

# THE PERSISTENT PROBLEM OF CONSENT IN AUSTRALIAN CRIMINAL LAWS ON TRAFFICKING IN PERSONS, SLAVERY AND SLAVERY-LIKE PRACTICES

PETA-JANE SECRETI\*

*The Australian federal government, in its recent review of the trafficking in persons, slavery and slavery-like offences in divs 270 and 271 of the Criminal Code Act 1995 (Cth), revisited the question of whether these offences adequately enshrine the principle of the irrelevance of consent originating in art 3(b) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. The task of ensuring compliance with this principle is fraught, given that both the meaning of consent in this context and the parameters of the principle itself are not settled. This article argues that, contrary to the intention of Australian legislators, consent is in fact relevant for the purposes of establishing a number of the offences in divs 270 and 271. It suggests that law reform on this matter is warranted, not only to address compliance with international law, but also to contend with challenges in the implementation of these laws connected to the meaning and role of consent.*

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\* PhD, Associate Lecturer at the Curtin Law School, Curtin University, Western Australia. This article is based in part on sections of the author's thesis entitled 'From Sexual Servitude to Modern Slavery: Examining Conceptual Coherence in the Australian Parliament's Understanding of Human Trafficking', accepted by the University of Western Australia in December 2022.

## I INTRODUCTION

Between September 2022 and August 2023, the Australian federal government conducted a targeted review of the trafficking in persons, slavery and slavery-like offences (“trafficking and related offences”) in divs 270 and 271 of the *Criminal Code Act 1995* (Cth) (“*Criminal Code*”).<sup>1</sup> One matter considered as part of the review was whether these offences adequately enshrine the principle of the irrelevance of consent set forth in art 3(b) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (“*Trafficking Protocol*”).<sup>2</sup> This is not the first occasion on which this matter has been addressed through the processes of law reform. Indeed, in 2013, when divs 270 and 271 were last subjected to substantial amendment, new provisions were inserted specifically for the purpose of ensuring compliance with this principle.<sup>3</sup> The fact that there remains a question as to compliance is not, however, surprising. The precise meaning of consent in art 3(b) of the *Trafficking Protocol* is not settled, and neither are the parameters of the principle of the irrelevance of consent it establishes. This renders the task of compliance in domestic law—Australian or otherwise—a fraught one.

This article considers whether the principle of the irrelevance of consent is in fact enshrined in the trafficking and related offences in divs 270 and 271 of the *Criminal Code*. It begins in Part II with an overview of the principle, including an explanation of its inherent ambiguity and why this is problematic. In Part III, this article describes the development of divs 270 and 271 and highlights efforts taken by legislators to ensure compliance with the principle. Then, in Part IV, this article draws on the trafficking-related literature to describe the possible conceptualisations of consent and its relevance for identifying trafficking. These different conceptualisations provide a framework to guide the analysis undertaken in Part V, which examines what the text of divs 270 and 271 reveals about consent and its relevance for the purposes of establishing the trafficking and related offences contained in those divisions.

This article identifies that there are different conceptualisations of consent embedded within the trafficking and related offences in divs 270 and 271 of the *Criminal Code*. It argues that consent is relevant, either explicitly or in effect, for the purposes of establishing a number of these offences, and that this necessarily calls into question the compliance of divs 270 and 271 with the principle of the irrelevance of consent established by art 3(b) of the *Trafficking Protocol*. This article suggests that law

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<sup>1</sup> Attorney-General’s Department (Cth), *Findings of the Targeted Review of Divisions 270 and 271 of the Criminal Code Act 1995 (Cth)* (Report, August 2023) 5.

<sup>2</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) (“*Trafficking Protocol*”).

<sup>3</sup> *Criminal Code Act 1995* (Cth) ss 270.11, 271.11B (“*Criminal Code*”), as inserted by *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth) sch 1 item 12 (“*2013 Act*”). See Explanatory Memorandum, Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (Cth) 31, 60 (“*Explanatory Memorandum for 2012 Bill*”) (discussed in Part III of this article).

reform regarding the relevance of consent for the purposes of the trafficking and related offences is necessary to confront challenges in the implementation of these offences and improve criminal justice outcomes, but warns that the *Trafficking Protocol* will not be a useful guide for reform.

## II THE *TRAFFICKING PROTOCOL* AND THE PRINCIPLE OF THE IRRELEVANCE OF CONSENT

The *Trafficking Protocol* was adopted by the United Nations General Assembly in November 2000. This instrument articulated, for the first time, an internationally agreed definition of ‘trafficking in persons’.<sup>4</sup> Complex differences of opinion about how trafficking should be defined had long plagued efforts to secure international agreement on the issue and, as such, the articulation of this definition was a ‘genuine breakthrough’.<sup>5</sup> As Gallagher explains, it ‘provided the necessary prerequisite for the elaboration of a meaningful normative framework’ and was ‘critical in forging a common vision’ for responding to trafficking.<sup>6</sup>

A central pillar of this common vision is the criminalisation by States Parties of conduct meeting the definition of trafficking in persons in art 3(a) of the *Trafficking Protocol*.<sup>7</sup> Article 3(a) specifies three components to the definition. The first is the ‘action’ element: ‘the recruitment, transportation, transfer, harbouring or receipt of persons’.<sup>8</sup> The second is the ‘means’ element:

the use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person ...<sup>9</sup>

The third is the ‘purpose’ element: ‘the purpose of exploitation’, which includes

at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs ...<sup>10</sup>

Essentially, the definition identifies trafficking as a situation where an action is carried out, through the use of one of the stated means, for the purpose of exploitation. The exception is where the trafficked person is a child, in which case the means

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<sup>4</sup> Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) 12. As Gallagher observes, the issue of trafficking had been the subject of a number of international legal agreements prior to the *Trafficking Protocol*, but these did not incorporate a definition of the term. For an examination of these agreements, see Gallagher 54-68.

<sup>5</sup> Anne T Gallagher, ‘Two Cheers for the Trafficking Protocol’ (2015) 4 *Anti-Trafficking Review* 14, 15. Gallagher explains that these differences of opinion concerned ‘the end result of trafficking; its constituent acts, and their relative significance; and the relationship between trafficking and related phenomena such as prostitution and irregular migration’.

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

<sup>7</sup> *Trafficking Protocol* (n 2) art 5.

<sup>8</sup> *Ibid* art 3(a).

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

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

element is not required.<sup>11</sup> The definition does not require that the purpose actually be achieved—that is, a situation will fall within the definition when the perpetrator merely intended that exploitation take place.<sup>12</sup>

The principle of the irrelevance of consent, which applies in the context of the criminalisation of trafficking in persons, originates in the language of art 3(b) of the *Trafficking Protocol*. Article 3(b) states that

the consent of a victim of trafficking in persons to the intended exploitation set forth in [art 3(a)] shall be irrelevant where any of the means set forth in [art 3(a)] have been used.<sup>13</sup>

The principle articulated in art 3(b) is ‘a troubled, complex and unresolved aspect of international law and policy around trafficking’.<sup>14</sup> This is explained by reference to the contentious nature of the negotiations regarding the definition of trafficking in persons which occurred during the drafting of the *Trafficking Protocol*. The negotiations were subjected to heavy lobbying by two feminist groups with opposing views on the nature of prostitution.<sup>15</sup> One group viewed it as a form of legitimate work to which a woman can consent to engage in, and the other as an inherently exploitative form of violence against women in relation to which consent is an impossibility.<sup>16</sup> Predictably, given the historical connection between anti-trafficking initiatives in international law and the movement for the abolition of prostitution, debate over the definition of trafficking in persons ‘quickly came down to a question of whether the offense of trafficking would occur “irrespective of the consent of the person”’.<sup>17</sup>

There was apparent consensus among participants in the negotiations that the consent of a person should not be an issue when determining whether that person had been trafficked.<sup>18</sup> There was disagreement, however, as to whether, and if so how, this

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<sup>11</sup> Ibid art 3(c).

