical aspect of the response to trafficking in persons has rarely been the subject of official or academic inquiry. In Australia, attention has largely been devoted to problems inherent in the criminal justice response to trafficking in persons, such as its focus on 'individualised exploitation',[3] invocation of the 'familiar rhetoric of law and order',[4] failure to address 'the reasons why people traffic and why those being trafficked are vulnerable in the first place',[5] and obscuring of the rights and agency of trafficked persons.[6] Beyond these critiques of criminalisation, the academic literature discusses the interpretation of Australia's slavery offences by the High Court of Australia in *R v Tang* (2008) 237 CLR 1,[7] the nature and effectiveness of Australia's trafficking and slavery offences,[8] and particular instances of trafficking in persons and slavery.[9] Although general

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2 UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organised Crime* (United Nations, 2004) 130.

3 Marie Segrave, 'Human Trafficking and Human Rights' (2009) 14(2) *Australian Journal of Human Rights* 71, 79.

4 Ibid 78.

5 Sarah Steele, 'Trafficking in People: the Australian Government's Response' (2007) 32(1) *Alternative Law Journal* 18, 20. See also Bernadette McSherry, 'Trafficking in Persons: A Critical Analysis of the New Criminal Code Offences' (2007) 18(3) *Current Issues in Criminal Justice* 385, 386; Jennifer Burn, Sam Blay and Frances Simmon, 'Combating Human Trafficking: Australia's Response to Modern Day Slavery' (2005) 79(9) *Australian Law Journal* 543, 545.

6 Marianna Leishman, 'Human Trafficking and Sexual Slavery: Australia's Response' (2007) 27 *Australian Feminist Law Journal* 193, 198; Steele, above n 5, 20; Segrave, 'Human Trafficking and Human Rights', above n 3, 79; Erica Kotnick, Melina Czymoniewicz-Klippel and Elizabeth Hoban, 'Human Trafficking in Australia: The Challenge of Responding to Suspicious Activities' (2007) 42(3) *Australian Journal of Social Issues* 369, 372.

7 See, eg, Irina Kolodizner, '*R v Tang*: Developing an Australian Anti-Slavery Jurisprudence' (2009) 31(3) *Sydney Law Review* 487; Jean Allain, '*R v Tang*: Clarifying the Definition of 'Slavery' in International Law' (2009) 10(1) *Melbourne Journal of International Law* 246; Stephen Tully, 'Sex, Slavery and the High Court of Australia: The Contribution of *R v Tang* to International Jurisprudence' (2010) 10(3) *International Criminal Law Review* 403; Rachel Harris and Katharine Gelber, 'Defining 'De Facto' Slavery in Australia: Ownership, Consent and the Defence of Freedom' (2011) 11(3) *International Criminal Law Review* 561.

8 McSherry, above n 5; Jarrod Jolly, 'Trafficking in Persons: A Critical Appraisal of Criminal Offences in Australia' (University of Queensland, Human Trafficking Working Group, 15 July 2010) available at: <http://www.law.uq.edu.au/ht-legislation>.

9 Andreas Schloenhardt and Jarrod Jolly, 'Honeymoon From Hell: Human Trafficking and Domestic Servitude in Australia' (2010) 32(4) *Sydney Law Review* 671; Andreas Schloenhardt and Joseph O'Shea, 'Reflections on *R v Dobie*' (2010) 34(6) *Criminal Law Journal* 400.

sentencing scholarship in Australia has developed significantly in recent decades,[10] the punishment of trafficking in persons offenders remains largely unexplored. There is a significant gap in the literature on trafficking in persons that should be rectified.

To that end, this article provides a comprehensive and detailed analysis of the punishment of trafficking in persons offenders in Australia. The significance of this research lies not only in the filling of this lacuna, but also in the serious problems identified with international and domestic criminalisation efforts, which are clearly displayed in the punishment of trafficking in persons offenders in Australia. In the absence of thorough analysis of actual experiences of sentencing trafficking offenders, measures designed to improve criminalisation and deter offenders remain incomplete.[11]

Any analysis of sentencing is constrained by the highly discretionary nature of sentencing decisions in Australia and the fundamental requirement that such decisions be made on the specific facts of each case. This is especially so given the High Court of Australia's controversial[12] endorsement of the 'instinctive synthesis' approach to sentencing, which generally requires that Judges not adopt a 'staged' approach specifying the precise weight given to particular considerations in the calculation of sentence, but, in the absence of any arithmetical process instead requires only that the sentencing Judge takes 'account of all of the relevant factors and to arrive at a single result which takes due account of them all'.[13] It is thus often difficult, if not impossible, to discern the considerations of greatest significance in the determination of a particular sentence, and even more difficult to reveal sentencing patterns. The latter problem is particularly acute because, as at 14 March 2012, only thirteen trafficking offenders have been sentenced in Australian courts.[14] However,

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[10] See, eg, Kate Warner, 'Sentencing Scholarship in Australia' (2006) 18(2) *Current Issues in Criminal Justice* 241, 259.

[11] Cf Melynda H Barnhart, 'Sex and Slavery: An Analysis of Three Models of State Human Trafficking Legislation' (2009) 16 *William and Mary Journal of Women and the Law* 83, 129-130.

[12] See, eg, Mirko Bagaric and Richard Edney, 'What's Instinct Got to Do With It? A Blueprint For a Coherent Approach to Punishing Criminals' (2003) 27(3) *Criminal Law Journal* 119; The Hon Justice D Mildren RFD, 'Intuitive Synthesis or the Structured Approach' (2006) 2(1) *International Journal of Punishment & Sentencing* 1; Terry Hewton, 'Instinctive Synthesis, Structured Reasoning, and Punishment Guidelines: Judicial Discretion in the Modern Sentencing Process' (2010) 31(1) *Adelaide Law Review* 79.

[13] *Wong v The Queen* (2001) 207 CLR 584, 611 [75] (Gaudron, Gummow and Hayne JJ); *Markarian v The Queen* (2005) 228 CLR 357, 373-375 [37]-[39] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

[14] Australia's trafficking and slavery offences, contained in divisions 270 and 271 of the *Criminal Code Act 1995* (Cth), were introduced in 1999 and 2005 respectively: *Criminal Code*

this small sample size does not reduce the importance of this analysis, as the limited number of convictions in Australia provides an opportunity for reform and critical reflection of sentencing practices before particular approaches to sentencing become firmly entrenched. Moreover, the relative vagueness of the sentencing process also makes it impossible to determine if considerations operating explicitly in one case operate implicitly in another.

Part II of this article analyses the criminalisation and punishment requirements of international instruments binding on Australia and non-binding guidelines and best-practice documents produced by UNODC and other international bodies. Part III outlines the relevant sexual servitude and trafficking in persons offences in Divisions 270 and 271 of the *Criminal Code* before analysing the sentences imposed by Australian courts. The article concludes in Part IV with a number of recommendations designed to provide greater guidance and consistency in sentencing trafficking in persons offenders.

II INTERNATIONAL STANDARDS

A *Requirements*

International instruments designed to combat trafficking in persons have focused on the creation of offences within domestic criminal laws, but these instruments are largely silent on the actual quality of that criminalisation, particularly in terms of the types and lengths of sanctions imposed for the commission of those offences. In international anti-slavery conventions the clearest guidance provided on sentencing is the requirement in Article 6 of the 1926 *Slavery Convention* that 'severe penalties' be imposed for offences of slavery and related practices.[15] The international instrument of greatest contemporary relevance which has been in operation since 2000 is the United Nations (UN) *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, [16] which supplements the *Convention against Transnational Organised Crime*.[17]

Amendment (Slavery and Sexual Servitude) Act 1999 (Cth); *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth).

15 *Slavery Convention signed at Geneva on 25 September 1926 and amended by the Protocol*, opened for signature 7 December 1953, 212 UNTS 17 (entered into force 7 July 1955) art 6.

16 *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, opened for signature 15 December 2000, 2237 UNTS 319 (entered into force 31 May 2004) [hereinafter *Trafficking in Persons Protocol*].

17 *Convention against Transnational Organised Crime,* opened for signature 15 December 2000, 2225 UNTS 209 (entered into force 29 September 2003).

