

‘SEX SLAVES’ AND SHREWD BUSINESS WOMEN: THE ROLE OF VICTIM CONSENT IN TRAFFICKING IN PERSONS IN AUSTRALIA

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This article explores and analyses the judicial treatment of victim consent in cases of trafficking in persons in Australia. Using available case law, this article examines how victim consent has been dealt with in the prosecution and sentencing of trafficking offenders, and how discussions of consent have, in certain cases, been used to undermine the credibility of victims in the trial process. This article reflects on the conceptual and practical significance of consent in trafficking in persons prosecutions in Australia and develops recommendations to overcome common stereotypes and protect the rights of trafficked persons.

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I INTRODUCTION

In international law and Australia's *Criminal Code Act 1995* (Cth) ('*Criminal Code*'), consent is neither an element nor a substantive defence to a charge of trafficking in persons. Provided that the material elements of the offence can be established, whether or not a victim gave their consent to any stage of the trafficking process is irrelevant. This has, however, not prevented Australian courts from discussing consent in the course of criminal proceedings.

This article examines how the issue of victim consent is often an important subtext in the prosecution and sentencing of trafficking offenders in Australia. Whilst it is broadly accepted that a victim's consent should not negate the criminality of the act, or allow the perpetrator to escape justice, the courts have nonetheless engaged in extensive discussions around the issue of consent in borderline cases. Whilst consent is also not a defence, it may be considered evidentially relevant in determining whether the elements of the offence can be established.¹ Moreover, in several cases, consent has been taken into account as a relevant factor in the sentencing of offenders.²

¹ See, eg, *R v Tang* (2008) 237 CLR 1; *R v Sieders* (2008) 72 NSWLR 417; *Ho v The Queen* (2011) 219 A Crim R 74.

² See, eg, *R v Tang* (2009) 23 VR 332; *Ho v The Queen* (2011) 219 A Crim R 74; *R v McIvor* (2010) 12 DCLR (NSW) 77.

This article proposes that one of the reasons why consent continues to be taken into account and discussed in many cases is that the actual experiences of most victims of trafficking in persons in Australia do not align with pre-existing stereotypes, and do not ‘neatly fall within the paradigm of slavery or servitude.’³ The ‘ideal victim’ myth,⁴ according to which all victims of trafficking are necessarily ‘innocent young women and children ... [who] are captured and sexually exploited by sociopaths and predators, gendered male, who force them into prostitution far from home’ undermines the credibility of those victims who deviate too far from this model.⁵ There is a widely held view and underlying assumption that a ‘true victim’ is one that makes every possible attempt to escape, and against whom severe physical force is used.⁶

Accordingly, in cases where, upon a closer examination of the facts, it is revealed that the victim in question gave their consent to either the initial movement to Australia, to the working conditions to which they would be subjected, or to the debts that would be imposed upon them, it can be very difficult for courts and juries alike to identify victims as victims. This is particularly evident in cases where the victim’s consent was garnered by emotional or psychological pressure and where no direct physical force was used. In such cases, victims risk being labelled as shrewd business women or

³ Vanessa E Munro, ‘Of Rights and Rhetoric: Discourses of Degradation and Exploitation in the Context of Sex Trafficking’ (2008) 35 *Journal of Law and Society* 240, 250; cf Carolyn Hoyle, Mary Bosworth and Michelle Dempsey ‘Labelling the Victims of Sex Trafficking: Exploring the Borderland between Rhetoric and Reality’ (2011) 20 *Social & Legal Studies* 313, 314–15.

⁴ Nils Christie, ‘The Ideal Victim’ in Ezzat A Fattah (ed), *From Crime Policy to Victim Policy* (Macmillan, 1986) 17, 18–21; cf Joris van Wijk, ‘Who Is the “Little Old Lady” of International Crimes? Nils Christie’s Concept of the Ideal Victim Reinterpreted’ (2013) 19 *International Review of Victimology* 159, 160.

⁵ Kay B Warren, ‘Troubling the Victim/Trafficker Dichotomy in Efforts to Combat Human Trafficking: The Unintended Consequences of Moralizing Labor Migration’ (2012) 19 *Indiana Journal of Global Legal Studies* 105, 106.

⁶ Julia Quilter, ‘Re-framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform’ (2011) 35 *Australian Feminist Law Journal* 23, 33–5. See also Jonathan Crowe, ‘Consent, Power and Mistake of Fact in Queensland Rape Law’ (2011) 23 *Bond Law Review* 21, 28–9. See generally Melanie Randall, ‘Sexual Assault Law, Credibility, and “Ideal Victims”’: Consent, Resistance, and Victim Blaming’ (2010) 22 *Canadian Journal of Women and the Law* 397, 410–12; cf Wendy Larcombe, ‘The “Ideal” Victim v Successful Rape Complainants: Not What You Might Expect’ (2002) 10 *Feminist Legal Studies* 131, 132.

'business women in the business of sex'.⁷ This is despite the fact that there are ample reports showing that victims of trafficking in persons in Australia are usually controlled by subtle means rather than direct physical force,⁸ and that many, if not most, victims of trafficking identified in Australia are aware of the nature of work they would be performing.⁹ Accordingly, reports which suggest that all 'trafficked victims are essentially slaves',¹⁰ or which portray trafficked women as 'victims of a ruthless slave market' are 'too simplistic and [ignore] the rational choices [some] women have made'.¹¹ As Jacqueline Berman notes:

many women who accept traffickers' assistance know they will work in the sex industry and accede to opaque or questionable travel and work conditions abroad because they wish to pursue some specific goal that they themselves have devised, for economically rational reasons.¹²

Contrary to popular belief, cases in which victims are completely misled about the type of work they will be carrying out are rather isolated in Australia. Indeed, as was noted by the Australian Institute of Criminology, 'most

⁷ Fiona David, 'Trafficking of Women for Sexual Purposes' (Research and Public Policy Series No 95, Australian Institute of Criminology, 2008) 52; see, for example, *Ho v The Queen* (2011) 219 A Crim R 74, 84 [38] (Buchanan and Ashley JJA).