<sup>12</sup> Following the adoption of the *Trafficking Protocol*, concerns were expressed that this feature of the definition of ‘trafficking in persons’ means that States Parties are not obliged to criminalise actual exploitation: Gallagher, *The International Law of Human Trafficking* (n 4) 47. Research conducted by the United Nations Office on Drugs and Crime indicates that this concern has not been borne out in practice: United Nations Office on Drugs and Crime, *The Concept of ‘Exploitation’ in the Trafficking in Persons Protocol* (Issue Paper, 2015) (*‘UNODC Report on Exploitation’*). This is certainly the case for Australian criminal law, as discussed in Part III of this article.

<sup>13</sup> *Trafficking Protocol* (n 2) art 3(b).

<sup>14</sup> United Nations Office on Drugs and Crime, *The Role of ‘Consent’ in the Trafficking in Persons Protocol* (Issue Paper, 2014) 34 (*‘UNODC Report on Consent’*).

<sup>15</sup> Jo Doezema, ‘Who Gets to Choose? Coercion, Consent, and the UN Trafficking Protocol’ (2002) 10(1) *Gender and Development* 20, 20; Vanessa E Munro, ‘A Tale of Two Servitudes: Defining and Implementing a Domestic Response to Trafficking for Women for Prostitution in the UK and Australia’ (2005) 14(1) *Social & Legal Studies* 91, 95.

<sup>16</sup> Doezema, ‘Who Gets to Choose? Coercion, Consent, and the UN Trafficking Protocol’ (n 15) 20. See also Anne Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 *Human Rights Quarterly* 975, 984-5; Munro (n 15) 95.

<sup>17</sup> Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (n 16) 985. Gallagher notes that there was another ‘hotly debated aspect of the definition’, namely ‘whether “use in prostitution” should be included in the definition as a separate end purpose’: Gallagher, *The International Law of Human Trafficking* (n 4) 27.

<sup>18</sup> *UNODC Report on Consent* (n 14) 26.

should be expressly acknowledged in the terms of the *Trafficking Protocol*.<sup>19</sup> A number of options were put forward, including: ‘with or without [victim] consent’; ‘irrespective of the initial consent of the victim’; and an assertion that the existence of any of the stated means ‘shall be considered as vitiating any alleged consent of a victim of trafficking’.<sup>20</sup>

The position ultimately adopted—reflected in the terms of art 3(b)—resembles one of compromise: ‘it explicitly affirm[s] the irrelevance of consent but mak[es] clear that this irrelevance [is] conditional upon the use of “means”’.<sup>21</sup> The United Nations Office on Drugs and Crime (‘UNODC’) identifies key questions which arise from this ‘unwieldy’<sup>22</sup> compromise: why was the irrelevance of consent ‘tied to the “intended exploitation” rather than the act of recruitment, transfer, etc. (to which the means is tied)’, and why was the ““consent is irrelevant” phrase chosen over a statement to the effect that consent would not be a valid defence or that means would vitiate consent’?<sup>23</sup>

Gallagher observes that the ‘clumsy handling of the consent issue’ has ultimately ‘generated considerable confusion’ for States Parties seeking to implement their criminalisation obligations under the *Trafficking Protocol*.<sup>24</sup> The idea that the apparent consent of a victim should not preclude culpability for trafficking retains widespread international support.<sup>25</sup> Nevertheless, it is now well-recognised that the terms of arts 3(a) and (b) lack sufficient conceptual clarity to successfully guide the development and implementation of domestic legislation with respect to the matter of consent.<sup>26</sup>

Reflecting on the experience of criminal justice actors across various jurisdictions, the UNODC observes that issues regarding consent and its relevance do not ‘generally arise in “hard” and “straightforward” trafficking cases’—that is, where the severity of the circumstances ‘make it perfectly obvious that consent was never present in the first place’, such as where the victim was abducted.<sup>27</sup> However, it observes that in ‘less straightforward cases’, consent becomes by default ‘one way of working out whether trafficking has occurred’, regardless of whether ‘the law [is] clear on its irrelevance’.<sup>28</sup> The UNODC explains that in such cases consent ‘appears to be an important subtext at every stage in the criminal justice response to trafficking’.<sup>29</sup> This includes at the stages of: victim identification (‘where victims are not identified as such on the basis that they appear to have consented to their situations’); prosecutorial decision-making

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<sup>19</sup> Ibid 26–7.

<sup>20</sup> Ibid 26, citing the *Travaux Préparatoires* of the negotiations for the elaboration of the *Trafficking Protocol*.

<sup>21</sup> Ibid 27. See also Gallagher, *The International Law of Human Trafficking* (n 4) 28.

<sup>22</sup> Gallagher, *The International Law of Human Trafficking* (n 4) 27.

<sup>23</sup> UNODC *Report on Consent* (n 14) 27.

<sup>24</sup> Gallagher, *The International Law of Human Trafficking* (n 4) 28.

<sup>25</sup> UNODC *Report on Consent* (n 14) 8–9.

<sup>26</sup> Ibid 34.

<sup>27</sup> United Nations Office on Drugs and Crime, *The International Legal Definition of Trafficking in Persons: Consolidation of Research Findings and Reflection on Issues Raised* (Issue Paper, 2019) 12 (‘UNODC Overall Report on the Trafficking Definition’). See also UNODC *Report on Consent* (n 14) 9.

<sup>28</sup> UNODC *Overall Report on the Trafficking Definition* (n 27) 12.

<sup>29</sup> Ibid.

(‘where apparent consent is a factor in deciding not to refer cases’); the trial process (‘where apparent consent presents an obstacle to successful conviction because of reliance on the testimony of a victim who insists upon the validity of his or her consent’); and sentencing (‘where indications of apparent consent result in lesser penalties’).<sup>30</sup> Relevantly, the UNODC has reported that this is the case in relation to the Australian trafficking and related offences in divs 270 and 271 of the *Criminal Code*.<sup>31</sup> This is explored in Part IV of this article.

### III THE DEVELOPMENT OF AUSTRALIAN CRIMINAL LAWS ON TRAFFICKING IN PERSONS, SLAVERY AND SLAVERY-LIKE PRACTICES

Australia was comparatively slow to show its commitment to the *Trafficking Protocol*, taking two years to provide its signature.<sup>32</sup> This is surprising, for the federal government had, just one year prior to the adoption of the *Trafficking Protocol*, led the passage of the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) (*1999 Act*), which introduced new offences into the *Criminal Code* intended to ‘target the traffickers that recruit, organise and profit from those engaged in sex work in slave like conditions’.<sup>33</sup> These were the offences of ‘sexual servitude’ and ‘deceptive recruiting for sexual services’ set out in a new division—div 270.<sup>34</sup> The *1999 Act* also introduced into that division new offences of ‘slavery’.<sup>35</sup> This was primarily for the purpose of replacing outdated offences found in nineteenth century imperial legislation, although legislators at the time did contemplate the application of the new slavery offences to particularly egregious forms of trafficking.<sup>36</sup>

In 2004, in response to significant public attention directed at inadequacies of the offences introduced by the *1999 Act* and their implementation,<sup>37</sup> the federal government published its *Action Plan to Eradicate Trafficking in Persons*.<sup>38</sup> This plan

<sup>30</sup> Ibid.

<sup>31</sup> UNODC *Report on Consent* (n 14) 39–40.

<sup>32</sup> Australia signed the *Trafficking Protocol* on 11 December 2002, one day before it closed for signature. This contrasts with Gallagher’s observation that states’ commitment to the *Trafficking Protocol* was, as a whole, ‘extremely rapid’: Gallagher, ‘Two Cheers for the Trafficking Protocol’ (n 5) 16. Comparable states, including the United States, the United Kingdom, France and Germany, all signed the *Trafficking Protocol* within a month of it being opened for signature.

<sup>33</sup> Commonwealth, *Parliamentary Debates*, Senate, 24 March 1999, 3077 (Ian MacDonald) (*Parliamentary Debates (24 March 1999)*).

<sup>34</sup> See *Criminal Code* (n 3) ss 270.6, 270.7, respectively, as inserted by *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) sch 1 item 1 (*1999 Act*).