The *Trafficking in Persons Protocol* requires States Parties to 'adopt such legislative and other measures as may be necessary to establish as criminal offences' the conduct encompassed by the concept of trafficking as defined in Article 3 of the Protocol. Because the *Trafficking in Persons Protocol* supplements the *Convention against Transnational Organised Crime*, the requirements of these instruments must be read together.[18] Accordingly, persons convicted of offences established in accordance with the *Trafficking in Persons Protocol* must be subject to 'effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions',[19] which 'take into account the gravity of that offence'.[20] It is thus also a requirement that each State Party 'ensure that its courts or other competent authorities bear in mind the grave nature of the offences … when considering the eventuality of early release or parole of persons convicted of such offences'.[21]

The *Trafficking in Persons Protocol* has been criticised for its lack of explicit guidance on sanctions, and its failure to specify 'minimum sentences which reflect the gravity of the crime'.[22] Comparisons have been drawn to the Council of Europe's *Framework Decision on Combating Trafficking in Human Beings*[23] and the European Union's *Convention on Action against Trafficking in Human Beings*.[24] These documents include requirements for sanctions that are similar to the *Trafficking in Persons Protocol* when read together with the *Convention against Transnational Organised Crime*, but they also specify four aggravating circumstances to be taken into account in sentencing.[25]

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18 *Trafficking in Persons Protocol*, art 1(1)-(3); *Convention against Transnational Organised Crime* art 37(4). See also UNODC, *Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime* (United Nations, 2004) 255-256.

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

20 Ibid art 11(1).

21 *Convention against Transnational Organised Crime*, art 11(4).

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

23 Fredette, above n 22, 121, citing Council of Europe, *Council Framework Decision of 19 July 2002 on combating trafficking in human beings* (2002/629/JHA).

24 *Council of Europe Convention on Action against Trafficking in Human Beings*, opened for signature 16 May 2005, CETS No. 197 (entered into force 1 February 2008) art 23(1).

25 Ibid art 23(1), 24. These aggravating factors are that the 'offence deliberately or by gross negligence endangered the life of the victim', or was committed 'against a child', 'by a

The absence of further guidance on sanctions in international law may be justified by the importance that States Parties attach to sovereign control over the content of their domestic criminal law and the practical problems for cooperation and agreement that would arise if overly detailed requirements on criminal sanctions were to be included in such instruments. The existence of more detailed requirements in regional agreements, however, does indicate that the inclusion of such requirements should be the subject of attention in any further developments of international law on slavery and trafficking in persons.

B *Guidelines*

Non-binding guidelines and 'toolkits' designed to assist with the implementation of the *Trafficking in Persons Protocol* provide more detailed guidance on sanctions. UNODC's *Framework for Action to Implement the Trafficking in Persons Protocol* specifies a minimum standard in accordance with Article 11(1) of the *Convention against Transnational Organised Crime* that 'penalties and sanctions are appropriate and proportionate to the gravity of the crime'.[26] Suggested implementation measures relevantly include that, in line with the requirements of the *Convention against Transnational Organised Crime*,[27] legislation provides for 'serious crimes' to be punishable by a maximum penalty of at least four years imprisonment, and that the penalty for crimes committed against 'vulnerable persons … must be increased appropriately and proportionately'.[28] The Framework specifies five 'operational indicators' of the implementation of the sanctioning aspect of the *Trafficking in Persons Protocol*:

(1) severity of sanctions imposed for trafficking in persons;

(2) number of sanctions reflecting aggravating circumstances;

(3) number of additional administrative and/or other non-criminal sanctions used;

(4) number of penal sanctions applied; and

(5) number of recidivist/repeat offenders.[29]

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public official in the performance of her/his duties', or 'within the framework of a criminal organisation'.

[26] UNODC, *International Framework for Action to Implement the Trafficking in Persons Protocol* (United Nations, 2009) 24.

[27] *Convention against Transnational Organised Crime*, art 2(b).

[28] UNODC, *International Framework for Action to Implement the Trafficking in Persons Protocol* (United Nations, 2009) 24.

[29] UNODC, *International Framework for Action to Implement the Trafficking in Persons Protocol* (United Nations, 2009) 24.

UNODC's *Model Law against Trafficking in Persons* similarly recommends offences be subject to a penalty of at least four years imprisonment, bringing them within the meaning of 'serious crimes' as defined in the *Convention against Transnational Organised Crime* and consequently attracting provisions on extradition and judicial cooperation.[30] The *Model Law* also lists thirteen aggravating factors that would tend to increase the seriousness of an offence, which are:

(a) the offence involves serious injury or death of the victim or another person, including death as a result of suicide;

(b) the offence involves a victim who is particularly vulnerable, including a pregnant woman;

(c) the offence exposed the victim to a life-threatening illness, including HIV/AIDS;

(d) the victim is physically or mentally handicapped;

(e) the victim is a child;

(f) the offence involves more than one victim;

(g) the crime was committed as part of the activity of an organized criminal group;

(h) drugs, medications or weapons were used in the commission of the crime;

(i) a child has been adopted for the purpose of trafficking;

(j) the offender has been previously convicted for the same or similar offences;

(k) the offender is a [public official] [civil servant];

(l) the offender is a spouse or the conjugal partner of the victim;

(m) the offender is in a position of responsibility or trust in relation to the victim; and

(n) the offender is in a position of authority concerning the child victim.[31]

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

[31] UNODC, *Model Law against Trafficking in Persons* (United Nations, 2009) 39-40. See also Inter-Parliamentary Union and UNODC, *Combating Trafficking in Persons: A Handbook for Parliamentarians* (United Nations, 2009) 28-29.

UNODC's *Anti-Human Trafficking Manual for Criminal Justice Practitioners* adopts a similar approach, as well as providing a basic outline of theories of punishment.[32] Although these documents provide some guidance on the punishment of offenders, they do not, with the exception of the *Trafficking Manual*, elaborate on what the particular label of the aggravating factor refers to, and none of the publications explain why the factors listed should be considered to be aggravating, or how they should be weighed. Furthermore, the 'operational indicators' listed in UNODC's *Framework for Action*, as outlined above, are not 'unpacked' or elaborated upon. Thus, although these publications provide some guidance, further detail would more meaningfully assist in effective criminalisation and punishment. Proposals for reform on this issue are discussed in Part IV of this article.

Despite the central importance of punishing trafficking offenders, binding international instruments and non-binding documents produced by UNODC, the 'guardian' of the *Trafficking in Persons Protocol*, contain little guidance for States Parties involved in the drafting of offences and the implementation of those offences in particular cases. It is difficult to assess the validity of criticisms by some scholars that 'complaints of light sentencing [in trafficking cases] relative to other serious crimes are common'.[33] However, it is unsurprising that, when faced with novel trafficking offences, legislatures and courts may have difficulty assessing both the seriousness of an offence and the weight to be given to particular circumstances of an offence in determining the punishment to be imposed on a particular offender. The assessment of the criminalisation of trafficking in persons and related practices in Australia contained in the following part demonstrates the need for further international guidance.

III CRIMINALISATION AND PUNISHMENT IN AUSTRALIA

A *Available offences and legislative history*

The offences that comprise the Australian Government's efforts to combat trafficking in persons and related practices are contained in Divisions 270 and 271 of the *Criminal Code*, which were introduced in 1999 and 2005 respectively.[34] The

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[32] UNODC, *Anti-Human Trafficking Manual for Criminal Justice Practitioners, Module 14, Considerations in Sentencing in Trafficking in Persons Cases* (UNODC, 2009).

[33] Anne Gallagher and Paul Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking: Lessons From the Front Line' (2008) 18(3) *International Criminal Justice Review* 318, 322-323.