⁸ Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, 20th sess, Agenda Item 3, UN Docs A/HRC/20/18 and Add.1 (18 May 2012) annex ('*Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, on Her Mission to Australia (17–30 November 2011)*') 4 [6].

⁹ See Australian Federal Police, *Annual Report 2006–07* (2007) 25; Australian Federal Police, *Annual Report 2005–06* (2006) 35; Australian Federal Police, *Annual Report 2003–04* (2004) 37; Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the Trafficking of Women for Sexual Servitude* (2004) 9–10 [2.18]; Rebecca Tailby, 'A Cross-analysis Report into Smuggling and Trafficking between the Philippines and Australia' (Executive Summary, Australian Institute of Criminology, January 2001) 6; *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, on Her Mission to Australia (17–30 November 2011)*, UN Docs A/HRC/20/18 and Add.1, annex 4 [7].

¹⁰ Iris Yen, 'Of Vice and Men: A New Approach to Eradicating Sex Trafficking by Reducing Male Demand Through Educational Programs and Abolitionist Legislation' (2008) 98 *Journal of Criminal Law & Criminology* 653, 656.

¹¹ Linda Brockett and Alison Murray, 'Thai Sex Workers in Sydney' in Roberta Perkins et al (eds), *Sex Work and Sex Workers in Australia* (University of New South Wales Press, 1994) 191, 195.

¹² Jacqueline Berman, 'Biopolitical Management, Economic Calculation and "Trafficked Women"' (2010) 48(4) *International Migration* 84, 94.

trafficked persons consen[t] to the initial movement in order to work in Australia'.¹³ To this day, there has been no conviction for trafficking involving the deception of victims about the type of work they would be engaging in. 'Moreover, there are no known cases of women, men or children [who have] been abducted and brought to Australia by force' for the purpose of exploitation.¹⁴

Using the available case law, this article examines the role of consent in the prosecution and sentencing of trafficking in persons in Australia and develops recommendations to overcome common stereotypes and protect the rights of trafficked persons. The primary focus of this article is on cases involving trafficking of adult women for the purpose of commercial sexual exploitation, ie prostitution. Trafficking for other exploitative purposes, such as domestic servitude, forced labour and trafficking in children, are not well documented in Australia and there are few reported cases on these points.

It should be acknowledged from the outset that one of the greatest challenges in developing conclusions in this area of law is the relatively small number of reported cases. According to the Commonwealth Director of Public Prosecutions, only 17 persons have been convicted for trafficking-related offences since divs 270 and 271 of the *Criminal Code* came into operation.¹⁵ The six cases analysed in this article have been chosen because they contain the most protracted discussion of consent in the context of trafficking in persons in Australia. This does not mean that consent was not discussed in the other cases; but, rather, that these cases turned on other facts and points of law. Indeed, rather than detracting from the importance of this issue, the minimal amount of case law on this topic merely serves to highlight the difficulties faced in measuring trafficking in persons in Australia.¹⁶

¹³ Jacqueline Joudo Larsen and Lauren Renshaw, 'People Trafficking in Australia' (Trends & Issues in Crime and Criminal Justice No 441, Australian Institute of Criminology, June 2012) 2.

¹⁴ Andreas Schloenhardt and Jarrod M Jolly, *Trafficking in Persons in Australia: Myths and Realities* (LexisNexis, 2013) 24; cf Attorney-General's Department, 'The Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protections' (Discussion Paper, Government of Australia, 2010) 6.

¹⁵ Interdepartmental Committee on Human Trafficking and Slavery, Australian Government, *Trafficking in Persons: The Australian Government Response: 1 July 2013 – 30 June 2014* (2014) 22.

¹⁶ For a detailed discussion of the difficulties faced in measuring trafficking in persons in Australia, see Matthew Wise and Andreas Schloenhardt, 'Counting Shadows — Measuring

This article is divided into six parts. Part II highlights the difficulties faced in understanding consent, and the need to move away from the consenting or non-consenting dichotomy. Part III examines the international framework for trafficking in persons and the role that consent has played in the development of the relevant international instruments. Part IV outlines the relevant domestic offences, laid out in divs 270 and 271 of the *Criminal Code*, and the relevance (or irrelevance) of consent in proving these offences. Parts V and VI proceed to examine how consent has been taken into account in criminal proceedings and sentencing in Australia. This article concludes in Part VII with a number of observations and preliminary recommendations.

II UNDERSTANDING VICTIM CONSENT

Contrary to popular belief, the available case law and literature demonstrates that most, if not all, victims of trafficking in persons in Australia have given their consent to at least one stage of the trafficking process.¹⁷ In order to evaluate the quality of this consent, it is necessary to examine both the relative knowledge of the victim and their desire to engage in the particular incidents of trafficking. As the analysis below illustrates, a victim may give their consent at various stages of the trafficking process, without any real understanding of the conditions or type of work in which they will be engaging.¹⁸ Accordingly, the distinction between the consenting and the non-consenting victim is not an easy one to draw.

A Recruitment: Knowledge and Deception

The recruitment of trafficked persons generally involves promises about lucrative employment and favourable working conditions in Australia.¹⁹ In

Trafficking in Persons in Australia' (2014) 3 *International Journal of Criminology and Sociology* 249.

¹⁷ See *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, on Her Mission to Australia (17–30 November 2011)*, UN Docs A/HRC/20/18 and Add.1, annex 4 [7].

¹⁸ Attorney-General's Department, above n 14, 5–6 [18].