<sup>35</sup> See *Criminal Code* (n 3) s 270.3, as inserted by *1999 Act* (n 34) sch 1 item 1.

<sup>36</sup> *Parliamentary Debates (24 March 1999)* (n 33) 3076 (Ian MacDonald).

<sup>37</sup> These inadequacies were brought to light by the coronial inquest, in early 2003, into the death of a Thai woman named Phuongtong Simaplee in Australian immigration detention. During the inquest it was suggested that Ms Simaplee had claimed to have been trafficked to Australia. This served to direct significant attention from journalists towards the adequacy of the government’s response to trafficking. See news reports from around this time: eg, Christine Jackman, ‘Human Rights Award for Our Journalists’, *The Australian* (Sydney, 11 December 2003) 1; ‘Inquiry Demand’, *The Australian* (Sydney, 5 April 2003) 19; Natalie O’Brien and Elisabeth Wynhausen, ‘Sex Slave Inquiry Demand’, *The Australian* (Sydney, 29 April 2003) 2.

<sup>38</sup> Australian Government, *Action Plan to Eradicate Trafficking in Persons* (2004).

revealed the government's intention to introduce legislation to expand the range of offences in order to criminalise 'all aspects of trafficking in persons' and arrange Australia's ratification of the *Trafficking Protocol*.<sup>39</sup> Making good on its commitment, the government introduced the Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 ('2004 Bill') which eventually passed in June 2005 in the form of the *Criminal Code Amendment (Trafficking in Persons) Offences Act 2005* (Cth) ('2005 Act'). Three months later, Australia ratified the *Trafficking Protocol*.

The 2005 Act revised the offence of deceptive recruiting introduced in 1999,<sup>40</sup> and inserted a series of new offences into a new division—div 271. These were offences of 'debt bondage', 'trafficking in persons', 'domestic trafficking in persons', 'trafficking in children', and 'domestic trafficking in children'.<sup>41</sup> The primary purpose of the 2005 Act was to rectify gaps in the existing trafficking-related offences in the *Criminal Code* in order to comprehensively criminalise the conduct involved in trafficking.<sup>42</sup> A secondary purpose was to ensure compliance with Australia's obligations under, and therefore permit Australia's ratification of, the *Trafficking Protocol*.<sup>43</sup>

The 2004 Bill explicitly referenced consent. It specified that one of each of the proposed trafficking in persons and domestic trafficking in persons offences would apply where the offender used force or threats and this 'result[ed] in [the offender] obtaining [the victim's] consent to' their entry into, receipt in, exit from, or transportation within Australia.<sup>44</sup> The Senate Legal and Constitutional Legislation Committee, tasked with reviewing the 2004 Bill, recommended that these references to consent be removed.<sup>45</sup> The Committee did so on the basis that the proposed offences would effectively 'require the prosecution to prove—and therefore the defence to disprove—that the force or threats of the accused resulted in consent on the part of the victim', which was 'at odds with the ... requirement of the [*Trafficking Protocol*] that the consent of the victim ... be irrelevant in such cases'.<sup>46</sup> The 2004 Bill was subsequently amended to substitute references to consent with the words 'compliance in respect of'.<sup>47</sup> This change was reflected in the provisions of the 2005 Act.

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<sup>39</sup> Ibid 5, 12.

<sup>40</sup> *Criminal Code* (n 3) s 270.7(1), as amended by *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth) ('2005 Act') sch 1 item 7.

<sup>41</sup> See, respectively, *Criminal Code* (n 3) ss 271.8, 271.2, 271.5, 271.4, 271.7, as inserted by 2005 Act (n 40) sch 1 item 9.

<sup>42</sup> Commonwealth, *Parliamentary Debates*, Senate, 8 December 2004, 3 (Christopher Ellison).

<sup>43</sup> Revised Explanatory Memorandum, Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 (Cth) 2.

<sup>44</sup> Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 (Cth) cls 271.2(1), 271.5(1).

<sup>45</sup> Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Criminal Code Amendment (Trafficking in Persons) Bill 2004* (Report, 2005) 6–7 [2.9].

<sup>46</sup> Ibid.

<sup>47</sup> Commonwealth, *Parliamentary Debates*, Senate, 20 June 2005, 82, 84.

In May 2012, the federal government once again introduced draft legislation to revise and expand the scope of the trafficking and related offences in divs 270 and 271. The *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth) ('2013 Act') was passed the following year. It introduced new offences of 'forced labour' and 'forced marriage' into div 270,<sup>48</sup> and new offences of 'organ trafficking', 'domestic organ trafficking', and 'harbouring a victim' into div 271.<sup>49</sup> It also replaced the offences of sexual servitude (introduced in 1999) with new offences of 'servitude',<sup>50</sup> and the offence of deceptive recruiting for sexual services (introduced in 1999 and amended in 2005) with a new offence of 'deceptive recruiting for labour or services'.<sup>51</sup> In addition, it replaced the existing definitions of 'coercion', 'threat' and 'exploitation' with new definitions of those terms,<sup>52</sup> and extended the scope of the slavery offences (introduced in 1999).<sup>53</sup> The primary purpose of these changes was to criminalise a broader range of exploitative conduct associated with trafficking, in order to account for additional kinds of exploitation and different tactics for effecting exploitation which had come to the attention of Australian authorities in the years since the *2005 Act*.<sup>54</sup>

One of the more specific purposes of the *2013 Act* was to 'clarify] that a victim's consent or acquiescence is not a defence to conduct that would otherwise be an offence' under div 270 or 271.<sup>55</sup> Sections 270.11 and 271.11B were introduced to give effect to this specific purpose. Section 270.11 applies in relation to the offences in div 270—slavery, servitude, forced labour, deceptive recruiting for labour or services, forced marriage and debt bondage. It specifies:

To avoid doubt, it is not a defence in a proceeding for an offence against [div 270] that a person against whom the offence is alleged to have been committed *consented to*, or acquiesced in, conduct constituting any element of the offence.<sup>56</sup>

Section 271.11B specifies the same as s 270.11 but applies in respect of the offences in div 271—trafficking in persons, domestic trafficking in persons, trafficking in children, domestic trafficking in children, organ trafficking, domestic organ trafficking, and harbouring a victim.

The Explanatory Memorandum associated with the *2013 Act* explains that these provisions were inserted in response to difficulties presented by the matter of consent

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<sup>48</sup> See, respectively, *Criminal Code* (n 3) ss 270.6, 270.7B, as inserted by *2013 Act* (n 3) sch 1 item 12.

<sup>49</sup> See *Criminal Code* (n 3) ss 271.7B–271.7G, as inserted by *2013 Act* (n 3) sch 1 item 38.

<sup>50</sup> *Criminal Code* (n 3) s 270.5, as inserted by *2013 Act* (n 3) sch 1 item 12.

<sup>51</sup> *Criminal Code* (n 3) s 270.7, as inserted by *2013 Act* (n 3) sch 1 item 12.

<sup>52</sup> For the replacement definitions of coercion and threat, see *Criminal Code* (n 3) s 270.1A, as inserted by *2013 Act* (n 3) sch 1 item 8. For the replacement definition of exploitation, see *Criminal Code* (n 3) s 271.1A, as inserted by *2013 Act* (n 3) sch 1 item 22.

<sup>53</sup> *Criminal Code* (n 3) s 271.3, as amended by *2013 Act* (n 3) sch 1 items 9–11.

<sup>54</sup> *Explanatory Memorandum for 2012 Bill* (n 3) 1.

<sup>55</sup> *Ibid* 31, 60.

