

CATCH 22

Trafficked persons who commit crime in Victoria are silenced and punished, not protected.

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A report on *Understanding the Experiences of Modern Slavery Survivors in the Victorian Criminal Justice System*.

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The title of this report was inspired by Recommendation 22 of the Australian Government's Hidden in Plain Sight Report leading to the establishment of Australia's *Modern Slavery Act 2018* (Cth) and Finding 22 of the Targeted Review of Modern Slavery Offences in Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth).

2025).

ABBREVIATIONS

AFP – Australian Federal Police

BSWAC – Beyond the Stone Walls Advisory Collective

BIICL – British Institute of International and Comparative Law

CFTT – Changing Faces Think Tank

CPS – Crown Prosecution Service in the United Kingdom

CVRC – Corrections Victoria Research Committee

DPFC – Dame Phyllis Frost Centre

DUHREC – Deakin University Human Research Ethics Committee

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

JHREC – Justice Human Research Ethics Committee

IBA – International Bar Association

NAP – National Action Plan to Combat Modern Slavery 2020–2025

OPP – Office of the Public Prosecutions Victoria

UNODC – United Nations Office on Drugs and Crime

UNTOC – United Nations Convention against Transnational Organised Crime

VLSB – Victorian Legal Services Board and Commissioner

ACKNOWLEDGEMENTS

This report is the culmination of decades of work as a barrister and academic to recognise the need to protect trafficked women who commit crime, to empower them to speak about their experiences and to provide legal pathways to exoneration that recognise they carry no culpability for crimes they have been trafficked to commit. I would like to acknowledge the Justice Human Research Ethics Committee (JHREC) and the Corrections Victoria Research Committee (CVRC) at the Department of Justice and Community Safety, Victoria for giving ethical approval to speak to women in prison. A special acknowledgement to the women in the Changing Faces Think Tank (CFTT) at the Dame Phyllis Frost Centre and the women in the Beyond the Stone Walls Advisory Collective (BSWAC) for sharing their knowledge and experiences as women who have encountered corrections systems and as peer support workers. Thank you to my brilliant research assistants Phillipa Stafford (who also co-authored this report),

Gabriela Franich, Cate Read and Jennifer Keene-McCann.

This project could not have been completed without the keen insights, guidance, and support from the project's diverse and knowledgeable advisory group Gabrielle Hill, Linh Cao, Zulay Buchs, Gabriela Franich (after her time as Research Assistant) and Marietta Martinovic. Above all, this project would not have been possible without the generous support from the Victorian Legal Services Board (VLSB) Grants Program for funding this post-doctoral research and recognising the need for women's experiences to be understood in the complex issue of when modern slavery meets criminal justice. A special mention for the cases of *Re Ning* and *Re Boo* - where it was alleged that a Chinese/Malaysian drug-trafficking syndicate operating throughout Victoria and Tasmania used vulnerable persons working on the farms to 'house sit' the clandestine laboratories - the need for understanding of modern slavery/human trafficking on those bail applications inspired this project.¹ I would also like to acknowledge Associate Professor Lata Satyen for providing bespoke certified trauma informed interview training.

ABOUT THE PRINCIPAL INVESTIGATOR

Dr Felicity Gerry KC is admitted in Victoria, Australia and England and Wales and on the lists of counsel at the International Criminal Court and the Kosovo Specialist Chambers and the Dubai International Financial Centre. She currently has temporary admission in the Cook Islands and has had ad hoc admission in Hong Kong and Gibraltar.

She has been defending trafficked persons who commit crime for over 30 years. This has included a young girl exploited to take drugs into a prison, a woman who was trafficked and managed other women in a sex trafficking network, a man who was trafficked across continents into fast fashion, a woman trafficked across continents and violently sexually abused, a man held as a slave in a multi-million dollar money laundering network and a trafficked woman sent to prison for getting a job on false papers whose conviction was quashed on appeal when her case was properly understood and recognised as a prosecution that amounted to an abuse of process.

Felicity has worked with the United Nations Office on Drugs and Crime (UNODC) on the Non-Punishment Principle and the intersection between human trafficking, smuggling of migrants and cybercrime. She is a Senior Trainer & Consultant for Lawyers Without Borders on human trafficking matters and gave training on the Non-Punishment Principle as part of the Westminster session of the Commonwealth Parliamentary Association Modern Slavery Project, to the Commonwealth Judicial College in Australia and in the Bangladesh Judiciary Management Project at Western

¹ *Re Boo* [2020] VSC 882 and *Re Ning* [2020] VSC 609.



Sydney University.

She was involved in the efforts to bring about the *Modern Slavery Act 2015* (UK) which came into force in 2015 and provides for a complete defence to criminal charges for trafficked persons who commit certain crimes.



In 2017 she gave evidence to the Commonwealth of Australia's Parliamentary Joint Committee on Foreign Affairs, Defence and Trade which published the *Hidden in Plain Sight* report which recommended establishing Australia's *Modern Slavery Act 2018* (Cth) ('*Modern Slavery Act*'), to include defences in Australia for trafficked persons who commit crime (Recommendation 22). The *Modern Slavery Act* is limited to corporate reporting of slavery in business supply chains and does not include criminal networks. In 2021, Felicity's made submissions to the Legal and Social Issues Committee of the Parliament of Victoria *Inquiry into Criminal Justice* on 'Introducing a Modern Slavery Defence: A Victim-Centred Approach'. In 2023, Felicity made submissions to the *Targeted Review of Modern Slavery Offences in Divisions 270 and 271 of the Criminal Code Act 1995 (Cth)* ('*Targeted Review*') which also made a finding regarding measures to strengthen application of the Non-Punishment Principle, including development of guidance for criminal justice practitioners and further consideration of a new statutory defence (Finding 22).

Felicity helped in the reprieve from execution of Mary Jane Veloso, a trafficked Filipina women on death row in Indonesia (the same death row as Australians Andrew Chan and Myuran Sukumaran) where use of the Philippines referral mechanism led to the arrest of Mary Jane Veloso's traffickers. She was returned home to her family during this project where she was welcomed as a 'living hero', embodying the deepest fears of families in a country that sends millions of workers abroad each year.²

Felicity is also widely published on issues relating to human trafficking, modern slavery and vulnerable defendants. In 2022 she completed a PhD focusing on trafficked women who commit crime which she dedicated to Mary Jane Veloso. It concluded that trafficked women suffer doubly, once at the hands of their traffickers and once at the hands of the state and that the dominant strategy was silence. This report is her post-doctorate research and builds on those findings. It was completed as an Honorary Professor in the Centre for Protection at Deakin University.

² Carmela Fonbuena, 'A living hero: Philippines welcomes back death row survivor Mary Jane Veloso', *The Guardian* (online news, 18 December 2024) <<https://www.theguardian.com/world/2024/dec/18/a-living-hero-philippines-welcomes-back-death-row-survivor-mary-jane-veloso>>.

I. EXECUTIVE SUMMARY & FINDINGS

This project provides the first evidence-based Victorian policy and legislative recommendations directed at reducing the barriers for survivors of modern slavery/human trafficking to be identified in criminal justice and protected, preventing further traumatisation. By examining whether patterns of silence are present in the data, this report is intended to help to inform survivor identification earlier in legal processes. Likewise, this report is intended to provide evidence-based guidance to stakeholders – broadly defined for the purposes of this project as policy makers, border force, police, prosecutors, lawyers and judges.

The project took a mixed methods approach, including the collection of qualitative data, focusing on valuable perspectives of women with lived experience of incarceration in Victoria. The research took place from 2023 to 2025. It took the form of workshops, first with stakeholders (prosecutors, defence lawyers, judges/judicial trainers, corrections operatives, social workers and NGOs) and then with women in the Changing Faces Think Tank (CFTT) at the Dame Phillis Frost Centre (DPFC) and the women in the Beyond the Stone Walls Advisor Collective (BSWAC).

This project has found the following:

- That Australia has committed to the implementation of the Non-Punishment Principle to protect victims of modern slavery/human trafficking in criminal justice since at least 2002 (through commitments to tackling organised crime) but has been very slow to do so, failing to follow a Senate recommendation to do so made seven years ago in the *Hidden in Plain Sight* Report.
- That modern slavery/human trafficking is understood as a crime in Victoria, particularly through guidance from the Judicial College of Victoria, but there is poor understanding that victims of that crime can appear as accused persons who have been forced, coerced or compelled to commit those crimes.
- The referral mechanisms for protection of victims of modern slavery/human trafficking which exist with the Australian Federal Police (AFP) and the Salvation Army are not being utilised. Victoria should have its own system, improving on the Single Competent Authority in the UK.
- That women are silenced by their experiences as victims of modern slavery/human trafficking and by the processes of criminal justice. They plead guilty and are sentenced without their cases being understood. It is a gross miscarriage of justice and contrary to Australia's *National Action Plan to Combat Modern Slavery 2020–2025*.

- That women victims of modern slavery/human trafficking are in the system already, including being sentenced for offences that were forced, coerced or compelled to commit for which there needs to be a complete defence and an appellate process, like the UK system, which can be improved upon by Victoria.
- That there are ways in which the Non-Punishment Principle can be facilitated within existing frameworks in Victoria, through utilising existing referral mechanisms, obtaining expert assessments, making decisions not to charge, seeking discontinuance and imposing non-conviction outcomes but the scope of all of these methods are limited and need to be improved upon, including through protective services, complete defences and an appellate system.
- That because modern slavery/human trafficking in criminal justice is not understood, there is an urgent need for training on the Non-Punishment Principle, especially for investigators, lawyers and judges.
- That systems for protections of victims of modern slavery/human trafficking in criminal justice should be developed to include expert assessments and support services which include those with lived experience.
- Since it is not currently clear if the ability to permanently stay a case in Victoria, where a victim of modern slavery/human trafficking is wrongly prosecuted, as has been identified by the Court of Appeal of England and Wales, use should be made of the pardon process.
- That victims of modern slavery/human trafficking in criminal justice are currently held in the prison system in Victoria. At a minimum women's prisons should be audited to identify those victims who should be pardoned and protected.

The data justifies the need for greater funding and commitment to addressing modern slavery *within* Australian states and territories; and the project methodology establishes the need for a model that is replicated in all Australian jurisdictions.

The data contributes to improving practice, firstly by bringing together relevant professionals across the legal and social work sectors in Victoria for a series of workshops to understand levels of knowledge before speaking to the women. Secondly by providing some foundation to indicate the missing quantitative data, such as: How many survivors enter the criminal justice system? How many survivors in the criminal justice system are charged with particular types of crimes? How many survivors may have benefited from earlier identification.



The expectation that most of the data would indicate some compulsion or exploitation prior to or during offending, as it had in a UK Sentencing Council study into ‘drug mules’ was fulfilled, alongside an indication that a non-prosecution policy could already have been applied to many women’s cases in Victoria and should be applied in future.

The practical reality is that Australia has committed to the non-prosecution and non-punishment of survivors of modern slavery/human trafficking in criminal justice but is failing to implement it. This means that women in Victoria (from Victoria, interstate and overseas) are being arrested, prosecuted and punished and held in the corrections system when they should have been listened to and protected.

The current system is not designed for victims of modern slavery/human trafficking and, in the voice of one of our participants: needs ‘re-education of whole system.’

II. RECOMMENDATIONS & OUTCOMES

This is a public report sharing consenting participants' stories 'in their own words'. It is a shocking indictment of the Victorian Criminal Justice system in its approach to women who have been forced, compelled or coerced to commit crime as victims of modern slavery / human trafficking.

This report recommends:

- **to all judges, lawyers (prosecutors and defence) and investigators** to engage in training on referral mechanisms and the Non-Punishment Principle and how it can already function in Victoria for victims of modern slavery /human trafficking who commit or are suspected or accused of committing any crime, especially relating to the ethical obligations to clients and court.
- **to the Office of the Public Prosecutions Victoria (OPP)** that guidance is published like that by the Crown Prosecution Service (CPS) in the United Kingdom (UK), to show how decisions not to prosecute or punish survivors of modern slavery/human trafficking are to be taken and are in the public interest.
- **to the Judicial College of Victoria** that when its current guidance on Modern Slavery is updated that attention is given to including guidance on referral mechanisms, admissibility of expert evidence, application of the abuse of process power and proactive measures on non-prosecution and non-punishment for victims of modern slavery/human trafficking who commit, or are suspected/accused of committing, crimes, including on bail applications and at sentencing, with an emphasis on non-conviction outcomes.³
- **to the Sentencing Advisory Council** that attention is given to ensuring that snapshots of sentencing for each specific offence collated include where there is reference to victims of modern slavery/human trafficking being sentenced, to include where there are non-conviction outcomes.
- **to the Victorian Government** that policy and law be introduced to further protect survivors of modern slavery/human trafficking in contact with the criminal justice system, including pathways for non-prosecution and non-punishment. At a minimum this should include:
 - A safe and confidential method for the public to report concerns

³ See NSW guidance here < <https://www.judcom.nsw.gov.au/news/publications-news/guide-modern-slavery-published>>

about victims of modern slavery/human trafficking, together with a public education program so that non prosecution and non-punishment of survivors of modern slavery/human trafficking who commit crime is understood and properly reported by the media.

- Creating a Victorian referral mechanism improving on the UK Competent Authority which builds on the Australian mechanism coordinated by the Salvation Army. The mechanism should allow for confidential expert assessment of modern slavery/human trafficking factors in relation to every woman arrested, with protective services, protection from traffickers and protected confessions and funded specialist legal services from Victoria Legal Aid.
- Having mandatory training for Victorian state police on identifying and protecting victims of modern slavery/human trafficking. To include that no state officer should be part of any joint taskforce into organised criminal networks with the AFP or Border Force unless they have undertaken this training.
- Having mandatory training for Victorian corrections staff on identifying and protecting victims of modern slavery / human trafficking, creating protective services within the corrections system to include a notification system to Victoria Legal Aid for legal services and early release.
- Revising bail laws to specifically provide for survivors of modern slavery/human trafficking accused of crimes to remain in the community, with appropriate services, at least whilst awaiting the above assessment, and certainly if assessed as a victim of modern slavery/ human trafficking, whatever the alleged crime.
- Creating special measures laws which specifically provide for anonymity and adapted or closed hearings to ensure that the identities of survivors of modern slavery/human trafficking are kept private and that they are protected at every stage of the criminal justice and corrections systems.
- Creating specialist courts and a diversion program to ensure survivors of modern slavery/human trafficking are not criminalised or incarcerated, with appropriate services.
- A complete defence to all state crimes where the perpetrator is

caused to commit that crime as a victim of modern slavery/human trafficking (as defined by Divisions 270 and 271 *Criminal Code Act 1995* (Cth)).

- An audit of women's prisons to identify survivors of modern slavery/human trafficking and pardoning them for those crimes committed as victims.

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- Regular reporting to the Federal Modern Slavery Commissioner on efforts to protect survivors in criminal justice
 - A call to the Commonwealth Attorney General to follow suit.
- **To all government bodies, authorities and organisations:** ensure persons with relevant lived experience are always involved in consultation and decision making around law, governance and policy relating to modern slavery / human trafficking in criminal justice.

This report also recommends that such guidance, training, laws and policies are replicated across Australia in relation to all alleged crimes and always involving people with lived experience.

These recommendations will be presented to government and other stakeholders, and the public report will be disseminated online and through public events and publications.

III. PROJECT FORMALITIES

ETHICS APPROVAL

Ethics approval for this project was granted by the Justice Human Research Ethics Committee (JHREC) at the Department of Justice and Community Safety, Victoria and the Deakin University Human Research Ethics Committee (DUHREC), prior to any field research being conducted. The Principal Investigator was Dr Felicity Gerry KC, first as Professor of Legal Practice at the Burwood Campus and later as Honorary Professor in the Centre for Protection at Deakin University.

ADVISORY GROUP

The advisory group included people who had conducted previous academic research on modern slavery, had worked with women with experience of the criminal justice system, who provided services in BSWAC and CFTT, and who are Aboriginal or Torres Strait Islander. The advisory group provided subject expertise and combined knowledge that was invaluable in developing the framework for the research. This knowledge was combined with Felicity's experience in facilitating training on advocacy with vulnerable people and her direct experience of working with vulnerable clients.

Advisory Group Members

Gabrielle Hill, via familiar clan lines, is a proud descendant of Australia's Palawa and Arrernte Nations. Gabby, having a long history of working and volunteering for national and international not-for-profit organisations, believes change starts from the ground up. Gabby holds an Assoc Degree and LLB of Law from Charles Darwin University (NT) along with qualifications in Youth Work and Aboriginal and Torres Strait Island Primary Health Care. Gabby is passionate about grass roots advocacy for positive legislative and social change. An advocate, inspirational speaker, paralegal, community engagement and asylum seeker advocacy officer, Gabby is proud to be associated with the VLSB project on understanding the experiences of modern slavery survivors in the Victorian Criminal Justice System.

Gabriela Franich is a PhD candidate at the University of Melbourne in the discipline of Criminology. She considers herself a critical feminist criminologist. Gabriela has worked and volunteered in prisons since 2017, delivering education programs in both

women's and men's facilities. She has also authored and co-authored academic articles and research reports addressing the needs of women in prison and post-release. She has also been involved in activist campaigns, working alongside and learning from women who have been inside.

Linh Cao is an experienced lawyer in criminal law. She appears as a solicitor advocate in all courts across Victoria. Since 2023, she has been the Director and Principal Lawyer at Cao & Co Legal. Linh previously worked at the Law & Advocacy Centre for Women as the Managing Lawyer in Crime and as a Senior Lawyer. In 2016, Linh was recognised by the Law Institute of Victoria as an Accredited Specialist in Criminal Law.

Zulay Buchs holds a PhD in Management from the University of Technology Sydney and is now a Lecturer in Strategic Management at the University of Tennessee's Haslam College of Business. Her research examines multi-stakeholder collaboration and strategic management to address global challenges such as forced labour in supply chains. Beyond academia, she brings experience as a business consultant, entrepreneur, and former intelligence operations agent. Passionate about ethical leadership and collaboration, Zulay has worked across four continents and is fluent in English, Spanish, and French, reflecting her global perspective and inclusive approach.

Marietta Martinovic is an Associate Professor in Criminology and Justice studies in the School of Global, Urban and Social Studies at RMIT University in Melbourne, Australia. She started the first Australian Inside-Out Prison Exchange Program in Australia, and has established, and is leading five prison-based and one community-based Think Tank composed of people with lived experience of the Criminal Justice System, university students, researchers and criminal justice practitioners.

DIFFICULTIES AND DURATION

The project duration was intended to be approximately 15 months (including preparatory time before data collection) from October–November 2023. It took longer, finishing in September 2025.

Difficulties were encountered during the research that caused delays:

- Lack of knowledge of human trafficking/ modern slavery in criminal justice hampered progress with all stakeholders and ethics approval bodies. This was surmounted by using the words 'forced, compelled or coerced offending' rather than 'human trafficking' or 'modern slavery'.
- JHREC did not approve direct interviewing of women which caused some adjustment to the project and took some time to resolve but, in the end, the



workshops methodology was approved.

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- A restructure at Deakin University also necessitated a pause in work for some months and loss of personnel, which meant this report was finalised without some of the in-kind provision agreed to by Deakin University, which led to some pressures of time.
 - There were also lockdowns at Dame Phillis Frost Centre due to staff shortages which prevented workshops being held for a while.

VLSB helpfully extended the time for the project to be completed.

IV. PROJECT PURPOSE & OBJECTIVES

BACKGROUND AND RATIONALE

Felicity's professional experience, academic research and training opportunities provided a background of understanding regarding the global problem of modern slavery/human trafficking in criminal justice. This experience is in addition to multi-jurisdiction practical experience of the Non-Punishment Principle (not to prosecute or punish survivors of modern slavery/human trafficking for crimes they were exploited to commit).

Preliminary research for this project indicated that for every modern slavery survivor detected in Australia, there were approximately four who go undetected.⁴ In 2019, the Australian Institute of Criminology found that the AFP had received reports of 841 possible cases of modern slavery between 2004–2017, of which 350 victims were referred to the Support for Trafficked People Program, and 21 perpetrators were convicted.⁵ There is no specific data on whether those protected may have been exploited to commit crime.

An early literature review showed that survivors of modern slavery/human trafficking are disincentivised from approaching authorities for assistance because of a fear of prosecution and/or punishment.⁶ When accused of criminal offences, the dominant strategy for survivors of modern slavery/human trafficking is to remain silent.⁷ The reasons for this are complex. This not only risks putting victims of crime (here, slavery, slavery-like offences, and trafficking) 'on trial' for offences that may be connected to their own exploitation but also removes an important potential source of information for authorities investigating the activities, often in serious organised crime, underlying such exploitation. Noting that protection for exploited persons should not be

⁴ Samantha Lyneham et al, 'Estimating the dark figure of human trafficking and slavery victimisation in Australia', Australian Institute of Criminology (Statistical Bulletin 16, 15 February 2019).

⁵ Ibid.

⁶ Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Trafficking in Persons Provisional Agenda and Annotations, CTOC/COP/WG.4/2010/1 (27–29 January 2010), item 5; Jacqueline Joudo Larsen et al, 'Experiences of trafficked persons: An Indonesian sample', Australian Institute of Criminology (Trends and Issues in Criminal Justice 449, 27 May 2013).

⁷ Felicity Gerry et al, 'Game Theory and the Human Trafficking Dilemma' (2019) 7(2) Journal of Human Trafficking, 168.

conditional on giving information or evidence for the prosecution.

In international legal practice outside of Australia, principles on non-prosecution and non-punishment of survivors are considered best practice because, in part, they facilitate survivors coming forward.⁸ These principles are based on an understanding that people exploited by criminal networks are victims, and therefore any connected offending must be assessed within this context. Guidelines developed in various national legal systems reflect these principles. For example, the UK Crown Prosecution Service (CPS) publicly published guidelines for a 4-stage approach to determining whether a victim of trafficking or slavery should be prosecuted or not as follows:⁹

The Four-Stage Approach to the Prosecution Decision

1. Is there a reason to believe that the person is a victim of modern slavery?
 - If yes, move to Question 2.
 - If not, you do not need to consider this assessment further.
2. Is there clear evidence of a credible common law defence of duress?
 - If yes, then the case should not be charged or should be discontinued on evidential grounds.
 - If not, move to Question 3.
3. Is there clear evidence of a statutory defence under section 45 of the 2015 Act?
 - If yes, then the case should not be charged or should be discontinued on evidential grounds
 - If not, move to Question 4.
4. Is it in the public interest to prosecute? This must be considered even where there is no clear evidence of duress, or all the elements of the statutory defence under section 45, or where the offence is excluded under Schedule 4.

This CPS public guidance also outlines how protection works at various stages

⁸ UNODC, Model Law against Trafficking in Persons, UN Doc ST/ODC(02)/M689(September 2009). see also, UN Protocol, 2000) ('Model Law').

⁹ Crown Prosecution Service, 'Modern Slavery and human trafficking: offences and defences, including the section 45 defence' (Guidance, last updated 22 July 2025) < <https://www.cps.gov.uk/legal-guidance/modern-slavery-and-human-trafficking-offences-and-defences-including-section-45> > ('CPS Guidance').

including assessments and suppression orders and pre-recorded evidence, alongside an analysis of the statutory defence under s 45 of the *Modern Slavery Act 2015* (UK) and how it is applied in practice (Non-Punishment in some crimes).¹⁰

In our region, other states, including both Indonesia¹¹ and the Philippines¹² have incorporated non-prosecution/non-punishment best practice into domestic law.

In 2023, an analysis of the implementation of the Non-Punishment Principle globally was conducted by the International Bar Association (IBA) Legal and Policy Unit (LPRU) and the British Institute of International and Comparative Law (BIICL).¹³ The comparative analysis provided guidance to ‘better understand the structural, legal and practical barriers to the implementation of the principle, and to contribute to the ongoing conversation among judges, lawyers, legislators and policymakers on the protection of trafficked persons and the application of the Non-Punishment Principle. In relation to Australia, the IBA report found as follows:

Although no legislative measures have been adopted in Australia, it appears that a general policy of non-punishment in respect of trafficked persons is available to state and federal prosecutors. In this regard, it has been recognised in the NAP that: ‘the [Australian Federal Police] and [Commonwealth Director of Public Prosecutions] 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’. However, there is no specific mention of the unique needs and circumstances of people with lived experiences of modern slavery and trafficking in the relevant policies. Moreover, these policies do not provide an explicit guarantee of non-punishment, and there is no empirical evidence that policies of non-prosecution are being widely applied by authorities at the state or federal level. Indeed, in reality, these policies may amount to little more than paper promises. There appears to be only one criminal case, *Re Boo* [2020] VSC 882, that mentions the potential for modern slavery in a bail application, but the judge described it as not persuasive on a question of

¹⁰ Ibid.

¹¹ Law No 21/2007, art 18

¹² Republic Act No 9208, s 17 – known as the ‘*Anti-Trafficking in Persons Act of 2003*’

¹³ Jean-Pierre Gauci and Noemi Magugliani, ‘Human trafficking and the rights of trafficked persons: An exploratory analysis on the application of the non-punishment principle’, IBA Legal Policy & Research Unit and British Institute of International and Comparative Law (Report, 2023) <<https://www.ibanet.org/IBA-and-BIICL-launch-new-report-exploring-the-global-implementation-of-non-punishment-principle-for-human-trafficking-victims>> (‘IBA/BIICL Report’). The IBA report was provided with case UK studies by Felicity and cites Felicity’s submission to the Legal and Social Issues Committee of the Parliament of Victoria, see: Felicity Gerry et al, Submission No 75 (‘Introducing a Modern Slavery Defence: Victim-Centred Approach’) to the Legal and Social Issues Committee, Parliament of Victoria, Inquiry into Victoria’s Criminal Justice System (31 August 2021).

exceptionality. The process for assessing trafficked persons in Australia is through the Australian Federal Police, not the state police nor a competent authority, which may militate against protection as accused persons are unlikely to wish to be further investigated by a second police force.¹⁴

Australia remains an outlier: implementation of the Non-Punishment Principle has occurred in policy but not legislation. As the IBA/ BIICL Report identifies, Australia has had international legal obligations to protect victims and survivors of human trafficking since 2002, on becoming a signatory to the UN Convention against Transnational Organized Crime (UNTOC)¹⁵ and its Trafficking Protocol.¹⁶ Australia has an *National Action Plan to Combat Modern Slavery 2020–2025* (NAP).¹⁷ This document observes Australia’s binding legal obligations under international law.

Australia’s obligations are set out in key treaties, including:

- *United Nations Convention against Transnational Organized Crime* (2000) (UNTOC), and its *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2000) (the Trafficking Protocol), ratified in 2005;
- *International Labour Organisation Convention No. 29 on Forced or Compulsory Labour* (1930) (Forced Labour Convention), ratified in 1932;
- *International Labour Organisation Convention No. 182 on Worst Forms of Child Labour* (1999) (Worst Forms of Child Labour Convention), ratified in 2006; and
- *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (1956) (Supplementary Slavery Convention), ratified in 1958.

In the NAP it was said that the Australian Government would launch a new

¹⁴ IBA/BIICL Report (n 12).

¹⁵ *United Nations Convention Against Transnational Organised Crime and the Protocols Thereto*, opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 19 September 20043) (UNTOC).