[34] *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth); *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth).

development of these offences has been comprehensively analysed elsewhere.[35] The introduction of the offences was surrounded by the rhetoric of deterrence and the need for harsh punishments. Accordingly, the penalties provided for most of these new offences are very severe,[36] with the offences of intentional slavery and trafficking in children punishable by a maximum term of 25 years imprisonment.[37]

The offences in Division 270, which relate to slavery and sexual servitude, have their origins in several detailed law reform reports that were informed by the need to respond to Australia's international obligations to outlaw and combat slavery.[38] At the time of their introduction, great emphasis was placed on deterring 'the impact on Australia of a growing and highly lucrative international trade in people for the purpose of sexual exploitation'.[39] The Government stated that the legislation would send 'a firm message to the organisers and recruiters that Australia will not be a destination for their trade',[40] and also that it payed 'special attention … to affording additional protection for children' by providing aggravated penalties.[41]

Section 270.1 of the *Criminal Code* defines slavery 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'. The most serious slavery offences involve the intentional possession of a slave or exercise over a slave of one or more powers attaching to the right of ownership, engaging in slave trading, entering into a commercial transaction involving a slave, or exercising control or direction over (or providing finance for) any act of slave trading or commercial transaction involving a slave: s 270.3. Entering into a commercial transaction involving a slave, and exercising control or direction over (or providing finance for) any act of slave trading or a commercial transaction involving a slave are punishable by 17 years imprisonment when committed with a mental element of recklessness. The offences of conducting a business involving sexual servitude and causing another person to enter into or remain in sexual

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35 McSherry, above n 5; Jolly, above n 8.

36 In his dissenting judgment in *R v Tang*, Justice Kirby noted that the penalty for the intentional slavery offence 'is one of the highest now provided under Australian legislation': *R v Tang* (2008) 237 CLR 1, 49 [115].

37 *Criminal Code Act 1995* (Cth) ss 270.3, 271.4, 271.7.

38 Model Criminal Code Officers Committee, *Model Criminal Code - Offences Against Humanity - Slavery - Report* (November 1998); Australian Law Reform Commission, *Criminal Admiralty Jurisdiction and Prize*, Report No 48 (1990).

39 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 August 1999, 8495 (Sharman Stone).

40 Ibid 8498 (Sharman Stone).

41 Ibid 8514 (Sharman Stone).

servitude are punishable by a maximum of 15 years imprisonment in the case of an ordinary offence, and 20 years imprisonment when committed against a person under the age of 18: s 270.6. Sexual servitude is defined in s 270.4 as 'the condition of a person who provides sexual services and who, because of the use of force or threats is not free to cease providing sexual services, or is not free to leave the place or area where the person provides sexual services'. Deceptive recruiting for sexual services, which involves the use of one or more means of deception to induce another person to engage in sexual services,[42] attracts a maximum penalty of 7 years in the case of an ordinary offence and 9 years when the victim of the offence is a child.

The development of Division 271 of the *Criminal Code*, which includes trafficking in persons offences, was sparked by the need to ratify the *Trafficking in Persons Protocol* and also by 'the emergence in the media of allegations of mishandling of cases of trafficked women by government agencies'.[43] In enacting these provisions, the Australian Government stated that the new offences would 'complement Australia's existing package of measures and … ensure that Australia remains a world leader in the fight against trafficking in persons'.[44] During the parliamentary debates, one member of the Government stated that the bill would 'safeguard the humanitarian ideals of our citizens, giving greater real legal clout to the battle against those animals who disregard the rights of others in their immoral pursuit of financial gain'.[45] He also emphasised what he described as the importance of 'appropriate penalties':

> The amendments outlined in this bill are accompanied by sentences in the range of 12 years to 20 years, serious time for serious crime. … I only hope and make the plea that, when the courts come to sentence some of these offenders, the courts use the full range of very serious penalties at their disposal to make sure that serious time is served for serious crime. There is no point in having maximum penalties unless these penalties are imposed in appropriate circumstances.[46]

Division 271 contains offences of trafficking in children, aggravated trafficking in persons and 'standard' trafficking in persons offences, which attract maximum penalties of 25, 20, and 12 years respectively.[47] The offence of debt bondage attracts a

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42 *Criminal Code Act 1995* (Cth) s 270.7(1)(a)-(e).

43 Parliamentary Joint Committee on the Australian Crime Commission, Parliament of the Commonwealth of Australia, *Inquiry Into the Trafficking of Women for Sexual Servitude* (June 2004) vi.

44 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 2005, 31 (Philip Ruddock, Attorney-General).

45 Ibid 40 (Peter Slipper).

46 Ibid.

47 *Criminal Code Act 1995* (Cth) ss 271.2-271.7.

significantly lower penalty, of 12 months in the case of an ordinary offence and 2 years when committed against a child victim.[48] Debt bondage is defined in the dictionary to the *Criminal Code* as 'the status or condition' arising from a pledge of a person's personal services

> as security for a debt owed, or claimed to be owed …, 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.

The low penalty for debt bondage has been criticised for its leniency elsewhere,[49] particularly on the ground that it covers similar conduct to the slavery offence, which is punishable by 25 years imprisonment. No person has as yet been convicted of the debt bondage offence.

On November 23, 2011, the Australian Government released a draft of the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012, which is expected to be introduced into Parliament and pass without major amendments some time in 2012. The draft bill proposes some substantive changes to Division 270 of the *Criminal Code* with the introduction of new offences relating to servitude (proposed new s 270.5), forced labour (proposed s 270.6A), deceptive recruitment (proposed s 270.7), and forced marriage (proposed s 270.7B). The penalties for these offences range between 15 years imprisonment for sexual servitude and 4 years for 'causing a person to enter into a forced marriage'. The bill, if passed, would also create new categories of aggravation for slavery-like offences in proposed new section 270.8 which would operate essentially as sentencing enhancers. It is also proposed to create a new offence for harbouring a victim of

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[48] Ibid ss 271.8-271.9.

[49] Elizabeth Broderick and Bronwyn Byrnes, 'Beyond Wei Tang: Do Australia's Human Trafficking Laws Fully Reflect Australia's International Human Rights Obligations?' (Speech delivered at the Workshop on Legal and Criminal Justice Responses to Trafficking in Persons in Australia: Obstacles, Opportunities and Best Practice, Monash University Law Chambers, 9 November 2009) [42]-[44]; Anne T Gallagher, 'Prosecuting and Adjudicating Trafficking in Persons Cases in Australia: Obstacles and Opportunities' (Speech delivered at the National Judicial College of Australia Twilight Seminar on Human Trafficking, State Library of New South Wales, 15 June 2009) 6; Julie Debeljak et al, 'The Legislative Framework for Combating Trafficking in Persons' (Background Paper for the Workshop on Legal and Criminal Justice Responses to Trafficking in Persons in Australia: Obstacles, Opportunities and Best Practice, Monash University Law Chambers, 9 November 2009) 22; Jolly, above n 8.

trafficking (s 271.7A) and new aggravated offences for harbouring and debt bondage (proposed ss 271.7B and 271.9).

B *Overview of sentences imposed*

Despite the legislative emphasis on deterrence and the imposition of severe punishments discussed in the previous section, most of the offences in Divisions 270 and 271 of the *Criminal Code* remain untested. At the time of writing only thirteen offenders have been sentenced in Australian courts, with one offender awaiting sentencing.[50] As shown in Figure 1 below, one person has been sentenced for trafficking in persons offences, three have been sentenced for sexual servitude offences, and nine have been sentenced for slavery offences.

Given the small number of convictions for these offences it is neither possible to meaningfully compare the sentences with those for other offences nor to state a general conclusion that sentences imposed have been unduly lenient. It is, however, possible to conclude that no cases that have come before the courts have been perceived as falling within the worst category of case.[51] With the exception of Mr Kam Tin Ho,[52] no offenders have ever received a maximum sentence of more than half the maximum available penalty. However, Mr Ho's appeal against sentence was recently allowed, as were those of his co-offenders Sarisa Leech and Ho Kam Ho, and his sentence was significantly reduced.[53] Figure 1 below shows that the total sentences imposed have generally been towards the lower end of the penalty range provided by the relevant offences. When assessing sentence length by individual counts, the sentences imposed are, of course, even lower down the available sentencing range.

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50 *R v Trivedi* (2011) (unreported, NSWDC).

51 *Veen v The Queen (No. 2)* (1988) 164 CLR 465, 478 (Mason CJ, Brennan, Dawson and Toohey JJ).

52 *DPP (Cth) v Ho & Leech (Sentence)* [2009] VSC 495; *DPP (Cth) v Ho & Ors* [2009] VSC 437.