<sup>56</sup> *Criminal Code* (n 3) s 270.11 (emphasis added). At the time of enactment of the *2013 Act*, the debt bondage offence was contained in div 271, rather than div 270. It was moved to div 270 in 2018: see *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018* (Cth).



in prosecutions for the trafficking and related offences.<sup>57</sup> It notes that although judges have ‘generally directed juries that consent by a victim is not a defence to a charge’, there are instances where some have indicated that ‘consent may be relevant to an assessment of whether [the offence can be established]’.<sup>58</sup> This, the Explanatory Memorandum states, runs counter to art 3(b) of the *Trafficking Protocol*, which ‘makes it clear that consent of a victim is irrelevant’.<sup>59</sup>

Sections 270.11 and 271.11B apply to offences which capture conduct extending beyond that strictly covered by the definition of trafficking in persons in art 3(a) of the *Trafficking Protocol*. For example, some of the trafficking in persons offences in div 271 criminalise conduct involving the action and means elements of art 3(a), but not the purpose element. Additionally, the offences in div 270 criminalise actual exploitation, and operate both as stand-alone offences and in conjunction with the trafficking in persons offences. As discussed in Part II, the definition of trafficking in persons in art 3(a) applies to situations where the perpetrator merely intended exploitation to take place—it does not require exploitation to actually take place in order for a situation to be designated as trafficking in persons. It is nevertheless clear that Australian legislators in 2013 sought to ensure that the principle of the irrelevance of consent was embedded across all offences in divs 270 and 271.

Importantly, despite the introduction of ss 270.11 and 271.11B, the UNODC reports that Australian practitioners have ‘affirmed the on-going relevance of consent’ in prosecutions for the trafficking and related offences, and have ‘noted that questions around whether alleged victims “consented” to the situation are relevant’ for both police and prosecutors.<sup>60</sup> The UNODC explains that

cases involving victims who believe they have (or appear to have) consented to the exploitation will often be difficult to successfully prosecute given the high reliance on victim testimony in the absence of corroborating evidence. Such cases may not be advanced for that reason. Evidence of consent to some or all of the conduct by the accused is also often sought to be used by the defence to undermine the credibility of the victim or in an effort to turn the sympathy of the jury away from the victim and hence more in favour of the accused.<sup>61</sup>

Other researchers have drawn similar conclusions.<sup>62</sup> However, the research of the UNODC and others does not precisely interrogate how the provisions which specify the offences in divs 270 and 271 contribute to the disconnect between, on the one hand, the text and purpose of ss 270.11 and 271.11B and, on the other, the evidence

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<sup>57</sup> *Explanatory Memorandum for 2012 Bill* (n 3) 31, 60.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *UNODC Report on Consent* (n 14) 41.

<sup>61</sup> *Ibid.* 41–2.

<sup>62</sup> Andreas Schloenhardt and Hannah Bowcock, “Sex Slaves” and Shrewd Business Women: The Role of Victim Consent in Trafficking in Persons in Australia’ (2015) 39 *Melbourne University Law Review* 592. See also Rachel Harris and Katharine Gelber, ‘Defining “De Facto” Slavery in Australia: Ownership, Consent and the Defence of Freedom’ (2011) 11 *International Criminal Law Review* 561.

revealing the ongoing relevance of consent in the implementation of those offences. This task is pursued in Part V of this article. The following part, Part IV, facilitates the analysis in Part V by describing the different possible conceptualisations of consent in the trafficking context, by reference to which the offences in divs 270 and 271 may be examined.

#### IV THE POSSIBLE MEANINGS OF CONSENT IN THE CONTEXT OF TRAFFICKING

There are various approaches to conceptualising trafficking which appear in the literature examining contemporary legislative responses to this problem. Importantly, proponents of some of these approaches make certain claims about the meaning of consent and its relevance for identifying situations of trafficking. Some make these claims with respect to consent at the point at which a person's involvement in a situation of trafficking actually begins—referred to in this article as the 'start point'. Others, either alternatively or additionally, make these claims with respect to consent at the point at which a person is actually subject to exploitation—referred to in this article as the 'exploitation point'.

The remainder of this part briefly describes the claims made about consent by proponents of five particular approaches to conceptualising trafficking.<sup>63</sup> For the purposes of the following discussion, these are referred to as the: 'transnational business', 'radical feminist', 'sex worker rights', and 'migrant labour' approaches. These approaches and their associated claims about consent are described in turn in approximate order of their emergence in the literature.

##### A *Transnational Business Approach*

The transnational business approach conceptualises trafficking as a profit-making enterprise perpetrated by persons and organisations who, in exchange for payment,

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<sup>63</sup> There are other approaches to conceptualising trafficking which appear in the literature but which are not discussed here because they do not attend to the matter of consent. These include, in particular, the 'modern slavery' approach, which conceptualises trafficking as a form of 'modern slavery'—an 'umbrella term' which describes a collection of 'severe relational exploitations in the workplace, at home and elsewhere', including forced labour, bonded labour, child slavery and domestic servitude, as well as trafficking: Donella Caspersz et al, 'Modern Slavery in Global Value Chains: A Global Factory and Governance Perspective' (2022) 64(2) *Journal of Industrial Relations* 177.

facilitate or assist with a person's illegal or irregular migration.<sup>64</sup> Proponents of this approach consider that a situation of trafficking arises when a person is coerced or deceived into making a decision to migrate and to rely on a third party to facilitate or assist them in doing so. In other words, they acknowledge that the making of a choice is not necessarily incompatible with trafficking, but consider the choice a meaningful one only if it was made in the absence of coercion or deception. They do not elaborate with clarity on the degree of coercion or deception required to vitiate choice, other than to identify situations which are reasonably straight-forward, such as where women are 'deceived by attractive package deals and offers of well-paying jobs [in the destination country], only to be forced into prostitution on arrival'.<sup>65</sup> Nevertheless, it is apparent that proponents of this approach conceive of consent at the start point as a choice which is made in the absence of coercion or deception, and consider its absence to be relevant for the purposes of identifying situations of trafficking.

### B *Radical Feminist Approach*

The radical feminist approach conceptualises trafficking as 'globalised prostitution'—it is distinguishable from prostitution only by virtue of the movement of the prostituted woman from one location to another.<sup>66</sup> This approach is underpinned by a perspective which regards prostitution as 'an institution of male dominance' arising from societal conditions which produce and perpetuate women's sexual and economic subordination.<sup>67</sup> From this perspective, every instance of prostitution is oppressive and harmful, and it is therefore impossible for a woman to

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<sup>64</sup> This approach emerges from the following publications: Andreas Schloenhardt, 'The Business of Migration: Organised Crime and Illegal Migration in Australia and the Asia-Pacific Region' (1999) 21 *Adelaide Law Review* 81; Phil Williams, 'Human Commodity Trafficking: An Overview' in *Illegal Immigration and Commercial Sex: The New Slave Trade* (Frank Cas, 1999) 1; Phil Williams, 'Trafficking in Women and Children: A Market Perspective' in Phil Williams (ed), *Illegal Immigration and Commercial Sex: The New Slave Trade* (Frank Cas, 1999) 145; John Salt, 'Trafficking and Human Smuggling: A European Perspective' (2000) 38(3) *International Migration* 31; Alexis A Aronowitz, 'Smuggling and Trafficking in Human Beings: The Phenomenon, the Markets That Drive It and the Organisations That Promote It' (2001) 9 *European Journal on Criminal Policy and Research* 163; Gillian Caldwell et al, 'Capitalizing on Transition Economies: The Role of the Russian Mafiya in Trafficking Women for Forced Prostitution' in *Illegal Immigration and Commercial Sex: The New Slave Trade* (Frank Cas, 1999) 42; Ronald Skeldon, 'Trafficking: A Perspective from Asia' (2000) 38(3) *International Migration* 7; John Salt and Jeremy Stein, 'Migration as a Business: The Case of Trafficking' (1997) 35(4) *International Migration* 467; Vincenzo Ruggiero, 'Criminals and Service Providers: Cross-National Dirty Economies' (1997) 28 *Crime, Law and Social Change* 27.

<sup>65</sup> Williams (n 64) 3.

<sup>66</sup> This is observed in Marie Segrave and Sanja Milivojevic, 'Sex Trafficking: A New Agenda' (2005) 24(2) *Social Alternatives* 11, 11. Segrave and Milivojevic are not themselves proponents of the radical feminist approach. This approach emerges from the publications such as: Janice G Raymond, 'The New UN Trafficking Protocol' (2002) 25(5) *Women's Studies International Forum* 491; Sheila Jeffreys, *The Industrial Vagina: The Political Economy of the Global Sex Trade* (Routledge, 2009); Sheila Jeffreys, 'Prostitution, Trafficking and Feminism: An Update on the Debate' (2009) 32(4) *Women's Studies International Forum* 316.