¹⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, GA Res 55/25, UN Doc A/RES/55/25 (15 November 2000) (‘Trafficking Protocol’).

¹⁷ Attorney-General’s Department, *National Action Plan to Combat Modern Slavery 2020–2025* (9 December 2020) <<https://www.ag.gov.au/crime/publications/national-action-plan-combat-modern-slavery-2020-25>> (‘NAP’)

International Strategy on Human Trafficking and Modern Slavery 2021–25 (International Strategy) to ‘provide the framework to inform Australia’s international efforts to help eradicate human trafficking and modern slavery, with a focus on the Indo Pacific region’ and ‘guide Australia’s diplomacy, international development, multilateral engagement, trade and advocacy work’ as well as setting out ‘the bilateral, regional and global avenues through which Australia will seek to make an impact to end these crimes.’ The NAP indicates that the International Strategy was to include ‘addressing the drivers to human trafficking and modern slavery, securing justice, promoting human rights and labour standards in responses to human trafficking and modern slavery and strengthening government, business and civil society partnerships.’

Prosecution of human trafficking/modern slavery perpetrators within Australia by way of criminal offences in Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth) has occurred. A schedule of cases from Australia was developed for this project and can be found in **Annexure 2** of this report.

Therefore, it can be concluded that Australia understands that modern slavery/human trafficking constitutes criminal activity. However, protection for survivors of modern slavery/human trafficking who are forced, compelled, coerced or otherwise exploited to commit crime is not specifically provided for in the NAP. Item 26 of the NAP provides an action to “undertake a targeted review of support and legislative protections, defences and remedies available to modern slavery victims and survivors, particularly women and children, taking into account existing reviews and inquiries.” Despite this, there is still no ‘modern slavery’ defence to any state or Commonwealth crime in Australia, nor is there evidence of the Non-Punishment Principle being applied in sentencing practice. This is also despite Pillar 4 of the the National Action Plan to Combat Human Trafficking and Slavery 2015–19 prioritising “Victim support and protection”, which suggests the policy actions are mere lip service. We have concluded that survivors of modern slavery/human trafficking are still at risk of prosecution and victims are clearly wrongly being held in prisons in Victoria (and elsewhere).

In 2017 the Commonwealth of Australia's Parliamentary Joint Committee on Foreign Affairs, Defence and Trade published *the Hidden in Plain Sight Report* (‘*Hidden in Plain Sight*’)¹⁸ led to the establishment of Australia's *Modern Slavery Act 2018*

¹⁸ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight: Findings of the inquiry into establish a modern slavery Act in Australia* (Report summarising the, December 2017) (‘*Hidden in Plain Sight*’).

(Cth). This landmark report examined the UK's *Modern Slavery Act* and recommended its adoption in Australia to tackle issues of modern slavery in global supply chains, support for survivors, and the need for an Independent Anti-Slavery Commissioner.

Recommendation 22 reads as follows:

6.101 The Committee recommends that the Australian Government introduce defences for victims of modern slavery offences who are compelled to commit a crime due to exploitation, similar to but improving on section 45 of the UK Modern Slavery Act 2015 and drawing from international best practice. This should include a pathway for appeal and/or expungement of criminal convictions for victims of modern slavery who have legitimate defences.

6.102 The Committee recommends that specific guidance (including sentencing guidance) be developed to support the introduction of these defences, which takes into account the impact of modern slavery, exploitation, coercion and vulnerability on victims.

The Australian Government's 2023 *Report of the Statutory Review of the Modern Slavery Act 2018 (Cth)* focussed on corporate reporting and not protection for victims who perpetrate crimes.¹⁹

However, the *Targeted Review of Modern Slavery Offences in Divisions 270 and 271 of the Criminal Code Act 1995 (Cth)* ('*Targeted Review*') (also published in 2023) *did* consider protection for survivors of modern slavery/human trafficking who commit crime in Finding 22.

Finding 22 reads as follows:

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

¹⁹ Attorney General's Department, *Statutory Review of the Modern Slavery Act 2018 (Cth)* (Report, 25 May 2023) ('Statutory Review').

Item 26 of the National Action Plan.

Despite these recommendations, the *Modern Slavery Act 2018* (Cth), the *Criminal Code Act 1995* (Cth), and Victoria's state legislation dealing with criminal law defences do not incorporate a statutory defence nor implement a non-prosecution policy to protect survivors of modern slavery/human trafficking in criminal justice.

This project took Recommendation 22 and Finding 22 and considered how Victoria could improve on section 45 of the UK *Modern Slavery Act 2015* and draw from international best practice. It also considered what measures could be taken to strengthen application of the Non-Punishment Principle in Victoria, including development of guidance for criminal justice practitioners.

Progress made during this project

In 2022, the Department of Foreign Affairs and Trade (DFAT) published Australia's international 'engagement strategy' on human trafficking and modern slavery.²⁰ It appears to focus on tackling human trafficking as an external problem, rather than a problem within Australia. It states that the Association of Southeast Asian Nations–Australia Counter Trafficking project (ASEAN–ACT) to date has been successful in 'Advocating for a rights-based, gender aware approach to victim identification and protections, including improved shelter practices and non-punishment of victims.' There appears to be little evidence that this advocacy has had an impact. Protection for the rights of victims appears limited to overseas development investment.²¹

The AFP also published a Human Trafficking and Slavery strategic plan for 2023 to 2026. It recognises that human trafficking and slavery are significant global issues affecting Australia which require a coordinated response, acknowledging that Australia is primarily a destination country for trafficking, with 294 reports in 2021–2022. It suggests that the AFP collaborates with various organisations to investigate and prosecute these crimes with a focus on prevention, disruption, investigation, and victim protection.

Under the strategy for 'prosecution' it states:

²⁰ Department of Foreign Affairs and Trade, International engagement strategy on human trafficking and modern slavery: delivering in partnership (Strategic Plan, 2022).

²¹ Senator the Hon Marise Payne, 'International Engagement Strategy on Human Trafficking and Modern Slavery' (Media release, 25 March 2022).

Giving effect to the Non-Punishment Principle through the Commonwealth Director of Prosecutions (CDPP) prosecution policy and legislative defences. This ensures persons are not detained, charged or prosecuted for visa status related offences or those offences committed as a direct result of their exploitation —Continuing to hold legal dialogues on human trafficking and slavery prosecution matters to improve prosecution outcomes —Ongoing review of legislative frameworks to ensure they are effective to support disruption, investigation and prosecution actions’

In the same year the AFP also clarified its support for the Non-Punishment Principle in its submission to the *Targeted Review*, agreeing that ‘victims should not be punished for conduct that may be undertaken as a direct result of the offending against them’ and conceded that available criminal defences would not sufficiently protect a victim who was forced to recruit other victims, adding that ‘authorities rely on the CDPP Prosecution Policy’.²²

Whilst the CDPP has a “Human Trafficking and Slavery” web page and a victim policy, there is no published policy from the CDPP on non-prosecution and there is no data on the Non-Punishment Principle published by the AFP, the CDPP, nor any state in Australia. For the CDPP non-prosecution would be apposite in cases involving human trafficking networks, international crimes where child soldiers are commonly used, terrorism where counter terrorist strategies recognise grooming and radicalisation as methods of trafficking and in all serious crimes where people are exploited as alleged accessories, including by family members. In state cases, many survivors should have been protected by now for alleged crimes committed as a result of their exploitation but there is no evidence this has been achieved. It can therefore be assumed that the policy still operates as a method to primarily prosecute and to protect victims, unless those victims commit crimes. It is also a concern that victims may be being used for information instead of being protected.

Progress at the federal level is therefore limited. Neither the NAP nor the Engagement Strategy provide frameworks, commitments, obligations or strategies to protect survivors of modern slavery/human trafficking from exploitation in criminal activity in accordance with the Non-Punishment Principle within Australia.

Findings in this project suggest Australia is not only a destination country for transnational modern slavery/human trafficking but that victims are being exploited in criminal activity within Australia (including in Victoria) and nothing is being done

²² And notes that available criminal defences would not sufficiently protect a victim who was forced to recruit other victims: Australian Federal Police, *Submission No 220781786 to the Australian Government’s Targeted Review of Divisions 270 and 271 of the Criminal Code Act 1995* (Cth) (17 March 2023), [67].

to protect those victims. Instead, they are prosecuted and often severely punished, including young, vulnerable women who have been forced to carry drugs across borders.

While there has been little movement towards legislative defence to any crimes for victims of modern slavery/ human trafficking forced, compelled or coerced to commit crime in Victoria, consideration of the situation of ‘victim perpetrators’ more broadly was the subject of recommendation by the Legislative Council in the Legal and Social Issues Committee Report following the inquiry into Victoria’s criminal justice system published in March 2022.²³

Section 7.6 of that Report reads as follows:

Criminalisation of victim-survivors replicates the trauma and abuse they have already suffered. Victorian Aboriginal Legal Service, Submission 139, p. 72. As discussed throughout this report, there are numerous factors which may increase the likelihood of criminal behaviour. One of these factors is being a victim of crime. Several studies have demonstrated there is a clear link between victimisation and offending. Vulnerable cohorts such as women and Aboriginal Victorians are even more likely to encounter the criminal justice system as a person who has committed criminal offences if they have been a victim of crime.

Accordingly, Finding 31 of the Report was that ‘being a victim of crime can be a risk factor for future criminal behaviour. Many people in contact with the criminal justice system who have committed an offence have previously been a victim of crime’. With the Committee forming the view that ‘there is merit in undertaking further assessment on the relationship between being a victim of crime and committing criminal offences. Any support or rehabilitation services offered to people who have committed crimes should factor in any victimisation or trauma that those individuals have experienced. Addressing trauma is an essential component of preventing recidivism.’

Location and strategies

For this study, Victoria was selected to serve as a smaller unit of analysis, the findings of which would be applicable to Australia as a whole. The primary objective was to provide the necessary evidence to lead to legislative change, alongside explaining why survivors remain silent when faced with arrest.

This necessitated research to identify categories of modern slavery /human trafficking survivors who, but for the current approach adopted by Victorian authorities, would have been assessed as having limited or absent culpability and/or be eligible for

²³ Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria’s Criminal Justice System* (Report, March 2022), s 7.6 (‘Criminal Justice System Inquiry’)

protection under the Non-Punishment Principle.

The difficulty with, and lack of, quantitative data on how many times these principles may be relevant for survivors was reflected in a report by the United Kingdom's Independent Anti-Slavery Commissioner. After a 2020 call for written evidence regarding the use of the UK statutory defence,²⁴ the Anti-Slavery Commissioner stated: '[Due to the complexities of identifying relevant criminal offences and unifying different record-keeping bodies' typologies] finding examples of the statutory defence through data held by the criminal justice system is like looking for a needle in multiple large haystacks'.²⁵ For this reason, the call for evidence adopted a qualitative approach and sought 'views and case studies from those with experience and practical knowledge', rather than through quantitative data.²⁶

Similarly, this project focussed on women's experiences of modern slavery in the Victorian Criminal Justice system and the collection of qualitative data. To this end, researchers collected data from women in the corrections system who were both offenders and peer supporters in one of two think-tanks established by RMIT University's Criminology and Justice Department: the prison-based Changing Faces Think Tank (CFTT) at the Dame Phillis Frost Centre (DPFC) and the community-based Beyond the Stone Walls Advisor Collective (BSWAC).

PURPOSE

Originally, the purpose of this project was to understand how modern slavery/human trafficking may present generally in women's criminal justice experiences. However, as the low level of understanding of all stakeholders of the terms 'modern slavery' and 'human trafficking' was revealed, we were led to a reframing of the language. The purpose of the project was thereafter expressed as 'to understand how forced, compelled or coerced offending' may present generally in women's criminal justice experiences. This enabled data on experiences to be collected without the distraction of terminology or having to explain concepts, and to avoid bias.

Existing research shows that women who are accused of crimes are unlikely to share that the offending was compelled, coerced or forced unless there is a defence available, which would provide a pathway to protection. For example, Susie Hulley found that in cases involving alleged accessory liability where women were coerced to be

²⁴ *Modern Slavery Act 2015* (UK) s 45.

²⁵ UK Independent Anti-Slavery Commissioner, *The Modern Slavery Act 2015 Statutory Defence: A call for evidence* (Report, October 2020), 13-14.

²⁶ *Ibid.*

complicit in a crime by abusive partners:²⁷

There was also a common belief among the women that any calls for help or protection would not be heard by State agencies, based on their previous experiences of the social welfare and criminal justice systems (see Barlow 2019). In such circumstances, women developed coping strategies to deal with the violence that they endured including minimisation (Hunter 2006).

As the following section demonstrates, women's sensitivities to the acute danger they faced and the strategies they used to normalise the abusive behaviour had clear implications in terms of both their presence at the scene of the violent offence for which they were convicted and their ability (or not) to withdraw.

²⁷ Susie Hulley, 'Defending 'Co-offending' Women: Recognising Domestic Abuse and Coercive Control in 'Joint Enterprise' Cases Involving Women and their Intimate Partners' (2021) 60(4) *Howard Journal of Crime and Justice* 580.



Tolmie et al discussed the challenges faced by Australian women as victim –survivors of intimate partner violence and cited one case, where a defence of ‘self–defence’ was unsuccessful, but the jury were given information about her circumstances to help understand the context of her actions and this was described as having ‘improved sentencing outcomes’. ²⁸

The purpose of this project, against this background, was to explore participants’ understanding of women’s experiences (not their own lived experience) and thus to build on existing research that the dominant strategy for trafficked women who commit crime is silence.²⁹ As it turned out, the women who participated, through Felicity’s trauma informed interviewing approach, gave frank and open perspectives which were compiled for the data in this report. Interestingly participants used the word ‘protection’ themselves without knowing it is a purpose of the UN Trafficking Protocol to UNTOC.

OBJECTIVES

The project objectives were threefold:

1. Increasing publicly available knowledge of the lived experience of women who find themselves in the Victorian criminal justice system;
2. Increasing stakeholder familiarity with relevant lived experiences of women within the Victorian criminal justice system; and
3. Increasing the cross–sector collaboration of survivors, researchers, policymakers, support professionals, and legal practice stakeholders

²⁸ Julie Tolmie et al, ‘Defending Primary Victims Who Face Criminal Charges for the use of Defensive Force Against their Abusive Partners: Attempting to Change “laws practices”’(2024) 47(2) *UNSW Law Journal* 626.

²⁹ Gerry et al (n 6).

V. TERMINOLOGY & SUBJECT MATTER

DEFINING ‘MODERN SLAVERY’ AND ‘HUMAN TRAFFICKING’

Modern slavery is defined in the *Modern Slavery Act 2018* (Cth) as conduct which would constitute:³⁰

- (a) an offence under Division 270 or 271 of the *Criminal Code*; or
- (b) an offence under either of those Divisions if the conduct took place in Australia; or
- (c) trafficking in persons, as defined in Article 3 of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the *United Nations Convention against Transnational Organized Crime*, done at New York on 15 November 2000 ([2005] ATS 27); or
- (d) the worst forms of child labour, as defined in Article 3 of the ILO *Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, done at Geneva on 17 June 1999 ([2007] ATS 38).

The Judicial College of Victoria defines **modern slavery** as an umbrella term which encompasses:³¹

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

Human Trafficking is more narrowly defined as the act of recruiting, transporting, transferring, harbouring, or receiving individuals through force, fraud, or coercion for the purpose of exploitation. Exploitation can include forced labour, sexual slavery,

³⁰ *Modern Slavery Act 2018* (Cth) s 4.

³¹ Judicial College of Victoria, *Modern Slavery: Guidance for Australian Courts* (Guide, 2023) ('Judicial College Guidance').

prostitution, servitude, removal of organs, and similar practices and is defined in international law to be as broad as an abuse of vulnerability which can include poverty. Human trafficking can be internal (within a country) or international (across borders). Child trafficking can occur even if no force or threats are used, and consent is considered irrelevant where coercion, deception, or abuse of vulnerability is present.

Human trafficking can also be a form of cybercrime: Traffickers use internet platforms and people to scam others online and either actively ‘hunt’ those who they deem as vulnerable to falling victim to trafficking, or passively ‘fish’ for potential victims by posting advertisements and waiting for potential victims to respond.³²

All these practices are criminalised through Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth).

Coercion in the Criminal Code (Cth)

Coercion as a type of conduct is criminalised by the *Criminal Code* (Cth).

Definitions of slavery and slavery like offences in ss 270.1A–270.14 include the definition of ‘coercion’ as including ‘force, duress, detention, psychological oppression, abuse of power and taking advantage of a person’s vulnerability’.

Forced labour, forced marriage, servitude, slavery and slavery-like offences are also defined and criminalised. The definition of threat includes a threat made by any conduct, whether express or implied and whether conditional or unconditional, including of coercion.

Distinguishing ‘Human Trafficking’ from ‘Smuggling of Migrants’

The Protocol against the Smuggling of Migrants criminalises not only smuggling of migrants – that is, the facilitation of illegal entry for profit – but also related conduct. It is a voluntary process. This includes enabling of illegal stay by any illegal means, as well as producing, procuring, providing or possessing a fraudulent document to enable the smuggling of migrants.³³

Trafficking in persons is different due to its ‘involuntary’ or exploitative nature but has

³² UNODC Regional Office for Southeast Asia and the Pacific, ‘Preventing human trafficking in the digital space among Thai youth (blog, 3 April 2025)< <https://www.unodc.org/roseap/en/2025/04/human-trafficking-digital-space-thai-youth/story.html>> Felicity Gerry and Peter Shaw, ‘Emerging and Future Technology Trends in the Links between Cybercrime, Trafficking in Persons and Smuggling of Migrants’, *IEEE Xplore* (Paper from the 2019 First International Conference on Transdisciplinary AI, September 2019)<<https://ieeexplore.ieee.org/document/8940396>>.

³³ Felicity Gerry, ‘Comparing smuggling of migrants and trafficking in persons’, *SHERLOC* (Module 11, UNODC Teaching Module Series) <<https://sherloc.unodc.org/cld/en/education/tertiary/tip-and-som/module-11/key-issues/comparing-som-and-tip.html>> (‘UNODC Module 11’)

commonalities: Both crimes are likely to seriously endanger the lives, safety and well-being of the individuals concerned. As such, smuggled migrants and trafficked persons both benefit from assistance and protection measures under the respective Protocols, although the specific obligations placed on States parties are different. Broadly speaking, the Protocol against Trafficking in Persons grants a greater standard of protection, consequent on the recognition of trafficked persons as victims of crime.³⁴

Smuggling of migrants and trafficking persons can also often occur along the same routes, use the same methods of transportation and, in some cases, are carried out by the same perpetrators. Persons who are smuggled may also be victims of trafficking or may become victims during or following the smuggling process. Indeed, the work of migrant smugglers often benefits human traffickers. The unequal power relationship between smugglers and migrants means migrants can be particularly vulnerable to being trafficked during the smuggling process.³⁵

It follows that this project was dealing with terms which overlap: Human trafficking is a form of modern slavery. It is not smuggling but smuggling may involve trafficking factors where victims are exploited and unable to leave freely, usually for financial gain.³⁶ Modern slavery encompasses a wider range of exploitative practices beyond movement and recruitment, including debt bondage, forced marriage, and other slavery-like practices.³⁷ Modern slavery is also used as a non-legal term to cover a broader set of problems and raise advocacy awareness, more often in the corporate space.³⁸

THE NON-PUNISHMENT PRINCIPLE

The ‘Non-Punishment’ Principle is an international legal principle with three purposes: to *prosecute* perpetrators, *prevent* human trafficking and *protect* trafficked persons. This includes protecting trafficked persons who commit criminal offences connected to, or because of, their victim status.³⁹

The principle is intended to protect survivors of modern slavery/human trafficking who commit crime through non prosecution and non-punishment. Many states across

³⁴ UNODC Module 11 (n 32).

³⁵ Ibid ‘Differences and Commonalities’

³⁶ ‘Modern Slavery’, *Anti-Slavery Australia* (website) <<https://www.antislavery.org/slavery-today/modern-slavery/>>

³⁷ Hidden in Plain Sight (n 17) s 3.

³⁸ ‘Global Slavery Index: Terminology’, *Walk Free* (website) <<https://www.walkfree.org/global-slavery-index/methodology/terminology/>>.

³⁹ Inter-Agency Coordination Group against Trafficking in Persons, *Non Punishment of Victims of Trafficking* (Issue Brief, 2020).

the globe have policies and laws dedicated to that protection that allow for diversion, discontinuance alongside laws that provide complete defences to a crime if the person has been caused or compelled to commit that crime. This is broader than duress and recognises the many forms of exploitation, particularly in organised criminal networks.

Australia does not yet have a statutory defence based on the Non-Punishment Principle at the Commonwealth, state or territory levels. This report seeks to make the case for its implementation through legislation and in all sectors of the criminal justice system.

FROM 'MODERN SLAVERY' TO 'FORCED, COERCED OR COMPELLED OFFENDING'

Understanding these terms clarifies that modern slavery refers to any exploitative situation with restricted freedom due to coercion and threats, while human trafficking focuses specifically on the recruitment and transport of individuals for exploitation. Both are serious human rights violations, and clear use of terminology helps in policy, law enforcement, and raising public awareness.

This project sought to collect views and case studies and to mirror a qualitative study conducted by the Sentencing Council for England and Wales solely on trafficked women who are exploited to carry drugs known as 'drug mules'.⁴⁰ This UK study interviewed 12 women imprisoned specifically for unlawful importation of drugs and sought to, in part, better understand the circumstances of their offending. Our project expanded this approach initially by proposing interviews with women in prison focusing on 'red flags' that their offence may have a connection to exploitation or compulsion related to modern slavery, rather than by focusing on a specific category of offence.

However, using these terms during the lifetime of this project was difficult as stakeholders had very low knowledge and discussions often turned on use of language rather than the experiences of woman in criminal justice. Ultimately the lack of understanding of modern slavery/human trafficking led us to deeply consider the framing of our research project. The Corrections secretariat also recommended plainer language when explaining the project to participants.

In the end the project language was adjusted from modern slavery to 'trafficking' then

⁴⁰ Sentencing Council, *Drug Mules: twelve case studies* (Research report, 2011) <<https://sentencingcouncil.org.uk/publications/research-reports/drug-offences-drug-mules-twelve-case-studies/>>.

to ‘forced criminality’ or ‘victim perpetrators’ and then to use the phrases ‘forced, compelled or coerced offending’. These terms lie at the heart of offending by survivors of modern slavery/human trafficking, as survivors typically offend in the context of exploitation, coercion, threats and a deliberate, systematic removal of agency. Broader terms were useful in ensuring that participants could discuss experiences rather than labels. These changes also led to a workshop format being adopted rather than direct interviews. Once this project adapted to the workshop format, the focus became the theme of silence – why survivors might *not* speak about being forced, compelled or coerced to commit crime and what changes might be necessary for stakeholders to assist survivors to speak about their experiences and not to be prosecuted or punished.

We note that it was only after these changes that JHREC approval was given for workshops with the CFTT. For consistency the same methodology was adopted for BSWAC.

THE RATIONALE FOR ‘WOMEN’ AS RESEARCH SUBJECTS

This research project focused on women’s experiences. This is because, according to the Commonwealth *National Action Plan to Combat Modern Slavery 2020–2025*, between 2015 and 2017, 83% of the estimated (identified) 1,900 survivors of modern slavery in Australia were women and girls.⁴¹ However, the experience of exploitation or compulsion related to modern slavery is not limited by gender, so the research findings are relevant to other individuals who have experienced related exploitation or compulsion and have come into contact with the Victorian criminal justice system as an accused.

This project focussed on women for FIVE additional reasons:

1. Victoria was in the process of decriminalising sex work, creating laws that distinguish between autonomous sex work and exploitative sex trafficking.
2. The project could build on the principal investigator’s previous research
3. Women in prison are a smaller cohort to meet and so the data would be manageable.
4. The UNODC had published a report in 2020⁴² which found that women and girls, who are often themselves victims of human trafficking and are sexually

⁴¹ NAP (n 16).

⁴² ‘Exploited and Prosecuted: When Victims of Human Trafficking Commit Crimes’, *UNODC* (website, 16 December 2020) <<https://www.unodc.org/unodc/frontpage/2020/December/exploited-and-prosecuted-when-victims-of-human-trafficking-commit-crimes.html>>.



exploited by criminal gangs, are being prosecuted and convicted for human trafficking–related crimes. These victims often have no alternative [...] traffickers use the women and girls as a shield to protect themselves from being punished for their crimes [...] deliberately using them in low-level roles that were more exposed to law enforcement authorities – meaning they were more likely to get caught. These roles occasionally included the recruitment of new victims.

The study also highlights the clear links between human trafficking and violence against women, domestic violence, and the role of intimate partner violence which is a key issue for policy makers in Victoria.⁴³

5. CEDAW General Recommendation No. 38 emphasizes the need for legislation and training on the Non-Punishment Principle.

General Recommendation No. 38 contextualizes the implementation of the obligations of States parties to combat all forms of trafficking, as stipulated in article 6 of the Convention, in the context of global migration. Pathways of trafficking in persons often align with mixed migration flows. The Committee highlights the vulnerability of smuggled women and girls to being trafficked and underlines the conditions created by restrictive migration and asylum regimes that push migrants towards irregular pathways.

In the present general recommendation, the Committee affirms that it is a priority duty of States, both individually and collectively, to prevent women and girls from exposure to the risk of being trafficked. States are also obliged to discourage the demand that fosters exploitation and leads to trafficking. It has set out practical guidance on implementing anti-trafficking interventions that are based on an approach incorporating a gender and intersectional perspective, with the focus placed on realizing the human rights of women and girls as a strategic priority for achieving sustainable development.

It recalls the obligations of States parties under international law, including the jurisprudence of the Committee, to identify, assist and protect survivors of trafficking, to prevent their revictimization and to ensure their access to justice and the punishment of perpetrators.

We have no doubt that the same is happening to people of other gender-identities, including men, and children but the data in this project relates to women.

As the 'in prison' research took place 'female only' Victorian correctional facilities, our gender focus, and ultimately the data, is also constrained by how Victorian correctional facilities have gendered inmates: by binary biological sex, rather than through inclusive self-identification of womanhood or encompassing a non-binary approach to sex and gender.

⁴³ 'Family Violence', *Victoria State Government* (website) <<https://www.justice.vic.gov.au/safer-communities/protecting-children-and-families/family-violence>>.

VI. METHODOLOGY

Our approach to this research project may be conceptualised as a ‘strata’ or layered methodology. Foundationally, it is a socio-legal project. This is a methodological framework which has been tried and tested by those wishing to affect change within policy or legislative frameworks, and its flexibility allows for rigorous, cross-disciplinary thinking.⁴⁴ Most relevantly, it allows researchers to examine the lacuna between ‘law on the books’ and ‘law in action’.⁴⁵

Within this socio-legal framework we conducted qualitative research involving the collection of lived-experience data from human sources. Lived-experience data is particularly important to this project as it provides important context and foundation from which to base eventual law and policy reform.⁴⁶

The nested aims of this project required a two-pronged approach to gathering this data. This was achieved by way of engaging with two distinct participant groups:

1. Stakeholders, including practitioners who work at survivor-focused services, community lawyers and barristers; and
2. Women who have lived experience of the Victorian criminal justice system.