53 *Ho & Ors v The Queen* [2011] VSCA 344.

Figure 1: ***Sentences Imposed for Trafficking in Persons, Sexual Servitude, and Slavery offences, 1999-March 2012***

Offence & Maximum Penalty	Offender & Case Citation	Sentence imposed	Non-parole period
Trafficking in persons - *Criminal Code* section 270.2(2B) 12 years	Keith Dobie (District Court of Queensland, Indictment No 1221 of 2008, Clare SC DCJ, 23 December 2008)	4y	1y, 10m
Sexual Servitude - *Criminal Code* section 270.6 15 years	Namthip Netthip [2010] NSWDC 159	2y, 3m	1y, 1m
	Johan Sieders [2006] NSWDC 184	4y	2y
	Somsri Yotchomchin [2006] NSWDC 184	5y	2y, 6m
Slavery - *Criminal Code* section 270.3(1) 25 years	Melita Kovacs (Supreme Court of Queensland, Indictment No 2 of 2007, Jones J, 18 February 2010)	4y	1y, 6m
	Sarisa Leech [2011] VSCA 344	5y, 6m	3y
	Ho Kam Ho [2011] VSCA 344	5y, 9m	3y
	DS (2005) 153 A Crim R 194	6y	2y, 6m
	Zoltan Kovacs (Supreme Court of Queensland, Indictment No 2 of 2007, Jones J, 18 February 2010)	8y	1y, 3m
	Kam Tin Ho [2011] VSCA 344	8y, 3m	5y
	Wei Tang (2009) 233 FLR 399	9y	5y
	Kanakporn Tanuchit [2010] NSWDC 310	12y	7y
	Trevor McIvor [2010] NSWDC 310	12y	7y, 6m

Although the facts of individual cases are examined below where relevant to particular issues identified, as a consequence of the highly discretionary and fact-specific nature of the sentencing process in Australia it is impossible to explain precisely how each sentence was determined within the confines of this article.[54] Moreover, the individual characteristics of each offender have had, as they must, an extremely important role to play in determining sentence. For example, although almost all of the offenders have been involved in the organisation and implementation of the particular exploitative scheme,[55] many have also been thought to have strong prospects of rehabilitation or other mitigating circumstances operating in their favour.[56] However, analysis of sentencing remarks shows that several contentious, and potentially controversial issues have arisen in the sentencing of offenders, which can broadly be seen to relate to judicial conceptualisations of the relevant offence, and of a 'consenting victim' and a 'prostitute victim'. These three issues are discussed individually in the following sections.

C *Judicial conceptualisations of offences*

1 *Deterrence*

As mentioned earlier, the objective of deterrence of the offences in Divisions 270 and 271 of the *Criminal Code* was emphasised at the time of their introduction and particular reference was made to 'sending a firm message' to traffickers.[57] However, in most cases general deterrence has been noted by most Judges but has not received particular emphasis.[58] The trafficking in persons case of *R v Dobie*[59] is the primary exception to this pattern.[60]

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54 See generally Hewton, above n 12.

55 All of the offenders with the exception of Ms Melita Kovacs fall into this category: Transcript of Proceedings, *R v Kovacs & Kovacs* (Supreme Court of Queensland, Indictment No 2 of 2007, Jones J, 18 February 2010).

56 See, eg, *R v Johan Sieders & Somsri Yotchomchin* [2006] NSWDC 184., [144]-[145] (Bennett SC DCJ); *R v DS* (2005) 153 A Crim R 194, 201-202 [19] (Chernov JA, Batt and Vincent JJA agreeing); *R v Netthip* [2010] NSWDC 159, [30] (Murrell SC DCJ); Transcript of Proceedings, *R v Kovacs & Kovacs* (Supreme Court of Queensland, Indictment No 2 of 2007, Jones J, 18 February 2010); *DPP (Cth) v Ho & Leech (Sentence)* [2009] VSC 495, [32]-[34] (Lasry J); *DPP (Cth) v Ho & Ors* [2009] VSC 437, [51] (Cummins J).

57 Commonwealth, *Parliamentary Debates,* House of Representatives, 11 August 1999, 8498 (Sharman Stone).

58 *R v DS* (2005) 153 A Crim R 194, 201 [19] (Chernov JA, Batt and Vincent JJA agreeing); *R v Johan Sieders & Somsri Yotchomchin* [2006] NSWDC 184, [134] (Bennett SC DCJ); *R v Tang* (2009) 233 FLR 399, 413 [61] (Maxwell P, Buchanan and Vincent JJA); *DPP (Cth) v Ho & Leech (Sentence)* [2009] VSC 495, [35] (Lasry J); *R v McIvor & Tanuchit* [2010] NSWDC 310, [9]

In *R v Dobie*, Judge Clare stated that 'general deterrence and denunciation must assume importance in the sentence' given the 'many millions of dollars' being spent to combat human trafficking.[61] Mr Dobie was convicted of two counts of trafficking in persons in relation to two Thai women brought to Australia for the purpose of prostitution. He was responsible for paying their airfares and arranging visas, as well as advertising their services, providing them with mobile phones, and driving them to clients.[62] The victims were aware that they would engage in sex work in Australia, but after arrival they were threatened, forced to work constantly, paid only a minimal sum of money, and treated as property 'bought for the cost of a plane ticket and a passport'.[63] In dismissing Mr Dobie's appeal against his sentence, the Court of Appeal rejected an argument that undue emphasis was placed on general deterrence. Fraser JA stated that

> the prosecutor's reliance upon extensive material detailing the costs and difficulties in policing trafficking offences did not induce the sentencing judge to over-emphasise the necessity for deterrence. Her Honour was correct to identify the relevance of the fact that 'many millions of dollars are being spent to combat trafficking in people' as bearing upon 'the importance of general deterrence and denunciation in sentencing'.[64]

It is possible that there is a difficulty in policing trafficking in persons offences in Australia as a result of the transnational nature of the crime and the novelty of the offences.65 Recognition of such difficulties is to be welcomed insofar as they are reflective of the nature of trafficking in persons.[66] However, the 'policing difficulties' referred to by Fraser JA are easily conflated with inadequate government responses to the trafficking problem, such as a lack of resources and training for investigators and prosecutors. Excessive sentences must not be used as a substitute for

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(Williams DCJ); Transcript of Proceedings, *R v Kovacs & Kovacs* (Supreme Court of Queensland, Indictment No 2 of 2007, Jones J, 18 February 2010).

59 236 FLR 455.

60 Transcript of Proceedings, *R v Dobie* (District Court of Queensland, Indictment No 1221 of 2008, Clare SC DCJ, 23 December 2008).

61 Ibid 11.

62 Ibid 3. For a detailed analysis of the case, see Schloenhardt and O'Shea, 'Reflections on *R v Dobie*', above n 9.

63 Transcript of Proceedings, *R v Dobie* (District Court of Queensland, Indictment No 1221 of 2008, Clare SC DCJ, 23 December 2008) 5.

64 *R v Dobie* (2009) 236 FLR 455, 468.

65 See, eg, Judy Putt, 'Human Trafficking to Australia: A Research Challenge' (2007) 338 *Trends and Issues in Crime and Criminal Justice* 5, 7.

66 Cf Schloenhardt and O'Shea, 'Reflections on *R v Dobie*', above n 9, 407.

improvement in law enforcement and prosecution.[67] Enhancing the capacity of investigators and prosecutors can lead to the identification of victims of trafficking, their removal from exploitative environments, and to the disruption and arrest of traffickers; longer sentences cannot. Furthermore, it must be recognised that simply increasing sentences in an attempt to 'send a message' in pursuit of deterrent goals, whether for trafficking offences or other crimes, is unlikely to result in tangible benefits. There is ample evidence that absolute general deterrence (which refers to the certainty of punishment) is effective in reducing crime, whereas marginal general deterrence (which refers to the extent or degree of punishment) has not been proven to be similarly effective.[68]

2 *Organised crime and border security*

In connection with general deterrence, some sentencing Judges have commented specifically on organised crime, referring to the fight against 'like minded criminal enterprises' and 'organised sexual exploitation'.[69] In *R v Dobie*, for instance, Judge Clare noted that the trafficking offences were 'introduced to address the pernicious trade in vulnerable people across the world'.[70] Although there is no evidence of high-level organised crime involvement in trafficking in persons in Australia, the judicial linking of organised crime and the need for deterrence is, to some extent, well justified: trafficking in persons and related practices have generally 'promised low risk of detection, prosecution and severe penalties', [71] which has presented opportunity and incentive for organised criminal groups to operate.[72] As a result, where the offence was committed as part of the activities of an organised criminal group it may well be seen as a factor increasing the importance of deterrence and thus increasing the sentence to be imposed. However, as discussed below, this factor

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67 Cf Fredette, above n 22, 121.