<sup>67</sup> Dorchen Leidholdt, 'Prostitution: A Violation of Women's Human Rights' (1993) 1 *Cardozo Women's Law Journal* 133, 136. See also Catharine A MacKinnon, 'Prostitution and Civil Rights' (1993) 1 *Michigan Journal of Gender & Law* 13, 24–5; Kathleen Barry, *The Prostitution of Sexuality* (NYU Press, 1995) ch 2; Janice G Raymond, *Not a Choice, Not a Job: Exposing the Myths About Prostitution and the Global Sex Trade* (Potomac Books, 2013).

consent to engage in it. Consistently with this perspective on prostitution, proponents of the radical feminist approach to conceptualising trafficking acknowledge that a woman might describe her movement from one place to another and her involvement in prostitution as voluntary, but argue that any such claim of voluntariness is meaningless given that it is provided in the context of prostitution. In this way, proponents of this approach conceive of consent at both the start and exploitation points as a choice which is made in the absence of sexual or economic subordination, but deny the possibility of consent altogether in this context.

### C *Sex Worker Rights Approach*

The sex worker rights approach conceptualises trafficking as the serious abuse of rights and freedoms of women who migrate for sex work.<sup>68</sup> It is underpinned by a perspective on prostitution which opposes the one underpinning the radical feminist approach to conceptualising trafficking. This perspective is informed by various strands of feminist theory which coalesce in emphasising the agency, voices and divergent experiences of women in prostitution. It contests the notion that prostitution is inherently exploitative, but instead regards it as a type of labour, the circumstances of which may or may not involve exploitation. In particular, it emphasises the capacity of women to choose to engage in prostitution (or, more fittingly, ‘sex work’). Reflecting this perspective on prostitution, proponents of the sex worker rights approach ‘conceptually separate’ trafficking from sex work: sex work is ‘one, but not the only, site in which trafficking occurs’.<sup>69</sup>

Proponents of this approach conceive of consent at the start point as the exercise of agency which is evidenced by choice or voluntariness, but argue that the presence or absence of consent should not serve to identify a situation as trafficking. This is because, they explain, focusing on choice or voluntariness creates a problematic divide between persons who are ‘forced’ and those who are ‘voluntary’, and therefore

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<sup>68</sup> This approach emerges from the following publications: Kamala Kempadoo, ‘From Moral Panic to Global Justice: Changing Perspectives on Trafficking’ in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds), *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights* (Paradigm Publishers, 2005) vii; Kamala Kempadoo, ‘Introduction: Abolitionism, Criminal Justice, and Transnational Feminism – Twenty-First-Century Perspectives on Human Trafficking’ in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds), *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights* (Taylor & Francis, 2012); Kamala Kempadoo, ‘Introduction: Globalizing Sex Workers’ Rights’ in Kamala Kempadoo and Jo Doezema (eds), *Global Sex Workers: Rights, Resistance, and Redefinition* (Routledge, 1998) 1; Jo Doezema, ‘Loose Women or Lost Women? The Re-Emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women’ (2000) 18 *Gender Issues* 23; Marjan Wijers, ‘Women, Labor, and Migration: The Position of Trafficked Women and Strategies for Support’ in Kamala Kempadoo and Jo Doezema (eds), *Global Sex Workers: Rights, Resistance, and Redefinition* (Routledge, 1998) 69; Kamala Kempadoo, ‘The Migrant Tightrope: Experiences from the Caribbean’ in Kamala Kempadoo and Jo Doezema (eds), *Global Sex Workers: Rights, Resistance, and Redefinition* (Routledge, 1998) 124 (‘The Migrant Tightrope’).

<sup>69</sup> Kempadoo, ‘From Moral Panic to Global Justice: Changing Perspectives on Trafficking’ (n 68) xii.

between those who are worthy of protection and those who are not.<sup>70</sup> They explain that it also ignores problems associated with ‘measuring choice’<sup>71</sup> in a context where the ‘boundaries of “forced” and “voluntary”’ are ‘fluid’ and ‘porous’.<sup>72</sup> As regards consent at the exploitation point, proponents of this approach support a conceptualisation of consent as the exercise of agency evidenced by a choice made where there is freedom to choose, and suggest that its impossibility is relevant for the purposes of identifying trafficking. This conceptualisation is grounded in their perspective on prostitution, which upholds the agency of sex workers and advocates for their right and freedom to choose the terms and conditions of their work.

#### D *Human Rights Approach*

The human rights approach conceptualises trafficking as a process which involves the movement or migration of persons using coercive, deceptive or other similarly exploitative means and for exploitative purposes, and which is both caused and characterised by violations of human rights law standards.<sup>73</sup> The way its proponents conceive of consent is informed by the definition of trafficking in persons in the *Trafficking Protocol* and, accordingly, they consider consent at the start point only. They acknowledge that choices are regularly made regarding the process of migration, but take the view that such choices are effectively annulled when made in the presence of sufficiently coercive or deceptive means. What they regard as sufficiently coercive or deceptive is not overly clear: taking advantage of a person’s position of vulnerability which is owing to their economic or other hardship possibly qualifies, while the use of force easily does. In this way, proponents of this approach conceive of consent at the start point as a choice or decision which is made in the absence of coercive or

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<sup>70</sup> Jo Doezeema, ‘Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy’ in Kamala Kempadoo and Jo Doezeema (eds), *Global Sex Workers: Rights, Resistance, and Redefinition* (Routledge, 1998) 34, 42.

<sup>71</sup> Jo Doezeema, *Sex Slaves and Discourse Masters: The Construction of Trafficking* (Zed Books, 2010) 23.

<sup>72</sup> Kempadoo, ‘The Migrant Tightrope’ (n 68) 127.

<sup>73</sup> This approach emerges from the following publications: Anne Gallagher, ‘Human Rights and Human Trafficking: A Reflection on the Influence and Evolution of the U.S. Trafficking in Persons Reports’ in Alison Brysk and Austin Choi-Fitzpatrick (eds), *From Human Trafficking to Human Rights: Reframing Contemporary Slavery* (University of Pennsylvania Press, 2012) 172; Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (n 16); Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Martinus Nijhoff, 2006); Tom Obokata, ‘A Human Rights Framework to Address Trafficking of Human Beings’ (2006) 23(3) *Netherlands Quarterly of Human Rights* 379; Anne Gallagher, ‘Using International Human Rights Law to Better Protect Victims of Trafficking: The Prohibitions on Slavery, Servitude, Forced Labor, and Debt Bondage’ in Leila Nadya Sadat and Michael P Scharf (eds), *The Theory and Practice of International Criminal Law: Essays in Honor of M Cherif Bassiouni* (Martinus Nijhoff, 2008) 397; Anne T Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’ (2009) 49(4) *Virginia Journal of International Law* 789; Bernadette McSherry and Susan Kneebone, ‘Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights’ (2008) 12(1) *The International Journal of Human Rights* 67; Alice Edwards, ‘Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor’ (2007) 36(1) *Denver Journal of International Law and Policy* 9.

deceptive means, and regard its absence as relevant for the purposes of identifying situations of trafficking.