Across the duration of the project the research team also examined legislation and case law, as well as secondary sources such as scholarly output and ‘grey’ literature (reports, submissions, discussion papers and policies) relevant to the project. This kind of literature review is a necessary step in any type of research, as it provides ‘a nexus to that which has been done before’ and seats the qualitative data within its specific social and legal context for further analysis.⁴⁷

TRAUMA INFORMED PRACTICE IN RESEARCH AND DATA COLLECTION

As noted above, the collection of lived-experience data is essential to the primary aims of this project. We recognise that there are many barriers to understanding the nexus

⁴⁴ Naomi Creutzfeldt, ‘Traditions of Studying the Social and the Legal’ in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Taylor & Francis Group, 2019) 10.

⁴⁵ Ibid, 9.

⁴⁶ Dwayne Antojado et al, ‘Bringing together the voices of contemporary lived experience through prison-based and community-based think tanks’ (2022) 1(13) *Advancing Corrections Journal* 152, 153.

⁴⁷ Terry Hutchinson and Nigel Duncan, ‘Defining and describing what we do: doctrinal legal research’ (2012) 17(1) *Deakin Law Review* 83, 87.

of coercion, compulsion and criminal offending – not least stigma and stereotypes, which may prevent victim-offenders from sharing their experiences and has a silencing effect.⁴⁸ This may be amplified when a victim/offender is a survivor of modern slavery/human trafficking, which can include those elements of fear and shame, as well as unique complexities and intersecting vulnerabilities.⁴⁹ Women with lived experiences of the criminal justice system and/or coercive or compelled offending are likely to have also experienced structural victimisation, which has gendered, classed and racialised foundations.⁵⁰ It is entirely possible that research subjects may have had previous negative experiences when sharing their stories – as even well-intentioned professionals can cause inadvertently cause harm through their verbal and non-verbal reactions.⁵¹

Furthermore, offending that occurs under coercion, compulsion and due to human trafficking or modern slavery contexts goes hand-in-hand with a loss of agency and control for the victim-offender. It was important to ensure that the collection of data did not leave participants with the feeling that they had again been exploited and/or unnecessarily retraumatised.⁵² We recognise that participants who have faced *more severe* trauma or adversity may find participating in research to be *more* onerous and distressing and may also feel *less* empowered to raise issues arising with the data collection, to withdraw or assert their needs.⁵³

⁴⁸ This can also create sample bias and ‘intervention-generated inequality’, see: Natalie Edelman, ‘Trauma and resilience informed research principles and practice: A framework to improve the inclusion and experience of disadvantaged populations in health and social care research’ (2023) 28(1) *Journal of Health Services Research and Policy* 66, 67.

⁴⁹ Alexandra L A Baxter, ‘She Should Have Known: Oversimplified Narratives of the Victim–Offender Cycle within Women Human Trafficking ‘Offenders’ in Isla Masson and Natalie Booth, *The Routledge Handbook of Women’s Experiences of Criminal Justice* (Routledge, 1st ed, 2022); Helen Leung et al, ‘Traffickers and Victims: Opposite Sides of the Same Coin?’ (2022) 18 *Anti-Trafficking Review* 190; Sabreena Ahmed and Ratnawati Mohd. Asraf, ‘The Workshop as a Qualitative Research Approach: Lessons Learnt from a ‘Critical Thinking Through Writing’ Workshop’ (2018) *The Turkish Online Journal of Design, Art and Communication* 1504, 1508 – 1509. For a discussion on vulnerability and the criminal justice system see: Felicity Gerry and Penelope Cooper, ‘Effective Participation of Vulnerable Accused Persons: Case Management, Court Adaptation and Rethinking Criminal Responsibility’ (2017) 26(4) *Journal of Judicial Administration* 265.

⁵⁰ Shoshana Pollack, ‘Transformative Praxis with Incarcerated Women: Collaboration, Leadership and Voice’ (2020) 35(3) *Journal of Women and Social Work* 344, 347.

⁵¹ Kirstin Foot, ‘Toward Trauma-Informed Professional Practices: What Legal Advocates and Journalists Can Learn from Each Other and Survivors of Human Trafficking’ (2020) 36(4) *Georgia State University Law Review* 1129, 1137–1138.

⁵² *Ibid*, 1131–1133.

⁵³ Natalie Edelman, ‘Trauma and resilience informed research principles and practice: A framework to improve the inclusion and experience of disadvantaged populations in health and social care research’ (2023) 28(1) *Journal of Health Services Research and Policy* 66, 67. Researchers also must understand

Both trauma-informed and ethical principles require that researchers minimise harm and re-traumatisation to participants, and therefore it was imperative to develop a method of data collection that would allow full, safe participation.⁵⁴

A Trauma-Informed Foundation

A trauma-informed approach begins with understanding the social, physical and emotional impacts of trauma, its prevalence, and responding by putting this knowledge into practice.⁵⁵ This approach not only recognises the impact of trauma on victims, survivors and offenders, but also on those working to assist them – often called vicarious or secondary trauma.⁵⁶

Key principles for trauma-informed practice adopted for this project include:⁵⁷

1. Recognition that all participants may have been impacted by trauma and adversity
2. Minimisation of re-traumatisation
3. Designing the data collection process so that it is respectful and transparent
4. Engagement with peer support and mutual self-help strategies
5. Collaborative researcher-participant relationships
6. Placing emphasis on the strengths, resilience and agency of participants and their experiences
7. Striving to be culturally competent and understanding of the myriad contexts of individuals⁵⁸

that they exist within the structures that have typically reproduced the inequalities and disenfranchisement of women victim-offenders, see generally: Pollack (n 49).

⁵⁴ Jasmine B MacDonald et al, *Principles for doing trauma-Informed Research and Program Evaluation* (Australian Institute of Family Studies Practice Guide, August 2024).

⁵⁵ Foot (n 50) 1134.

⁵⁶ Ros Lethbridge et al, *Vicarious trauma in the legal profession: Discussion paper* (Report prepared for the Victorian Legal Services Board and Commissioner and Phoenix Australia – Centre for Posttraumatic Mental Health, 2024); Ibid, 1134.

⁵⁷ These principles are synthesised from various sources, see: MacDonald et al (n 53) citing Substance Abuse and Mental Health Services Administration, *SAMHSA's Concept of Trauma and Guidance for a Trauma Informed Approach* (HHS Publication No 14-4884, 2014); Edward Alessi and Sarilee Kahn, 'Toward a trauma-informed qualitative research approach: Guidelines for ensuring the safety and promoting the resilience of research participants' (2023) 20(1) *Qualitative Research in Psychology* 121; Edelman (n 52); Katherine Anderson, 'Engagement of Sexual Violence Survivors in Research: Trauma Informed Research in the THRIVE Study' (2023) 29(1) *Violence Against Women* 2239.

⁵⁸ In Australia it is particularly important to understand that Aboriginal and Torres Strait Islander women face unique barriers, adversity and trauma-backgrounds, including a proportionally higher rate of incarceration: 'Statistics about Aboriginal and Torres Strait Islander Women and Girls', Australian

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8. Understanding that adversity and trauma can be a barrier to participating in research.

Human Rights Commission (website, 2024) < <https://humanrights.gov.au/education/stats-facts/statistics-about-aboriginal-and-torres-strait-islander-women-and-girls>>; Pollack (n 49) 345.

The field research was conducted by Dr Felicity Gerry KC who undertook specialist training in trauma informed interviewing to ensure suitability for the task she was to undertake and to make sure that she was able to separate (and hide) her work as defence counsel from her work as an academic collecting data.

The workshop as a collaborative approach to data collection

With many months of consultation with Corrections Victoria on approach, language and method and with these principles in mind, the ‘workshop’ format was finally identified as a mode of co-production that would allow for participatory, collaborative and flexible data collection and which could be approved within the DPFC staffing abilities. Workshops are a foundationally participatory research method.⁵⁹ They promote collaborative problem solving and therefore provide a structure for lived-experience data collection which is trauma-informed and generative.⁶⁰ Well-planned and facilitated workshops can provide unique opportunities to gather rich, high-quality data through intensive and collaborative engagement with participants.⁶¹ Where participants feel safe and included in the process, they are more to offer candid, meaningful insights on the topic being discussed.⁶²

Literature on workshop-as-research-methodology also shows that the workshop framework can provide a space where unexpected information is shared, due to the fact collaboration can provoke participants into new or different reflections.⁶³ This is important as it offers an opportunity to challenge stereotypes and hegemonic narratives, which are particularly prevalent when incarcerated women are invited to share their experiences and perspectives.⁶⁴

⁵⁹ Participatory research models have long been used in health research, see: Andrea Cornwell and Rachel Jewkes, ‘What is participatory research?’ (1995) 41(12) *Social Science & Medicine* 1667. And in social and political practices, see: Ruth Hall et al, ‘A Tool Kit for Participatory Action Research’ (Publication, n.d.).

⁶⁰ For discussion on the definition of ‘workshop’ see: Aihua Hu, ‘Chapter 7. The Workshop as a Research Methodology: Lessons Learned from Workshops Utilized as a Participatory Research Method’ in Liv T. Grindheim, Jorunn S. Borgen and Åsta Birkeland (eds), *Metodetilnærminger og Prosessuelle Design i Barnehageforskning* (Universitetsforlaget, 2024), 120, 122–123; Rikke Ørngreen and Karin Tweddell Levinsen, ‘Workshops as a Research Methodology’ (2017) 15(1) *Electronic Journal of E-Learning* 70, 71.

⁶¹ Ahmed and Asraf (n 49); Ørngreen and Levinsen (n 59); Maria Eidenskog, Réka Andersson and Wiktor Glad, ‘Workshops as a Relational Material Research Practice: Creating Space for Shared Knowledge’ (2014) 23 *International Journal of Qualitative Methods* 1; Aihua Hu (N 59) 120; Pia Storvang et al, ‘Workshops as a Research Methodology in Business Research’ in Per Vagn Freytag et al (eds), *Collaborative Research Design: Working with Business for Meaningful Results* (2nd ed) (Springer 2018), 121

⁶² Ahmed and Asraf (n 49) 1508.

⁶³ Ørngreen and Levinsen (n 60) 72–73.

⁶⁴ Pollack (n 50) 349.

VII. PROJECT PLANNING & DESIGN

PLANNING AND DESIGN

Initially, the project was designed around collecting interview data by way of interviews with individuals from two groups:

1. **‘Stakeholders’** – professionals and practitioners in social services and legal fields who work with women who may have experienced modern slavery/human trafficking, or who have offended due to coercion or compulsion.
2. **‘Participants’** – women who have experience of the Victorian criminal justice system and may have lived experience of coercive or compelled offending.

However, we quickly identified issues with this approach: that there was a risk of practitioners sharing case studies without survivor consent in 1:1 interviews; and, that restrictions placed on high-risk women in prison would make interviews difficult to arrange and undertake.

This also contributed to the development of the workshop methodology (see rationale above) which would help to negate these two issues and could also be designed in line with trauma informed principles and with a more collaborative, flexible approach. The project team then developed workshops for the two groups, which were designed as a two-step process of collecting background information and practitioner knowledge, and then collecting lived-experience data with the benefit of this prior knowledge.

Therefore, the workshops aimed at Stakeholders were designed to collect background information and ‘grassroots’ information – to confirm the existing research and knowledge of the Principal Researcher and to glean any professional insights from those working in the field. Alongside our qualitative analysis of case law, legislation and secondary sources, the stakeholder workshops provided background and context for the workshops with the women in the ‘Participants’ group. It was also hoped that stakeholder attendees may be able to assist in developing relationships with women for the lived-experience workshops – though this ended up not being the case, as is expanded on below.

As noted above practitioners who attend the stakeholder workshops were not treated as ‘participants’. In this report ‘participants’ refers to women with lived experience of incarceration and potential understanding of forced, compelled or coerced offending. The project was fundamentally designed to hear from women in this second group. The workshops for Participants were designed to collect data by way of group discussion

with women already connected to support groups at DPFC and within BSWAC.

Stakeholder Workshops: Gathering background information and context

Stakeholders were invited to workshops in advance of speaking to the Participants. Communications were sent to a wide range of professionals to secure a broad understanding of the current level of knowledge in Victoria and any background information that may be useful.

No data was collected during stakeholder workshops given the concern that they may identify trafficked women who did not have the opportunity to consent to the project.

All ethics procedures required by the project and the ethics process were detailed during all workshops, and Felicity highlighted the importance of respecting and prioritising mental and physical wellbeing.

Stakeholders who attended these sessions included members of survivor services, lawyers and members of the judicial college.

These workshops provided context to frame the workshops with participants. In advance of the workshops with participants, project concerns were articulated by Felicity as follows:

- What brings about the silence as suggested by the preliminary research.
- Levels of understanding of modern slavery/human trafficking amongst stakeholders in Victoria
- Barriers to identifying survivors for whom non-punishment, non-prosecution could be relevant – particularly police/AFP/border force approaches
- Self-identification
- Opportunities for identifying survivors for whom non-punishment, non-prosecution could be relevant
- Methods of forced, compelled or coerced offending – exploiting drug users / sexual violence / deception /other exploitation
- Barriers around lawyers and poor lawyering – defence and prosecution
- Approaches to bail
- Barriers around provision of services.
- Potential reasons for the small number of prosecutions for modern slavery in Australia, and particularly Victoria, under the criminal code sections.
- Pressures on survivors as victim perpetrators
- Pressures on survivors in criminal networks to be a prosecution witness/to give information

- Availability of protected confessions
- Availability of anonymity
- Specific issues for women traveling across borders within Australia or transnationally
- Cultural issues
- Issues for Indigenous women
- Availability of experts/expert assessments on modern slavery/human trafficking
- Types of cases where modern slavery/human trafficking might occur in Victoria
- Any overlap between family violence and modern slavery/human trafficking
- Understanding/awareness of decision making around diversion/discontinuance
- Evidence of capacity biding such as a referral mechanism outside of the AFP
- Limitations of Judicial College guidance which uses the law as is and not what it could be.
- Judicial knowledge/judicial responses to vulnerability
- Applicability of defences/sentencing principles (e.g. *Verdins* and *Bugmy*)
- Use of language – child soldiers/trafficked persons/modern slavery/sex trafficking and levels of understanding
- Role of the Anti-Slavery Commissioner in criminal justice for survivors
- Role for Corrections if trafficking identified post-conviction
- Role for Court of Appeal
- Potential for improvement on UK approach as recommended in the Hidden in Plain Sight Report – opportunities to protect survivors
- Need for training resources

During the Stakeholder workshops, Felicity also provided background context to the project, including sharing her general, non-confidential experiences of modern slavery/human trafficking cases overseas and her understanding of the stark contrast with the approach in Australia.

Addressing the knowledge gap: stakeholder understanding of modern slavery and human trafficking

Overall, the Stakeholder workshops were attended by persons who already had an

interest in this area which helped focus this project on formulating the workshops with participants. Invitees included members of the Victorian legal profession (primarily employment, migration, family, and criminal lawyers) as well as practitioners from related fields (survivor-led organisations, homelessness support, health support).

Broadly speaking there was clear understanding among Stakeholders that women are being exploited in criminal activity and the current criminal justice system in Victoria is not responding to this problem. However, even in these discussions ‘trafficked women’ were nearly always assumed to be illegal migrants. Therefore, for the purposes of this report, we kept the focus broad to include survivors of modern slavery/human trafficking who commit crime to and from and within Australia which reflects the broadly understood concept of exploitation but is intended to encompass the wide range of experiences of women in criminal justice in Victoria who have been subject to modern slavery in all its forms.

Unprompted examples later revealed by participants from CFTT and BSWAC include:

- Women trafficked into and out of Australia who are forced, compelled, coerced or deceived into carrying drugs, including of trafficable quantities and / or working in crop houses/ meth labs in slave like conditions.
- Women working in slave-like conditions in sex work venues, sometimes surviving by trafficking other women, within Australia and overseas.
- Women in debt bondage committing paper migration offences.
- Women exploited in organised crime, committing financial offending/organised money laundering or theft, including where their controller is a family member.
- Women in servitude in marketing teams for online scams, including what are known as ‘honey traps’ or ‘love scams’.
- Women who are highly vulnerable and are exploited in a range of other crimes, such as holding weapons, driving vehicles or perverting the course of justice offences, especially where the compulsion or deception comes from violent and coercive partners.

Stakeholders also raised important concerns regarding the issue of coerced offending:

- (a) that women would pretend to be trafficked;
- (b) the difficulty with separating women who act autonomously from those who are trafficked; and
- (c) how to consider a person who has acted voluntarily and should still be prosecuted but deserves a lesser punishment because of a modern slavery/human trafficking context.

Ultimately the stakeholder workshops developed attendees' knowledge of the concepts related to modern slavery as levels of knowledge of the issues were so low. This meant it was not possible to identify women to speak to through referral, however these workshops were used as background to inform the workshops with women in CFTT and BSWAC.

The project was sufficiently informed by the stakeholder workshops to develop the slides for the participant workshops (see **Annexure 1**) and to inform the qualitative research to make recommendations that could answer stakeholder concern that the 'right' victims are identified and dealt with accordingly.

PARTICIPANT RECRUITMENT

The initial plan was to call for participants by advertising an information session (via posters and leaflets) within Dame Phyllis Frost Centre and Tarrengower Prison, and with the assistance of the CFTT and Corrections staff; as well as a call-out through stakeholders for women with lived experience of corrections outside of prisons. However, in response to feedback from CVRC, the approach was modified to workshops with CFTT with a discussion element. This approach was mirrored in organising workshops with BSWAC. Contact with CFTT and BSWAC was made through RMIT researchers, who also helped to facilitate the workshops – this also helped to ensure that the participants felt comfortable and well-supported in sharing information.

The CFTT and BSWAC think tanks were both established by RMIT researchers to address the lacuna of lived-experience voices in the criminal justice and policy space. The groups are made up of women with lived-experience of the criminal justice system, who collaborate to affect solution-based change in policy from a 'bottom-up' or community-based perspective. The groups also offer a 'safe-space for incarcerated people to create connections with other people' and provide a much-needed opportunity for them to have their voices heard in a non-tokenistic setting.⁶⁵ The RMIT-established think tanks are well-regarded for generating innovative and practical solutions to various challenges within Victorian prisons, using a combination of personal experiences combined with best-practice empirical research.⁶⁶ Consulting with CFTT and BSWAC for this project has meant that our research is grounded in this wealth of knowledge – both lived experience and academic – and can be contextualised amongst the range of change-implementing projects on which the think tanks have consulted.⁶⁷

⁶⁵ Antojado et al (n 45) 154–5.

⁶⁶ Ibid 157.

⁶⁷ For a list of such projects and outcomes see: Ibid 157–8.

This approach built on and expanded upon the UK Sentencing Council ‘drug mule’ study because it no longer sought direct interviews but instead created a discussion base for understanding experiences of modern slavery/human trafficking in criminal justice for women in Victoria. In addition, in contrast to the ‘drug mule’ study, this project did not focus solely on women charged with or convicted of drug trafficking. Instead, the focus was on experiences of forced, compelled or coerced offending in the criminal justice system with an emphasis on CFTT and BSWAC experience of stakeholder understanding of modern slavery/human trafficking (particularly police, prosecutors, defence lawyers and judges).

INFORMED CONSENT, PLAIN LANGUAGE STATEMENTS & DISTRESS PROTOCOLS

The field research involved discussions in the CFTT and BSWAC workshops with women in prison or who have had experience of the corrections system and were likely to have multiple vulnerabilities. It was recognised that this was a high-risk group of women.

A trauma-informed approach was developed and used in all workshops: ⁶⁸

- It was assumed that all participants may have experienced trauma;
- Felicity ensured that participants fully understood the purpose of the project;
- Participants were taken through the plain language statement and consent forms in detail;
- Participants were informed that their responses were anonymised;
- Consent and participant information forms were made available to all women in plain language, following protocols approved by both ethics’ committees;
- All participants received contact information for the project and were given the chance to withdraw from the research at any point, during the workshops and afterwards;
- Project contact number and email were provided.
- Written and oral consent was obtained from all the women;
- Felicity, together with staff members from BSWAC and CFTT, monitored all participants for any signs of discomfort or distress;
- Participants were made aware of the details of support services they could access post-discussion;

⁶⁸ For a list of recommendations for the design of workshops as qualitative data collection methods, see: Ahmed and Asraf (n 48) 1510.

- An informal discussion format was used, with familiar, trusted staff members from RMIT CFTT and BSWAC present to reduce the likelihood of distress and traumatisation;
- Each woman confirmed they felt they were in a safe physical and emotional environment and that they felt comfortable sharing their experiences as individuals with lived experience and as peer supporters.

As the Principal Investigator, and a practising criminal defence barrister, Felicity ensured there was no relationship between the participants and previous, current, or future clients. Felicity presented herself solely as the Principal Investigator of a research project with Deakin University to avoid the potential presumption that participants may receive legal assistance as a part of their participation. It was made clear that participation was not and is not connected to legal assistance.

Save for not mentioning she was a barrister, Felicity approached each workshop as a collaboration, actively listening to participants and taking handwritten notes prioritising participant well-being and then applying the thematic analysis grounded on issues of silence, sensitively to focus on women's understanding of criminal justice using empathetic interaction.

This trauma-informed research methodology maximised data collection and comfort for participants and the investigator.⁶⁹

Overall, the project was grounded in women's voices – and women's silence.

The project also provided for team care: Felicity had her own well-being plan, which was utilised during the Deakin University restructure that caused delays to the project.

DATA COLLECTION AND ANALYSIS

Workshop Content and Practicalities

Data was collected from workshops with women held in person with CFTT in Dame Phillis Frost Centre and online with BSWAC. As noted above, the women who took part were accompanied and guided by those who manage the CFTT and BSWAC projects. The women were not paid for their participation.

The participants were enthusiastic to be heard, and many had long-term experience of giving peer support to many hundreds, if not thousands, of incarcerated women. In total, we spoke to 13 women, several of whom had supported many more women in corrections or with experience of criminal justice systems. This sample size matches the 2011 UK Sentencing Council study focused on women incarcerated for drug-

⁶⁹ Jasmine B MacDonald et al (n 53).

trafficking (12 interviews) which led to adaptation of sentencing for ‘drug mules’.

Workshops were conducted in English. Interpretation was available but no woman requiring interpretation attended. Given the concerns relating to women from overseas, it was concluded that this is an extremely high-risk group who remain silenced.

Slides were created and used to structure the discussions. These were approved by JHREC and DUREC in advance (see slides at **Annexure 2**)

At the end of each workshop, only after data collection, participants were given two examples of cases where the Non-Punishment Principle had been applied outside of Australia. Their reaction to those two stories was not recorded as data but can be conveyed as hopeful that Victoria would progress to such an approach. As noted above, all participants were offered support by RMIT facilitators in BSWAC and CFTT and the opportunity to check the data and withdraw, should they wish. Before any workshop with participants was conducted Felicity undertook trauma informed interview training

Data Collection

Notes were handwritten and then transcribed digitally and provided to both groups for checking and confirming consent to inclusion in the report. All personal information has been deidentified and, where there appeared to be a possibility of identification, data was not included in the report.

Alongside providing copy notes, women participants were given a draft of this report before it was finalised.

Data Analysis

The workshop content was analysed for narrative and thematic content, as set out below, focussing on listening to women’s experiences and the identification of common patterns amongst the circumstances of offending.

The data presented in this report is synthesised through the following themes:

- Women’s experiences of forced, compelled or coerced offending
- How are women silenced?
- Women’s experiences of police/services
- Women’s experiences of defence lawyers
- Women’s experiences of court
- Women’s experiences in prison
- What would help women speak?

Data management

The handling of personal data always conformed to the requirements of a comprehensive data management plan. Workshop data was recorded in English (written paper copy only) by Felicity. Data collected during the workshops was typed up and transferred to the Deakin University Research Data File storage system [RedCap](#) which has failsafe support systems and backups. Access to the service requires authorised credentials, is restricted by the institutional firewall, and is encrypted. Only Felicity has access to the data. It will be held for 5 years and then destroyed.



Follow up and feedback

Draft copies of the report were provided to participants and the advisory group for 'peer review' to ensure quality of research. Participants were also offered the opportunity for follow up. Several participants sent further comments by email which have been included in the findings – grouped and anonymised to protect participant identities.

VIII. FIELD RESEARCH AND FINDINGS

The workshops with BSWAC involved two sessions over three hours with four women. They all had lived experience of the Victorian Criminal Justice system.

The workshop with CFTT was one session inside DPFC over one hour and 15 minutes with nine women at DPFC. Participants all had lived experience of the Victorian Criminal Justice system. Administration and support from an RMIT staff member was provided, who was present but did not contribute to the data.

Several of the women in BSWAC and CFTT were peer supporters and/or peer educators who had mentored thousands of women. One alone was able to calculate she saw 20 people a week (four per day) over 5 years. The project therefore had the benefit of individual and shared experiences.

It was emphasised that participants were not being asked about their personal experiences, but many chose to share and clearly enjoyed the group discussions.

The potential for secondary stress from the workshops was emphasised but they explained they felt it was a place where they could speak freely and were reassured that the data collected would be anonymised. The handwritten notes were typed up and supplied to facilitators from BSWAC and CFTT and to the women themselves to ensure accuracy and to confirm no one had been inadvertently identified.

In this report, responses were grouped to make sure no participant was identifiable, nor anyone they mentioned. A draft copy of the report was sent to stakeholders, participants, RMIT support staff and the advisory group members for review before the report was finalised.

WOMEN'S EXPERIENCES OF FORCED, COMPELLED OR COERCED OFFENDING

All participants said it was important to recognise that women can commit crimes autonomously but, even when they do, the reasons for those crimes are complex. Participants discussed how the current system does not differentiate between those who offend autonomously and those who are forced, compelled or coerced to commit crime. They were able to give examples of women who had controlled other women, as well as women who had been controlled by others.

Participants stated that in their experience there were a range of factors that did not always sit neatly with the phrase 'forced, compelled or coerced offending' but much

broader abuse of vulnerabilities and exploitation – ironically far closer to the broad legislative definitions for human trafficking / modern slavery, even though this language had been removed.

Participants expressed that ‘the vast majority’ of women in prison were in a situation of forced, compelled or coerced offending.

Participants in the prison-based CFTT workshop estimated that the percentage of women in prison who had offended due to force, compulsion or coercion was 75 – 80%

Participants of the community-based BSWAC workshop offered an estimated figure that was lower: 40 – 60%.

Some women said it was impossible to put a number on, as women in such situations are not heard or understood.

All references were to male perpetrators:

→ ‘Somewhere along the line set them on a path. If men didn’t exist women’s prisons would not.’

Participants shared their collective opinion that ‘there are definite cases where women are being forced into unlawful activity’. Some described ‘more subtle manipulation’, deception and other methods of deception and exploitation.

Overall participants said that ‘women are forced, compelled, coerced by strangers and particularly by family.’

Forced Offending

Participants described serious harm being caused or threatened that led to crimes:

- ‘If I went home, he would find me. I couldn’t go home. He would find me... He did things.’
- ‘The things I did I was trying to ... get away.’ This participant accepted that the things she did were ‘not legal’ but said she had no other option.
- One participant described being ‘a serious victim of domestic violence’.
- Another said she made decision [to commit crime] which she ‘would not usually make’ because of ‘threats of death to me and kids.’ Which included ‘gun, knife,

threats’.