¹⁹ Australian Federal Police, *Annual Report 2006–07 (2007)* 25; Australian Federal Police, *Annual Report 2005–06 (2006)* 35; Australian Federal Police, *Annual Report 2003–04 (2004)* 37; Parliamentary Joint Committee on the Australian Crime Commission, above n 9, 9–10 [2.18]. See also Tailby, above n 9, 6.

most cases, the recruiters create false expectations about the type of work, accommodation, pay, personal freedom, and working environment, and keep the victims ignorant about the scale of exploitation awaiting them in Australia.²⁰ The picture that emerges from law enforcement reports, case law, and other official information is that many, if not most, victims of trafficking are or might be aware of the nature of work they would be performing in Australia, including the fact that they would engage in sex work.²¹ Cases in which victims are completely misled about the type of work they will be carrying out are rather isolated in Australia.²²

Several attempts have been made to identify different levels of deceit and intimidation employed by traffickers against their victims at the recruitment stage. For example, the parliamentary *Inquiry into the Trafficking of Women for Sexual Servitude* conducted in 2004 identified three different categories:

The first group comprises women who come to Australia intending to work in the sex industry. The second group come knowingly intending to work in the sex industry, but are misled by traffickers as to the conditions under which they will be working. This second group includes women who have worked in the sex industry previously in and/or abroad, as well as those who have never engaged in prostitution before. ...

The third group are totally deceived about the fact that they will be required to work as prostitutes in Australia. These women are often told that they will be working in businesses unrelated to the sex industry, such as restaurants, travel services, or domestic work.²³

The main focus here is on the level of knowledge victims of trafficking have at the time they are recruited in their home country. While such categorisation tends to ignore individual experiences and reactions, it can be helpful in understanding the spectrum of consent. These findings support the view that many victims — most of them women — are recruited by the traffickers and arrive in Australia with a general understanding of the nature of the work they

²⁰ *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, on Her Mission to Australia (17–30 November 2011)*, UN Docs A/HRC/20/18 and Add.1, annex 4 [7]; Schloenhardt and Jolly, above n 14, 25.

²¹ See generally above n 19.

²² Schloenhardt and Jolly, above n 14, 25.

²³ Parliamentary Joint Committee on the Australian Crime Commission, above n 9, 8 [2.10], [2.13].

will be engaging in, but are misled or unaware about the exploitative conditions in which they will be working.

Reported case law and academic research provide further evidence that in instances of trafficking for the purposes of commercial sexual exploitation, many victims initially agree to the type of work they will be engaging in and have prior experience in the sex industry.²⁴ In some cases, the victims also had some level of awareness that, once in Australia, they would owe a debt to the traffickers.²⁵

B *Arrival and Subsequent Exploitation*

In the Australian context, the exploitation of victims — which characterises and defines trafficking in persons — usually occurs after the victims arrive and relates to the reality they face here. In the known cases of trafficking, the exploitation mostly relates to the working conditions to which victims are subjected, the lack of freedom to decide if, how, and when they work, restrictions placed on their movement, instances of forced labour and servitude, along with cases involving physical harm, sexual exploitation, and threats of violence. The power that traffickers maintain over their victims is reinforced by the fact that

the women may not speak English, they have no money or passport, and may not even know where they are. This is compounded by the women's distrust of authorities and the fear — deliberately cultivated — that the law enforcement agencies are involved with the traffickers and misinformation about the consequences of cooperating with authorities.²⁶

²⁴ See, eg, *Ho v The Queen* (2011) 219 A Crim R 74, 80 [16] (Buchanan and Ashley JJA); *R v Tang* (2008) 237 CLR 1, 12 [6] (Gleeson CJ); *R v McIvor* (2010) 12 DCLR (NSW) 77, 79 [8] (Williams DCJ); *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, on Her Mission to Australia (17–30 November 2011)*, UN Docs A/HRC/20/18 and Add.1, annex 4 [7]; Drugs and Crime Prevention Committee, Parliament of Victoria, *Inquiry into People Trafficking for Sex Work* (2010) 37; Marnie Ford, 'Sex Slaves and Legal Loopholes: Exploring the Legal Framework and Federal Responses to the Trafficking of Thai "Contract Girls" for Sexual Exploitation to Melbourne, Australia' (Research Paper, Victoria University, 2001) 31.

²⁵ See, eg, *R v Netthip* [2010] NSWDC 159 (30 July 2010) [4]–[5] (Murrell DCJ); *R v Tang* (2008) 237 CLR 1, 13 [10]–[11] (Gleeson CJ); *R v Sieders* (2008) 72 NSWLR 417, 421 [11] (Campbell JA); *R v McIvor* (2010) 12 DCLR (NSW) 77, 81 [18] (Williams DCJ).

²⁶ Parliamentary Joint Committee on the Australian Crime Commission, above n 9, 15 [2.40].

There are also reports about the hard and unsafe working conditions for trafficked women, the risk of infection with sexually transmitted diseases, poor and unsanitary accommodation, instances of rape, imprisonment, threats of deportation, cases in which victims had to work during menstruation, and forced drug use.²⁷

It is both difficult and dangerous to make generalisations about the level and characteristics of the exploitation of victims of trafficking in persons in Australia. The available case law and accounts given by victims demonstrate that not only their experiences, but also their reactions to exploitation, are often unique and differ greatly from case to case and from person to person. Marianna Leishman remarks that ‘imposing stereotypes of victimhood upon women can be damaging, particularly where women may not necessarily see themselves as victims; they may see their situation as one in which they can improve their family’s lives.’²⁸ Moreover, different traffickers employ different methods of threats, harm, and intimidation — and individual victims perceive and respond to such situations differently.