### E *Migrant Labour Approach*

The migrant labour approach conceptualises trafficking as the serious exploitation of migrant workers.<sup>74</sup> It views trafficking as part of a spectrum of workplace exploitation, and considers that it is the especially weak position of migrant workers—as opposed to non-migrant workers—which gives rise to their vulnerability to workplace exploitation at the hands of their employers. The amplified power disparity between migrant workers and their employers is, according to proponents of this approach, the outcome of structural forces created by the legal regimes of destination states in areas of labour and migration. Proponents focus on consent at the exploitation point only. They conceive of it as a choice which is made within the constraints of a person’s social and economic situation, but do not attach any relevance to it for the purpose of identifying trafficking. To do otherwise, they explain, focuses blame entirely on the individual employer and thereby ‘obscures the role of the state in constructing the conditions of precariousness within which workers exercise agency’.<sup>75</sup>

## V EXAMINING CONCEPTUALISATIONS OF CONSENT IN THE AUSTRALIAN CRIMINAL LAWS

Apart from amendments to the definition of forced marriage,<sup>76</sup> there have been no significant changes made to the trafficking and related offences in divs 270 and 271 since 2013.<sup>77</sup> Divisions 270 and 271 remain generally organised around two broad

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<sup>74</sup> This approach emerges from the following publications: Laurie Berg, *Migrant Rights at Work: Law’s Precariousness at the Intersection of Immigration and Labour* (Routledge, 2016); Hila Shamir, ‘A Labor Paradigm for Human Trafficking’ (2012) 60(1) *UCLA Law Review* 76; Hila Shamir, ‘The Paradox of “Legality”’: Temporary Migrant Worker Programs and Vulnerability to Trafficking’ in Prabha Kotiswaran (ed), *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (Cambridge University Press, 2017) 471; Hannah Lewis and Louise Waite, ‘Migrant Illegality, Slavery and Exploitative Work’ in Gary Craig et al (eds), *The Modern Slavery Agenda: Policy, Politics and Practice* (Policy Press, 2019) 219; Adriana Kemp and Rebeca Raijman, ‘Bringing in State Regulations, Private Brokers, and Local Employers: A Meso-Level Analysis of Labor Trafficking in Israel’ (2014) 48(3) *International Migration Review* 604; Benjamin Harkins, ‘Base Motives: The Case for an Increased Focus on Wage Theft Against Migrant Workers’ (2020) 15 *Anti-Trafficking Review* 42; Hannah Lewis et al, ‘Hyper-Precarious Lives: Migrants, Work and Forced Labour in the Global North’ (2014) 39(5) *Progress in Human Geography* 580; Zuzanna Muskat-Gorska, ‘Can Labour Make an Effective Contribution to Legal Strategies Against Human Trafficking?’ in Ryszard Piotrowicz, Conny Rijken and Baerbel Heide Uhl (eds), *Routledge Handbook of Human Trafficking* (Routledge, 2018) 635.

<sup>75</sup> Berg (n 74) 245.

<sup>76</sup> See *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth) sch 4, cl 1; *Combating Child Sexual Exploitation Legislation Amendment Act 2019* (Cth) sch 5, cl 1.

<sup>77</sup> Since the enactment of the *2013 Act* there have been some relatively minor changes made to divs 270 and 271: see *Statute Law Revision Act (No. 1) 2014* (Cth); *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Act 2015* (Cth); *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth); *Statute Law Revision Act (No. 1) 2016* (Cth); *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018* (Cth); *Combating Child Sexual Exploitation Legislation Amendment Act 2019* (Cth).

types of offences. In the case of div 270, this is the exploitation offences: slavery, servitude, forced labour, deceptive recruiting for labour or services, forced marriage and debt bondage. In the case of div 271, this is the trafficking offences: trafficking in persons and children, organ trafficking, and harbouring a victim.

This part examines the provisions of seven categories of offences in divs 270 and 271. Embedded within each is a particular conceptualisation of consent. For the first two categories which are examined—trafficking in persons and deceptive recruiting for labour or services—the conceptualisations embedded relate to consent at the start point. For the other five—servitude, forced labour, slavery, forced marriage and organ trafficking—the conceptualisations relate to consent at the exploitation point. The examination which follows identifies which conceptualisations are embedded within the provisions specifying the offences, and assesses what the provisions reveal about the relevance of consent for the purposes of establishing the offences.

### A *Trafficking in Persons Offences*

Two of the eight trafficking in persons offences in div 271 apply where a person's actual or proposed movement into or out of Australia is accompanied by the use of coercion, threat or deception.<sup>78</sup> The first is s 271.2(1), which specifies:

- A person (the *first person*) commits an offence of trafficking in persons if:
- (a) the first person organises or facilitates the entry or proposed entry, or the receipt, of another person into Australia; and
  - (b) the first person uses coercion, threat or deception; and
  - (c) that use of coercion, threat or deception results in the first person obtaining the other person's compliance in respect of that entry or proposed entry or in respect of that receipt.<sup>79</sup>

Section 271.2(1A) specifies the same, except it applies in relation to the exit or proposed exit of another person from Australia. Additionally, s 271.5(1), which sets out one of the four domestic trafficking in persons offences, mirrors ss 271.2(1) and (1A) but applies in relation to the transportation or proposed transportation of another person from one place to another within Australia.<sup>80</sup>

Even though ss 271.2(1), 271.2(1A) and 271.5(1) do not explicitly reference consent, it is possible to discern a particular conceptualisation of consent which is

<sup>78</sup> The eight offences are specified in: *Criminal Code* (n 3) ss 271.2(1), (1A), (1B), (1C), (2), (2A), (2B), (2C).

<sup>79</sup> Coercion is defined to include 'force', 'duress', 'detention', 'psychological oppression', 'abuse of power' and 'taking advantage of a person's vulnerability': *ibid* s 270.1A (definition of 'coercion'). Threat is defined in a way which clearly contemplates conduct intended to have some coercive effect, namely as 'a threat of coercion', 'a threat to cause a person's deportation or removal from Australia', or 'a threat of any other detrimental action, unless there are reasonable grounds for the threat of that action in connection with the provision of labour or services by a person': at s 270.1A (definition of 'threat'). The meaning of deceived is derived from the definition of deceive, and means being '[misled] as to fact ... or as to law, by words or other conduct': at ss 270.1A (definition of 'deceived') and 271.1 (definition of 'deceive').

<sup>80</sup> The four offences are specified in: *Criminal Code* (n 3) ss 271.5(1), (2), (2A), (2B).

embedded within them. This conceptualisation relates to consent at the start point, owing to the fact that the three offences are not concerned with actual exploitation, but rather with conduct taking place prior to any exploitation. It resembles the way proponents of the transnational business and human rights approaches conceive of consent and its relevance at the start point: consent is a choice or decision made in the absence of coercion and deception, and the absence of consent is relevant for the purposes of identifying trafficking.

This conceptualisation is evidenced by the fact that the offences specified in ss 271.2(1), 271.2(1A) and 271.5(1) apply only where a person's choice or decision to comply with their movement into, out of or within Australia was made in the presence of coercion, threat or deception. Where there is no coercion, threat or deception, the person's choice or decision to comply is not called into question—they are not a victim. In this way, consent is implicitly relevant for the purposes of establishing these trafficking in persons offences: they each in effect require evidence of its *absence*. Moreover, because it is open for the accused to dispute the use of coercion, threat or deception, a defence based on the *presence* of consent is by default a possibility.

### B *Offence of Deceptive Recruiting for Labour or Services*

The offence of deceptive recruiting for labour or services in div 270 is specified in s 270.7, which states:

A person (the **recruiter**) commits an offence if:

- (a) the recruiter engages in conduct; and
- (b) the recruiter engages in the conduct with the intention of inducing another person (the **victim**) to enter into an engagement to provide labour or services; and
- (c) the conduct causes the victim to be deceived about:
  - (i) the extent to which the victim will be free to leave the place or area where the victim provides the labour or services; or
  - (ii) the extent to which the victim will be free to cease providing the labour or services; or
 ... [certain other matters relating to the circumstances of the engagement to provide labour or services].<sup>81</sup>

In other words, s 270.7 applies where a person uses deception in order to recruit another person to provide labour or services.

Similar conclusions made in relation to the trafficking in persons offences discussed above regarding consent can be made in relation to the deceptive recruiting offence. Section 270.7 does not explicitly reference consent, but it is nevertheless possible to recognise a particular conceptualisation of consent embedded within it. This conceptualisation pertains to consent at the start point, given that the offence is concerned with conduct which takes place before the victim goes on to engage in the

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<sup>81</sup> For the definition of 'deceived', see above n 79.



labour or services for which they are recruited, and therefore before they experience any exploitation in connection with that labour or those services. It resembles the way proponents of the transnational business and human rights approaches conceive of consent and its relevance at the start point: consent is a choice or decision made in the absence of coercion and deception, and the absence of consent is relevant for the purposes of identifying trafficking.