→ Fear forced women to ‘do this’ [carry out criminal conduct]:

‘Repercussions. Syndicate. Who are they... didn’t know. Lots of things come with that. Fear for yourself, family, friends, animals’.

→ Other more general examples included: ‘abuse – physical and mental’, ‘domestic violence’, ‘wrong company’.

→ Some ‘use people’.

Women used as ‘drug mules’ were understood to be a particularly concerning group: It was reported they would be deceived into relationships then ‘kept’ in a room and things were ‘put inside them’ to ‘bring back’. ‘They said if you speak will kill you. She could not discuss with anyone.’ And a ‘number of girls importing large amounts. Mules. Young. Under impression handbags. At airport bags swapped. Told by people not seen before to just go. Scared. In another country... Caught. Finds out meth.’ Participants described how these women cannot identify their ‘traffickers’, and their circumstances of importation are not understood: ‘No one believed her. Say she knew. Disbelieved. Charged. Plead guilty. At trial can’t prove didn’t know. Risk extra time. One was described as ‘a throw off’ for ‘others to get through.’

Women coerced into becoming ‘drug mules’ were also described as a ‘family affair.’ where ‘women end up taking the rap and men continue in the community. A lot of stories around that. Women want a great life. Forced into doing that [drug traffic] to provide for family. So many say take on chin. Women grounded by dominant male in that family.’

Compelled and coerced offending

Participants tended to group compulsion and coercion together and time was not wasted sorting out definitions. They said that ‘common situations’ leading to crimes came from coercion by ‘family’ or ‘people they know’ and circumstances included ‘alcohol and other drug issues’, ‘financial’ situations that led to crime, ‘sex work’, ‘to feed a gambling addiction’ and ‘lack of accommodation’. They understood that when women are ‘dependent on someone for a home they can be coerced very quickly’.

Participants said, particularly as peer supporters inside and outside of corrections facilities, they ‘come across coercion on a daily basis. ‘People always trying to tell women what to do’.

Those with an Asian background expressed that they are culturally conditioned to ‘listen to’ and ‘respect’ elders and this ‘causes a lot of problems.’

Participants said how, in their experience of supporting thousands of women; many factors lead to offending – ‘coercion’, ‘cultural issues’, ‘Asian background’, ‘language

barriers', 'trauma' and 'hopelessness'. In seeking to explain why women are coerced to offend, one participant included 'issues such as poverty, conflict and gender inequality can be reasons why women are exploited'.

Regarding financial crime, participants explained how some women may act through 'greed' or because some crimes pay 'a lot of money', for 'power, or 'narcissism or as an 'escape mechanism'. However, they also spoke of high levels of coercion through direct behaviour of others or because of their circumstances including 'cultural issues, trauma, hopelessness, love for their spouse, inheritance, addictions'. One example given was committing crimes for 'their bosses' which involved several factors including 'intimidation', 'taken advantage due to mental health issues', 'poor backgrounds', 'to protect family', as an emotional or fear response where they 'do not have a choice' and / or there is 'emotional and physical coercion'. Another example was a woman who was arrested for a financial crime where the background of exploitation by a family member was uncovered by investigators and eventually charges were 'dropped'. However, she was detained in corrections for a long time and felt under pressure to provide information (without safe protection) to the police, and she was described as having 'no control over her situation, trauma and hopelessness'.

Family coercion into crime was discussed in the workshops with participants saying women were 'in power of the person who looks after you' and 'you 'depend on for living and care for children. Bound to comply to what they want you to do. Some cases where you feel guilty because not earning and money expected. Led to believe if you do a crime it would benefit the family.'

Generally, women were described as committing crime when forced, coerced and compelled by family and other people, including a woman who was 'prostituted and she was in bad relationship'.

Other exploitation/ abuse of vulnerability

Participants described how women offenders were often in relationships with their co-offenders. Some activity was because of 'relationship pressure'. This might be a genuine partner or a partner who would 'catfish' and 'say romance' using 'trauma bonding' or a method described as 'love bomb'. Participants described how women would 'believe a love story' when it was a 'deception – using our caring side. [You] want to think someone would care, love, have a relationship.' One said 'You think they will protect you. You protect them. They will use you and leave you.'

Participants described emotional blackmail of already vulnerable women that could fit within 'abuse of vulnerability' in the definition of human trafficking: Women would be told to 'take this somewhere', meaning weapons / drugs / stolen goods / other items or they would not be told what it was and would be reassured that they were 'not in

trouble'. This was described as 'false promises', 'empty promises' and 'false hope'. One participant shared her personal experience: 'I got involved because felt pressure... not coerced but was used several times... Emotional. Psychological. Financial. Certainly pressure.' For migrants, vulnerabilities leading to criminal activity was described by participants to include 'domestic violence, immigration related issues, familial issues' and 'forced' / 'child' marriage or 'marriage of convenience'.

HOW ARE WOMEN SILENCED?

Participants explained that women would not speak about issues of forced, coerced, compelled offending and other exploitation for reasons related to the perpetrators and to the criminal justice system.

Silence through Fear

- 'He took shit (my life) from me. He knows about me, and I am stuck. He knows his target.'
- 'I wouldn't feel I could with emotional blackmail pressure to protect man and family.'
- 'The person involved with instructed me. I would not throw him under the bus. I love him. I expect him to speak for me.'
- Fear of being found out
- Fear of confiding: 'Would be hard for someone to even believe would be protected'
- 'Basically, becoming an informant. Your life on the line'
- When 'charged and need lawyers. Never alone. With partner / someone. In shock. Follow flow...'
- 'No alone time for any professional to be with you or ask questions'
- One participant said she had spoken and had 'no problems throwing him under the bus' but described how she was not listened to and not believed.
- Another, who often exhibited distress in the workshop was very well supported by the other women and the facilitators. She felt there is an 'onus on women to stop men being violent'.
- It was also said that 'some women are reluctant to speak about their crimes or abuse endured to a support worker or another prisoner due to the fact another cellmate/individual can come forward and offer to be a Crown Witness in a case. The individual concerned may not be involved in that particular case, but she can claim to have information that has been confessed to her. As a result, women do not to speak about their crimes.'

- The major concern was that if women talk 'how [can you be] safe afterwards? No one cares after. Big men. Tough men... Then lawyer says IVO but [it's] still me. Asked in IVO hearing for name and address and phone number.'
- 'Could not speak. Too unsafe'.

Silence through lack of understanding

The next significant issue was not being understood or believed: To speak at all a woman would 'have to be in the right mental capacity' and it would depend on the 'level of empathy and education' of the person available to speak to. 'Bias' against women can prevent them speaking. Even when getting out they are 'still blamed'.

At court participants said women are 'forced and coerced into pleading guilty and not be heard.'

Participants felt there is 'little understanding. Little conversation. People not educated.' Domestic violence is now 'more talked about' but there is a 'long way to go.':

- 'I was not understood.'
- 'Lots of women not understood.'
- 'I did not understand the system. I thought there would be more sessions [with psychologist and/or lawyer]'
- 'Never explained to me.'
- 'Also needs to be trust. See one person one day. Not full picture.'
- 'For you to realise coercion need several specialists helping. Experts and specialist lawyers and judges.'
- 'If there is domestic violence women are vulnerable. 'Not to open up. Scared of fall out. Let down by services already. Women not opening up.'
- 'Sometimes not able to confide at early stage.'
- 'Not knowing if taken seriously.'
- 'People take time like any other abuse. Need to be recognised'
- 'Separated from children when went to prison. Minimal visits.'
- 'A lot of distrust'

Overall participants said that women have 'no opportunity to talk', are 'not heard', are 'misunderstood' and 'people question honesty'. Women feel they get 'no discussion with lawyers, prosecution, or judges.'

Participants cited fear of 'backlash' and '[n]ot opening up to strangers', although accepted it may depend on the individual.

Rhetorically one participant said:

‘Issues understood? Sometimes these issues are *never acknowledged.*’

Silenced by experiences

Participants described women also being silenced by their experiences: ‘Women [who are] raped [or] sexually abused [feel] shame or not knowing if high on substance or some other self-harm... Comes out years later with proper treatment’.

Participants also explained that if a woman is compelled to do a crime factors causing women to remain silent could be ‘culture, lack of self-worth, mental health issues, helplessness, not knowing what services are available’.

Other factors included ‘hopelessness’, that ‘people do not like to admit to mistakes or their vulnerabilities’ and ‘community perception’: It is ‘really difficult that sort of thing...People will not open up willingly’.

Examples given of experiences which link to silence included the following:

- Lack of self-worth.
- People not confident will be listened to.
- Mental health issues.
- Trauma.
- Time to process.
- Feel helpless.
- Not knowing if there are services or what services.
- Multi-cultural community. Child brides. Forced marriage. Underage marriage.
- ‘All these issues’.

Again, participants were concerned about Asian women who ‘do not talk about this, or health because [they are] told not to talk about problems’

- ‘I did not talk to my lawyers about the issues I had that made me go into life of crime.’

New women migrants within Australia were described as ‘too fearful to speak’ and ‘not understood’ with ‘no viable pathway to assist them to speak’. New migrants ‘don’t know how to access services’.

When considering opportunities to speak to experts, participants complained of the short opportunities: 2–3 hours with psych evaluation and ‘that’s it’.

Participants said that services were not directed towards collection of issues:

- Substance abuse
- Mental illness
- Sexually assaulted
- Poor physical health

Participants said those who had been forced or compelled or coerced or exploited in criminal activity 'need people to be able to build them up to be able to trust people to be able to start talking'.

One participant spoke of her personal decision not to speak in the trial process: 'When I was offending, I was in a relationship with a man I met on the internet, I didn't bring up ... because I felt that as part of the rehabilitation process I needed to take responsibility and not blame somebody else for my own actions. Also, there is an element of pride, not wanting to admit to, or be seen as, a person who was manipulated and also as not wanting to be a victim.'

One participant observed: 'initiating factors with women not wanting to be up front about what's behind scenes'

Participants placed great emphasis on the effects of trauma:

- 'Trauma for that person, complexity about how they perceive themselves. Very little perception of their own situation.'
- 'Feel not worthy then commit crime – being caused to commit that crime.'
- 'People don't wake up and commit crime. So many layers. Complexity. Why women commit crime and end up in custody.'

WOMEN'S EXPERIENCES OF POLICE / SERVICES

The language of 'protection' – a purpose of the Trafficking Protocol – was not mentioned at all by the Chief Investigator but was often volunteered by participants, who stated there was: 'no protection from police'. Participants described how women offenders are 'scared. Need someone to confide in. can't confide in [a] police officer.'

Even with a restraining order against the person coercing the crime, one participant 'didn't involve police. Fear [it] would get worse.'

There was some acceptance that 'lawyers and judges have a good grip' on issues of vulnerability but participants were firm that police did not, and social workers were stretched and not able to maximise service.

- 'Certainly, no trust with police'
- 'Such bad experience'

- 'Trust police then they misrepresent what you say'
- 'Police [were] disgusting – being all nice ... then said, 'listen here, cunt'. It was the first time I was in trouble.'
- 'Girls raped and coerced do not go to police.'
- 'No women police staff to search.'
- 'One woman staff.'
- 'Police don't listen'
- 'Choices stripped from you'
- 'Not speak to police. Protect partner.'
- 'Conditioned to say no comment.'
- 'Couldn't feel police could or would help. Don't want to help.'

- 'Police pick weakest link. Don't think of repercussions on us. We lose children. We lose jobs.'

Participants described how differently police officers behave in the street compared with in court, referring to 'two different beings'. This was said to be 'not a way to build trust'.

- 'Police officers should not take superficial level but questioning some of the circumstances'
- 'Factors stop women admitting what has happened or going to happen: Charge / court / sentence is a very short window'
- Investigative stage more questions need to be asked: 'Answer did this for reason'

Participants expressed that intervention orders do not provide protection:

- '[The IVO process] doesn't fix anything. Just paper. Call police. You have to do that. Get IVO ourselves. Nothing in system to protect us at all. We have to bring the case'.

One participant spoke to police and explained the circumstances of her offending: 'I felt under pressure. Stress levels higher... Breakdown. Attempted suicide...' She explained she waited years to be charged: 'Not on bail. Not what I did. Not what I'd explained. Compelled to confess. Tainted and tamed. Manipulated.' This led several participants to agree: 'how can women trust a system even when we've given the police everything. Tainted cops / system... never trust... needs to be legal protection. Not police.'

Overall participants considered that 'police sometimes don't understand the complexities, hence the brief might be biased'.

WOMEN'S EXPERIENCES OF DEFENCE LAWYERS

All participants agreed that 'A lot of women would not speak to their lawyer about forced, coerced or compelled offending.' But said 'it would help if lawyers [and others] knew about these issues.' When discussing opportunities to speak, one participant stated: 'no lawyers asked me how I was going [or] whether I needed help'. This led to group discussions about lawyers as follows:

- 'Do job. Get paid. Get out'
- 'Majority of lawyers – Process not humanity'
- 'No care'
- 'No continuation of care'
- 'Nothing from police / lawyers'
- 'All the lawyer wanted to know was how to get me off.'
- 'Lawyers have no warmth.'
- 'Clinical'
- 'Their job'
- 'No trust with lawyers'

Some participants questioned each other about whether this lack of care was a 'funding issue' for Legal Aid lawyers and one or two sessions with a psychologist, all with an allocated set amount. Other participants said it was much the same with private lawyers: 'So transactional' and 'No continuous conversations'.

One participant thought that if women were forced or compelled to commit crime this would be understood by social workers or lawyers: 'They are professionals and will understand. However, resources might be too tight to put someone on the case for an extended period of time. Honesty from the victim can be questionable. They are only hearing one version'. That participant explained in cases of forced, compelled or coerced offending, this involved 'getting over the bias'.

One barrier to engagement by women who had been forced, compelled or coerced to commit crime to engage with lawyers was their own lack of understanding of their own circumstances: Sometimes these issues are 'not acknowledged' or 'not seen as being a problem/the problem'

- 'Afraid that people might be judgemental'
- 'Did not have the opportunity to speak'
- 'Might not have had a good relationship with someone to speak to'
- 'Trust and confidentiality issues'
- 'Fear of being misunderstood'

→ 'Whether anyone will listen to them'

One participant said she 'wanted to tell story but lawyer stopped me. Would be silly without legal advice. AFP organised lawyer on the phone'. Several women said they 'can't talk to anyone. Occasionally good lawyer. Lawyers gave away my information and I was cross examined on them. Don't trust lawyers. Don't trust anyone.' Another participant described learning to trust other women within corrections: 'Get help here to get new lawyer. Took a chance. Build relationship with new lawyer.'

Even if lawyers understand the story for women who have been forced, coerced or compelled to commit crime, participants took the view that it 'doesn't make a difference in court.'. It was said that 'even if talk to lawyer they might listen but not put forward as [they] only look at the prosecution evidence'

One participant thought it was 'fine if people/lawyers talk to me like a person – family, kids – before paperwork. Want to hear about me but another said it 'depends on what charged with. Importation doesn't factor in knowledge.'

WOMEN'S EXPERIENCE OF COURT

Several women agreed: 'if court understood victims of circumstances would not be in prison.'. Participants expressed an overall lack of understanding from the court about their complex situations:

- 'He coerced my offending. Not understood in court'
- 'Not a lot of women prepared to sacrifice relationships by blaming partners and also admitting been used / coerced is hard thing to do and would take quite a while to realise that's what is happening when finally at court. Every person reacts differently. Some go to grave defending other party.'
- 'No understanding from judges in general of women's situations. At sentencing court order psych report to judge. One meeting with psych. One report. Judge doesn't know the women or the psych. Damage. One meeting – not going to open up to psych and judgment on that.' When judge sentences, remarks 'speak like 'who you talking about? Not me'. 'I did something wrong. I took on chin. Knew custody. Needed time. Benefitted me. Not for every woman. Took accountability. Not just me happened it to.'
- 'As peer worker [I] listen to sentencing remarks. I know more about the person sitting there then judge knows. Not for vulnerable women coerced.'
- 'Is part of issue the adversarial system? Judge only to weigh up sentence. No ability to raise questions. Can't point to avenues to explore'

One participant articulated her views of the legal system:

'I feel legal system is taking easiest road in Australia – If getting to truth is a hard drive and getting to end of case is the easy route.'

She continued: '[The system doesn't] care about truth of what happened. Prosecutors think I deserve what can be got and not what actually happened. Ticking boxes. [My] own lawyer said in court I was a liar'

One group described the core problem: 'Truth is lost'

One participant considered that judges and barristers 'being professionals have a good grip on what is going on' but 'sometimes their hands are tied'. It 'depends on the Judge as he can sentence only after the verdict is passed' and 'sentence depends on how effective the Prosecution has been'. She could not understand why 'Judges make decisions on a particular case based on one Psych Report'. It was a concern that 'their sentencing remarks can be brutal not knowing the back story. Why can't they be more involved?'

Overall participants thought that forced, coerced and compelled offending is not understood by any stakeholders (e.g. police, lawyers, judges, support workers, psychologists):

- 'They don't believe you.'
- 'They are desensitised. We are put in a basket and not unique to our own story.'
- 'Can have five [expert's reports] for defence and one for prosecution and that one will be followed in court'
- 'They go off previous cases if you are involved same category as the person with the past'
- 'I feel you are a guilty party even though a victim'
- 'Prosecution paint a story that doesn't exist. Should let the facts tell the story but they don't do that.'
- 'Paint you as a bad person even if you are not'
- 'If you have a criminal history but this time [it was] forced, compelled/ coerced [it] doesn't matter. History of drugs / violence and in trouble before, if happens again, even if [there is] DV/coercion [it] doesn't matter – [you are] painted with same brush'
- 'Done before. Done again... No one believes my history/trauma.'

There was significant disappointment that there had not been more progress on

women's issues alongside progress on women judicial appointments, but this was not explored further.

- 'Female judges are harder'
- 'Judgment from women judges is terrible'

Participants were particularly vocal on guilty pleas that they considered were being entered without understanding the cases properly:

- 'Women plead guilty to higher degree of fraud'
- 'Appearing with partner. Intimidation. Coercive partner. Not always violent. Putting documents in your name.'
- 'Women forced to plead guilty to charge did not commit'
- 'Fear talking too hard. Jury find guilty. Triple the time'
- 'How it looks is not how it is'
- 'If jury have experts might not help'
- 'How I'm painted. How I look. Judged on looks. Look like a common drug user. Accidental import. Guilty. Junkie dog... Long sentence... effect of media and books – makes it way worse.'
- 'We don't have to prove anything. Not whole story. Court sees you as guilty. Whole trial system doesn't work – seen as guilty by jury.'
- 'If law was to allow her to be understood that would make a difference'
- 'Just plead guilty.'

Participants questioned the whole system:

- 'Why doesn't the system allow us to be understood?'
- 'System does nothing to understand women's experiences'

WOMEN'S EXPERIENCES IN PRISON

Participants described being in prison as a place where they might be understood by peers and services, explaining: 'In prison reality hits. You are alone.'

- 'Time when there is access to wrap around counselling/peer support. Talking. [But] not going to tell anyone inside until I trust them.'
- Value of 'peer supporters'
- In prison experience: Already offended. From 'that point' peer supporters help
- 'We help them with education'
- '[In] jail can then tell someone you trust'

There was a particular concern for Indigenous women who were institutionalised and

had suffered family violence but could find religious and cultural opportunities inside. Other women were described as arriving in prison with ‘drug induced psychosis’, ‘vulnerability’ and ‘drug habits’ and with continuing issues with family violence including breaches of Family Violence Intervention Orders (‘IVO’s’), even though inside.

Participants were also aware of the plight of women overseas: ‘We are lucky no death penalty. Other countries have the death penalty. Two women ... Both trafficking drugs. One was the lead of a trafficking group. Story where the person in prison but cannot say anything because the other one is threatening her is also in prison. This is a problem. For the person under threat wants to say but can’t because told something will happen to their family back home... So many repercussions. Influenced not to say a word. [They] know if they don’t speak then family/children [will be] looked after.’

WHAT WOULD HELP WOMEN SPEAK

Participants wanted ‘re-education of whole system.’ They ‘would speak to people with level experience’ and ‘with legal protection.’

To speak about issues of forced, compelled or coerced offending participants explained this ‘depends on potential outcome. Is there a gain? Sentencing/ guaranteed protection’

Participants highly recommended:

‘Judges who specialise in this. And police and prosecutions.
Whole cohort as wrap around.’

A ‘pathway into protective services, not prison’

Several participants said it would make a difference ‘if [we] could be heard and believed... People more likely to tell their story if something like that... At some time, distant of police and lawyers’.

One participant said: ‘I would love to have protective pathway not prison. Knowing I could open up and I would be safe, and my children would be safe.’

Another participant returned to the one case where found a woman was trafficked and charges were dropped: ‘Only one. Sex trafficking. Case by case. Not systematic. Needs a new system. I would speak up and explain why I was involved’.

Several participants said speaking out about forced, compelled or coerced offending ‘depends on whether has bearing on fate. Could tell speak to who interviews you.’

Another said the problem was 'far deeper' and it was expressed that to make a difference, laws are needed which would enable women to be heard and understood:

- 'If seed planted in their mind can come to awareness [about] how it happened and how to avoid it happening again.'
- 'Not going to open up to strangers. Depends on the individual. For me it might have made a difference if there were a different pathway. Experts.'
- 'If it helped I would open up and help my case to be understood.'
- 'By the same token some women are successful at bettering themselves. So, coming to jail short time is manageable. But even the successful women not being listened to or understood... [They] may not have articulated. May not be willing to do it in the system. People should be willing to listen. Social workers, colleagues. Might stop earlier if there is someone to talk to.'
- 'System does not identify the difference between women who have autonomy and women who were vulnerable before. Maybe after. Expanded system – not working. Women not being understood.'
- Stakeholders 'need to make huge changes.'
- 'Only when get to know/trust, you will say something.'

Participants were asked what they mean when they say 'protection':

'Protection means being heard. Action being taken.'

All participants said that for cases involving forced, compelled and coerced offending there needed to be a system that involves those with lived experience:

- 'Women with trauma [or experiences of] trafficking, slavery will talk to a peer. Feel a load off. Able to talk. Have rapport. Confide in us. Know we will not go anywhere. Means system should include people with lived experience... Should be a given in this space. Not necessarily experience of incarceration but lived experience in a relevant form.'
- 'I have their trust because shared experience'

Participants all emphasised how 'people with lived experience might work alongside professionals' (e.g. lawyers and police). They suggested a process of 'protective steps' and that consideration should be given to issues such as:

- 'What type of steps or peer professionals could work together or separately?'
- 'How to entice women to feel at ease to speak?'

→ 'What kind of protection will be effective?'

Participants discussed the types of people and programs likely to build trust:

- peer worker in community
- different experiences
- women different from men
- Social services
- Creation of peer professionals in medical capacity/allied health professionals
- Professional network
- Training and education on the issues
- People with lived experience of incarceration working in partnership with professionals
- Have people with lived experience coming into the conversation
- People to empower women financially to look after them selves and family
- Employment programs
- Education programs
- Gaining independence from perpetrator
- Inserting humanity into the system

Participants also talked about downside of prison and repercussions when they were released, which included impacts on jobs and education.

They wanted a system to 'prevent people going through that process'. These needs include training for police on how to deal with these matters to get best outcome for this individual, 'empathy from lawyers, humanity from lawyers. Sentencing laws can be more lenient. Serve sentence but include time on outside'. Participants suggested training and education could be provided at/on:

- Speaking at forums
- Workshops
- Public forums
- Trauma training
- Trauma informed interviews
- Delivered to employees
- Empathy
- Understanding

Participants stated that 'trauma informed care is lacking, especially at entry point of arrest, bail and charge'.

- 'Agree with trauma training'
- Judge as investigator: 'Judges should ask. Be proactive'

'Somehow, we need to identify the women who need protection and have [a] system that is protective.'

Participants discussed what might be a 'safe hearing' with anonymity. They also discussed the importance of

- Community based programs
- Knowledge on how to advocate for themselves
- Community support
- People who would check in
- Confidential helpline. 'Like Beyond Blue. Suicidal: Beyond Stone Walls'
- Peers who help. Having a support group. Peer support group
- Organisation like a prison network. Wrap around support
- If you want to talk: a peer support case worker
- Trafficking hotline. With support services, e.g. women and mentoring on post release
- Peer mentors specialised towards women who've experienced coercion, compulsion or who have been forced to commit crime
- Peer workers – 'Someone specialised and able to support that person in community. Pre and post release. That care from the get-go.'

Participants saw such supports as a way to assist women to speak. Participants considered a mentoring system could help. Separate from court, with services. Mentors with a referrals system.

- 'People don't want to automatically tell story. One person conversation, feels safe – a visitation and mentoring program.'

They also wanted an appeal system for when issues of forced, compelled or coerced offending was revealed later: 'If takes time to speak there needs to be a way to get back to a judge. Feels so far-fetched 'n Australia... Needs a complete overhaul for women in their situations particularly.'

Examples of support services were also given:

- Salvation Army crisis accommodation

- Women's Refuge
- Prison Network's emergency accommodation
- Would be good if Police Stations can carry information on accommodation:
 - ACSO – Mc Cormack housing
 - Immigration
 - Hostels
 - Community groups
 - Support from Churches
 - Anglicare
 - Uniting Vic and Tas
 - Magpies Nest run by the Collingwood Football Club in conjunction with the Salvation Army (where individuals can either volunteer or work at the cafe and be paid a wage).

Participants said they 'Don't know what [protection] looks like. Different for every person' 'Guaranteed protection. A carrot.'

The only current example they could give was 'Drug Court':

- 'This is the only time when Magistrates, AOD Counsellors, Case Managers, Social Workers, VicPol and VLA Lawyers are involved.'



A person who is eligible to attend a Drug Court is assessed whilst in custody and appears before a Drug Court Magistrate to plead guilty. That individual's sentence is then suspended, and a Drug Treatment Order is made. The person concerned is supervised by the Drug Court Magistrate. If compliance is not adhered to sanctions can be imposed.

→ 'This is the only Court where Magistrates are involved. Not aware of any other.'

This data suggests that there is no systemic understanding that trafficked women should be protected by a Non-Punishment Principle. The workshop participants understood and explained that there are high levels of exploitation of women in crime but could see no mechanisms that would allow this to be recognised in the Victorian criminal justice system. They expressed their belief that such women should be 'protected' and 'not prosecuted or sentenced'. This was stated without knowing that this reflects the Non-Punishment Principle in international law on modern slavery /human trafficking, but rather through lived experience that women are being punished and further victimised by a system that does not recognise the complex and nuanced ways that they are coerced, compelled or forced into offending.