In some cases, traffickers confiscate the passports of their victims to ensure that they do not run away and also to facilitate applications for further visas. In some instances victims are kept under lock and key, while other traffickers grant them some freedom to venture out, with or without supervision, and employ more subtle ways to exercise control over the victims and effectively restrict their personal freedom. In a 2011 assessment, the Australian Crime Commission identified a trend suggesting

that it is increasingly unusual for a victim of trafficking to be physically restrained (locked up) or overtly controlled, or to have their passport/identification papers confiscated. Many victims of trafficking have greater freedom of movement and access to mobile phones.²⁹

²⁷ See, eg, *R v McIvor* (2010) 12 DCLR (NSW) 77, 81 [15]–[16] (Williams DCJ); *R v Dobie* [2011] 1 Qd R 367, 377 [14] (Fraser JA); *R v Kovacs* [2009] 2 Qd R 51, 62 [10]–[11] (Muir JA). See also *ibid* 15–16 [2.40]–[2.46]; Brockett and Murray, above n 11, 196–7.

²⁸ Marianna Leishman, ‘Human Trafficking and Sexual Slavery: Australia’s Response’ (2007) 27 *Australian Feminist Law Journal* 193, 196.

²⁹ Australian Crime Commission, *Organised Crime in Australia 2011* (2011) 92.

C Debt Bondage

Known instances of trafficking in persons to Australia for the purpose of commercial sexual exploitation reveal that most victims are bound to the traffickers by a verbal agreement or contract. The victims usually enter into the agreement prior to their arrival in Australia, though the contract and the associated debt are sometimes transferred between individuals.³⁰ The existence of a contract between a sex worker and an agent or brothel owner in and of itself does not automatically amount to trafficking and is not uncommon for foreign sex workers in Australia. Trafficking arises when the contract is linked to inflated debts, coercion, or exploitation that occurs as a result of the contract.³¹ This situation is usually referred to as debt-bondage: it obliges the victims to work for a brothel-owner until an inflated debt for the cost of transport to Australia and living expenses has been paid off.

In several cases, the traffickers kept meticulous accounts about the inflated debts owed and the money earned by victims of trafficking and translated these debts into figures and formulas that determined exactly how many sex jobs (and how many hours and days) the women had to work in order to discharge their debts.³² From the available information, the fees charged by traffickers range between A\$35 000 and A\$53 000, which, depending on the case, have been equated with approximately 500 to 900 sex jobs.³³ On average, it takes the victims between six and 18 months to pay off that debt, usually by working six or seven days a week and more than 10 hours per day.³⁴

The physically demanding and unsafe working conditions and long working hours often take a serious toll on the victims and frequently cause physical and mental harm. As a result, traffickers often release the women once they have discharged their debt, rather than continuing their exploitation indefi-

³⁰ Ford, above n 24, 15. See, eg, *R v Sieders* (2008) 72 NSWLR 417, 421–3 [10]–[22] (Campbell JA).

³¹ Elena Jeffreys, 'Anti-trafficking Measures and Migrant Sex Workers in Australia' (2009) 19 *Intersections: Gender and Sexuality in Asia and the Pacific* [58]–[60].

³² See, eg, *R v Sieders* (2008) 72 NSWLR 417, 422–3 [18]–[22] (Campbell JA); *Ho v The Queen* (2001) 219 A Crim R 74, 80 [16] (Buchanan and Ashley JJA).

³³ See, eg, *R v Tang* (2008) 237 CLR 1, 13–14 [12]–[14] (Gleeson CJ); *R v DS* (2005) 191 FLR 337, 340 [6] (Chernov JA); *R v McIvor* (2010) 12 DCLR (NSW) 77, 79 [8] (Williams DCJ); *R v Netthip* [2010] NSWDC 159 (30 July 2010) [9] (Murrell DCJ); Parliamentary Joint Committee on the Australian Crime Commission, above n 9, 9 [2.17].

³⁴ Drugs and Crime Prevention Committee, above n 24, 46–7.

nately. This also lends support to suggestions that there is often a rapid ‘turnover’ of women in the commercial sex industry and that sex workers are released from the brothel in order to make room for new workers.³⁵

D *Post-trafficking Experiences*

It is not possible to make meaningful generalisations about the situation and intentions of victims after they exit or are rescued from a situation of trafficking. In some cases it is difficult to identify a clear point at which the trafficking situation ends as many victims have to live with the trauma of exploitation for years to come, often continuing to be exposed to deceit and coercion, and are at risk of being re-trafficked.

Victims also differ in their immediate intentions after exiting a situation of trafficking: some may desire to leave Australia and return to their families as quickly as possible, others may seek to remain in Australia and live normal lives, others may try to avoid being apprehended by the authorities, while others still may opt (or may have no choice but) to remain affiliated with their traffickers. Given the serious nature and harmful consequences of exploitation, it is perhaps surprising to learn of those cases in which victims stay with their traffickers even after their debts have been discharged.³⁶ This phenomenon has been referred to as a ‘re-entry scenario’ in order to

describe the situation of a woman who, having escaped or having been released from debt bondage as a forced prostitute, ‘voluntarily’ decides to re-enter the trafficking industry as a prostitute, believing that alternative forms of employment would be unavailable to her due to the social stigma against former prostitutes.³⁷

It is noteworthy in this context that many victims were initially drawn to Australia’s sex industry by the hope that they will earn enough money to support their families abroad. Some victims were able to transfer some of their income to their families, and — given the lack of other employment opportunities in Australia — this fact may contribute to their decision to

³⁵ Brockett and Murray, above n 11, 192.

³⁶ See, eg, *DPP (Cth) v Ho* [2009] VSC 495 (4 November 2009).