68 See generally Andrew von Hirsch, Anthony E Bottoms, Elizabeth Burney and Per-olot Wikström, 'Deterrent Sentencing as a Crime Prevention Strategy' in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3rd ed, 2009) 57; Mirko Bagaric, 'Strategic (and Popular) Sentencing' (2006) 2(3) *International Journal of Punishment and Sentencing* 121, 126; Mirko Bagaric, 'Bringing Sentencing Out of the Intellectual Wasteland – Ignoring Community Opinion' (2010) 34 *Criminal Law Journal* 281.

69 *DPP (Cth) v Ho & Ors* [2009] VSC 437, [52] (Cummins J); *R v Netthip* [2010] NSWDC 159, [25] (Murrell SC DCJ).

70 Transcript of Proceedings, *R v Dobie* (District Court of Queensland, Indictment No 1221 of 2008, Clare SC DCJ, 23 December 2008) 10.

71 Fredette, above n 22, 121.

72 Andreas Schloenhardt, *Migrant Smuggling; Illegal Migration and Organised Crime in Australia and the Asia Pacific Region* (Martinus Nijhoff, 2003) 107-108.

should not distract judicial attention from the nature of the exploitative scheme under consideration or the harm suffered by victims.

Although organised crime may at times be relevant to the sentencing calculus, conceptualising trafficking in persons as an instance of border infringement is much more likely to lead into error. In her sentencing remarks in *R v Dobie*, Judge Clare appears to establish a connection between the seriousness of the offence and infringements to Australia's immigration and border control systems, stating that:

> Your scheme involved the temporary stay of illegal sex workers. It is not as serious as it would have been if your intention was to keep the complainants here permanently. Nonetheless, your offences strike at the heart of the immigration system which is designed to control the passage of people through Australia's borders.[73]

Although Judge Clare did not ignore the experiences of Mr Dobie's victims elsewhere in her sentencing remarks, a focus on the illegal immigration aspects of the offence has the potential to divert attention from the exploitation of victims of trafficking in persons.[74] As Marie Segrave has noted, the border has consistently been the site at which governments identify and respond to trafficking, and trafficking in persons is thus easily conceptualised as 'another threat to the nation that requires the escalation of enhanced border policing efforts'.[75]

3 *Exploitation and human rights*

Trafficking in persons offences are about more than securing the state against the threats of organised crime and border infringement. Existing case law in Australia demonstrates that these offences frequently involve serious violations of human rights, such as the rights to liberty, personal integrity, equality, and freedom from slavery and involuntary servitude.[76] Examples of horrific treatment are easy to find in

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[73] Transcript of Proceedings, *R v Dobie* (District Court of Queensland, Indictment No 1221 of 2008, Clare SC DCJ, 23 December 2008) 9.

[74] Leishman, above n 6, 198; Fredette, above n 22, 102; Ann D Jordan, 'Human Rights or Wrongs? The Struggle for a Rights-Based Response to Trafficking in Human Beings' (2002) 10(1) *Gender and Development* 28, 29-30.

[75] Segrave, above n 3, 79.

[76] Elizabeth Broderick and Bronwyn Byrnes, 'Beyond Wei Tang: Do Australia's Human Trafficking Laws Fully Reflect Australia's International Human Rights Obligations?' (Speech delivered at the Workshop on Legal and Criminal Justice Responses to Trafficking in Persons in Australia: Obstacles, Opportunities and Best Practice, Monash University Law Chambers, 9 November 2009) [5]; Miriam Cullen and Bernadette McSherry, 'Without Sex: Slavery, Trafficking in Persons and the Exploitation of Labour in Australia' (2009) 34(1) *Alternative Law Journal* 4, 10.

the conduct of the offenders sentenced in Australia thus far. For example, in at least two cases victims were forced to engage in sex work during menstruation,[77] and in one case victims were forced to insert a sponge into their vagina to allow continued intercourse.[78] The nature and extent of such violations should be the primary consideration when determining the seriousness of particular offences. As Miriam Cullen and Bernadette McSherry have argued, conceptualising trafficking in persons as a human rights issue 'highlights the protective role of the criminal law and gives added impetus to pursuing criminal law sanctions where basic needs have been deprived'.[79] In most cases, due attention has been paid to the harm suffered by victims.

However, in *R v Johan Sieders & Somsri Yotchomchin*,[80] the circumstances of the victims during their exploitation received little consideration,[81] perhaps as a result of the prosecution not leading evidence on the point. The offenders, Mr Johan Sieders and Ms Somsri Yotchomchin, were convicted in December 2006 for conducting a business involving the sexual servitude of other persons contrary to section 270.6 of the *Criminal Code*. A debt of approximately $45,000 was incurred by four Thai women in return for their 'opportunity to remain and work' as sex-workers in Australia.[82] While in Australia, they were subject to control by a 'mother of contract' who 'exercised control over the arrangement until the debt was repaid and the girls were free to leave'.[83] This was characterised by the defence as 'no more than a commercial arrangement at the conclusion of which these women were free to continue in the sex industry and harvest the available rewards for themselves'.[84] Judge Bennett, however, described this submission as flawed, noting that despite the existence of such an 'arrangement', the women in question were heavily indebted to the defendants, faced the risk of deportation, and were required to live in 'something of an underground community'.[85] It was later noted that the women were subject to an

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77 *R v McIvor & Tanuchit* [2010] NSWDC 310, [11] (Williams DCJ); Transcript of Proceedings, *R v Dobie* (District Court of Queensland, Indictment No 1221 of 2008, Clare SC DCJ, 23 December 2008) 4.

78 *R v McIvor & Tanuchit* [2010] NSWDC 310, [15], [19], [24] (Williams DCJ).

79 Cullen and McSherry, 'Without Sex', above n 76, 10.

80 [2006] NSWDC 184.

81 Ibid (Bennett SC DCJ).

82 Ibid [17].

83 Ibid [54].

84 Ibid [24].

85 Ibid [26].

'implied or actual threat of detrimental action if [they] attempted to leave the service of the offenders' without having repaid their debt.[86]

Judge Bennett noted that one victim who continued to engage in sex work in Australia after her debt to the defendants was discharged was able to dramatically reduce the number of clients she was servicing; after discharging her debt her monthly earnings reduced from $13,000 to $2,000 per month.[87] It was later noted that the debt owed by the women 'required that they work long hours for seven days a week within those periods before they had generated sufficient funds to be able to engage upon the same trade for their own benefit'.[88] These comments are the most informative assessment of the victims' experiences in the sentencing remarks, indicating that only minimal consideration was given to this aspect of the case.

It is not suggested that Judge Bennett failed to respond to the factual material placed before him in relation to the victims. Indeed, he later remarked that 'there was no evidence of any injury or loss or damage resulting from the offence', and that this was thus not a significant factor.[89] Given the absence of evidence on the point, it is impossible to reject the hypothesis that the victims suffered no loss or damage during their exploitation by the offenders. However, Judge Bennett's comments on the number of clients being serviced during the contract period indicate that significant exploitation was occurring. Also, the activities of the offenders were disrupted after one of the victims 'resorted to procuring the assistance of a customer who, at her request, made contact with Immigration officials'.[90]

This case underscores the need for the prosecution to furnish the court with sufficient evidence to demonstrate the gravity of particular offences by reference to the harm suffered by victims. It also demonstrates the need to have regard of the extent to which the human rights of victims have been violated. It is, however, important to be mindful of the potential for error occasioned by stereotyping and generalisation when considering the harm suffered. Two examples, the 'consenting victim' and the 'prostitute victim', merit detailed analysis.