This conceptualisation is revealed by the fact that the offence specified in s 270.7 applies only where a person's choice or decision to enter into an engagement to provide labour or services was made in the presence of deception. Where there is no deception, the person's choice or decision is not called into question, and they are not a victim of the deceptive recruiting offence. Consent is therefore implicitly relevant for the purposes of establishing the offence: in effect, evidence of the *absence* of consent is required. Furthermore, a defence to the deceptive recruiting offence based on the *presence* of consent is by default a possibility, stemming from the fact that it is open to the accused to dispute the use of deception.

### C *Servitude and Forced Labour Offences*

The servitude offences in div 270 apply where a person engages in conduct which causes another person to enter into or remain in servitude, or conducts any business which involves the servitude of another person.<sup>82</sup> In order to establish these offences, it must be shown that the victim was in a condition of servitude, as defined in s 270.4(1). Section 270.4(1) specifies that

***servitude*** is the condition of a person (the ***victim***) who provides labour or services, if, because of the use of coercion, threat or deception:

- (a) a reasonable person in the position of the victim would not consider himself or herself to be free:
  - (i) to cease providing the labour or services; or
  - (ii) to leave the place or area where the victim provides the labour or services;and
- (b) the victim is significantly deprived of personal freedom in respect of aspects of his or her life other than the provision of the labour or services.<sup>83</sup>

The forced labour offences mirror the servitude offences, but apply where the victim is in a condition of 'forced labour', as defined in s 270.6(1), rather than servitude.<sup>84</sup> The definition of forced labour is the same as the definition of servitude, except it does not require that the victim also be significantly deprived of personal freedom in respect of aspects of his or her life other than the provision of the labour or services.

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<sup>82</sup> *Criminal Code* (n 3) ss 270.5(1), (2).

<sup>83</sup> For the definitions of 'coercion', 'threat' and 'deception', see above n 79.

<sup>84</sup> *Criminal Code* (n 3) ss 270.6A(1), (2).

It is possible to discern from the definitions of servitude and forced labour in ss 270.4(1) and 270.6(1) a particular conceptualisation of consent which is embedded within those provisions. This is the case even though consent is not explicitly mentioned. The conceptualisation relates to consent at the exploitation point, given that ss 270.4(1) and 270.6(1) deal directly with exploitation. It resembles the way proponents of the sex worker rights approach conceive of consent at the exploitation point: consent is a choice which is made where there is freedom to choose, and the impossibility of consent is relevant for the purposes of identifying trafficking.

This conceptualisation is made clear by the fact that ss 270.4(1) and 270.6(1) apply only where a reasonable person in the position of the person providing the labour or services would not consider themselves to be free to make a choice to stop providing labour or services or to leave the relevant place or area. Where, on the other hand, a reasonable person would consider themselves to be free, then a choice by the person providing the labour or services to continue providing the labour or services, or to remain in the relevant place or area, is not called into question—they are not a victim. To establish the offences of servitude and forced labour, ss 270.4(1) and 270.6(1) require proof of a lack of freedom to choose, or in other words, evidence of the *impossibility* of consent. In this way, consent is relevant for the purposes of establishing these offences. Moreover, a defence constructed around the *presence* of consent is by default a possibility, because it is open for the accused to argue that there was freedom to choose to stop providing labour or services and to leave the relevant place or area.

It is useful here to contrast the current definition of forced labour with the former definition of sexual servitude<sup>85</sup> (inserted in 1999 and repealed in 2013). The former sexual servitude definition differs from the current forced labour definition in just three respects. First, the sexual servitude definition applied in respect of persons who provided ‘sexual services’, whereas the forced labour definition applies in respect of persons who provide ‘labour or services’. Second, the sexual servitude definition required a subjective assessment, whereas the forced labour definition requires an objective assessment (the reasonable person test). Third, the sexual servitude definition specified that the lack of freedom must be because of the use of ‘force or threats’, whereas the forced labour definition specifies that it must be because of the use of ‘coercion, threat or deception’. These differences do not, however, override what the two definitions have in common: both involve an assessment of whether the person lacked freedom in certain respects.

The New South Wales Court of Appeal considered the application of the former sexual servitude definition in *R v Sieders* (*‘Sieders Case’*).<sup>86</sup> The Court’s decision in this case supports the conclusions that the current servitude and forced labour offences are underpinned by a conceptualisation of consent as a choice which is made where

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<sup>85</sup> See *Criminal Code* (n 3) s 270.4, as inserted by *1999 Act* sch 1 item 1.

<sup>86</sup> (2008) 72 NSWLR 417.

there is freedom to choose, and that these offences effectively require evidence of the impossibility of consent in order to be established.

The *Sieders Case* involved two brothel owners, Sieders and Yotchomchin, who recruited four women to move from Thailand to Australia to engage in sex work in their brothels located in Sydney. At trial, the jury found Sieders and Yotchomchin guilty of conducting a business involving the sexual servitude of others under former s 270.6(2). In considering their appeals against their convictions, the Court was required to determine whether the decision of the jury was unreasonable or could not be supported having regard to the evidence.

Campbell JA, with whom James and Johnson JJ agreed, made it clear that evidence that a person agreed to *not* take the actions specified in the definition of sexual servitude—to *not* cease providing sexual services and to *not* leave the relevant place or area—did not preclude a finding of sexual servitude. In this regard, his Honour explained that ‘it is possible for a person to be not free to take some particular action even if they have agreed that they will not take that action’.<sup>87</sup> He also made it clear that evidence that the person did not want to take the specified actions—that is, that they had made a choice to not take them, or at least to not attempt to take them—did not preclude a finding of sexual servitude. Here, his Honour stated:

[I]t is not necessary for [the person] to actually want to cease providing sexual services, or to leave the place or area where the person provides the sexual services. Rather, what is involved is that, if they *were to want to*, there would be some circumstance or set of circumstances in which they live that would prevent, or seriously inhibit, their ability to take that action.<sup>88</sup>

In applying this interpretation, Campbell JA observed that there was no evidence indicating that the three women wanted, or had sought, to do anything ‘about seeking to free themselves from the conditions under which they worked, other than by diligent work over long hours to pay off the debt’.<sup>89</sup> His honour noted that the evidence was to the contrary: it suggested that the women acquiesced to their conditions.<sup>90</sup> Nevertheless, he considered that this evidence did not preclude a finding of sexual servitude.

#### D *Slavery Offences*

The slavery offences in div 270 apply where, for example, a person: reduces another person to slavery; possesses a slave or exercises over a slave any of the other powers attaching to the right of ownership; or engages in slave trading.<sup>91</sup> Each of the slavery offences rely on the definition of slavery in s 270.1, which states:

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<sup>87</sup> Ibid 425 [94].

<sup>88</sup> Ibid 425 [93] (emphasis in original).

<sup>89</sup> Ibid 439 [142].

<sup>90</sup> Ibid.

<sup>91</sup> *Criminal Code* (n 3) ss 270.3(1), (2).

*slavery* is the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or a contract made by the person.

Similar conclusions made in relation to the servitude and forced labour offences discussed above regarding consent can be made in relation to the slavery offences. Although the definition in s 270.1 does not explicitly reference consent, it is possible to recognise a particular conceptualisation of consent embedded within it. This conceptualisation relates to consent at the exploitation point, for the reason that s 270.1 clearly deals with exploitation. It resembles the way proponents of the sex worker rights approach conceive of consent at the exploitation point: consent is a choice which is made where there is freedom to choose, and the impossibility of consent is relevant for the purposes of identifying trafficking.

This conceptualisation is revealed by the fact that the definition of slavery effectively requires that the person lack freedom of choice. Indeed, this is the very nature of ownership: a person who is in essence owned by another cannot be said to have any freedom of choice. Consent is therefore implicitly relevant for the purposes of establishing the slavery offences. In effect, evidence of the *impossibility* of consent is required. Furthermore, a defence based on the *presence* of consent is by default a possibility, because it is open for the accused to adduce evidence of freedom of choice on the part of the victim.