³⁷ Linda Malone, ‘Economic Hardship as Coercion under the Protocol on International Trafficking in Persons by Organized Crime Elements’ (2001) 25 *Fordham International Law Journal* 54, 69.

remain involved with the persons who exploited them.³⁸ In addition, there are several other factors that may contribute to a trafficked person's decision to remain associated with their traffickers. These factors may include pressure from the traffickers, economic hardship, the victim's inability or perceived inability to seek outside help and access support systems, a lack of English language skills or their fear of authorities — which would be a common concern given the irregular migration status of many victims.³⁹

III THE ROLE OF VICTIM CONSENT IN INTERNATIONAL LAW

A Overview

The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children Supplementing the United Nations Convention against Transnational Organised Crime* ('*Trafficking in Persons Protocol*'),⁴⁰ entered into force on 25 December 2003 and is the first international instrument to provide a universal definition of trafficking in persons. Article 3(a) of the *Trafficking in Persons Protocol* defines the term 'trafficking in persons' to mean:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Exploitation is further defined to include, at a minimum:

The exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

³⁸ Cf Janie Chuang, 'Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts' (1998) 11 *Harvard Human Rights Journal* 65, 72.

³⁹ See generally Kevin Bales, 'What Predicts Human Trafficking?' (2007) 31 *International Journal of Comparative and Applied Criminal Justice* 269, 269–71.

⁴⁰ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003).

The definition in art 3(a) combines elements relating to the acts involved in each stage of the trafficking process, the means used by the traffickers against victims, and the purpose of trafficking in persons. While the definition makes no specific reference to the consent — or lack thereof — of victims of trafficking in persons, the means elements relate indirectly to the absence of free and voluntary consent. To that end, art 3(b) of the *Trafficking in Persons Protocol* seeks to ensure that the consent of the victim of trafficking in persons to the intended exploitation is to be void where any of the means (such as threats, force, coercion, abduction, fraud) have been used. It is only 'logically and legally impossible' for consent to be given where the specified means listed in the definition is used.⁴¹ The practical effect of art 3(b) is that absence of consent is not an element that needs to be positively established in trafficking prosecutions. This is a fine but important point, which is seen by many as one of the greatest achievements of the *Trafficking in Persons Protocol*. Linda Malone, for instance, remarks that:

A shift away from the issue of consent refocuses the legal inquiry from the victim and onto the actions of the trafficker/exploiter, reflecting a recognition that deception or coercion nullifies any meaningful, fully informed consent. This would make clear that a person, in the absence of coercion and/or deception, has a right to choose to migrate and to choose their form of labour.⁴²

The requirement that one of these means be used against the victim also ensures that practices such as prostitution are not considered trafficking when engaged in by fully consenting adults.⁴³ The terms 'other forms of sexual exploitation' and 'exploitation of the prostitution of others' have been deliber-

⁴¹ United Nations Office on Drugs and Crime ('UNODC'), 'Model Law against Trafficking in Persons' (United Nations, 2009) 26. For examples of what establishes the different 'means' under the *Trafficking in Persons Protocol* see UNODC, 'Abuse of Other "Means" Within the Definition of Trafficking in Persons' (Issue Paper, United Nations, 2013).

⁴² Malone, above n 37, 61.

⁴³ This element involved reconciling a debate over whether an adult woman could ever consent to prostitution. For an outline of this debate, see 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; cf UNODC, 'The Role of "Consent" in the Trafficking in Persons Protocol' (Issue Paper, United Nations, 2014) 25–7.

ately left undefined and are open to interpretation by state parties.⁴⁴ An interpretative note further explains that the *Trafficking in Persons Protocol* takes no position on the treatment of non-coerced adult sex work and explicitly leaves its legal treatment to the discretion of states.⁴⁵ This accommodates the seemingly irreconcilable views of countries with different regulatory schemes for prostitution. Those with liberal regimes are able to exclude voluntary prostitution from their national trafficking framework while countries with stricter prostitution laws are able to expand the scope of their offences. While this compromise resolved a major stumbling block in the negotiations, it is seen by some commentators as having repressive consequences, particularly for migrant sex workers.⁴⁶

A secondary issue concerns the extent to which consent is offered and, in particular, whether a person who initially agrees to be transported into and work in another country illegally also automatically consents to conditions of forced labour which may subsequently arise. The weight of academic opinion suggests that a victim's consent, once given, may later be withdrawn or vitiated. A victim may consent to illegally migrating and illegal employment, but the consent, if any, is void or defective once any form of exploitation occurs.⁴⁷

⁴⁴ UNODC, 'Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto' (United Nations, 2006) 347.

⁴⁵ Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, Interpretative Notes for the Official Record (Travaux Préparatoires) of the Negotiations for the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, 55th sess, Agenda Item 105, UN Docs A/55/383 and Add.1 (3 November 2000) 12 [64].

⁴⁶ Jo Doezema, 'Who Gets To Choose? Coercion, Consent, and the UN Trafficking Protocol' (2002) 10(1) *Gender & Development* 20, 24–5.

⁴⁷ See, eg, Natalia Ollus, 'The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: A Tool for Criminal Justice Personnel' (Paper presented at the 122nd International Training Course of the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, Japan, 2 September – 24 October 2002) 23; Mohamed Y Mattar, 'Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention' (2006) 14 *Tulane Journal of International and Comparative Law* 357, 371, citing Mohamed Y Mattar, 'The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: Reflections after Five Years' (Speech delivered at the Concord Center Annual Conference on Disposable People: Trafficking in Persons, Israel, 22 December 2005).

The definition contained in art 3(a) of the *Trafficking in Persons Protocol* is intended to provide an authoritative definition for trafficking in persons.⁴⁸ Drafters are encouraged to not ‘simply incorporate the language of the *Protocols* verbatim’, but rather to adopt the provisions in accordance with their domestic legal systems.⁴⁹ The *Trafficking in Persons Protocol* thus plays an important role in setting an international standard for defining trafficking in persons, and clarifies the irrelevance of consent in cases where the requisite elements of trafficking have been proven.