D *The 'consenting victim'*

The concept of consent has been centrally important in debates over defining trafficking in persons. Indeed, the problematic role of consent can be traced to international anti-prostitution treaties, which pre-date contemporary concepts of

86 Ibid [38].

87 Ibid [56].

88 Ibid [71].

89 *R v Johan Sieders & Somsri Yotchomchin* [2006] NSWDC 184, [123], [140].

90 Ibid [51].

trafficking. Reaching consensus on a definition of trafficking in persons 'has been fraught with difficulties partly because of the continuing debates about whether women trafficked into the sex industry should be seen as victims or independent agents acting in their own interests or some combination of these two approaches'.[91] Jo Doezema notes that:

> Modern debates around the relationship of consent to 'trafficking in women' have a long history. At the beginning of the last century, there was a great public outcry against 'white slavery' in Europe and America. 'White slavery' referred to the abduction and transport of white women for prostitution. … The international debates around 'white slavery' were highly concerned with the issue of consent. Many campaigners against the white slave trade saw all prostitutes as victims in need of rescue; others argued for the importance of distinguishing the 'willing' prostitute from the victimised white slave.[92]

In line with its predecessor Convention,[93] Article 3(b) of the *Trafficking in Persons Protocol* maintains that the consent of a victim of trafficking is irrelevant. Similarly, it has been stated that the absence of any reference to the agency of the victim or coercion in the definition of slavery in the 1926 *Slavery Convention*[94] 'reflects the assumption that slavery is an inherently coercive state: a person simply cannot consent to slavery'.[95] The irrelevance of consent to the determination of guilt was confirmed by the High Court of Australia in *R v Tang*.[96] However, these statements on the irrelevance of consent are not directly addressed to sentencing. Indeed, there is potential for conflict between the irrelevance of consent and the requirements in the *Crimes Act 1914* (Cth) that govern the sentencing of federal offenders in Australia. Specifically, section 16A requires that sentences imposed be 'of a severity appropriate in all the circumstances of the offence', and take into account 'the nature and circumstances of the offence', 'the personal circumstances of any victim of the offence', and 'any injury, loss or damage resulting from the offence'.[97]

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91 McSherry, 'Trafficking in Persons', above n 5, 388.

92 Jo Doezema, 'Who Gets to Choose? Coercion, Consent and the UN Trafficking in Persons Protocol' (2002) 10(1) *Gender and Development* 20, 22.

93 *Convention for the Suppression of the Traffic in Persons and Exploitation of the Prostitution of Others*, opened for signature 2 December 1949, 96 UNTS 271 (entered into force 25 July 1951).

94 *Slavery Convention signed at Geneva on 25 September 1926 and amended by the Protocol*, opened for signature 7 December 1953, 212 UNTS 17 (entered into force 7 July 1955).

95 Frances Simmons and Jennifer Burn, 'Evaluating Australia's Response to All Forms of Trafficking: Towards Rights-Centred Reform' (2010) 84(10) *Australian Law Journal* 712, 722.

96 *R v Tang* (2008) 237 CLR 1, 21 [35]. Justice Hayne made similar comments: 1, 64 [167].

97 *Crimes Act 1914* (Cth) ss 16A(2)(a), 16A(2)(d), 16A(2)(e).

The approach of Australian courts to the issue of consent as a factor in sentencing appears to be to treat it as a mitigating factor. In Mr Kam Tin Ho's recently allowed appeal against sentence, one of the factors that 'tended to place [his] offending at the lower rather than the higher end of the scale' was that 'the contracts appeared to have been freely made by the women and were honoured by the [offender]'.[98] In Ms Wei Tang's appeal against sentence it was argued that the consent of the victims, 'whilst not a defence to slavery, was highly relevant to an assessment of the level of [the offender's] culpability'.[99] The Victorian Court of Appeal stated:

> Had this been a case where the victims had been kidnapped or coerced into agreeing to come to Australia to work in the sex industry, the applicant's culpability would undoubtedly have been much higher. Such circumstances would have significantly aggravated the seriousness of the offending.[100]

The Court went on to say that the offender's conduct 'was very serious offending nonetheless' given that the victims 'were, as the jury found, enslaved' by the offender, and 'were not free to choose whether or when they worked in the brothel' and some victims were not permitted to refuse customers.[101] Similar comments have been made in other cases. Sentencing judges who have commented upon or noted the consent or voluntary movement of victims have invariably hastened to add that the offending remained serious or was committed despite that consent or voluntariness.[102]

An analogy can be drawn between the treatment of victim-consent in the sentencing of trafficking and slavery offenders and the treatment of victim-involvement or complicity in other areas of criminal law, in which attempts have been made to prevent judgments of the 'worth' of victims entering the sentencing calculus. According to Callaway JA, having regard to a victim's complicity or involvement in an offence when determining sentence 'does not import a distinction between the worthiness of victims but the weight to be given to sentencing objectives'.[103] His Honour purported to demonstrate this difference through comparison of the cases of *R v Wright*[104] and *R v McGrath*[105].[106] In *R v Wright,* two 17 year-old boys stole a car

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98 *Ho & Ors v The Queen* [2011] VSCA 344, [61] (Buchanan and Ashley JJA, Tate JA agreeing).

99 *R v Tang* (2009) 233 FLR 399, 409 [42] (Maxwell P, Buchanan and Vincent JJA).

100 Ibid.

101 Ibid.

102 See, eg, *DPP v Ho & Ors* [2009] VSC 437, [42] (Cummins J); *R v McIvor & Tanuchit* [2010] NSWDC 310, [33] (Williams DCJ); *R v Sieders & Somsri* [2008] NSWCCA 187, [217] (Campbell JA).

103 *R v Tran* (2002) 4 VR 457, 467 [32] (Callaway JA, Buchanan and Vincent JJA agreeing).

104 *R v Wright* [1999] 3 VR 355; *R v McGrath* [1999] VSCA 197; as referred to by Callaway JA in *R v Tran* 4 VR 457, 467 [32] (Buchanan and Vincent JJA agreeing).

and, when one of them was killed while joyriding, the other was convicted of culpable driving causing death.[107] In *R v McGrath* 'a man affected by alcohol killed a cyclist' and 'the victim was blameless and entirely unassociated with the conduct of the offender and the events which led him to commit the offence'.[108] His Honour stated that 'it would not … have been in accordance with community values or expectations to have denounced Wright's conduct to the same extent as McGrath's'.[109] When dealing with most offences, appropriately taking into account victim complicity in this way is not especially problematic. However, offences that deal with aspects of the trafficking in persons process stand in a different position.

Validly taking into account victim involvement by distinguishing between 'the weight to be given to sentencing objectives' rather than distinguishing 'between the worthiness of victims', requires that the consent or complicity of the victim can be referred to the conduct constituting the offence per se. Thus, in order to determine whether consent can be taken into account, it is necessary in each case to discern precisely what each victim consented to or was involved in, but this task is far from easy. It has been stated that evidence 'indicates that many [victims of servitude] travelled willingly to work in the Australian sex industry, only to find themselves trapped in conditions of debt bondage and/or sexual servitude upon arrival'.[110] Furthermore, evidence surrounding this consent will rarely be satisfactory, given the usual occurrence of critical events outside Australia. As one Justice of the High Court noted in *R v Tang*, further inspection of circumstances surrounding a supposed consent may expose that consent as being vitiated by a number of factors.[111]

It is not suggested that the consent of victims should be overlooked by other aspects of the Australian Government's response to trafficking in persons, or that the role of consent in the trafficking process need not be appreciated to gain a full understanding of that phenomenon.[112] However, when sentencing offenders, courts should be cautious when taking into account the supposed consent of victims, and

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105 [1999] VSCA 197.

106 *R v Tran* (2002) 4 VR 457, 467 [32] (Callaway JA, Buchanan and Vincent JJA agreeing). The cases are described earlier in his Honour's reasons: *R v Tran* (2002) 4 VR 457, 464-465 [24]-[25].

107 *R v Wright* [1999] 3 VR 355.

108 *R v McGrath* [1999] VSCA 197, [18].

109 *R v Tran* (2002) 4 VR 457, 467 [32] (Callaway JA, Buchanan and Vincent JJA agreeing).