It is useful here to consider the decision of the High Court in *R v Tang*.<sup>92</sup> This case involved the actions of Tang, an owner of a Melbourne brothel who was convicted at trial of offences of slavery. The convictions related to five women who moved from Thailand to Australia, where they worked at Tang's brothel. The Court of Appeal of the Supreme Court of Victoria upheld an appeal by Tang, quashed her convictions and ordered a new trial. This decision was later reversed by the High Court.

Comments made by Hayne J lend support to the conclusions that the slavery offences are underpinned by a conceptualisation of consent as a choice which is made where there is freedom to choose, and that they effectively require the *impossibility* of consent in order to be established. In particular, his Honour suggested that, for the purposes of determining slavery, it is helpful to ask what freedom the complainant had:

[T]o ask whether a complainant was deprived of choice may assist in revealing whether what the accused did was exercise over that person a power attaching to the right of ownership. To ask how the complainant was deprived of choice may help to reveal whether the complainant retained freedom of choice in some relevant respect.<sup>93</sup>

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<sup>92</sup> *R v Tang* (2008) 237 CLR 1.

<sup>93</sup> *Ibid* 61 [156].

Ultimately, Hayne J explained, if the complainant retained freedom to choose in relevant respects, ‘that freedom will show that the use made by the accused of the complainant was not as a slave’.<sup>94</sup>

### E Forced Marriage Offences

There are two forced marriage offences in div 270. The first applies where a person engages in conduct and that conduct causes another person to enter into a forced marriage as the victim of the marriage, and the second where a person is a party to a forced marriage and is not the victim of that forced marriage.<sup>95</sup> Both offences depend on the definition of forced marriage in s 270.7A(1), which specifies:

A marriage is a **forced marriage** if:

- (a) either party to the marriage (the **victim**) entered into the marriage without freely and fully *consenting*:
  - (i) because of the use of coercion, threat or deception; or
  - (ii) because the victim was incapable of understanding the nature and effect of the marriage ceremony; or
- (b) when the marriage was entered into, either party to the marriage (the **victim**) was under 16.<sup>96</sup>

In other words, a marriage is a forced marriage if (among other things) the victim entered the marriage without fully and freely consenting, because they were either coerced, threatened or deceived, or were incapable of understanding the nature and effect of the marriage ceremony.

The term consent is not itself defined for the purposes of s 270.7A(1), but the definition of forced marriage as a whole reflects two different conceptualisations of consent. These conceptualisations relate to consent at the exploitation point, on the basis that the forced marriage offences apply to conduct which is inherently exploitative. The first is consent as a choice which is made in the absence of coercion, threat and deception, and the second is consent as a choice which is made freely by a person capable of making an informed choice. These do not resemble any of the conceptualisations of consent described in Part IV of this article—or at least those which relate to consent at the exploitation point. Nevertheless, regardless of which of these two conceptualisations is considered, consent is unambiguously relevant in establishing the forced marriage offences. The *absence* of consent is an explicit element of the offences—and, by default, its *presence* is a possible defence.

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<sup>94</sup> Ibid.

<sup>95</sup> *Criminal Code* (n 3) ss 270.7B(1), (2).

<sup>96</sup> Ibid s 270.7A(1) (emphasis added). For the definitions of ‘coercion’, ‘threat’ and ‘deception’, see above n 79.

### F *Organ Trafficking Offences*

The offences of organ trafficking and domestic organ trafficking in div 271 apply where a person organises or facilitates the movement of another person (the victim) into, out of or within Australia and is reckless as to whether this will result in the removal of an organ of the victim.<sup>97</sup> These offences apply only in the circumstances specified s 271.7A, namely:

- (a) the removal, or entering into an agreement for the removal, would be contrary to the law of the State or Territory where it is, or is to be, carried out; or
- (b) neither the victim, nor the victim's guardian, *consents* to the removal, and it would not meet a medical or therapeutic need of the victim.<sup>98</sup>

Also relevant here is s 271.11A(1)(b), which specifies that, for the purposes of the organ trafficking offences, the trier of fact may have regard to the fact that 'the alleged victim, or the alleged victim's guardian, had *consented* to the removal of an organ of the alleged victim'.<sup>99</sup>

The term consent in ss 271.7A and 271.11A(1)(b) is not defined. In the absence of any qualifying terms such as 'because of the use of coercion, threat or deception'—as exist in the definition of forced marriage—it is not possible to discern from the provisions of s 271.7A any particular conceptualisation of consent reflected in the organ trafficking offences. Nevertheless, it is plainly clear that consent is relevant to establishing these offences. By virtue of s 271.7A, the *absence* of consent is an explicit element to be established—and, by default, its *presence* is a possible defence. What is more, s 271.11A(1)(b) explicitly declares consent to be relevant.

## VI CONCLUSION

The analysis in Part V of this article reveals that there are different conceptualisations of consent embedded in the provisions of various trafficking and related offences in divs 270 and 271 of the *Criminal Code*. The trafficking in persons and deceptive recruiting offences reflect a particular conceptualisation of consent at the start point: that consent is a choice which is made in the absence of coercion or deception. The servitude, forced labour and slavery offences reflect a particular conceptualisation of consent at the exploitation point: that consent is a choice which is made where there is freedom to choose. It is possible to discern these conceptualisations from the provisions which specify these offences even though consent is not explicitly referenced in those provisions. The forced marriage and organ trafficking offences are outliers in this regard. The provisions specifying these offences explicitly mention consent, but do not make it clear which conceptualisation in particular applies.

<sup>97</sup> Ibid ss 271.7B, 271.7D. Aggravated offences are specified in ss 271.7C and 271.7E.

<sup>98</sup> Ibid s 271.7A (emphasis added).

<sup>99</sup> Ibid s 271.11A(1)(b) (emphasis added).

Crucially, the analysis in Part V reveals that consent is relevant for the purposes of establishing each offence category discussed. Its relevance is implied in the offences of trafficking in persons, deceptive recruiting, servitude, forced labour and slavery, but is explicit in the offences of forced marriage and organ trafficking. For some offences it is the absence of consent which is relevant, whereas for others it is the impossibility of consent. However, regardless of whether it is the absence or impossibility of consent which matters, it is certainly questionable whether legislators' desire to ensure the compliance of divs 270 and 271 with the principle of the irrelevance of consent in art 3(b) of the *Trafficking Protocol* has been achieved. This conclusion is not altered by the existence of ss 270.11 and 271.11B, which declare that consent is not a defence to the offences in divs 270 and 271. Indeed, the analysis in Part V reveals that the various offences discussed by default open the door to a defence based on the presence or possibility of consent.

Ultimately, what the analysis in Part V reveals is a complex and interwoven series of contradictions between the terms of the *Trafficking Protocol*, the intentions of Australian legislators, and the provisions of divs 270 and 271. The practical ramifications of this for the implementation of the trafficking and related offences in divs 270 and 271 are identified in the existing research. Those whose job it is to implement these offences—police, prosecutors, triers of fact—are left to reconcile blunt instructions to disregard consent with a set of laws which effectively demand the opposite. This is, fundamentally, a failure of the international law on trafficking, which has left states in the position presently occupied by Australia: seeking to embrace, out of a sense of legal obligation, an international legal principle, the meaning of which is unsettled and the very essence of which is burdened by a long legacy of unresolved debate and divide.

The federal government's recent targeted review of divs 270 and 271 signals ongoing concern regarding the role of consent in both the provisions and implementation of the trafficking and related offences. This article has demonstrated that law reform on this matter is warranted. However, navigating a path towards conceptual clarity will not be easy. As the UNODC observes,<sup>100</sup> discussions about consent are inevitably informed by values—such as human dignity, agency and personal autonomy—on which there is no consensus and which, as Part IV of this article indicates, may be summoned in support of vastly different perspectives on the causes of trafficking, who bears culpability for it, and what the responses ought to be.

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<sup>100</sup> UNODC *Report on Consent* (n 14) 75–6.