However, the irrelevance of consent, once the means are established, does not shift the burden of proof or affect the presumption of innocence.⁵⁰ The *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* provide that, in practice, consent can still be discussed by courts and be raised as a defence in domestic law.⁵¹ Thus, although the *Trafficking in Persons Protocol* sought to settle this issue, as Anne Gallagher notes: ‘it would be incorrect to view the final result as indicative of a majority sentiment on the issue of prostitution.’⁵²

B *The Continued Relevance of Victim Consent*

The issue of consent remains a principal point of contention in current debates about the concept and scope of trafficking in persons.⁵³ The extent to which an exploited person has consented, or even has the capacity to consent, was subject to much debate during the negotiation and drafting stages of the *Trafficking in Persons Protocol*. Several delegations argued that, on a traditional liberal view, in order to respect an individual’s inherent dignity and

⁴⁸ UNODC, ‘Toolkit to Combat Trafficking in Persons: Global Programme against Trafficking in Human Beings’ (United Nations, 2008) 3.

⁴⁹ UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol Thereto’ (United Nations, 2004) 277.

⁵⁰ UNODC, ‘Model Law against Trafficking in Persons’ (United Nations, 2009) 27. For examples of what establishes the different ‘means’ under the *Trafficking in Persons Protocol* see UNODC, ‘Abuse of Other “Means”’, above n 41.

⁵¹ UNODC, ‘Travaux Préparatoires’, above n 44, 348.

⁵² Gallagher, above n 43, 986.

⁵³ See, eg, UNODC, ‘The Role of “Consent” in the Trafficking in Persons Protocol’, above n 43, 9–11.

autonomy, one must respect their right to determine their own destiny.⁵⁴ Accordingly, when an individual freely consents to a particular activity, her or his consent must be respected, irrespective of the 'perceived moral rightness' of the agreement.⁵⁵

As has already been noted, many victims of trafficking in persons do give at least their initial consent to the movement to Australia. Particularly in the context of trafficking for the purposes of sexual exploitation, it has been argued 'that the choice to partake in commercial sex work is a rational economic choice made by a woman who is simply cashing in on her sexuality by taking advantage of a pre-existing market'.⁵⁶ Accordingly, deeming consent irrelevant in all cases 'appears to deny paternalistically the possibility that a woman might consciously and freely choose to use a trafficker for the purpose of her own migration'.⁵⁷ It assumes that a victim has no ability to make free choices or exercise any free will.⁵⁸

The mere fact that a victim may have given some consent to one or more aspects of the trafficking process does not, however, reduce their vulnerability or diminish the exploitative situation they face after arrival in Australia, as is evidenced by the harsh, violent, coercive, and unsafe conditions documented in the case law.⁵⁹ Dina Haynes notes:

While some trafficked persons may be willing to work in the sex industry, they do not anticipate being forced to pay off large forcibly imposed debts, being kept against their will, having their travel documents taken from them, or being raped, beaten, and sold like chattel.⁶⁰

⁵⁴ Ibid 78–9.

⁵⁵ Samuel Vincent Jones, 'Human Trafficking Victim Identification: Should Consent Matter?' (2011) 45 *Indiana Law Review* 483, 505.

⁵⁶ Jessica Elliot, *The Role of Consent in Human Trafficking* (Routledge, 2015) 109.

⁵⁷ Chuang, above n 38, 89.

⁵⁸ Jones, above n 55, 507.

⁵⁹ See, eg, *R v McIvor* (2010) 12 DCLR (NSW) 77; *R v Kovacs* [2009] 2 Qd R 51.

⁶⁰ Dina Francesca Haynes, 'Used, Abused, Arrested and Deported: Extending Immigration Benefits To Protect the Victims of Trafficking and To Secure the Prosecution of Traffickers' (2004) 26 *Human Rights Quarterly* 221, 231.

Similarly, Linda Malone remarks:

Even if a woman can freely and voluntarily choose to engage in prostitution, that does not mean that the person who procures her services and transports her, intending to exploit her, should be immune from criminal punishment.⁶¹

Moreover, even where consent is given, questions remain as to whether such consent was informed, free, and voluntary. It is thus prudent to consider the circumstances under which consent is tendered. In order for any form of consent to be effective, 'there must be some reasonable alternative to withholding it.'⁶² Even where a victim does have knowledge of the type of work and the conditions under which they will be working, their consent may be tainted by external pressures — such as economic and social hardship — which undermines the quality of the consent.⁶³ Whilst each individual case will be different, 'poverty, social unrest ... and the perception of opportunity [overseas]' have all been identified as potential factors which may 'propel [victims] across borders.'⁶⁴ Evidence of a victim's voluntary decision to risk potentially exploitative conditions abroad should not prevent their status as a victim, or mean that they are any less entitled to assistance and protection.⁶⁵ As Ramona Vijeyarasa notes, '[t]o be simultaneously a victim and an agent of one's destiny should not be impossible under the law.'⁶⁶

IV VICTIM CONSENT IN AUSTRALIAN CRIMINAL LAW

A Evolution of Australia's Trafficking in Persons Offences

In Australia, legislation to penalise trafficking in persons and associated practices first came into existence in the late 1990s. The *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) ('*Criminal Code Amendment Act*') inserted a new div 270 entitled 'Slavery, sexual servitude

⁶¹ Malone, above n 37, 90.

⁶² Jones, above n 55, 507, citing Don Herzog, *Happy Slaves: A Critique of Consent Theory* (University of Chicago Press, 1989) 225.

⁶³ Ibid.

⁶⁴ Bales, above n 39, 271, 273.

⁶⁵ Munro, above n 3, 242–3; Jones, above n 55, 507.