110 Kotnick, Czymoniewicz-Klippel and Hoban, above n 6, 371.

111 *R v Tang* (2008) 237 CLR 1, 64 [167] (Hayne J).

112 See, eg, Simmons and Burn, above n 95, 715.

should remain reluctant to give this factor significant weight.[113] As Kalen Fredette has argued, if too much emphasis is placed on the 'powerlessness of trafficked women' it is inevitable that 'elements of agency which women exhibit in their own trafficking' will be glossed over and that a dichotomy will arise 'between the deceived, innocent victim and those who consented'.[114]

E *The 'prostitute victim'*

The fact that many victims of trafficking in persons involving sexual exploitation in Australia had previously engaged in sex work has been noted in several cases.[115] Prostitution has always loomed large in anti-trafficking policy making,[116] and efforts to combat trafficking in persons have often dichotomised between the innocent victim, who is in need of rescue, and the complicit sex worker who is not.[117] The *Trafficking in Persons Protocol* does not adopt this dichotomy, although its development was characterised by debates over that dichotomy's validity.[118]

Prior prostitution experience was most prominently taken into account in determining sentence in the case of *R v McIvor & Tanuchit.*[119] Mr Trevor McIvor and Ms Kanakporn Tanuchit were convicted of intentional slavery offences in relation to five victims who were working at the couple's brothel in western Sydney between June 2004 and July 2006. The victims' treatment at the hands of the offenders, perhaps the most heinous of the cases so far prosecuted in Australia, involved their exploitation at the brothel for approximately 16 hours per day, with little food, physical restraint, and (at most) one day off per week.

In sentencing the offenders, Judge Williams made several comments in relation to the victims' prior experience in the sex industry:

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113 Cf Fredette, above n 22, 112; Ramona Vijeyarasa, 'The Impossible Victim: Judicial Treatment of Trafficked Migrants and Their Unmet Expectations' (2010) 35(4) *Alternative Law Journal* 217; Ramona Vijeyarasa, 'Exploitation or Expectations: Moving Beyond Consent' (2010) 7 *Women's Policy Journal of Harvard* 11.

114 Fredette, above n 22, 111.

115 *DPP (Cth) v Ho & Ors* [2009] VSC 437, [28], [31] (Cummins J); *DPP (Cth) v Ho & Leech (Sentence)* [2009] VSC 495, [2] (Lasry J); *R v McIvor & Tanuchit* [2010] NSWDC 310, [6] (Williams DCJ).

116 See, eg, Jacqueline Berman, 'The Left, the Right, and the Prostitute: The Making of U.S. Anti-Trafficking in Persons Policy' (2005) 14 *Tulane Journal of International & Comparative Law* 269.

117 Doezema, above n 92, 22.

118 Cullen and McSherry, 'Without Sex', above n 76, 9.

119 [2010] NSWDC 310. For a full analysis of this case, see Andreas Schloenhardt and Laura-Rose Lynch 'R v McIvor & Tanuchit: A 'truly heinous' case of sexual slavery' (2012) 35(1) *UNSW Law Journal* (forthcoming).

> Except for Mickey none had any previous experience in the sex industry although in cross-examination the suggestion was made to all of them that this was not the truth and that they had in fact previous sex industry experience. … Given that most had never worked in the sex industry before I have no doubt that they suffered pain and distress in working excessive hours from the day that they arrived in Australia.[120] …
>
> The victims were generally subjected to cross-examination that suggested prior sex industry experience to a greater or lesser degree without there being any reliable evidence to support such innuendoes. It was quite clear that a number of the victims found these suggestions distressing. Whilst I have been urged by defence counsel not to believe their assertions no convincing evidence has been advanced as to why I should.[121]

From these comments it can be inferred that regard was had in determining sentence to additional 'pain and distress' suffered by the victims who did not have previous prostitution experience. This is supported by comparison of the circumstances of two victims, 'Mickey' and 'Yoko', and the sentences imposed on the offenders in relation to each.

Mickey, who had previously engaged in sex work in Bahrain, came to Australia with the intention of doing massage and sex work. She worked at the brothel for 13 days before it was searched by police and the offenders taken into custody.[122] Within one hour of her arriving in Australia she was taken to the brothel, where she was 'forced to perform sex work every day and was not allowed to refuse clients' and 'was detained and not given any freedom to leave'.[123] Mickey 'gave evidence that she did not attempt to escape because she was afraid that she would not succeed in escaping and that if she got caught she would be harmed'.[124] During the 13 days, in which she was only given instant noodles to eat, Mickey 'serviced 72 clients at [the brothel] and repaid $3,770 of her $45,000 debt'.[125]

Yoko, who had not previously engaged in sex work and 'gave evidence that she had no intention of doing sex work in Australia', was recruited to come to Australia to do massage work with the option of doing sex work.[126] The victim gave evidence that, on arrival in Australia, she felt pressured into sex work by Ms Tanuchit who told her

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120 *R v McIvor & Tanuchit* [2010] NSWDC 310, [6]. The names used for the victims are pseudonyms assigned by the court.

121 Ibid [34].

122 Ibid [29]-[31].

123 Ibid [30]-[31].

124 Ibid [31].

125 Ibid.

126 Ibid [27].

that 'whilst she could do just massage work it did not pay very well and it would take a much longer time to pay off her debt'. She worked at the brothel for 17 days during which time she serviced 41 clients and repaid $2,125 of her $45,000 debt.[127] In relation to her lack of prior sex work experience, Judge Williams stated that '[t]he victim gave evidence that she had never worked in the sex industry and did not want to do that type of work, which must have been a source of additional distress to her'.[128]

On the count of using a slave in relation to Mickey the offenders were sentenced to three years imprisonment, but on the same count in relation to Yoko they were sentenced to four years.[129] Although there may have been a slight difference in the treatment of the victims, in that Yoko may have been pressured by the offenders into performing sex work, it is submitted that this circumstance alone cannot explain the disparity in sentences, especially given the fact that, unlike Yoko, Mickey was detained constantly at the brothel and serviced nearly twice as many clients over a much shorter period of time. Judge Williams' remarks that Yoko's lack of prior sex industry experience 'must have been a source of additional distress to her' imply that Mickey suffered less distress as a result of her prior sex work experience, despite servicing a greater number of clients. Judge Williams also failed to consider the causes and circumstances of Mickey's prior sex work experience in Bahrain, for example, whether she was trafficked or otherwise exploited, harmed, or threatened at that time.[130] This reasoning leaves open the concerning possibility that sentencing judges will assume that victims with prior sex industry experience suffer less at the hands of their exploiters than those without such prior experience.

Similar concerns arise from several controversial decisions of the Victorian Court of Criminal Appeal in the 1980s and early 1990s, which seem to suggest that the psychological impact of a sexual offence is less serious when committed against a sex worker.[131] The approach was given its fullest expression in *Attorney-General v Harris*, where Starke J stated that the victims in that case

> had been engaged in the trade of selling their bodies for gain. Accordingly it seems to me that one of the elements which is taken into account in respect of the crime of rape is not as potent an ingredient in this case as in the case of a

[127] Ibid [28].

[128] Ibid.

[129] Ibid [65], [66].

[130] *R v McIvor and Tanuchit* [2010] NSWDC 310, [28], [29].

[131] *Attorney-General v Harris* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, 11 August 1981); *R v Henry* (Unreported, County Court of Victoria, 6 October 1988); *R v Hakopian* (Unreported, County Court of Victoria, 8 August 1991); *R v Hakopian* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, 11 December 1991).

> chaste woman, … the forcible sexual act itself would not cause a reaction of revulsion which it might cause in a chaste woman. [I]t seems to me that the crime when committed against prostitutes, at all events in the circumstances of this case, is not as heinous as when committed, say, on a happily married woman living in a flat in the absence of her husband when the miscreant breaks in and commits rape on her.[132]

The application of this approach in *R v Hakopian*,[133] led to a public outcry in Victoria and was strongly criticised in academia.[134] It is noteworthy that these decisions have not been explicitly applied outside Victoria and have been disapproved by judges in New South Wales and Western Australia.[135] Criticism centred on the invalidity of such generalisations and the implicit judgments made about the 'worth' of particular victims.[136] It is submitted that these criticisms are also directly applicable to the approach in *R v McIvor & Tanuchit.*

Generalising that victims who are enslaved in a brothel suffer less 'pain and distress' if they have previously engaged in sex work distracts attention from the experiences of individual victims. It is not plausible to suggest that a victim suffers less if he or she is re-victimised, but this may well have been the practical effect of the approach in *R v McIvor & Tanuchit*. While the approach taken by Judge Williams does not appear to be widespread, other sentencing judges have commented on previous sex

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[132] *Attorney-General v Harris* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, 11 August 1981) 7 (Starke J).