IX. ANALYSIS

THE INTERSECTION OF VIOLENCE, COERCION AND INCARCERATED WOMEN

Among the population of incarcerated or previously incarcerated women there is a vast, intersecting number of risk factors and vulnerabilities, including family violence, mental health issues, drug and alcohol dependency, carer responsibilities, lower socio-economic status, and experience of poverty. These overlap with other characteristics of marginalisation such as gender, age, disability, ethnicity, and Aboriginal and Torres Strait Islander status.⁷⁰ It is well understood that intersecting structural inequalities exacerbate experiences of control and exploitation.⁷¹

Research on the nexus of compulsion, coercion and forced offending by women shows that women who commit criminal offences often do so in the context of family violence.⁷² In 2021, at least 85% of women in Australian prisons were victims of family violence, with an estimated 98% of incarcerated women having experienced trauma and violence more generally.⁷³

Incarcerated women are often trapped in cycles of abuse, first perpetrated by their family or intimate partner, and then by the state: ‘violence increases the risk and effects of imprisonment, and imprisonment increases the risk and effects of violence’.⁷⁴ Women who experience family violence are more likely to return to prison and these cycles have impacts that ripple outwards: contributing to intergenerational trauma, family breakdown, homelessness and the exacerbation of mental health conditions,

⁷⁰ Justice System Inquiry (n 22) [7.6]; Bartels et al, ‘Understanding Women’s Imprisonment in Australia’ (2020) 30 *Women & Criminal Justice* 204, 206–209; Russell et al, ‘Gendered Injustice: The Policing and Criminalisation of Victim-Survivors of Domestic and Family Violence’ (Report, 2022).

⁷¹ Julia Tolmie, ‘Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence’ (2018) *New Zealand Law Review* 181, 185.

⁷² Ibid. Note that we have used ‘family violence’ as an umbrella term covering all types of violence that occurs in family, family-like and intimate relationships, also known as ‘domestic violence’ and ‘intimate partner violence’. We recognise that family violence is most commonly perpetrated by men against current or former partners, but also occurs in other relationships, and between all genders. See: ‘What is family violence?’, *Safe and Equal* (website) < <https://safeandequal.org.au/understanding-family-violence/what-is-family-violence/>>.

⁷³ Silke Meyer, ‘Rethinking female incarceration: Road to prison paved with domestic abuse’, *Monash University Lens* (web site, 30 July 2021) < <https://lens.monash.edu/@politics-society/2021/07/30/1383557/rethinking-female-incarceration-road-to-prison-paved-with-domestic-abuse>>. In 2015 a survey by Corrections Victoria reported this number was 65%, see: Justice System Inquiry (n 22) [7.6].

⁷⁴ ANROWS, ‘Women’s imprisonment and domestic, family and sexual violence’ (Research Synthesis, March 2020), 5

among others.⁷⁵

The fact that almost all incarcerated women have experienced significant trauma and violence, both prior to, during, and after their imprisonment, is well understood by the authorities and bodies of the Victorian criminal justice system. Corrections Victoria's 'Women's Policy' is unequivocal in recognising that most women offenders are also victims of abuse: physical, emotional, economic and sexual, both within the family context and outside of it.⁷⁶ The policy also acknowledges that the custodial environment can aggravate trauma and replicate violence. This is especially so for Aboriginal and Torres Strait Islander women, whose personal experiences of trauma and violence are combined with collective and generational trauma arising from colonisation and discrimination.⁷⁷ VLSB has previously reported that Aboriginal and Torres Strait Islander women are also 21 times more likely to be in prison than other women.⁷⁸

Though the number of women in prison rose 64% in the decade to 2023, data shows that the number of female prisoners decreased between 2019 and 2023, from 575 to 298 in total. VLSB's 'Keeping Women Out of the Justice System' report asserts that funded initiatives which address the intersecting causal factors of women's incarceration are successful in reducing contact with the justice system, rates of imprisonment and recidivism – and provide 'proven options for [systemic] reform'. It is clear from the results of those funded programs that the combination of long-term wrap-around support services, stakeholder education, strategic litigation, and law and policy reform works to divert women cycles of incarceration. This suggests that there is ample evidence for an initiative that specifically targets coerced and compelled offending and provides protective, diversionary pathways for survivors of modern slavery/human trafficking and exploitation.

Understanding coercive control as a pathway to understanding coerced offending?

In Australia, there has been recent research, law reform, and debate regarding coercive control as a facet of family violence, often in the context of a stand-alone crime of

⁷⁵ Ibid, 6; Hilde Tubex and Natalie Gately, "No support, no housing, no job' – the vicious cycle pushing more women into prison", *The Conversation* (online article, 28 May 2025) <<https://theconversation.com/no-support-no-housing-no-job-the-vicious-cycle-pushing-more-women-into-prison-257218>>.

⁷⁶ Corrections Victoria, 'Women's Policy for the Victorian Corrections System' (policy, 2017), 8 ('Corrections Women's Policy').

⁷⁷ Ibid; ANROWS (n 73).

⁷⁸ Victorian Legal Services Board and Commissioner, *Keeping Women Out of the Justice System* (Final Report, August 2023).

coercive control.⁷⁹ This has arisen from increasing understanding that family violence can be defined broadly – that it encompasses a wide range of behaviours and patterns, beyond the physical. In 2024, a report of the first national research study which examined victim-survivors' views on the 'benefits, risks and impacts of the criminalisation of coercive control' in Australia was published.⁸⁰ The study described the levels of violence against women in Australia as a 'national crisis', noting 'inadequate legal responses' which are 'failing to meet the needs of victim-survivors'. The main finding from that study was 'in-principle support for the criminalisation of coercive control as a standalone criminal offence, albeit with concern for 'distrust of police and fears of 'misidentification''.

The study explored outcomes including 'raising community awareness; increasing victim-survivor safety; improving police responses; and increasing access to justice for victim-survivors.' Across all the interviews in the study 'victim-survivors described feelings of being let down by the system, ignored and silenced through police and court responses, and being unable to access support services.'⁸¹ Those findings are echoed in this project, through the data provided by CFTT and BSWAC participants, including that there needed to be 'trust' and a 'whole-of-system response' and 'the views of those with lived experience, should be used to inform effective implementation [of coercive control laws]'.

Also in 2024, a study by Vanessa Munro et al, examined the impact of coercive control criminalisation in England and Wales, and in Scotland on professional responses to women who have committed offences that may have been compelled or coerced. The authors conducted semi-structured interviews with 55 stakeholders across the two jurisdictions, which included police officers, Crown prosecutors, magistrates, sheriffs and specialists from legal and social support organisations. The researchers aimed to explore the participants' understanding of how coercion might causally contribute to offending in a broad range of situations, which may be typically understood as remote from an identified situation of coercive control.

What is clear from the report is that in England, Wales and Scotland the nexus of offending and coercion is not being identified at early stages and women victim-offenders are not being diverted from prosecution. The interviews reveal that

⁷⁹ Marilyn McMahon and Paul McGorrery, *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2021).

⁸⁰ Fitzgibbon et al, *The criminalisation of coercive control: A national study of victim-survivors' views on the need for, benefits, risks and impacts of criminalisation* (Final Report 1, 12 December 2024).

⁸¹ Criminology Research Grants, *The criminalisation of coercive control: A national study of victim-survivors' views on the need for, benefits, risks and impacts of criminalisation* (Report portal, 2024) <<https://www.aic.gov.au/crg/reports/crg-24-20-21#:~:text=This%20study%20represents%20the%20first,coercive%20control%20from%20across%20Australia>>.

professionals in the criminal justice system, especially police and prosecutors, do not view unpicking the causality of coercive offending as part of their role. Police in both jurisdictions felt that their role was to investigate and report on crimes being committed, and Prosecutors stated that they will take charges to court and ‘see what comes out in the trial’. However, interviews with judicial officers revealed that there was little leeway afforded by the court. While there was understanding of the intersecting issues which led women to offend, magistrates opinions reflected a black and white approach, in which the offence is entirely separate from the situation from which the offending arose, even if ‘it’s sad’ coercive and even if coerced: ‘we’re very sorry, we understand why you did it, but you did it and therefore you’re guilty’.⁸²

The study also revealed reticence from criminal justice professionals around statutory acknowledgement of compelled offending, based on the idea that women could then lie about being compelled, controlled or coerced into any number of crimes as a ‘get out of jail free card’. This is in line with concerns raised in our research that women may lie about being trafficked in Australia. On this, Munro’s findings are pertinent: for women the reality is that victims of exploitation, coercion and slavery *do not* usually raise this as explanation for their offending, let alone as a defence. This is echoed in our data.

Moreover, those who exploit them often use their fear of prosecution to control and silence them further. Women who are subject to coercive control also may lack a ‘corroborative trail’ of evidence (such as hospital admissions generated by physical abuse) and this type of abuse may go undetected by those working in the justice system.⁸³ And, as revealed by Munro et al, where offending is the slightest bit removed from the situation of coercion, criminal justice professionals are unlikely to consider it as a causal factor, even if it is raised by the victim-offender or their defence counsel.

As the 2024 national study revealed, there is more recognition of coercive control as a factor impacting women in Victoria, and Australia more widely. However, the connection between coercion and broader offending is yet to be seriously acknowledged and understood in the criminal justice system. Kyla Raby and Nerida Chazal pertinently point out that one of the reasons for the schism between policy around coercive behaviour in family violence and coercive behaviour as it relates to trafficking and slavery, is that family violence offences are state based and trafficking and slavery offences are federal: ‘Australia’s federated system of governance has contributed to a disconnect between these closely related crimes’.⁸⁴ Nonetheless, as a

⁸² Vanessa Munro et al, ‘Coercion, Control and Criminal Responsibility: Exploring Professional Responses to Offending and Suicidality in the Context of Domestically Abusive Relationships’ (2024) 33(3) *Social & Legal Studies* 392

⁸³ Ibid, 399.

⁸⁴ Kyla Raby and Nerida Chazal, ‘The Myth of the ‘Ideal Offender’: Challenging persistent human trafficking stereotypes through emerging Australian cases’(2022) 18 *Anti-Trafficking Review* 13.

recent report by UNODC asserts, systemic action on protecting victim-offenders must be a coordinated effort with shared responsibility across jurisdictions.⁸⁵

But for now, although coercion is a form of modern slavery/human trafficking in *Criminal Code (Cth)* divs 270 and 271, this lacuna is a problem, as it is known that trafficking in persons disproportionately affects women (and children) who are deliberately manipulated and targeted by traffickers. Organised crime and trafficking thrive where social protection systems are inadequate and exploit people's vulnerabilities, such as poverty, lack of education and displacement.⁸⁶ These are also all factors comorbid with (a) criminal offending and (b) being silenced, misunderstood or misidentified within a criminal investigation by a system that doesn't understand or acknowledge coerced or exploitative offending. Catch 22, indeed.

Identifying coercion and balancing prosecutorial aims

While this project has been one with practical objectives, some attention has been given to theoretical approaches that may assist. Apposite to the question of adjudicating whether genuine exploitation has occurred are the categories of coercion identified by Wertheimer as follows:

- Non volitional coercion – generally seen in questions of mental capacity over wills or coerced confessions from prolonged coercive questioning where the effect undermines a person's voluntariness and their will is overborne.
- Constrained volition – where the circumstances someone is in affects their choices. This level of constraint comes with a 'two pronged' theory (choice and proposal) where (a) choices depend on reasonable alternatives, currently seen in duress and (b) where someone proposes to do something they may not be coerced unless their rights are abused or their proposal is something the law considers illegitimate.
- Coercion and responsibility where stage one is to determine if there has been coercion and stage two is to assess the responsibility of the person for their acts. This is described by Wertheimer as a judicial form of 'reflective equilibrium' where judges arrive at the bottom line by rigorous moral reasoning.

This is not to suggest that all crimes that are coerced should remain unprosecuted. However, the data has made clear that there is a need to properly identify those who are victims of modern slavery/human trafficking, which can include exploitation by deception. Wertheimer categories may be useful in emphasising the need for modern slavery/human trafficking factors to be identified in decision making at every stage –

⁸⁵ UNODC, Global Report on Trafficking in Persons, (United Nations publication, Sales no: E.24.XI.11, 2024) ('2024 UNODC Trafficking Report').

⁸⁶ 2024 UNODC Report (n 84).

whether not to prosecute at all, to stay a case where factors are revealed, and/or to have a system of appeal or pardon for those whose cases are understood at a later stage.

Wertheimer's approach is also consistent with the findings of Felicity's PhD research, which found that justice for trafficked persons who commit crime comes at the mean between two extremes of unfairness (the victim of crime and the victim who commits that crime), that having a human trafficking defence is capable of finding the equilibrium between those two extremes, and that having such a systemic approach would relieve the dominant strategy of silence so that trafficked persons could be identified and protected.⁸⁷ Focussing on volition and responsibility is consistent with a model that identifies the cause of the crime as the traffickers, not the survivors. This might mean exoneration for more serious crimes, improving on the system in the UK, which is limited.

This search for balance was also reflected in the IBA/BIICL report on the Non-Punishment Principle⁸⁸ which tracked the approaches of various states in protecting trafficked victims who commit crime. They found that some states use a 'compulsion' model and others a 'causation' model. The causation model was preferred by the report because it did not focus on levels of harm to victims but on true responsibility for the crime. If the Hidden in Plain Sight report's Recommendation 22 is to be followed to improve upon the modern slavery defence in England and Wales, one area for consideration should be a causation model in which relevant exploitation excuses culpability.

The IBA/BIICL report also found that countries without explicit non-punishment laws rely on general defences, which often lack the necessary nuance to protect trafficked persons effectively. Training for officials on identification and non-punishment were described as essential, especially where formal processes were absent.

The key takeaway from available literature is that while there is understanding of family violence as an aggravating factor for women's incarceration, and coercive control as a part of family violence, there is still a knowledge gap in the criminal justice system around violence, compulsion and coercion as the cause of offending.

HOW ARE SLAVERY AND TRAFFICKING CASES DEALT WITH IN AUSTRALIA CURRENTLY?

Whilst this project was inspired by the 'drug mules' project, its aims were to look more broadly at the experiences of survivors of modern slavery in the Victorian criminal justice system and link this to the international commitments to the Non-Punishment Principle – that is not to prosecute or punish those whose offending is a direct

⁸⁷ Gerry et al (n 6).

⁸⁸ IBA/BIICL Report (n 12).

consequence of their exploitation. Modern slavery/human trafficking is a global problem, so it was relevant to consider potential approaches for Victoria having regard to international approaches to the problem and identified solutions.

The number of trafficked persons in the world is an estimated 40.3 million.⁸⁹ The number of persons trafficked to commit crime globally is unknown and the number of persons trafficked to commit crime in Australia is also unknown. The problem of exploitation in criminal justice is also unknown in Victoria – and very difficult if not impossible to ascertain. Our data shows that this is because many victim-offenders are silent, or where they do speak are not believed, or are unable to find a pathway to non-prosecution and/or support.

Additionally, many of these cases would be summary and lower-level indictable are rarely published publicly or in law reports, so case law research is limited. Even if the cases are reported (or have unreported versions uploaded to Austlii or court websites), they will be recorded under the legislation that is applicable to the criminal offence, which may be drug trafficking, or assault, or theft, or any number of offences unrelated to ‘modern slavery’ or ‘human trafficking’. It is even harder to ascertain from a Boolean search whether cases have any nexus to coercion, compulsion or force.⁹⁰ Furthermore, even if coerced offending or modern slavery is raised as a factor, it may not be understood.⁹¹

Therefore, cases we have reviewed are limited to those under the trafficking and slavery offences in the *Criminal Code (Cth)*, immigration cases that deal with issues of trafficking and a scant few criminal cases which mention modern slavery or human trafficking in passing (see **Annexure 2**).

Indeed, the specific number of trafficked persons in *any context* in Australia is unknown, and reports in Australia, whilst increasing, are filed in less than 500 cases each year.⁹² There appears to be no specific recognition whatsoever of trafficked persons who commit crimes. This was despite published research on victim perpetrators in Australia which found that in Australia people were yet to grasp the reality of trafficking in Australia and that several of those prosecuted for human trafficking within Australia were women who had themselves been trafficked as sex workers to Australia and, even as perpetrators, would have money added to their debt

⁸⁹ ‘Statistics’, *Disrupt Human Trafficking* (website) < <https://www.disrupthumantrafficking.com/statistics> >.

⁹⁰ As noted earlier in this report, this data limitation issue was also noted in UK Anti-Slavery Commissioner Report (n 24).

⁹¹ For example, there is one mention in one case in which modern slavery was not understood: *Re Boo* (n 1).

⁹² Australian Federal Police, ‘Human Trafficking Reports Continue to Increase in Australia’ (Media Release, 8 December 2023) <<https://www.afp.gov.au/news-centre/media-release/human-trafficking-reports-continue-increase-australia>>.

just to be able to eat.⁹³

Extending ‘slavery’ in the High Court

The slavery case, *R v Tang*,⁹⁴ is foundational for its expansion of the meaning of slavery under the *Criminal Code (Cth)*. Indeed, in this judgment, Gleeson CJ made many salient points about the offence of slavery, which allows for a nuanced view of how slavery or slavery-like situations may arise and be identified. For the purposes of the report *Tang* is important as it also provides a broad understanding of the conditions under which slavery might occur, and how coercion and control may operate in different ways. The expanded meaning of ‘slavery’ accepted by the High Court in *Tang* helps to reinforce the view that there are cases of modern slavery/human trafficking that involve subtle forms of compulsion or coercion that prevent a victim from seeking help or leaving – and, therefore, can also be applied in cases where a victim has also offended.

The expanded approach was also applied in *Ho v R*, which drew attention to Gleeson CJ’s reference to *Prosecutor v Kunarac et al*, which elucidated on ways a person may be subject to slavery as including control of movement and physical environment, psychological control, force and threat of force, cruel treatment, abuse and coercion, among others.⁹⁵

It is clear, therefore, that the Australian High Court is cognisant of the role of coercion and force on victims of slavery, as well as the complex ways this may occur. However, Australian courts are yet to expand this to victim-offenders. See for example *Nantahkum v R*,⁹⁶ in which the court acknowledged that the Appellant’s experiences of the sex industry as severe, as compared with the complainants in that case who were understood to be victims of slavery, under seemingly similar circumstances. The few published cases in which modern slavery/human trafficking victim-perpetrators are recognised as being victims themselves are also revealing of the attitude of the court towards women offenders, which often pits elements of agency or choice against victimhood.⁹⁷ This is highly problematic, especially as it is known that women who are

⁹³ Gabriella Marchant, ‘Study finds that half of human traffickers are women, and many have been victims’, *ABC News* (online news, 12 April 2019) < <https://www.abc.net.au/news/2019-04-12/research-finds-half-of-human-traffickers-in-australia-are-women/10997902>>.

⁹⁴ (2008) 237 CLR 1.

⁹⁵ Ibid, citing *Prosecutor v Kunarac et al (Judgment)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II, Case no IT-96-23, 22 February 2001), quoted by [2011] VSCA 344, [79] per Buchanan, Ashley and Tate JJA.

⁹⁶ [2013] ACTCA 40.

⁹⁷ For a full discussion of this see: Alexandra Baxter and Dr Nerida Chazal, “It’s About Survival”: Court constructions of socio-economic constraints on women offenders in Australian human trafficking for sexual exploitation cases’ (2022) 18 *Anti-Trafficking Review* 121; Charlotte Barlow, *Coercion and Women Co-Offenders: A Gendered Pathway into Crime* (Policy Press, 2016).

victims of trafficking in persons, especially for sexual exploitation, may themselves become perpetrators, by force, by circumstance or for survival.⁹⁸

Trafficked people and immigration

The IBA/BIICL Report explained that residence permits for trafficked persons can influence the application of the Non-Punishment Principle. This is an issue that arises in a number of ways for victim/survivors of trafficking and modern slavery in Australia. For example, one might be an immigration detainee who raises their trafficked status as a means of obtaining refugee status under section 5H of the Migration Act, the other a person who is arrested for a crime related to their trafficking or immigration status, due to a raid on a brothel suspected of sex trafficking.

⁹⁸ 2024 UNODC Trafficking Report (n 84); Marchant (n 92); Baxter et al (n 48); ICAT Issue Brief (n 38).

In these cases, the legal system has dealt with trafficked persons inconsistently,⁹⁹ and there is at least one case of the where a trafficked person was identified, given a visa through the Human Trafficking Visa Framework, and then was later stripped of it due to later offending.¹⁰⁰ Australia must ensure that trafficked persons are not punished or detained for the illegality of their entry or residence in the country.

⁹⁹ *KQDV* and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2022] AATA 210; 1906027 (Refugee) [2019] AATA 6729; N04/07711 [2005] MRTA 660.

¹⁰⁰ *KQDV* (n 98).

X. IMPLEMENTING THE NON-PUNISHMENT PRINCIPLE IN AUSTRALIA

NON-PUNISHMENT AS HUMAN RIGHTS OBLIGATION

It is made plain through data collected and the literature reviewed by this report that women in Victoria are being arrested, prosecuted and incarcerated, despite, and *because of* their status as victims of coercion, compulsion and forced criminality. It is also clear that the criminal justice system still struggles to view victims and offenders as one and the same and does not have a pathway for adequately protecting women who are victim-offenders, where their victimisation has a causal link to their offending. Movement on this is essential, especially when dealing with victims and survivors of human trafficking/modern slavery.

As outlined in the background section of this report, Australia has international legal obligations to protect victims and survivors of human trafficking and to do so must adopt best practice legal and policy frameworks for non-punishment, in line with the many states across the globe who have already done so.¹⁰¹ Our data suggests that in addition to legislative change, including the implementation of defences, training and education is also required for all levels of the criminal justice system – judges, lawyers, prosecutors, police and allied support professionals all lack understanding of how nuanced and complex coerced criminalisation can be. This is backed up by the IBA/BIICL report which found that:

Barriers to the application of the Non-Punishment Principle were common across several or all jurisdictions studied. These include lack of awareness and training on the application of the principle; systemic issues of identification of trafficked persons; the presence of procedural requirements that act as barriers to non-punishment; and the thresholds and limitations placed on statutory protections.¹⁰²

The obligation for Australia, against this background, is to provide practical cooperation by identifying survivors of modern slavery/trafficked persons in criminal justice and not to prosecute or not to punish them for crimes they were forced, compelled or coerced commit by exploitation because that removes their culpability. This includes protecting persons trafficked *from* Australia, such as those who are currently at risk of the death penalty exiting Australia when exploited in sex or drug trafficking networks.

¹⁰¹ IBA/BIICL Report (n 12).

¹⁰² IBA/BIICL Report (n 12).

MODEL LAWS

In paragraph 13 of its resolution 55/67, the UN General Assembly invited Governments to:

‘Consider preventing, within the legal framework and in accordance with national policies, victims of trafficking, in particular women and girls, from being prosecuted for their illegal entry or residence, taking into account that they are victims of exploitation. The suggested provision ensures that victims of trafficking in persons are not prosecuted or otherwise held responsible for offences, be it criminal or other, committed by them as part of the crime of trafficking, such as, in appropriate cases, working in or violating regulations on prostitution, illegally crossing borders, the use of fraudulent documents and so on.’¹⁰³

This led to the creation of **Article 10 of UNODC’s Model Law against Trafficking in Persons**.¹⁰⁴

Article 10. Non-liability [non-punishment] [non-prosecution] of victims of trafficking in persons

1. A victim of trafficking in persons shall not be held criminally or administratively liable [punished] [inappropriately incarcerated, fined or otherwise penalized] for offences [unlawful acts] committed by them, to the extent that such involvement is a direct consequence of their situation as trafficked persons.
2. A victim of trafficking in persons shall not be held criminally or administratively liable for immigration offences established under national law.
3. The provisions of this article shall be without prejudice to general defences available at law to the victim.
4. The provisions of this article shall not apply where the crime is of a particularly serious nature as defined under national law.

The **Model Law** recognises two different criteria to be used:

1. Causation – the offence is directly connected/related to the trafficking; and
2. Duress – the person was compelled to commit the offences.

Commentary to the Model Law states that legal systems that have prosecutorial

¹⁰³ *Traffic in women and girls*, GA Res 55/67, UN Doc A/RES/55/67, adopted 31 January 2001, [13].

¹⁰⁴ UNODC Model Law (n 7), art 10.

discretion and a similar provision could be included in guidelines for prosecutors.

For example:

‘A victim of trafficking should not be detained, imprisoned or held liable for criminal prosecution or administrative sanctions for offences committed by him or her as a direct result of the crime of trafficking in persons, including:

- (a) The person’s illegal entry into, exit out of or stay in [State];
- (b) The person’s procurement or possession of any fraudulent travel or identity documents that he or she obtained, or with which he or she was supplied, for the purpose of entering or leaving the country in connection with the act of trafficking in persons;
- (c) The person’s involvement in unlawful activities to the extent that he or she was compelled to do so.’

The Model Law also provides guidance. This includes that it is not good practice to detain victims in any case, regardless of their willingness to cooperate with authorities. The Model law suggests this may be adopted in regulations on treatment of victims, for example:¹⁰⁵

‘Victims of trafficking in persons shall not be held in a detention centre, jail or prison at any time prior to, during or after all civil, criminal or other legal or administrative proceedings.’

Existing approaches: England and Wales

For this project, it was not possible within the budget to analyse every model across the globe but, since Recommendation 22 of the *Hidden in Plain Sight* report suggested improving on the UK approach to non-punishment, some research was done into the approach in England and Wales:

Following the EU Trafficking Directive, the UK has implemented the Non-Punishment Principle in several ways:¹⁰⁶

- There is a duty to investigate which is not always recognised but was reinforced by the European Court of Human Rights in *VCL and AN*.¹⁰⁷
- There is a referral mechanism through which victims can be referred to the

¹⁰⁵ Examples are given where implementation has occurred in Kosovo and the United States of America.

¹⁰⁶ 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 (amended by Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024).

¹⁰⁷ *VCL and AN v the United Kingdom* (European Court of Human Rights, Application Nos 77587/12 and 74603/12, 16 February 2021).

‘Single Competent Authority’ by ‘first responder organisations’ and assessed.¹⁰⁸ Those staffing that referral mechanism are not experts and their assessments are not admissible at trial but they are useful for assisting the CPS to decide whether to prosecute or not.¹⁰⁹

- There is published CPS guidance on how the Non-Punishment Principle is to be applied when a trafficking/slavery victim has been compelled to commit a crime.¹¹⁰ This guides Prosecutors to consider whether the suspect’s criminality or culpability is extinguished or diminished to the extent that it is not in the public interest to prosecute. This is balanced with the seriousness of the offence.

In addition, there are measures specific to modern slavery/human trafficking in criminal justice:

- There is a statutory presumption of ‘intimidation’ which allows for the equivalent of a suppression order and pseudonym for an accused person who is a victim of modern slavery.¹¹¹
- There is a complete defence to certain crimes set out in section 45 of the *Modern Slavery Act 2015* (UK).
 - In respect of adults Section 45 states:
 - (1) A person is not guilty of an offence if—
 - a. the person is aged 18 or over when the person does the act which constitutes the offence,
 - b. the person does that act because the person is compelled to do it,
 - c. the compulsion is attributable to slavery or to relevant exploitation, and (d) a reasonable person in the same situation as the person and having the person’s relevant characteristics would have no realistic alternative to doing that act.
 - In respect of children Section 45 states:
 - (4) A person is not guilty of an offence if—
 - a. the person is under the age of 18 when the person does the act which constitutes the offence,
 - b. the person does that act as a direct consequence of the person

¹⁰⁸ ‘National Referral Mechanism Guidance’, UK Government (website)<
<https://www.gov.uk/government/publications/human-trafficking-victims-referral-and-assessment-forms/guidance-on-the-national-referral-mechanism-for-potential-adult-victims-of-modern-slavery-england-and-wales>>.