⁶⁶ Ramona Vijeyarasa, *Sex, Slavery and the Trafficked Woman: Myths and Misconceptions about Trafficking and Its Victims* (Ashgate, 2015) 180.

and deceptive recruiting' into ch 8 of the *Criminal Code*, creating new offences of slavery,⁶⁷ sexual servitude,⁶⁸ and deceptive recruitment for sexual services.⁶⁹

Further amendments to Australia's trafficking offences and a considerable broadening of their scope and application followed Australia's ratification of the *Trafficking in Persons Protocol* on 11 December 2002. Whilst there is no singular definition of 'trafficking in persons' in the *Criminal Code*, the offences related to trafficking in persons contained in divs 270 and 271 do mirror, to a large extent, the definition of trafficking contained in art 3(a) of the *Trafficking in Persons Protocol*. The *Criminal Code Amendment (Trafficking in Persons and Debt Bondage) Act 2005* (Cth) inserted a new div 271 into the *Criminal Code* creating a set of offences for international and domestic trafficking in persons,⁷⁰ and debt bondage arrangements.⁷¹ The *Criminal Code Amendment Act* also made amendments to div 270 of the *Criminal Code*, including a significant extension to the scope of the existing deceptive recruiting offence in s 270.7.⁷²

The *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth) ('*Crimes Legislation Amendment Act*') further expanded the types of exploitative conduct recognised in the *Criminal Code*, without fundamentally changing any of the trafficking offences in div 271. This Act introduced new, separate offences of forced labour,⁷³ forced marriage,⁷⁴ harbouring a person for the purposes of furthering the offence of trafficking,⁷⁵ trafficking for the purpose of organ removal,⁷⁶ and aggravated debt bondage into the *Criminal Code*.⁷⁷ The *Crimes Legislation Amendment Act* also expanded the former sexual servitude and deceptive recruiting for sexual services offences to ensure they apply regardless of the industry in

⁶⁷ *Criminal Code* s 270.3.

⁶⁸ *Ibid* s 270.6.

⁶⁹ *Ibid* s 270.7.

⁷⁰ *Ibid* ss 271.2–271.7; see also the discussion below in Parts V(A) and (B) of this article.

⁷¹ *Criminal Code* ss 271.8–271.9.

⁷² Revised Explanatory Memorandum, *Criminal Code Amendment (Trafficking in Persons Offences) Bill 2005* (Cth) 2.

⁷³ *Criminal Code* s 270.6A.

⁷⁴ *Ibid* s 270.7B.

⁷⁵ *Ibid* ss 271.7F–271.7G.

⁷⁶ *Ibid* ss 271.7B–271.7E.

⁷⁷ *Ibid* s 271.9.

which such servitude or deception occurs.⁷⁸ Similarly, the *Crimes Legislation Amendment Act* amended the definition of exploitation to incorporate the types of exploitation criminalised by the new ‘stand-alone offences’ and reflect changes to existing ones.⁷⁹ The *Crimes Legislation Amendment Act* also clarified several issues relating to victim consent and evidence that may be considered in a prosecution for a trafficking-related matter.⁸⁰

B Consent in divs 270 and 271 of the Criminal Code

In Australia, consent is neither an element of, nor a defence to, a charge of trafficking of persons. In this context, consent is understood to mean agreement freely and voluntarily given by a person with the cognitive capacity to give such consent.

1 Elements of the Offences

There has been an increased recognition by the Australian legislature that trafficking in persons, by its very nature, involves the suppression of the free will of the individual. None of the offences relating to trafficking in persons and slavery and servitude under divs 270 and 271 of the *Criminal Code* contain any element that requires proof of absence of consent of the trafficked person. While, originally, slavery and slavery-like offences focused solely upon criminalising deceptive conduct, there has been an increased recognition that many victims of trafficking in persons in Australia do give their consent to, or acquiesce in, the trafficking in question.⁸¹

Further, the Australian government has recognised that the majority of cases involving slavery and slavery-like offences tend to involve the use of subtle, non-physical means in obtaining the compliance of a victim.⁸² Accordingly, s 270.1A of the *Criminal Code* defines the term ‘coercion’ to capture a

⁷⁸ Ibid ss 270.5, 270.7.

⁷⁹ Ibid s 271.1A.

⁸⁰ Ibid ss 270.10–270.11, 271.11A–271.11B.

⁸¹ Explanatory Memorandum, Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (Cth) 9–10.

⁸² Ibid; see also *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, on Her Mission to Australia (17–30 November)*, UN Docs A/HRC/20/18 and Add.1, annex 4 [6]; see further discussion in UNODC, ‘The Role of “Consent” in the Trafficking in Persons Protocol’, above n 43, 40–3.

range of threatening and abusive conduct, including force, duress, detention, psychological oppression, abuse of power, and taking advantage of a person's vulnerability. This expanded definition mirrors the requirements contained in art 3(a) of the *Trafficking in Persons Protocol*. Importantly, this definition makes it possible to find that victims were coerced even where they gave their consent to the exploitation in question. Proof of physical restraint is not necessary to establish criminal liability.

2 Defences

The Australian legislature has also clarified that victim consent does not provide a defence to any of the offences under divs 270 and 271. Section 271.11B of the *Criminal Code*, entitled 'no defence of victim consent or acquiescence', specifically states that:

To avoid doubt, it is not a defence in a proceeding for an offence against this Division that a person against whom the offence is alleged to have been committed consented to, or acquiesced in, conduct constituting any element of the offence.