[133] *R v Hakopian* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, 11 December 1991).

[134] Jocelynne A Scutt, 'Judicial Vision: Rape, Prostitution, and the 'Chaste Woman'' (1994) 17(4) *Women's Studies International Forum* 345; Meredith Carter and Beth Wilson, 'Rape: Good and Bad Women and Judges' (1992) 17(1) *Alternative Law Journal* 6; Graeme Coss, 'Hakopian's Case – Oh Chastity! What Crimes are Committed in Thy Name' (1992) 16(3) *Criminal Law Journal* 160; Deborah Cass, 'Hakopian' (1992) 16(3) *Criminal Law Journal* 200; Michael Sharpley, 'Heros as Villain: A Defence of the Judicial Approach to Hakopian' (1993) 67(11) *Law Institute Journal* 1064.

[135] *R v Leary* (Unreported, Supreme Court of New South Wales, Court of Criminal Appeal, 8 October 1993, BC9302383) 8 (Kirby P); *R v Villar; R v Zugecic* [2004] NSWCCA 302 (Unreported, Supreme Court of New South Wales, Court of Criminal Appeal, 3 September 2004) [155] (Grove J); *Michael v Western Australia* (2008) 183 A Crim R 348, 399 [246] (Miller JA).

[136] See, eg, Haley Clark, 'Judging Rape: Public Attitudes and Sentencing' (2007) 14 *Australian Centre for the Study of Sexual Assault Newsletter* 17, 21; Marion Brown, 'Heros Hakopian, Sexual Assault and Victim Impact' (Speech delivered at the 40th Anniversary Conference of the Women Lawyer's Association of New South Wales, 5 March 1992) quoted in Coss, above n 134, 162; Cass, above n 134, 203.

industry experience in a manner suggesting that such experience may have operated as a mitigating factor.[137]

Delivering a lesser sentence in relation to victims with prior prostitution experience may send a message that encourages offenders to focus on the victimisation of sex workers. But the prior prostitution experience – or lack thereof – of a victim should not be taken into account when determining sentence, as it invites the Court to act on unsafe assumptions about the harm suffered by victims, and denies sex workers the full protection of the criminal law.

IV OBSERVATIONS AND RECOMMENDATIONS

This article has shown that, despite the emphasis placed on criminalisation within international agreements on trafficking in persons and related practices, guidance on sanctions offered at the international level remains minimal and fragmented. Although the *Trafficking in Persons Protocol* and the *Convention against Transnational Organised Crime* are a comprehensive mechanism for the criminalisation of trafficking in persons, these treaties contain little or no guidance on types and levels of appropriate punishment.

It is not suggested that international organisations or future international instruments lay down inflexible rules or minimum penalties for the sentencing of offenders. Such an approach would have insufficient regard to the differing legal traditions and punishment regimes of individual jurisdictions, not to mention the vast range of offences and offenders that fall with the ambit of international anti-trafficking in persons and slavery law. Moreover, a law reform approach that focuses crudely on the immediate outcome of the sentencing process (i.e. sentence length) diverts attention from the potentially flawed reasoning processes underlying that outcome, which may be indicative of broader prosecutorial, policing, and popular attitudes towards victims of trafficking and the trafficking process. It is these underlying considerations – the determinants of sentence – that should be exposed to scrutiny and critical reflection if the proportionate punishment of offenders is to be achieved.

At this stage, the development of detailed guidelines on the development and imposition of proportionate criminal sanctions would greatly assist in the implementation of this critical, but under-developed aspect of the *Trafficking in Persons Protocol*. At a minimum, such guidelines should provide details of specific aggravating and mitigating factors, how they relate to each other, and how they cohere with particular objectives and theories of punishment. This would greatly

[137] *DPP (Cth) v Ho & Ors* [2009] VSC 437, [28], [31] (Cummins J); *R v Johan Sieders & Somsri Yotchomchin* [2006] NSWDC 184, [129]-[131] (Bennett SC DCJ).

improve on current publications, which simply list potential aggravating factors without further explanation. Importantly, such guidelines could be informed by an analysis of issues arising in sentencing in particular jurisdictions, such as that undertaken in this project and by the UNODC's recently launched human trafficking case law database.[138] In the future, and depending on the adoption of such guidelines, the development of structured international sentencing guidelines for trafficking in persons and related practices could be the subject of attention.

Conceptualising trafficking in persons as a problem of organised crime or border infringement has the potential to divert attention from the harm suffered by victims. On the other hand, focusing judicial attention purely on the role and experience of victims gives rise to further complications, as the foregoing discussion of the 'consenting victim' and 'prostitute victim' has shown. Given the need to conceptualise offences as protecting the rights of trafficked persons and to respond in sentencing to the degree to which those rights have been violated, victim impact statements may at first appear to be a solution. But the effect of such statements remains controversial, as they may provide opportunity for discrimination between victims based on whether or not they 'fit the stereotype of innocent victims',[139] and lead to the division of victims 'into those who are seen as worthy of the law's full protection and those who deserve only a bit of protection'.[140] As Lynne Henderson states:

> 'Victim' suggests a non-provoking individual hit with the violence of 'street crime' by a stranger. The image created is that of an elderly person robbed of her life savings, an 'innocent bystander' injured or killed during a holdup, or a brutally ravaged rape victim. 'Victims' are not prostitutes beaten senseless by pimps or 'johns', drug addicts mugged and robbed of their fixes, gang members killed during a feud, or misdemeanants raped by cellmates. ... In short, the image of the 'victim' has become a blameless, pure stereotype, with whom all can identify.[141]

Insofar as the authors can determine, *R v McIvor & Tanuchit* was the first case under Divisions 270 and 271 of the *Criminal Code* in which victim impact statements were used.[142] Whether causally related to the tender of victim impact statements or not, it

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138 The database is available at http://www.unodc.org/cld.

139 Amy K Philips, 'Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing' (1997) 35 *American Criminal Law Review* 93, 110.

140 Carter and Wilson, above n 134, 7-8.

141 Lynne N Henderson, 'The Wrongs of Victim's Rights' (1985) 37(4) *Stanford Law Review* 937, 951 quoted in Philips, above n 139, 111.

142 *R v McIvor & Tanuchit* [2010] NSWDC 310, [32] (Williams DCJ).

is the clearest case of the division of victims based on the harm suffered due to the imputed effects of prior prostitution experience.

Given the highly discretionary nature of the sentencing process in Australia, the most effective responses to the issues identified in this article will likely involve the continuing training of prosecutors, defence counsel, and judges on the characteristics of the trafficking process and the need to ensure that the seriousness of offending is not linked to particular perceived characteristics of victims. Education and awareness-raising in relation to the phenomenon of trafficking in persons, which is important on necessarily different levels for the community as a whole, would be furthered by the development of international guidance on sentencing, as discussed above.

It should also be recognised that relying on 'law enforcement as the panacea' to trafficking problems is likely to be counterproductive.[143] Simply demanding increased sentences for trafficking offenders is misguided and unsatisfactory. While criminalisation of trafficking in persons and the effective and proportionate punishment of offenders has an important role to play in any counter-trafficking strategy, punishment can only be truly effective for the protection of victims and the community at large, and proportionate to the crime in question, if sentencing judges do not act on unsound assumptions about the cases that come before them. Moreover, all aspects of criminalisation, including the sentencing process, must have at their core, and as their primary consideration, the needs of the trafficked person and the vindication of their human rights. It is therefore hoped that this analysis has exposed areas for improvement in both the international and domestic aspects of criminalisation of trafficking in persons.

[143] Segrave, 'Surely Something is Better Than Nothing?', above n 1, 90.