¹⁰⁹ See, eg, *Breani v R* [2021] EWCA Crim 731; *AAD, AAH, AAI v R* [2022] EWCA Crim 106 (note that Felicity Gerry appeared for the appellant AAH in this case).

¹¹⁰ CPS Guidance (n 8).

¹¹¹ Youth Justice and Criminal Evidence Act 1999 (UK) s 17

being, or having been, a victim of slavery or a victim of relevant exploitation, and

- c. a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act.

Accordingly, whilst an adult can only take advantage of the defence if compelled to commit the crime, there is no requirement in law for a child to be compelled to commit the act for the defence to be applicable; force, threats or coercion are not required.¹¹² The 'act' must be as a direct consequence of the child being a victim of slavery or trafficking and a reasonable person in the same situation, of similar characteristics (such as age, sex, mental or physical disability) would have done the same. To exemplify, the defence works slightly differently for adults and children, as children do not have to show the same degree of compulsion when raising it. Children also do not have to show there was 'no realistic alternative' as adults must. The absence of compulsion and a lower threshold for meeting the reasonable person test is in recognition of the unique vulnerabilities of children.¹¹³

- The Law Society has published a practice note for criminal prosecutions of victims of trafficking.¹¹⁴
- The Court retains a power to issue a permanent stay of a prosecution.
- Those wrongly convicted can appeal with evidence of their status as survivors and cases involving migration and criminal offences have resulted in convictions being quashed.¹¹⁵

Criticisms of the UK approach

There are criticisms of the system in the UK – largely these relate to investigative and prosecutorial failures.¹¹⁶

The 'compulsion' test is a concern as it necessitates proof that a survivor has suffered some harm before being effective whereas a 'causation' test focusses on culpability and allows for a broader range of protection from other abuses of vulnerability.¹¹⁷ An

¹¹² See *R v ADG; R v BIJ* [2023] EWCA Crim 1309 where an appeal on conviction was allowed as the trial judge had referred to compulsion in relation to a minor who had raised the section 45 defence.

¹¹³ Gerry et al, 'Disorganised crime: Legal and evidential challenges of raising a modern slavery defence' (2022) *Criminal Law Review* 961.

¹¹⁴ 'Criminal prosecutions of victims of trafficking', The Law Society (practice note, 20 November 2023) <<https://www.lawsociety.org.uk/topics/criminal-justice/criminal-prosecutions-of-victims-of-trafficking>>.

¹¹⁵ Examples of such cases are provided in the UK case list at **Annexure 3**.

¹¹⁶ Gerry et al (n 112)

¹¹⁷ Ibid; IBA/BIICL Report (n 12)

argument that there should be a focus on autonomy and causation was rejected by the Court of Appeal.¹¹⁸

Further criticism is that Schedule 4 of the UK *Modern Slavery Act* excludes a range of crimes for which the modern slavery defence is not applicable. For example, the defence is not applicable in terrorism even though there is research of relevant exploitation in such cases. The modern slavery defence is also not applicable to sex trafficking cases despite evidence that women and girls are trafficked in sex trafficking networks, even as managers.¹¹⁹ The defence is also inapplicable to accessories in other serious crimes which, given the links between family violence/coercive control and women co-offending is an area where exploitation is likely to be rife, and where women victim-offenders may be convicted under joint enterprise law.¹²⁰ At present there is no element of causation in complicity cases which gives rise to a serious concern that survivors will suffer serious punishment for crimes which were a direct result of their exploitation.¹²¹

These are all areas where Australia could ‘improve upon’ the UK as suggested by the Hidden in Plain Sight report.

Experience from other jurisdictions

Implementation in Tanzania and ASEAN countries

During this project, Felicity travelled to Tanzania as a senior Trainer & Consultant for Lawyers Without Borders facilitating training for investigators, prosecutors, NGO’s, defence lawyers and judges on human trafficking and trauma informed practice. Tanzania's *Anti Trafficking in Person’s Act 2008* is not solely directed at prosecution. Notably, it has led to the creation of the Anti-Trafficking Secretariat (ATS) within government, which collaborates with other stakeholders to implement and address trafficking challenges within Tanzania. There is an investigative task force that works with prosecutors to bring cases to court and protect victims. The ATS, along with the Attorney General's Office, the Minister of Home Affairs, the Ministry of Labour, and the Vice President's Office are all involved in the national action plan to combat trafficking.

This is a cross-government approach which is like the Australian NAP but appears to have greater ‘buy in’. That said, as with Australia, various aspects of modern slavery/human trafficking are criminalised such as those that constitute slavery and human trafficking, including recruitment, transport, or harbouring of persons by any

¹¹⁸ AAD and ors (n 108).

¹¹⁹ See 2024 UNODC Trafficking Report (n 84)

¹²⁰ Hulley (n 26).

¹²¹ *R v Rowe* [2022] EWCA Crim 27; *R v Hussain, Fiaz and Carpenter* [2023] EWCA Crim 697 (note Felicity appeared as counsel for Mr Fiaz).

means, for purposes such as sexual exploitation, forced labour, slavery, and debt bondage. Where the approach improves upon both the UK and Australia is that there are specific provisions for protection, rehabilitation, and assistance for victims in the law. This includes statutory provisions for offering services including counselling, medical care, temporary housing and a fund for victims. Section 9 protects the identity of victims at both the investigation and prosecution stages, to include hearings in camera and restrictions on media publication. Sections 17 provide for statutory care, protection, counselling and rehabilitation of victims through a statutory Commissioner for Welfare. The best interests of children are paramount, and Ministers have duties to take adequate measures for protection. This includes interpretation, legal counsel, housing, grants of assistance to those trafficked across borders and other services. There is also statutory protection for trafficked persons who commit crime in section 34 of the *Anti-Trafficking in Person's Act 2008* as follows:

34.(1) Trafficked persons shall neither be the subject of prosecution trafficking in persons nor penalized for crimes directly relating to prosecution in offences stipulated under this Act.

This provision does not limit the types of crimes it can be applied to, and it was applied to at least one case in 2024 when Felicity was in Tanzania.

To take such a broad approach would create duties of care to survivors which could drive law and policy. In the 2015-2019 NAP, Pillar 4 includes a commitment to 'offer trafficked people the possibility of obtaining compensation for damage suffered'. The word 'compensation' is not repeated in the 2020-2025 NAP but there is a stated mission to 'afford victims and survivors of modern slavery access to effective remedies'. To legislate duties of care would therefore be a leap in Australian law when even corporate reporting is limited to 'assessing and addressing' exploitation in corporate supply chains rather than due diligence.¹²² Nonetheless, as a destination country for modern slavery/human trafficking, Australia really does need to up its game in relation to both organised corporate networks (value chains) and organised criminal networks, especially where, in some industries these will overlap.

Felicity has previously reported on the approach to human trafficking in the Philippines and Indonesia. This came about partly because of her involvement in the reprieve for Mary Jane Veloso a trafficked Filipina reprieved from execution in Indonesia,¹²³ and partly when there was a suggestion that the Philippines would

¹²² Ruby Evans and Felicity Gerry, 'Due Diligence in Modern Slavery Investigations: Lessons from the Uyghur Congress Case for Australia' (2025) 45 *ANZSIL Perspective* 13.

¹²³ Reported on in Australia by Foreign Correspondent, see: ABC News In-Depth, 'Mary Jane, The Woman Who Escaped A Firing Squad', Foreign Correspondent (YouTube video, 2016) <<https://www.youtube.com/watch?v=fOmzpIlQ1ho>>.

reintroduce the death penalty.¹²⁴

The 2004 *ASEAN Declaration Against Trafficking in Persons Particularly Women and Children* states the importance of distinguishing victims of trafficking from perpetrators and reinforces the need to ensure that the ‘dignity and human rights of genuine victims of trafficking’ are respected.¹²⁵ Since 2004, ASEAN as a whole has committed to combating human trafficking through the *ASEAN Convention on Trafficking in Persons* which follows the UNODC Model Law and has similar definitions of human trafficking and objectives to punish perpetrators and protect victims.¹²⁶ Implementation is through the *ASEAN Plan of Action Against Trafficking in Persons, Especially Women and Children* (‘APA’)¹²⁷ and *ASEAN Guidelines on Corporate Social Responsibility in Labour* (‘CSR’).¹²⁸

Article 14 of the *ASEAN Convention Against Trafficking in Persons Especially Women and Children* provides protective provisions including Article 14(7) which provides:¹²⁹

Each party shall, subject to its domestic laws, rules, regulations and policies, and in appropriate cases, consider not holding victims of trafficking in persons criminally or administratively liable, for unlawful acts committed by them, if such acts are directedly related to the acts of trafficking

The *ASEAN Plan of Action Against Trafficking in Persons* encourages member states to be ‘mindful of the equal rights and inherent human dignity of women and men, as well as the rights of children’.¹³⁰

The Philippines has responded with legislation that criminalises human trafficking in a range of respects. The *Anti Trafficking in Persons Act* (RA No. 9208) defines human trafficking in the same terms as the UN Trafficking in Persons Protocol. The

¹²⁴ Senate of the Philippines, House Bill No. 1239, 17th Congress of the Republic.

¹²⁵ Association of Southeast Asian Nations, *ASEAN Declaration Against Trafficking in Persons Particularly Women and Children*, adopted 29 November 2004.

¹²⁶ *ASEAN Convention Against Trafficking in Persons Especially Women and Children*, signed 21 November 2015 (entered into force 8 March 2017)

¹²⁷ Ibid. The ASEAN Trafficking Convention is not the first instrument in the region relating to human trafficking: It reaffirmed commitment to the ASEAN Declaration Against Trafficking in Persons Particularly Women and Children, adopted in 2004; the ASEAN Criminal Justice Responses to Trafficking in Persons, Ending Impunity for Traffickers and Securing Justice for Victims, adopted in 2007; The ASEAN Leaders’ Joint Statement in Enhancing Cooperation Against Trafficking in Persons in South East Asia in 2011; and ASEAN’s efforts in promoting human rights including the ASEAN Human Rights Declaration in 2012.

¹²⁸ Association of Southeast Asian Nations (ASEAN) ‘ASEAN Guidelines for Corporate Social Responsibility (CSR) on Labour’ (Guidelines) <https://asean.org/storage/2012/05/ASEAN-Guideline-on-CSR-in-Labour.pdf>>. See also: General Principles 4 and 13 of the ASEAN Human Rights Declaration

¹²⁹ ASEAN Trafficking Convention (n 126).

¹³⁰ United National Action for Cooperation against Trafficking in Persons, ‘ASEAN Plan of Action Against Trafficking in Persons, Especially Women and Children’, ASEAN 2015.

Philippines also affords substantial legal protection to victims of trafficking and invests in their rehabilitation.

RA 9208 Section 17 provides legal protection for trafficked persons who commit crime. It reads as follows:

Trafficked persons shall be recognised as victims of the act or acts of trafficking and as such shall not be penalised for crimes directly related to the acts of trafficking (...) the consent of a trafficked person to the intended exploitation set forth in this Act shall be irrelevant.¹³¹

Similarly, in Indonesia article 18 of *Law Number 21 of 2007* states:

A victim who commits a crime under coercion by an offender of the criminal act of trafficking in persons shall not be liable to criminal charges.

A victim is defined in article 1 of *Law Number 21* as ‘a person suffering from psychological, mental, physical, sexual, economic, and/or social trauma caused by the criminal act of trafficking in persons.’

These provisions were helpful in Mary Jane Veloso’s case because the referral mechanism in the Philippines was used to identify her traffickers who were then attested. This led to fresh evidence and the call for her reprieve from execution was successful. Her traffickers were then convicted of trafficking others.

Although it proved insurmountable for Ms Veloso to give evidence in her own case from Indonesia she was released back to the Philippines in 2024.

Had this been an Australian in Indonesia, it is not at all clear that there would have been the same result. The concern here is that not only are women arriving in Australia from overseas as victims of modern slavery/human trafficking in criminal justice and their status not being identified, but there is also a serious risk for Australian women deceived or exploited to travel overseas, especially to a country with the death penalty. Diplomacy in this respect needs protective defences in Australia to provide a basis for Australians not to receive prosecution or punishment overseas. Hence, Australia needs to cooperate with the global drive for the Non-Punishment Principle to be a stand-alone right.

The test for non-punishment: Causation or Compulsion?

In terms of how the Non-Punishment Principle should operate, the IBA/BIICL report discusses the ‘causation test’ as one of the approaches used to determine the application of the Non-Punishment Principle. This approach considers whether the unlawful act

¹³¹ Interestingly, in *R v Tang* the High Court stated raised consent in the context of a defence to slavery offences, stating that it was not irrelevant, but also that lack of consent was not a necessary element of the crime, *R v Tang* (n 93).

committed by a trafficked person is a direct consequence of their trafficking situation. It requires proof of a causal link between the trafficking experience and the offence committed, rather than evidence of coercion or compulsion. The causation approach was contrasted with the ‘compulsion test’, which focuses on whether the offense was committed under coercion, compulsion, or intimidation.

The report highlights that the causation test aligns more closely with a human - rights-based approach, as it recognizes that offences may arise from the broader context of trafficking, including the victim's lack of independence or ability to exercise free will, rather than requiring immediate coercion. It also accepts that the crime is caused by the trafficker who exploits the victim. This test has been instrumentalised in Argentinian law, through Law 26.364, which states (when translated to English) at article 5 ‘that a trafficked person will not be punished for the commission of any offence that is the *direct result* of having been subject to human trafficking.’¹³²

In contrast, the English model (for adults) is that of compulsion, whereby a victim-offender must have been compelled to commit the criminal act *and* the compulsion is directly connected to their situation of exploitation. Criticism of this approach has been noted above. Each of the approaches has its challenges, partly because neither focuses on the autonomy of the individual. However, causation has the benefit of better allowing for the on-going psychological and physical abuse that trafficked persons endure.¹³³

This brief review shows that Australia has the benefit of a wealth of research and practice across the globe to choose to improve on approaches to the protection of trafficked persons who commit crime.

Resources for Implementing the Non-Punishment Principle

ASEAN Guidelines on the Implementation of the Non-Punishment Principle for Protection of Victims of Trafficking in Persons

<https://www.aseanact.org/resources/asean-guideline-npp/>

¹³² Emphasis added. The Non-Punishment Principle is supplemented by other defences under Argentinian national law that have similar effects, including the defence of state of necessity, enshrined in Article 34 of the Argentinian Criminal Code, and the principle in dubio pro reo, enshrined in Article 3 of the Criminal Procedural Code.

¹³³ IBA/BIICL Report (n 12).

UNODC Toolkit to Combat Trafficking in Persons 2008 – includes guidance on identification and non-criminalisation of trafficking victims. UNODC Global Report on Trafficking in Persons	https://www.unodc.org/e4j/data/university_uni_toolkit_to_combat_trafficking_in_persons.html https://www.unodc.org/unodc/en/data-and-analysis/glotip.html
The OHCHR’s ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’	https://www.ohchr.org/en/trafficking-in-persons
OHCHR Special Rapporteur on trafficking in persons report on the Importance of implementing the Non-Punishment provision: the obligation to protect victims	https://www.ohchr.org/en/special-procedures/sr-trafficking-in-persons/importance-implementing-non-punishment-provision-obligation-protect-victims
ICAT Issue Brief: Non-Punishment of Victims of Trafficking	https://icat.un.org/sites/g/files/tmzbd1461/files/publications/19-10800_icat_issue_brief_8_ebook_final.pdf

NON-PUNISHMENT & EXISTING MECHANISMS IN VICTORIA

Insofar as the Non-Punishment Principle is developing as a stand-alone right, its effectiveness is generally measured as against broader human rights violations.

While there is no domestic implementation of human rights legislation at the federal level, Victoria has committed to operationalising human rights obligations through the *Charter of Human Rights and Responsibilities* (2006) (‘the Victorian Charter’), which at section 11 enshrines the prohibition on slavery, which is modelled on article 8 of the International Covenant on Civil and Political Rights (ICCPR) and is also found at article 4 of the ECHR. Relevantly, a 2023 UK Case Study on *the Non-Punishment of Victims/Survivors of Human Trafficking in Practice* found that the Non-Punishment Principle strengthens human rights protection by preventing secondary victimisation

of trafficked persons.¹³⁴ It found that the Non-Punishment Principle operationalises EU states' positive obligations under Article 4 of the European Convention on Human Rights (ECHR) prohibiting slavery, servitude, and forced or compulsory labour and related rights, even though the status of the Non-Punishment Principle itself (as an autonomous human right to protect those who have lost their autonomy under coercion and exploitation) is still developing.

The UK study found that any failure to apply the Non-Punishment Principle can result in serious breaches of human rights obligations, especially fair trial rights under (Article 6 of the ECHR and section 24 of the *Victorian Charter*), and the prohibition of slavery, servitude, and forced labour (Article 4 of the ECHR and section 11 of the *Victorian Charter*). One focus of the UK study was the decision of the European Court of Human Rights (ECtHR) in the application *VCL and AN v UK* (2021) against the UK which held that prosecuting trafficked minors breached Articles 4 and 6 ECHR linked the Non-Punishment Principle to states' *positive obligations* to identify and protect victims, even though it stopped short of declaring the Non-Punishment Principle itself a freestanding human right.¹³⁵

The study recognised the key challenge is balancing victim protection with law enforcement and immigration control and that implementing the Non-Punishment Principle can ensure that exploitation is recognised in criminal justice as mitigating or eliminating culpability. While the Section 11 *Victorian Charter* rights have not been tested in the Victorian courts, the UK case study and jurisprudence suggests that there is a clear link between implementation of the Non-Punishment Principle and the state's obligations to protect victims of slavery, including recognising when offenders are also victims.

Insofar as the *Victorian Charter* also places obligations on public bodies,¹³⁶ it has potential to drive normative change around understanding the human rights implications of the Non-Punishment Principle. This would help to ensure victims of modern slavery/human trafficking who encounter the criminal justice system are identified and protected, rather than prosecuted and punished. Laws do not just create procedures and offences but also lead to broader recognition of issues affecting specific parts of the community. A topical example of this, though related to corporate reporting, is the *Modern Slavery Act 2018* (Cth) which has brought awareness in Australia around slavery and slavery like practices as fundamental human rights violations, where individuals are deprived of their freedom and safety through coercion, threats, or deception: foundational knowledge from which policy and

¹³⁴ Marija Jovanović and Maayan Niezna, *Non-Punishment of Victims/Survivors of Human Trafficking in Practice: A Case Study of the United Kingdom* (Report, 2023).

¹³⁵ *VCL and AN* (n 106).

¹³⁶ Charter of Human Rights and Responsibilities Act 2006 (Vic).

legislative change can grow.

Existing Federal Policy

At the federal level, there are some existing policies which can drive implementation of the Non-Punishment Principle as it applies to Commonwealth offences. The Department of Foreign Affairs and Trade (DFAT) leads Australia's whole-of-government international engagement to counter human trafficking and other forms of modern slavery, including forced labour and forced marriage. The Australian Government released the National Action Plan to Combat Modern Slavery 2020–2025,¹³⁷ and the International Engagement Strategy on Human Trafficking and Modern Slavery: Delivering in partnership.¹³⁸ In November 2024, the first federal Anti-Slavery Commissioner was appointed. Although his functions are exercised under the *Modern Slavery Act 2018* (Cth).

However, as set out above, Recommendation 22 in the Hidden in Plain Sight Report and Finding 22 in the Targeted Review have not yet led to any statutory protection for survivors of modern slavery/human trafficking who commit crime.

No state in Australia has enacted a modern slavery defence and nationwide policies are not clearly directed to protection of those accused of crimes. That said, Victoria is well placed to implement the Non-Punishment Principle and there are methods by which it can already be effected in the ways the participants in this project suggest.

Public information and media coverage

Public information available on modern slavery/human trafficking in Victoria is low. There is an information page on the Victoria Police website, but it provides very little information and is unlikely to have much reach.¹³⁹ It links to a more detailed AFP web page with some factors to explain modern slavery/human trafficking. Neither mention the Non-Punishment Principle. This should be improved. The public need to understand why people are prosecuted and when they should be protected.

There has been some media coverage around higher profile victim-offender cases, such as in 2015 and 16, when Felicity spoke to media outlets about Mary Jane Veloso's case.¹⁴⁰ However, media reporting and awareness campaigns usually perpetrate

¹³⁷ NAP (n 16).

¹³⁸ DFAT Engagement Strategy (n 19).

¹³⁹ 'Human Trafficking', *Victoria Police* (website) <<https://www.police.vic.gov.au/human-trafficking>>.

¹⁴⁰ 'Mary Jane Veloso: Human trafficking case of Filipina maid spared from Bali Nine firing squad continues', *ABC News* (Online news, 26 April 2016) <<https://www.abc.net.au/news/2016-04-29/legal-case-of-filipina-spared-from-indonesia-execution-continues/7368780>>; Emma Reynolds, 'Saving Mary Jane: Death-row mother's last-minute rescue was thanks to Darwin lawyer', *News.com.au* (Online news, 8 July 2015) <<https://www.news.com.au/lifestyle/real-life/true-stories/saving-mary-jane>>

offender stereotypes and focus on the prosecution of perpetrators. Some public campaigns have also been aimed at reporting human trafficking – such as the AFP and A21 campaign in Melbourne and Sydney airports, encouraged travellers: ‘If you suspect it, report it’.¹⁴¹ The Australian Government also has a portal website at modernslavery.gov.au but it is very much aimed at victims who are willing to contact the police or support services themselves and does not envisage that victims of modern slavery may also be frightened that they will also be prosecuted.

As noted by Raby and Chazal, the narrative of trafficking in Australia is mediated through three distinct subjects: victims, villains, and rescuers.¹⁴² This means that awareness of Non-Punishment Principle must also disrupt the often dichotomous ‘goodies’ and ‘baddies’ notion of criminal justice to ensure that victim-offenders are better understood.

Education and Training

Lack of understanding amongst stakeholders and drivers that keep trafficked women silent means there is an urgent need for education and training to which it is hoped this report can contribute. The *Victorian Police Manual* does not appear to have any guidance for police officers on identifying or addressing victims of modern slavery within the criminal justice system so that should be updated with the same effort for all public bodies, including Corrections Victoria.

Common barriers to the implementation of the Non-Punishment Principle were identified in the IBA/BIICL report to include lack of awareness and lack of trained legal representatives as well as fear of reprisals, and misidentification of victims or procedural bars to identification. Recommendations from IBA/BIICL include enhancing awareness and training on the Non-Punishment Principle, particularly among legal practitioners with only a few respondents reporting mandatory training. This was especially important in relation to prosecutors as prosecutorial discretion was found to play a crucial role in the application of the Non-Punishment Principle, even though there were mixed results across jurisdictions. Education of investigators, prosecutors, defence lawyers and judges is urgent to ensure that identification of victims progresses, decisions are taken not to charge, decisions are taken to discontinue and, where possible there are non-conviction outcomes.

deathrow-mothers-lastminute-rescue-was-thanks-to-darwin-lawyer/news-story/77c48306a13c99b3412499fe7b8042ac>.

¹⁴¹ ‘Australia’s largest airports join forces in the fight against human trafficking’, *Melbourne Airport* (Media Release, 4 November 2024) <<https://www.melbourneairport.com.au/corporate/australia-s-largest-airports-join-forces-in-the-fight-against-human-trafficking>>.

¹⁴² Kyla Raby and Nerida Chazal, ‘The Myth of the ‘Ideal Offender’: Challenging persistent human trafficking stereotypes through emerging Australian cases’(2022) 18 *Anti-Trafficking Review* 13.

Referral mechanism

One mechanism for reporting human trafficking is through the AFP.¹⁴³ Our data shows that survivors of modern slavery/human trafficking in criminal justice are unlikely to report themselves to the AFP. However, there is now an additional (pilot) Referral Pathway (ARP) through the Salvation Army for people to access support if they have experienced modern slavery, it is specifically for victim-survivors who do not wish to engage with law enforcement.¹⁴⁴ Neither mechanism mentions the Non-Punishment Principle.

There is scope for Victoria to create a Referral Mechanism like the UK framework for identifying and referring potential victims of modern slavery/human trafficking and/or coercion ensuring they receive the appropriate support and could assess whether a person is a victim in a process separate from law enforcement investigation.

This mechanism can be improved upon in Victoria because in the UK it is staffed by non-experts and their assessments are not admissible at trial.¹⁴⁵ It makes sense for expert assessments to be at the very outset because that can also provide expert analysis as to necessary support. Victoria can also improve upon this mechanism by providing a process for 'protected confessions' whereby admissions as to criminal conduct in the mechanism are not admissible at trial. This is not a protection in the UK, largely because the NRM is a 'tick box' exercise on trafficking factors.

Prosecution Policy

There is no published guidance from the Office of the Public Prosecutor in Victoria on decisions not to prosecute survivors of modern slavery/human trafficking. This is likely to be because modern slavery/human trafficking is siloed, by virtue of it being a federal offence, and seen as a CDPP problem – which, of itself, reflects the fact that modern slavery/human trafficking is likely to drive exploitation in state offences.¹⁴⁶ In contrast, the UK CPS policy is detailed and public. In addition to the four-stage test set out above, on Non-Punishment Principle, it reads as follows:

The identification of victims of modern slavery during the course of an investigation and prosecution involves compliance with international and domestic law, the importance of which is codified in treaties and legislation and underlined by

¹⁴³ 'Human Trafficking', Australian Federal Police (website) <<http://afp.gov.au/what-we-do/crime-types/human-trafficking>>.

¹⁴⁴ 'Additional Referral Pathway', Salvation Army<<https://www.salvationarmy.org.au/additional-referral-pathway/>>.

¹⁴⁵ See *Breani* (n 108); *AAD and ors* (n 108). The AAD judgment upheld *Breani* confirming that SCA decision makers are not experts but did state that the SCA's decision on conclusive grounds is potentially admissible in appeal matters.

¹⁴⁶ The 2024 UNODC Trafficking Report (n 84) confirms that the conditions driving exploitation thrive in a accountability vacuum.

international and domestic court decisions (...) The CPS and its prosecutors must act compatibly with Article 4 of the European Convention on Human Rights (ECHR) which prohibits slavery and forced labour. Further, Article 26 of the Anti-Trafficking Convention requires the UK (and therefore the CPS) to: ‘... provide for the possibility of not imposing penalties on victims [of trafficking] for their involvement in unlawful activities, to the extent that they have been compelled to do so’, as does Article 3 of the UN Palermo [Trafficking] Protocol.

Guidance on prosecution of perpetrators of modern slavery is well developed in the Judicial College of Victoria Modern Slavery Guide¹⁴⁷ and there have been cases where prosecutions have occurred (see **Annexure 2**). However, preventing women being trafficking in crime and protecting accused women who are exploited to commit crime is not being achieved. **Annexure 3** sets out a series of cases from England and Wales to highlight the approach. It exposes how many cases involve exoneration of survivors of modern slavery / human trafficking, but some do not – reflecting the data in this project which suggests, whatever system is adopted it must be recognised that some women act autonomously but many do not.

Accordingly, Australia is not achieving the purposes it has signed up to in international law in this context and not improving on the UK system as recommended by the Hidden in Plain Sight report. Prosecutorial guidance is vital in this process to ensure that survivors of modern slavery/human trafficking are protected and not prosecuted or punished. This can be by way of not charging, acceding that to prosecute is not only not in the public interest but would bring the criminal justice system into disrepute; or by way of not opposing a pardon (or second appeal where appropriate) for those already wrongly convicted. Insofar as these remedies are not protective, use should be made of the pardon procedure, at least until the abuse of process system develops as it has in England and Wales.

The Court of Appeal of England and Wales has developed the ability for a permanent stay at trial level and to quash convictions on appeal. This has a knock-on effect to prosecutorial decision making. The UK CPS guidance on abuse of process in Victims of Trafficking (VOT) outlines cases to which the section 45 defence does not apply and follows the decision in *ADD*.¹⁴⁸ In *AAD*, Fulford LJ stated that a two-limb abuse of process jurisdiction remains available in principle in all VOT following the enactment of the *Modern Slavery Act* (UK). His Lordship clarified that this was not a ‘special’ jurisdiction in that the core requirements of unfairness, oppression and illegality remain the central elements for applications for a stay (as they are ‘in every two-limb case’).

¹⁴⁷ Judicial College Guide (n 30).

¹⁴⁸ *AAD and ors* (n 108), [142].

In Victoria there is scope to permanent stay proceedings in ‘extreme cases’,¹⁴⁹ where ‘in all the circumstances, the continuation of the proceedings would involve injustice or unfairness’,¹⁵⁰ there is no current precedent in Victoria to stay a prosecution in trafficking cases specifically. Such guidance may give prosecutors confidence in making decisions not to prosecute or not to continue a prosecution or not to oppose an appeal. In any event, it is a window into how Victorian law and policy could develop.

In the meantime, an audit of prisons for those survivors already wrongly convicted would identify those who could be the subject of a pardon.

Procedural protections

Victims as accused persons may be vulnerable and may need support in a police interview, protection by use of suppression orders and pseudonyms and other reporting restrictions, to include closed courts for safety reasons. The CDPP’s witness assistance service is available to victims of modern slavery, but it is unclear if this would apply to accused persons who are also victims. Limited case law suggests that the approach of federal agencies is to treat victims and offenders in binary terms, despite the AFP’s informal recognition of the Non-Punishment Principle.

While dichotomous language, law and policy making is also inherent in the Victorian criminal justice system, in Victoria victims of crime are protected by the *Victims’ Charter*, which aims to treat *all* persons affected by crime with respect, whether or not they report the crime and to prevent secondary victimisation by the criminal justice system.¹⁵¹ This suggests its scope should encompass victim-offenders. The Victims’ Charter also sets out ways that victims should be supported, including mechanisms for privacy, protection from the Accused and financial support. There are also witness support services, such as the Witness Assistance Service which provides support for vulnerable witnesses, such as those in family violence cases and is staffed by social workers. Similarly, those accused of crimes in Victoria, of course have rights stemming from various sources – common law, statute and overarching human rights protections arising from Australia’s international obligations. Accused persons have the benefit of an interpreter if required¹⁵².

A relatively simple way to help victim-accused be heard is to put in place procedural and/or information-sharing measures to allow those accused with crimes to also be treated as victims where there is evidence or self-reporting of their victimisation. This could be as simple as, for example, requiring that prosecution and defence canvas any

¹⁴⁹ *Dupas v The Queen* (2010) 241 CLR 237, 245 [18].

¹⁵⁰ *Walton v Gardiner* (1993) 177 CLR 378, 392.

¹⁵¹ Victims Charter Act 2006 (Vic) ss 4, 6.

¹⁵² Criminal Proceedings Act 2009 (Vic) s 335.

potential victim status during an early case conference (with permission and instructions from the accused), or that the defence is required to fill out a form that has a section relating to potential victim status, such as that in the UK, which asks the defence to disclose whether the accused is a potential victim of modern slavery.¹⁵³ This triggers the CPS to consider whether prosecution should continue or whether defence will be raised under section 45 of the UK *Modern Slavery Act*. Of course, Victorian victim-accused do not have the benefit of raising such a defence, but if flagged the OPP could then decide whether prosecution of a victim-accused is in the public interest, as per their prosecutorial discretion at sections 1 and 2 of the Policy of the Director of Public Prosecutions Victoria, taking into consideration the victim-accused's culpability, background, personal attributes and other factors.

Bail is an ever-vexing issue in Victoria and the decision in *Re Boo* is unhelpful. It would be very helpful if modern slavery/human trafficking could be raised as an exceptional circumstance. This would be more likely to succeed if judicial officers were trained in the Non-Punishment Principle and the need to protect survivors. Plainly laws are necessary to make this clear.

Criminal defences

As is the premise of this project and which has been repeated throughout this report: there no specific modern slavery defence in state or Commonwealth legislation in Australia. Some general defences may be effective at trial for some alleged crimes (duress, necessity and possibly self-defence) but, even if there is judicial understanding human trafficking from a prosecution perspective, there is no mechanism to direct an acquittal nor to stay an indictment (as there is in the UK). This urgently needs to change. The data in this project demonstrates a specific defence is sorely needed and women are being wrongly prosecuted and punished for offences they were forced, compelled and coerced to commit. The data in this project supports the value of a specific defence in that it provides a mechanism for women to speak and be understood when they have been exploited to commit a crime.

Sentencing

Promisingly, Victoria has developed and incorporated a number of principles into its sentencing guidelines and law which are designed to assist vulnerable offenders. In the UK, the 'drug mules' project that inspired this research led to new sentencing guidelines for drug offences, which aimed to reduce the length of sentences and increase proportionality for those exploited to traffic drugs. An evaluation of this report for that these guidelines worked to reduce custodial sentences by taking into account the defendant's roles in the offending. This type of regime could be replicated

¹⁵³ PTPH2 form, enshrined in CPS Guidance, following principles set out in *R v D* [2018] EWCA Crim 2995.

for victim-offenders in Victoria, particularly where modern slavery/human trafficking is a factor in offending. In the meantime, there are other mechanisms available to courts that may be used to reduce sentences for victim-offenders.

Verdins

In Victoria the court ‘must take into account an offender’s impaired mental or intellectual functioning – whether it be the result of illness, injury, disability, or disorder, whether permanent or temporary, mild or severe, newly acquired or longstanding and whether the impairment existed at the time of the offending or at the time of sentencing’.¹⁵⁴ The *Verdins Principles* allow that impaired mental functioning may be relevant to sentencing in several ways.¹⁵⁵

Research shows that around 70% of women in prison have a history of mental health conditions.¹⁵⁶ This statistic is higher for incarcerated Aboriginal and Torres Strait Islander women – around 86%.¹⁵⁷ For women victim-offenders, mental health conditions may be exacerbated by the exploitation, violence and/or trauma that they have experienced and contact with the criminal justice system may also aggravate existing conditions.¹⁵⁸ As noted above, for victim-offenders this trauma and violence is cyclic and the criminal justice system is known to re-traumatise and perpetuate abuse.¹⁵⁹

Where criminal offending is linked to coercive factors, victim-offenders are very likely to be operating under ‘mental impairment’ occurring as a direct result of the coercion. *Verdins* does not rely on ‘diagnosis labels’¹⁶⁰ and therefore factors such as eroded agency and fear could be considered as part of the nexus of mental impairment for sentencing women who have been coerced, compelled or forced into offending. This is particularly relevant to limb 1 of verdins which allows for a reduction in moral culpability if an offender’s mental impairment reduced their ability to exercise judgment, make rational choices, think clearly or appreciate the wrongfulness of their conduct. We argue that women victim-offenders who commit crimes because of coercion or exploitation would almost always be impaired in their ability to think clearly, make rational choices or exercise judgment – the removal of agency and choice are key aspects of coercive control, exploitation and slavery. The seriousness of the offending notwithstanding, with

¹⁵⁴ Judicial College of Victoria Sentencing Manual, [6.2.2.1].

¹⁵⁵ *R v Verdins & Ors* [2007] VSCA 102.

¹⁵⁶ ANROWS (n 73); Victoria Corrections Women’s Policy (n 75).

¹⁵⁷ ANROWS (n 73), 8.

¹⁵⁸ Victoria Corrections Women’s Policy (n 75).

¹⁵⁹ ANROWS (n 73); Victoria Corrections Women’s Policy (n 75).

¹⁶⁰ Verdins (n 154) [8].

expert evidence as to the causal link between the coercion and the offending, these circumstances would surely make an offender ‘less blameworthy’?¹⁶¹

Bugmy

The Bugmy Principles are likewise able to be applied as sentencing considerations, and provide that a court should take into account an offenders’ background of disadvantage in relation to moral culpability and deterrence.

Unlike Verdins there does not have to be a direct causal link to the offending – as *Bugmy* recognises that trauma and disadvantage is ‘complex, multilayered [and] non-linear’.¹⁶² This may be particularly relevant to women who are implicated in human and sex trafficking offences, as research shows that even where women offenders are not ‘victims’ of trafficking themselves, they are often from backgrounds of poverty and under familial financial burden.¹⁶³

Non-conviction outcomes

A non-conviction outcome for those survivors of modern slavery / human trafficking who are prosecuted is available pursuant to section 8 of *the Sentencing Act 1991* (Vic). It appears to be available for all crimes although conflicts with mandatory sentencing in some relevant offences. This is a particular problem for survivors of modern slavery / human trafficking who have been forced, compelled, coerced, deceived or otherwise exploited to be involved in serious offending.

We note that this is currently a problem even in jurisdictions where a modern slavery defence is available, for example: Schedule 4 of the UK *Modern Slavery Act* excludes some of these crimes from protection. That could be improved upon in Victoria by recognising a broader range of offending that can lead to non-punishment. Notably in England and Wales there is no non-conviction sentencing outcome system, so the Victorian sentencing regime is already more progressive in this way.¹⁶⁴

¹⁶¹ DPP (Vic) v Patterson [2009] VSCA 222.

¹⁶² Sophie Parsons and Lauren Roycroft, ‘Bugmy 10 years on: Principles and practice’, Law Institute of Victoria (article, 2024) < <https://bugmybarbook.org.au/wp-content/uploads/2024/03/Feature-Article-Law-Institute-of-Victoria-Bugmy-10-years-on-principles-and-practice.pdf>>, 32; *DPPv Herrmann* (2021) VSCA 160, at [45]–[46].

¹⁶³ Baxter and Chazal (n 96).

¹⁶⁴ This was recently recommended in the context of removing the defence of reasonable chastisement of children, see: Elizabeth Fussey et al, ‘Equal protection from assault in England and Northern Ireland: The health, education and legal case for legislative change to remove the ‘reasonable punishment’ defence and to prohibit all physical punishment of children’, *Royal College of Paediatrics and Child Health* (Policy Report, April 2024).

XI. CONCLUSION

This research revealed that there is poor stakeholder understanding about people being exploited and coerced into offending, as victim-offenders of modern slavery/human trafficking, and more broadly. There is no systemic realisation of the Non-Punishment Principle and little attempt to locate victims. Women caught in the criminal justice system are understandably distrustful and afraid to speak – *they* are fully cognisant of the low level of understanding from their lived-experience. Furthermore, there is a real need to collect both qualitative and quantitative data from a non-punishment perspective.

In conclusion, the data in this project demonstrates that women who are coerced, compelled or forced to commit crimes are silenced and punished in criminal justice. They are not protected.

This is contrary to Australia's commitments to protection of such victims and inconsistent with its expressed global and regional cooperation. Our data identifies a clear need to protect women who are coerced to commit crime, to empower them to speak about their experiences, and to provide legal pathways to exoneration (and release from incarceration) that recognise they carry no culpability for crimes they have been exploited to commit.

Global commitments to the implementation of the Non-Punishment Principle must be honoured. Recommendation 22 in the *Hidden in Plain Sight* report and Finding 22 of the *Targeted Review* need to be acted upon. This project provides the necessary data to support systemic changes required to implement the Non-Punishment Principle in law and policy. As the 2024 UNODC Trafficking Report states, effectively addressing trafficking requires a 'unity of purpose, clarity of commitment, shared responsibility, and a rights-based, gender-responsive and age-sensitive approach. This means coordinated efforts in prevention, investigation and prosecution, alongside victims' identification, support and protection.'¹⁶⁵

Of course, Victoria can only legislate for defences to state offences, but this report suggests that plenty of coerced or forced offenders are accused or convicted of crimes not captured by the *Criminal Code (Cth)*. It would provide these vulnerable people with a defence and a pathway to support rather than incarceration.

Most urgently, the findings set out in **Section VIII** above demonstrate a need for 're-education' and training of all stakeholders to ensure survivors are identified and protected through existing mechanisms, alongside advocacy for improved systems. Suggestions have been made in the recommendations **Section II** of this report. The fact

¹⁶⁵ 2024 UNODC Trafficking Report (n 84).

that women are silenced by state failures to recognise their relevant exploitation, when they suffer the sorts of harm identified in this report, is shameful and ought to drive systemic reform.

ANNEXURE 1

WORKSHOP SLIDES

The graphic consists of two slides. The top slide is dark grey with a teal line and a pink circle. The bottom slide is dark grey with a pink circle and a teal circle. Both slides feature the Deakin University logo.

Welcome

This study has received Deakin University ethics approval (reference number: 2023-282).
It is funded by the Victorian Legal Services Board.

Deakin University CHRCOS Provider Code: 001138

Introductions

Researchers:

The Chief Investigator is Dr Felicity Gerry from Deakin Law School.

Attendees?

Project Purpose

To understand how forced, compelled or coerced offending may present generally in women's criminal justice experiences.



Deakin University CRICOS Provider Code: 00113B

Project Objectives



1. Increasing publicly available knowledge of the lived experience of women who find themselves in the Victorian criminal justice system;
2. Increasing stakeholder familiarity with relevant lived experiences of women within the Victorian criminal justice system; and
3. Increasing the cross-sector collaboration of survivors, researchers, policymakers, support professionals, and legal practice stakeholders.

About this Workshop

Our research seeks to understand issues for women who may have experienced force, compulsion or coercion connected to their interactions with criminal justice.

These workshops do not seek to ask participants about their own experiences but to consult on the level of understanding of forced, compelled or coerced offending amongst lawyers and other professionals in criminal justice.



Deakin University CRICOS Provider Code: 00113B

Workshop Structure



- Introduction
- Discussion

Things to consider



- **Confidentiality:** Please do not share anything discussed during the workshop with anyone outside of the workshop
- **Personal circumstances:** Please carefully consider whether you would like to mention your personal circumstances before doing so
- **Support:** Discussion topics might cause discomfort or distress. Section 11 of your Plain Language Statement has the details of supports you can access.

Definitions



For these workshops it is not necessary to have any personal knowledge regarding legal definitions of forced, compelled or coerced offending

We break the definition for these workshops down into three things:

- **The acts of others that may cause or compel or coerce women to commit crime**
- **The methods or means used to cause or compel or coerce women to commit crime**
- **The reasons women may be caused or compelled or coerced to commit crime**

For these workshops it is not necessary to discuss any personal experiences

We are using these workshops to examine the criminal justice system in three ways

RESEARCH: To understand the extent to which lawyers, judges and other professionals know about these acts, means and purposes

SUPPORT: To understand what support women might need in order to speak to their lawyers about their circumstances

PREVENT: To develop resources to increase the knowledge of stakeholders and women in Victoria of these types of drivers on women

What is the concern?

Discussion Topics

- (a) Do you believe that these issues are understood by social workers, lawyers, prosecutors or judges? Why/why not?*
- (b) Do you believe that these issues are understood by women who come into contact with the criminal justice system? Why/why not?*
- (c) Do you believe that women talk about these issues with their lawyers? If not, why not?*

Deakin University CRICOS Provider Code: 00113B



**Summary of
discussions and any
further reflections**

Deakin University CRICOS Provider Code: 00113B



ANNEXURE 2

TABLE OF HUMAN TRAFFICKING & MODERN SLAVERY CASES: AUSTRALIA (2005 – 2025)

In reverse chronological order (most recent first).

Citation	Offence	Sex	Victim/ Offender?	Key Facts/issues
DPP v Miller (a pseudonym) [2025] VSC 164	Criminal Code (Cth) ss 270.5 and 270.8 (aggravated servitude) + common assault and drug possession	M	No	- Sentencing remarks on guilty plea. The victim of the assault and servitude charges was the Offender's wife, 'MK'. The element of aggravation applied to the servitude charge (per s 270.8) is on the basis that Miller subjected MK to cruel, inhuman or degrading treatment. This is the first case relating to servitude under ss 270.5 and 270.8 of the Criminal Code to be prosecuted and heard in an Australian court. - Consideration of De Simoni principles and double punishment - Verdins considered, limited weight given to limb 5.
DPP (Cth) v Falco (a pseudonym) [2024] VSCA 247	Criminal Code (Cth), s 271.2(1A) (organising and facilitating the exit of another person from Australia by deception)	M	No	- Charges relate to exit trafficking of defendant's wife who was returned to Indonesia under false pretences. - Contains discussion of meanings of 'deception', 'coercion' and 'trafficking in people'. - Appeal by DPP on trial judgment on grounds that the judge erred in finding that s 271.2(1A)(b) requires proof that the deception must involve a risk of exploitation of the person deceived and requires proof that the deception is a means of trafficking of the person deceived; and requires proof of a person's participation in the 'chain of exploitation' of another person. Appeal allowed on grounds that trial judge erred in holding that deception must involve a risk of exploitation. - Appeal court found: 'the clear language employed in s 271.2(1A)(b) does not require a nexus to a risk of exploitation. 'Deception' in s 271.2(1A) must take its meaning from s 271.1, which says nothing of exploitation, and, notably, is not linked to the definition of 'exploitation' in s 271.1A' [at 34].

				It also notes that where Parliament has sought to confine or limit the subject-matter and content of ‘deception’ under Division 271 it does so in clear terms [at 36].
R v AR [2024] NSWDC 307	Criminal Code (Cth) s 271.2(1A) (exit trafficking)	M	N	- The offender and victim were a married couple, the victim was in Australia on a partner visa. The offender deceived the victim into travelling to Afghanistan under false pretences and abandoned her there. The offender obtained a fake itinerary for a return flight for her and when he returned to Australia without the victim he withdrew his sponsorship of her partner visa. The victim managed to return to Australia with financial assistance from her family and reported the offender to police on her return. - The sentencing decision noted the level of premeditation, the seriousness of the offence, including the fact that he treated his wife/the victim like ‘expendable chattel’ and highlighted her vulnerability, the lack of contrition displayed by the offender.
Shergill v Singh (No 2) [2024] FCA 261	Fair Work Act (Cth) ss 323, 536, 44(1) and 45			- The applicant, Ms Shergill, was ‘a member of a proportion of Australian workers who are invisible from Australian society: Their work and entire existence is entrapped within domestic servitude.’ [1] (per Raper J) - Ms Shergill was a domestic worker in the house of Mr Singh, who was then the Indian High Commissioner to Australia. Her working conditions included having her passport taken from her, working seven days a week with no leave and only being allowed outside the house for brief periods. Ms Shergill was employed personally by Mr Singh, rather than the Indian High Commission. - Mr Singh was ordered to pay a pecuniary penalty to the applicant, in addition to the civil penalty originally ordered in the liability judgment due to non-payment.
CDPP v Farshchi [2024] VCC 24	Criminal Code (Cth) s 270.6 (forced labour)	M	No	- Accused found guilty by a jury of two charges. - The Accused had a confectionary business for which the victim performed labour. Accused made threats against the victim that meant that he remained in a condition of forced labour for a substantial period of time. - Mental health considerations not rising to the level engaging Verdins.

DPP (Cth) v Omer [2024] VCC 1810	Criminal Code (Cth) s 271.2(1A) (exit trafficking)	M	No	• First conviction for exit trafficking in Australia. • Mr Omer was convicted in respect of conduct committed against his then wife, who he deceived into leaving Australia believing they were going on holiday to visit her family in Sudan. • Mr Omer then had tickets re-issued and returned to Australia alone with his children. The sentencing judgment notes that this occurred within a context of coercive control, isolation, forced labour, financial abuse and violence perpetrated by Mr Omer. • In addressing the seriousness of the offending, the court took into account that Mr Omer had deprived their very young children of their mother's care, the youngest being 7 months old and still breastfeeding when they left Sudan without Ms Belmont. • Limited consideration of Verdins
Kannan v R [2023] VSCA 58; BC202302010 [2023] VCC 1165 DPP (Cth) v Kannan & Anor [2021] VSC 439 (21 July 2021)	Criminal Code Act (Cth) Div 270 (intentionally possessing a slave)	M, F	No, but trauma background	• Application to extend time to file leave to appeal, married couple convicted of possessing a slave. These charges related to their treatment of Rajalakshmi Natarajan between 2007 and 2015, who lived in their home after her tourist visa expired. • See also: DPP v Kannan [2023] VCC 1165 – in which Kumuthini Kannan pleaded guilty to one charge of attempting to pervert the course of justice under the Crimes Act (Cth) regarding conduct in which she pretended to be an interpreter and spoke on the phone to the victim in the above case and tried to influence her into not giving evidence in court.
KQDV and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2022] AATA 210	S 501(3A) of the Migration Act	F	Yes	• The Applicant had her visa cancelled on the basis that she does not pass the “character test” due to her “substantial criminal record” (defined under s 501(7) of the Migration Act, as having been sentenced to a term of imprisonment for 12 months or more). • The Applicant stated that her offending was related to mental health issues as a result of being trafficked and subjected to sexual servitude in Australia. • The Applicant assisted the AFP to investigate and prosecute the people who enslaved her which has put her at personal risk if she returned to Malaysia. The Applicant was also the victim of family violence. Evidence that she developed a drug habit as a coping mechanism while being subjected to sexual servitude, which escalated due to the stress of the AFP

				investigation and prosecution. She had been convicted of drug offences (possession and supply) and was sentenced to 16 months imprisonment. - Evidence was given to the tribunal by the Trafficking and Slavery Safe house and a forensic psychologist who diagnosed her as suffered from PTSD. The Tribunal would not accept that the Applicant was at risk of harm or re-trafficking if she was returned to Malaysia, despite the fact that she was granted a Witness Protection (Trafficking) Permanent Visa. - However, the tribunal revoked the cancellation of her visa based on her 'significant contribution' to Australia by testifying against her traffickers.
DPP v Shaik [2020] VCC 909 Fair Work Ombudsman v Shaik [2016] FCCA 2345	Criminal Code (Cth) s 270.6 (forced labour)	M	No	Sentencing judgment. Restaurant owner who employed a couple in Australia on bridging visas and then refused to pay one of them and threatened them when they requested payment. The victims also lodged a complaint with the Fair Work Ombudsman. The Accused pleaded guilty, and the sentence was mitigated by the plea, good character and the lesser gravity of the offending
R v Grey (No 3) [2020] ACTSC 43	Criminal Code (Cth) s 271.7 (trafficking in children) and Crimes Act 1900 (ACT) ss 54, 60 (sexual intercourse without consent + act of indecency without consent)	M	No	- Grey was found guilty by a jury for a crime under the Criminal Code of trafficking in children after coercing one of the complainants into with him around Australia for the purposes of sex work, with his partner 'X'. - He was also found guilty of crimes under the ACT Crimes Act for offences against 7 other complainants, including one woman from South Africa, whom he had sexually assaulted under the guise of 'training' for sex work roles. - The crimes under the ACT Act also had elements of trafficking type conduct, even though they were not ultimately charged under those provisions.
R v Kanbut [2019] NSWDC 931	Criminal Code (Cth) Div 270 (slavery)	F	No, but background of poverty	- The offences relate to conduct by the Accused in respect of women recruited in Thailand to come to Australia as sex workers, who were coerced, and placed under debt-bondage and other threatening conditions. - Kanbut was not actively involved in the recruitment but organised their transport to and from the brothel.

1906027 (Refugee) [2019] AATA 6729	Migration Act	M	Yes (not offender but at risk of offending)	• Decision from the Migration & Refugee Division of AAT – Review of a refusal to grant a protection visa under s 65 of the Migration Act 1958. The Applicant, a citizen of Vietnam, was denied a visa on the basis they are not a refugee on grounds that there was no real risk he would suffer harm if removed to Vietnam. • The Applicant was trafficked from Vietnamese orphan as unaccompanied minor in April 2013. He was placed in community detention but absconded in 2014, due to fear of being pushed into working on an illegal marijuana farm by his traffickers. He was located and detained in 2018. • He applied for a subclass 790 visa in October 2018 and was denied. • This decision contains an extensive discussion and analysis of the applicant’s status as a potential victim of trafficking, including submissions on Australia’s obligations under international law, including the UNHCR Guidelines on the Application of Refugee Law to Victims of Trafficking and Persons at Risk of Trafficking. There is also discussion of the difference between someone in a situation of people smuggling and someone, such as the applicant, who has been trafficked by opportunistic traffickers who had sought out the applicant in an orphanage. The decision also examines the specific risks and vulnerabilities of trafficking victims, and the risks of re-trafficking and reprisals for returned victims. • The Tribunal found he was not a refugee under the meaning in s 5H of the Act but did find that he is a someone in respect of whom Australia has protection obligations under s 36(2)(aa) of the Migration Act by virtue of his risk of being re-trafficked if returned to Vietnam. • See also: ○ 1823742 (Refugee) [2023] AATA 2268 in which the AAT remitted a visa decision on the basis that the applicant is at risk of persecution and human trafficking due to her membership of a particular social group of women and ethnicity. ○ 1100482 [2011] RRTA 794 in which the ART remitted a visa decision of two connected applicants for reconsideration on the basis that the first applicant satisfied s 36(2)(a) of the Migration Act with reference to their trafficked status and the second as a member of the first applicant’s family unit.
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N04/07711 [2005] MRTA 660 (CF with above)	Migration Act	F	Unknown but highly likely	• A review of a visa cancellation. The Applicant's visa was cancelled after she was located apparently working as a receptionist at a Sydney brothel in breach of her visa conditions (no work). • It appears her detention and subsequent visa cancellation was as a result of a 'sting' by a migration officer posing as a customer to the brothel. The Applicant's boyfriend, Mr Noblett, was allegedly the owner of the business, leasing from a "Mr Chen". The Applicant claimed that a false address (Balfour St, Allawah) was provided by Mr Noblett for her to write on her inbound immigration card when she arrived in Australia for various trips. • The MRT raised the possibility that another woman found and detained on the same premises at the same time was a victim of trafficking. • The MRT did not discuss or consider whether the Applicant herself may be a victim of trafficking, despite evidence that this could be a factor in her breach of visa conditions, her involvement in the sex industry and her inconsistent evidence which seems to have been directed by Mr Noblett, and the fact that she used a false address known to be used by other trafficking victims.
The Queen v Lay Foon KHOO [2017]	Unknown	F	Yes + extremely abusive/underprivileged background, domestic violence	• Khoo was a victim-offender who was recruited in Malaysia to come to Australia to earn money as a sex worker – she came to Australia and was subject to debt bondage and had her passport taken from her (the sentencing judge apparently highlighted the good conditions she had such as accommodation, clothing and hygiene products). • Khoo allegedly recruited other women to come to Australia to work in the same brothel. • The sentencing judge did not take into account the fact that Khoo was vulnerable and may have been under pressure from the brothel owner to recruit other women.
R v Pulini (Malavine); R v Pulini (Isikeli Feleatoua) [2019] QCA 258; BC201910395	Criminal Code (Cth) (s 271.2(2); s 270.1A(1)) and the Migration Act (Cth) (s 233(2) and s 233E(3))	F, M	No	• Appeal against conviction by Malavine Pulini and her husband Isikeli Pulini on various grounds. • The convictions related to the complainant, Ms RM, a Fijian who worked for the Pulini's in a domestic capacity without a passport or a visa for well below acceptable remuneration. • The appellants pleaded guilty on counts regarding harbouring an unlawful non-citizen. A jury found Mrs Pulini guilty on other counts applicable to her only, and Mr Pulini was found guilty of causing a person to enter into or remain in forced labour and was acquitted on trafficking in persons.

DPP (Cth) v Huang & Another, Unreported (QLDDC, 8 February 2017)	Unknown (servitude)	M, M	Unknown	Two Accused pleaded guilty to causing a person to enter into or remain in servitude. They ran scam call centres in Brisbane recruiting Taiwanese nationals to work for no pay 15 hours a day, 7 days a week. The workers were subject to rules around eating, showering and sleeping and lived together in two locations.
DPP v Olarte [2017] VCC 1654	Attempted rape	M	Yes, likely, + impoverished background and illiteracy/low functional capacity	- Sentencing remarks on a conviction for attempted rape, included as there is some indication that the male offender, Anton Olarte, is a victim of human trafficking. - Mr Olarte was brought to Australia by Dido Bohol, a boxing trainer who has been investigated for recruiting Filipino boxers and treating them as slaves. - Mr Olarte had an impoverished up bringing in the Philippines, and the judgment notes that he was only educated until grade 3, has limited functional capacity and was very reliant on his wife. - Verdins considered but not enlivened
DPP v Kim & Ors [2015] VCC 1849	Sex Work Act 1994 (Vic) (repealed) s 10, Criminal Code (Cth) s 400.5(1) (money laundering)	F, F, M, M	Not confirmed but highly possible on facts	- Not charged under HT/slavery offences but has many features seen in those cases. - The Accused participated in recruiting women from SE Asia to work in the sex industry in Victoria promising good pay and conditions. The Accused would receive a percentage of money paid to the sex workers and directed visa applicants to lie on their visa applications. - The workers were also indebted to the Accused, placing them in increased vulnerability. The venues and employees of the scheme were not licenced under the Sex Work Act and were therefore operating illegally. - Two of the accused are sisters who came to Australia on holiday visas and worked in the sex industry. Mae Ja Kim's former husband, Huan Ye is a co-accused.
<i>Doe v Howard</i> [2015] VSC 75	Civil Procedure Act 2010 (Vic) ss 61 and 63, enforcement of foreign judgment	F	No, and highly privileged offender (US Diplomat)	- The respondents, Linda and Russell Howard, were found civilly liable for their conduct against two women, which amounted to slavery and sex trafficking in the US. The Howards forced two Ethiopian women into sexual slavery in their home while Linda was posted as a US diplomat in Yemen. - The Howards fled to Australia and one of the women, known as Jane Doe, sought to have the judgment entered against the Linda Howard in the VSC, after discovering that she was living in Melbourne with her second husband (Russell Howard now being deceased). The order was granted.

				Linda Russell had her Australian visa revoked as a result: <i>Howard v Minister for Immigration & Border Protection</i> [2017] FCCA 2916
Nantahkum v R [2013] ACTCA 40 (25 October 2013)	Criminal Code (Cth) ss 270.1, 270.3 (intentionally possessing a slave)	F	Yes	- The charges are in respect to the treatment of SK and YO, Thai women who were trafficked from Thailand to Australia to work in the sex industry. - SK had her passport removed and was not free to leave the apartment she was brought to on her arrival. She was made to work 6 or 7 days a week and was subject to debt bondage. It is unclear whether YO was subject to similar conditions. - When their debts were repaid SK & YO eventually established a sex work business together until they were taken into custody by immigration officers. - Information about Nantahkum's own experiences in the sex industry were redacted from the appeal judgment "for legal reasons" but it states that "Conditions there as she described them were severe"
R v KAK [2013] QCA 310	Criminal Code (Cth), ss 271.2(2B) and s 271.4(1)	F	Unknown, but possible on facts	- Appeal on sentence after guilty pleas in relation to conduct against the appellant's daughter. - The Appellant is a Thai national who moved to Australia with her Australian husband and started a massage business. At that time her daughter was living in Thailand with her maternal grandparents. - When her daughter was brought to Australia, at age 9, the appellant had her massage clients and eventually provide sexual services. This was encapsulated by the prosecution as the "provision of prostitution by [the applicant] by procuring her daughter to engage in prostitution".
R v Chee Mei Wong (2013) NSW District Court	Criminal Code (Cth) s 270.6 (2) (forced labour), 245AC(2) Migration Act	F	Unknown, but possible on facts	- Ms Wong was the manager of two brothels who coordinated with agents in Malaysia to bring the complainants to Australia under false pretences of education opportunities. The victims all came to Australia on student visas. - The victims knew they were to work in brothels but they did not know the conditions under which they would work.

				During sentencing the judge took into account the physical and emotional harm of the victims and noted their distress at being involved in the trial process but expressed that this could not be taken into account in sentencing.
1105325 [2012] RRTA 272	Migration Act	F	Yes	- Review of protection visa refusal (affirmed). Applicant was trafficked to Australia to work in the sex industry, and subjected to debt bondage. - She was granted a bridging visa on the basis that she was possibly a trafficked person, until the AFP decided she was no longer a trafficked person. - The tribunal decided she was not a victim of trafficking because she knew she was coming to Australia to work in the sex industry and that she had done so in two other countries. - The Tribunal did not find that the Applicant had a well founded fear of persecution and affirmed the decision not to grant her a protection visa.
R v Divye Kumar Trivedi, Unreported (NSWDC, 8 May 2012) Ram v D&D Indian Fine Food Pty Ltd & Anor [2015] FCCA 389	Criminal Code(Cth), s.271.2; Workplace Relations Act; Fair Work Act	M	No	- Civil and criminal proceedings arising from the treatment of Mr Ram after he was brought to Australia to work in an Indian restaurant, organised by the defendant, Mr Trivedi. - Mr Ram was subject to debt bondage, financial exploitation and was forced to work 7 days a week 12 hours a day as a cook and was vastly underpaid. - Despite the fact that the respondent had pleaded guilty in the criminal proceeding for trafficking under s 271.1(1B) of the Criminal Code, he claimed the plaintiff had not be exploited and brought a cross claim which the judge rejected. - Plaintiff's evidence of underpayment was accepted
Ho v R; Leech v R (2011) 219 A Crim R 74 Appealed from [2009] VSC 437 (Cummins J)	Criminal Code (Cth) s 270.3 (intentionally possessing a slave); Financial Transactions Reports Act 1998 (Cth) s 31(1)	M, M, F	Yes (Sarisa Leech)	- Applications on leave to appeal convictions and sentences. - Slavery offences in relation to a woman called 'KW' who was brought to Melbourne from Thailand by the Defendants to work in brothels. - Ms Leech was herself previously sex trafficked to Australia and subject to debt bondage. - Very limited consideration given to Ms Leech as a victim of sex trafficking. - In VSC 437 the sentencing judge noted that he was impressed by the women who gave evidence, opining that "complainant" and "prosecutrix" to be incorrect, as complainant has overtones of blaming the subject and prosecutrix is misconceived as it is the State which

[2009] VSC 495 (Lasry J)				brings the proceedings. “More fundamentally, the terms are gender biased” as they are usually used in relation to women and in sexual assault or rape cases.
R v Dobie [2011] 1 Qd R 367; (2009) 236 FLR 455; [2009] QCA 394; BC200911435	Criminal Code (Cth): s 271.2B (trafficking in persons); s 400.6(1) dealing in the proceeds of crime + Migration Act 1958 ss 11.2(1) + 234(1)(a) presenting a false document to an immigration official	M	No	• Application for extension of time to file for leave to appeal. • The convictions are in respect of sex trafficking of two women from Thailand who were forced into providing sexual services outside what they had agreed to do. The defendant had deceived the women in order to get them to come to Australia, telling them they could work as much or little as they liked. However, when they arrived they were forced to work whenever a client called and were subject to abuse and debt bondage. • Discussion on the meaning of “cease” in s 271.2(2B)(c)(iii)
R v Netthip 2010 NSWDC 159	s. 270.6(2) Criminal Code (Cth) (sexual servitude)	F	No, but background of poverty and former sex worker	• Ms Netthip ran a business placing Thai women into work in brothels across Australia. • The women were recruited in Thailand by a local recruiter who organised travel, passports/visas and the women agreed to pay back debt of \$53,000 and work in the sex industry to pay off that debt. Ms Netthip was responsible for looking after the women when they arrived in Australia and their placement into brothels. It took approx. 6 months for each of the women to pay back their debts. • Unlike other similar cases, Ms Netthip would attempt to resolve issues arising for the women and that they were allowed more freedom than in other cases. • Ms Netthip coached the women to give false answers in applying for protection visas in order to claim refugee status. • Brief discussion of the difference between the offence of debt bondage and sexual servitude [11]-[16]. Counsel for Ms Netthip argued for debt bondage on the facts, which is a summary offence with a max 12 month term of imprisonment. (See also <i>Sieders</i>).

McIvor v R; Tanuchit v R (2009) 247 FLR 363; [2009] NSWCCA 264; BC200909765 R v McIvor & Tanuchit [2010] NSWDC 310	Criminal Code (Cth) s 270.3(1) (possessing a slave and exercising power of ownership over a slave)	F, M	Yes (Ms Tanuchit was subject to control by her husband/co-accused and had a similar background to victims)	• Appeal on conviction after Tang – appeal allowed, new trial ordered but appellants found guilty on retrial. • Convictions were in relation to five Thai women who had been employed in a brothel owned by Mr McIvor and which was co-managed by Ms Tanuchit. The women were subject to sexual servitude and debt bondage and had been trafficked from Thailand to Australia. The women also had their passports taken, were forced to work lengthy hours and were not allowed to leave the venue unless accompanied. One of the victim's eventually managed to raise the alarm with the Thai consulate which resulted in a raid by AFP and Immigration. • That Ms Tanuchit was a victim/offender did not appear to mitigate sentence.
The Queen v Tang [2008] HCA 39 R v Wei Tang [2009] VSCA 182 R v Tang [2006] VCC 637	Criminal Code (Cth) s 270.3(1)(a) (possessing a slave)	F	No, though co-accused was, see: R v DS (2005)	• The charges arose from Ms Tang's ownership of a licensed brothel in Fitzroy, in respect of five women who were sex trafficked from Thailand to Australia. The women were subjected to debt bondage, their passports confiscated and effectively confined to the premises – though not kept under lock and key and generally well provided for, with food, accommodation and medical requirements. • Ms Tang appealed against conviction in 2007 and the convictions were quashed and a retrial was ordered. • The CDPP appealed this decision to the High Court. The High Court upheld the appeal, set aside the orders to quash and retrial and ordered that the appeal by Tang be dismissed and resentencing to be remitted to the VSCA. • HCA expanded meaning of 'Slavery' accepted by the High Court that helps to reinforce the view that there are cases of trafficking that involve subtle forms of coercive control that prevent a victim from seeking help or leaving.
R v Kovacs [2009] 2 Qd R 51; (2008) 192 A Crim R 345; [2008] QCA 417;	Criminal Code (Cth) s 270.3(1)(a). (slavery)	M, F	No	• A complex case of domestic servitude, in which the victim was recruited by Mr and Mrs Kovacs to marry Mr Kovacs' friend and then come to Australia to work for the family. • The victim was subject to domestic slavery in their home and store. It was also alleged that she was raped repeatedly by Mr Kovacs.
SIEDERS, Johan v R; SOMSRI.	Criminal Code (Cth) s s 270.6(2) (sexual servitude)	M, F	No, but Yotchomchin has a	• Appeal against conviction and sentence (both dismissed). • The Accused were husband and wife who owned and managed four brothels between them. The charges are in respect to five women who worked at the brothels, having arrived

Yotchomchin v R [2008] NSWCCA 187 R v Johan Sieders and Somsri Yotchomchin [2006] NSWDC 184 R v Johan Sieders and Somsri Yotchomchin [2007] NSWDC 101			background of poverty, sexual abuse and was also a sex worker up to her charge for these offences.	in Australia on tourist visas from Thailand and were then subject to debt bondage. All of the women, except one, had to give up their passport and return ticket. The women were also to apply for protection visas on fictional grounds. • Appeal judge took a broad approach to the definition of “threat” under s 270.6. • AFP helped key witnesses apply for visas (which was highlighted by defence counsel with the implication that the witnesses testimony had been “bought”). • Defence counsel tendered a psychologists report stating that Yotchomchin was suffering from an extreme stress disorder due to a rape and consequent pregnancy/child birth but the court dismissed any causal effect with her offending.
Commonwealth DPP v Xu [2005] NSWSC 191	Criminal Code (Cth) s 270.6(1) (sexual servitude), s 270.2(1) (possess a slave); Crimes Act 1900 (NSW) s 86 (2)(a) (kidnapping with the intention to obtain advantage in the company of another person)	F	Unknown	• Charges brought against two Sydney brothel owners and a manager, in respect of conduct against Ms K, a woman who was trafficked from Thailand under the pretext of being given waitressing work in Australia. • Ms K testified that she was forced into sexual servitude, her passport taken and that she was subject to debt bondage. She also provided evidence that she was then sold to another brothel owner and it was at these premises where she was able to access a phone and call police.

ANNEXURE 3

LIST OF CASES, UNITED KINGDOM (2023 – 2025)

1. Modern Slavery Act 2015 s 45 Defence for slavery or trafficking victims who commit an offence

Citation	Key Facts/issues
<i>R v AEU</i> [2024] EWCA Crim 1653	• Leave to appeal conviction for supply of cannabis, per s 45 <i>Modern Slavery Act</i> defence. The Appellant argued that he was not adequately informed by his defence counsel about the s 45 defence and unsafe conviction due to CPS errors and failure to recognise him as a victim of slavery. • A co-defendant in his case was granted leave to appeal and had his conviction quashed. • The CPS has been informed that a decision on AEU's status as a victim of modern slavery would not be available before the trial. CPS went ahead on basis of evidence against AEU's s 45 defense. Post-conviction a conclusive grounds decision was made in favour of AEU's status as a victim of modern slavery – notwithstanding inconsistencies in his account. • Despite procedural errors, appeal court found the CPS's decision to proceed with prosecution did not rise to injustice, as CPS evidence negated a s 45 defence. • The appeal was dismissed but the court quashed the original sentence and substituted w/ reduced sentence – however the appellant had already served his custodial sentence and was free, so it had negligible material effect on him.
<i>FGH v R</i> [2024] EWCA Crim 1353	• Question of abuse of process re: trafficking victim and intellectual disability • Appeal on conviction of possessing a firearm with intent to endanger life. • Appeal was based on three grounds: that his intellectual disability and status as a victim of human trafficking nullified his criminal conduct (abuse of process); that he should have been provided a defence intermediary for his trial, and that the jury was given flawed directions on duress. • Appeal court dismissed all three grounds, holding that the applicant's vulnerability and past exploitation was adequately considered at trial, that there was no intermediary did not produce an unfair trial, and that the judge's summary to the jury nullified any initial omissions regarding psychiatric evidence.
<i>R v Goodwin</i> [2024] EWCA Crim 1383	• Failure to disclose jury communications to counsel • The appellant had been convicted of supplying a controlled class A drug in a 'county lines' operation. • s 45 Modern Slavery defence was raised at trial, as the appellant was a victim of modern slavery, compelled to become involved in supplying drugs under duress.

	• Appeal centred unsafe conviction due to pressure felt by jury to reach a verdict based on the fact that the trial judge received notes from the jury that they would have difficulty if the trial went into the following week, of which counsel had not been informed, and the judge did not respond to the jury or let them know they would not have to return if a verdict was not reached. • The appeal court stated that there was no evidence that the jury was put under improper pressure to reach their verdict but that the court's lack of response to their note may have caused a juror or jurors to vote with the majority in order to bring the trial to a close on that day. On the latter basis the court concluded that the conviction was unsafe, granted leave to appeal and the appeal, and quashed the conviction. • The court declined to make an order for a re-trial, as the appellant had served his custodial sentence.
<i>R v BNN</i> [2024] EWCA Crim 991	• Appeal on Crown's decision to prosecute a victim of trafficking and modern slavery for a drugs offence on grounds it was an abuse of process. • Appellant was found to be a victim of trafficking and forced criminality but his claim for asylum had been denied. • The offences occurred after the Appellant had exhausted all his asylum appeal rights. • Appeal court stated that for the defence under s 45 to apply, the offending had to be a direct consequence of trafficking or slavery, and there had to be no realistic alternative but to comply and commit the offence. • Appeal court dismissed the application, finding evidence of slavery not determinative due to evidence of food, a clean toilet and keys to the house where the Appellant lived.
<i>R v AAB</i> [2024] EWCA Crim 880	• Appeal court found that a conviction for drug production was unsafe due to evidence that the offender was compelled to commit the offence due to having been trafficked for the purposes of being exploited to commit crime. • The trial judge accepted that the Appellant, B, was vulnerable and had been used as an economic slave in the production of cannabis but imposed a sentence of 15 months imprisonment and a deportation order (based in part on the idea that she would be further exploited if she remained in the UK). • B's claims of asylum were refused but she was granted leave to remain as a stateless person after it was found she had been trafficked. • The appeal was argued on the ground that her status as a trafficked person (among other information including a psychiatric report) was fresh evidence that she should not have been prosecuted. • The Appeal was allowed despite guilty plea in the originating proceeding (applying <i>R v Lee (Bruce George)</i> [1984] 1 WLR 578). The court found that there was sound basis for finding that B was compelled to commit the offence due to being trafficked and her conviction was quashed.
<i>R v K</i> [2023] EWCA Crim 1364	• The Appellant was charged with production of cannabis and later found to be a victim of trafficking via a conclusive grounds decision. • Charges were dropped against the appellant's co-defendants due to their trafficked status, but K was prosecuted on the basis he had a previous conviction of cannabis production to which he had pleaded guilty. • The later decision on his trafficking status covered the time and circumstances of both convictions.

	• Appeal based on two grounds: ineffective representation on the basis that the s 45 defence was not raised, and abuse of process, based on the fact that the CPS did not take into account the clear indications that K was a victim of trafficking. • The appeal court allowed the introduction of the conclusive grounds decision as fresh evidence, and concluded that the abuse of power ground of appeal had been established, noting that CPS guidance on procedure in the case of possible trafficking defendants was not followed by the CPS. The court also stated that if a referral had been made for a positive grounds decision at the time of investigation the CPS would not have proceeded to trial or a s 45 defence would have succeeded. • Appeal granted and conviction quashed.
<i>R v ADG; R v BIJ</i> [2023] EWCA Crim 1309	• Appeal on convictions for conspiracy to supply class A drugs on basis that the trial judge had misdirected the jury regarding the elements of s 45 of the Modern Slavery Act as they apply to minors. Trial judge had referred to ‘compulsion’ which is not applicable to defendants under 18. • Appeal allowed as those under 18 do not have to prove that they were compelled to commit the crime, only that it ‘had to be shown that a reasonable person in the same situation and with the child’s relevant characteristics would have done what the child did.’ The convictions were deemed unsafe and quashed.
<i>R v AH</i> [2023] EWCA Crim 808	• The appellant appealed against convictions for firearm offences on the basis he was a victim of trafficking and had no alternative but to comply with the dominant force of others in relation to his offending. The CPS accepted the credible evidence that AH was a VOT and the nexus between his status and the offending but argued that t prosecution was in the public interest due to the seriousness of the offences. The risk and seriousness of AH’s offending was balanced against his young age and VOT status, but ultimately the court found that seriousness of offending outweighed Victim of Trafficking (VOT) status • Appeal dismissed.
<i>R v BRP</i> [2023] EWCA Crim 40	• The appellant appealed against a conviction for conspiracy to supply class B drugs on the basis he should have been advised of s 45 defence. The court found that BRP’s account lacked credibility and even if credible the defence would not have been established. Appeal dismissed.
<i>R v AFU</i> [2023] EWCA Crim 23	• Appeal against conviction for conspiracy to produce drugs. • Appellant pleaded guilty but sought to produce evidence he had been trafficked as fresh evidence and that he had not been advised by original counsel of the s 45 defence. • Appeal allowed, unsafe conviction due to abuse of process because the police had failed in their duty as first responders and the CPS had failed to comply with guidance on VOT suspects. The court found that there were clear indicators of trafficking, no proper enquiries and no referral made to the NRM, no review of whether there was a credible s 45 defence, and no consideration of whether there was a public interest in prosecuting the Appellant. The court found against the other ground of review, being that the trial counsel failed to advise on the s 45 defence, as contemporaneous notes showed he was aware of the possibility of the defence and had talked to the appellant through it.

<i>R v AAC</i> [2023] EWCA Crim 15	• AAC was convicted of 21 offences relating to false ID documents and benefit fraud and was later recognised as a victim of trafficking. She was sentenced and was at risk of deportation. • In 2013 she claimed asylum on the basis that she was a VOT and was referred to the NRM. However, her claim was denied and an order for deportation made. • During her appeal the Home Office decided she should be granted leave to remain pending proceedings regarding her child. • In 2017 she was interviewed by police regarding an investigation into an organised crime network involving human trafficking and sex work, during this interview she reasserted that she was a victim of trafficking and had been forced into sex work. • She was referred to the NRM for a second time and this time she was assessed to be a VOT. • This appeal relied on the second NRM finding and the on-going police investigation to show that she was a VOT at the time of her offending. The court found her account credible and that there was a clear nexus between the offending and the trafficking, finding that her case fell into the third of three categories for which an appeal could be granted despite a guilty plea per <i>R v Tredget</i> – that the appellant had not committed the offence. The court also found there was no public interest in her prosecution. Appeal allowed on the basis the convictions were unsafe.
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2. Cases considering human rights issues and modern slavery/human trafficking

Citation	Key Facts/issues
<i>R (on the application of AAM) v Secretary of State for the Home Department</i> [2025] EWHC 447	• The Claimant, a Syrian national, applied for a judicial review of a decision made by Home Department in 2023. • The claimant was subject to serious ill-treatment in Libya, including being kidnapped for ransom. Despite this being a ‘credible account’, the review concluded that there were no reasonable ground to believe that AAM was a victim of human trafficking or slavery and that the treatment did not meet definitions of exploitation under European Convention on Action Against Trafficking (‘ECAT’) or the Slavery and Human Trafficking (Definition of Victim) Regulations 2022 (‘Regulations’). • In this proceeding the claimant argued that the Home Department’s decision was based on a unduly restrictive interpretation of the definition. • The High Court allowed the judicial review and quashed the 2023 decision, due to the fact that the Secretary of State erred in finding there were no reasonable grounds to find that the Claimant had been trafficked due to an overly restrictive definition of exploitation, which failed to recognise that kidnapping is expressly referred to in the Regulations as a means of exploitation or coercion (para 56) (which the Secretary failed to reference at all – see para 59). • Discusses meaning of ‘exploitation’ under art 4 ECAT and rule 3(6)(d) of the Regulations.

<i>SNT v Poland</i> [2024] EWHC 3349 (Admin)	• Human rights (ECHR arts 4 and 5) • Appeal against Extradition • per art 36 of the Council of Europe Convention on Action against Trafficking in Human Beings ('ECAT') • Appeal on grounds that extradition would be incompatible with the Appellant's rights under arts 4 and 8 of ECHR. The art 4 ground was based on the principle of non-punishment. The Appellant's country of origin (Poland) sought extradition, so that they could face trial for drug production charges dating back to 2017 and 2018. The Appellant has previous convictions for robbery, fraud, organised crime and human trafficking, but maintained that he had been trafficked himself and was subject to debt bondage. • Considers the Home Office statutory guidance on Modern Slavery (v3.11) , the Equal Treatment Bench Book (April 2023 revision) and the Group of Experts on Action against Trafficking in Human Beings Report 2023 established • Appeal court did not have a transcript of the oral evidence given by the Appellant at the trial and therefore could not analyse the trial judge's assessment that the evidence was 'vague'. Nevertheless, appeal was dismissed; the appeal court was unable to conclude that SNT was a victim of trafficking
<i>Begum v Secretary of State for the Home Department</i> [2024] EWCA Civ 152	• Appellant is Shamima Begum who is one of a group of teenage girls who travelled to Syria in 2015 to marry an Islamic State fighter. Her citizenship was revoked in 2019 on national security grounds. She remains in a refugee camp in Syria. • Appeal to Special Immigration Appeals Commission stated there was a credible suspicion that Ms Begum was a victim of trafficking and sexual exploitation, but this did not stop the Home Secretary from lawfully taking away her British citizenship. • This appeal was on grounds that the Secretary of State had failed to consider that authorities had breached art 4 of ECHR – the question being whether the fact that there was credible suspicion Begum had been trafficked for the purpose of sexual exploitation and that the decision meant she would be rendered de facto stateless had breached human rights obligations. Also question as to whether the Wednesbury irrationality test applied and whether the fact that Begum was not in the UK means that art 4 obligations did not arise (Per <i>Rantsev v Cyprus</i> [2010] 1 WLUK 30).

3. Other (2017)

Citation	Key Facts/issues
<i>R. v Joseph (Verna Sermanfure)</i> [2017] EWCA Crim 36	• Conjoined appeal: with <i>Craciunescu; VCL, NTN, Nguyen (Dong), AA</i> • Considers the approach to the defence of duress regarding victims of trafficking who had committed crimes prior to the enactment of the <i>Modern Slavery Act 2015</i> • Sets out the principles to be followed for offences that pre-date the <i>Modern Slavery Act</i>

	• Appeal court found that the law of duress is well established and that Parliament had not enacted s 45 of the <i>Modern Slavery Act</i> with retrospective provision: • ‘... clear injustice was required to justify a court amending the law of duress as applicable to trafficking victims unable to take advantage of the Act’. • The Appeal court held that in the instant cases the court had upheld the UK’s international obligations. The court noted that issues as to trafficking frequently arise post-conviction and changing the law on duress would not assist in those cases as the court can only ‘grapple with the issue’ at the time it is raised. • Three key issues were raised in the instant cases: • Relevance of gravity of the offences (there are circumstances where it is in the public interest to prosecute despite trafficking nexus) • With child victims there still had to be a nexus to the trafficking for the offending to be mitigated, but there did not have to be compulsion as required for an adult (as per CPS guidance from 2015). • The SCA decision on trafficking does not bind the court – the court can bear the decision in mind but would also examine the cogency of the evidence and subject the evidence to forensic investigation, as well as analysis of the facts, an examination of the individual’s account and a focus on the evidence of a nexus between trafficking and the offending. • The appeal judgment provides extensive analysis of the development of international and domestic law and policy, as well as case law on the offence and trafficking nexus - see: [1]–[23].
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