An equivalent provision for offences involving slavery and servitude under div 270 of the *Criminal Code* is set out in s 270.11. The Explanatory Memorandum to the legislation further explains why consent is not a defence to trafficking-related charges, noting that, '[t]o allow a defendant to escape liability because his or her offending achieved the desired effect ... so that the victim appears to acquiesce in his or her treatment would be inexcusable'.⁸³ As consent is not a defence to a trafficking-related charge, it also logically follows that a defendant cannot argue that she or he was under the mistaken belief that the victim consented to the offending in question.⁸⁴

V CONSENT IN CRIMINAL PROCEEDINGS

Although consent is not a material element of Australia's slavery, servitude, and trafficking offences, this does not foreclose discussion of victim consent

⁸³ Explanatory Memorandum, Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (Cth) 31.

⁸⁴ *Criminal Code* s 9.2.

in criminal proceedings involving these offences.⁸⁵ Courts have, on several occasions, entertained discussions of consent in borderline cases, in determining whether or not the alleged victim was, in fact, a trafficked person. Irrespective of how the issue is framed in legislation, the available cases illustrate that consent is often an important subtext at various stages of the criminal proceedings.

A R v Tang (2008)

The decision in *R v Tang* (*'Tang I'*)⁸⁶ marked the first attempt by the High Court to provide a modernised definition of slavery and to reconcile slavery with the existence (or perceived existence) of victim consent.⁸⁷ As the first case of trafficking in persons to come before the High Court of Australia since the introduction of div 270 into the *Criminal Code*, the task facing the Court was one of considerable difficulty, there being no guiding case law on the elements of the offence or the meaning to be attributed to the statutory language.⁸⁸

In June 2006, Ms Wei Tang was convicted of five counts of intentionally possessing a slave and five counts of intentionally exercising a power of ownership over a slave, contrary to s 270.3(1)(a) of the *Criminal Code*.⁸⁹ The charges related to five Thai women who had been recruited in Thailand to work in Ms Tang's brothel in Fitzroy, Melbourne.⁹⁰ The women were required to work in the brothel six days a week, serving up to 900 customers over four to six months.⁹¹ While they were not physically prevented from leaving the

⁸⁵ *R v Tang* (2008) 237 CLR 1; *R v Sieders* (2008) 72 NSWLR 417; *Ho v The Queen* (2011) 219 A Crim R 74; see also *R v Dobie* [2011] 1 Qd R 367.

⁸⁶ (2008) 237 CLR 1.

⁸⁷ Irina Kolodizner, 'R v Tang: Developing an Australian Anti-slavery Jurisprudence' (2009) 31 *Sydney Law Review* 487. See also Elizabeth Broderick and Bronwyn Byrnes, 'Beyond Wei Tang: Do Australia's Human Trafficking Laws Fully Reflect Australia's International Human Rights Obligations?' (Speech delivered at the Workshop on Legal and Criminal Justice Responses to Trafficking in Persons in Australia: Obstacles, Opportunities and Best Practice, Monash University Law Chambers, 9 November 2009).

⁸⁸ 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, 562.

⁸⁹ *R v Tang* [2006] VCC 637.

⁹⁰ *Tang I* (2008) 237 CLR 1, 12 [6]-[7] (Gleeson CJ).

⁹¹ *Ibid* 14 [14].

premises, their working hours were strict, and their passports and return tickets were confiscated by Ms Tang.⁹² All of the women had prior experience in the sex industry in Thailand and were aware that, upon their arrival in Australia, they would be required to perform sex acts in order to pay off an imposed debt of between A\$42 000 and A\$45 000.⁹³ All of them had voluntarily entered into this arrangement whilst in Thailand, giving their initial consent, believing that when the debt was paid, they would have the opportunity to earn money as sex workers in Australia.⁹⁴

In determining whether or not there was evidence capable of sustaining a guilty verdict, the High Court considered the role of consent in establishing the existence of slavery. One of the submissions made by counsel for the accused in the course of the trial was that apparent consent of the alleged victims negated the finding of slavery. It was contended that the relationship between Ms Tang and the 'contracted' sex workers 'was a relationship of employer and employee, not a relationship of slave owner and slave'.⁹⁵ The brothel in Melbourne in which the complainants worked held a licence, and the commercial sex work engaged in by the complainants was not, in itself, illegal under Victorian law. Each complainant was above the legal age of consent and there was no suggestion that any of the women were legally incompetent.⁹⁶ The issue therefore became whether or not the existence of consent on the part of the complainants meant that the women were not, for the purposes of the offence, actually enslaved.

Following the guidance provided by the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Kunarac*,⁹⁷ Gleeson CJ noted that the presence of the complainants' consent was not necessarily inconsistent with a finding of slavery. His Honour referred to the fact that, historically, it

⁹² Ibid 14 [15]–[18].

⁹³ Ibid 13–14 [10]–[14].

⁹⁴ Ibid 14 [11].

⁹⁵ *R v Tang* (2007) 16 VR 454, 488 [150] (Eames JA).

⁹⁶ *Tang I* (2008) 237 CLR 1, 32 [79] (Kirby J).

⁹⁷ (*Judgement*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001) 193–4 [542]–[543]. The International Criminal Tribunal for the Former Yugoslavia noted that where a person is enslaved, the consent of the victim is rendered impossible or irrelevant by virtue of the exploitative nature of the enslavement. See also *Prosecutor v Kunarac (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case Nos IT-96-23 and IT-96-23/1-A, 12 June 2002).

has always been possible for a person to sell herself or himself into slavery. This act has never negated the fact that the person was, in fact, enslaved.⁹⁸ Eames JA also stated: 'A volunteer slave ... is no less a slave.'⁹⁹ Accordingly, absence of consent is not a necessary element of the offence.

Hayne J generally concurred with the reasons of Gleeson CJ, but added that the subsequent conditions under which the women were submitted had the effect that the women no longer possessed the ability to consent.¹⁰⁰ His Honour noted that:

Taking the concession at its highest (that each woman had consciously, freely and deliberately submitted herself to the conditions that she encountered in Australia), the evidence permitted the jury to conclude that none of the women thereafter retained *any* freedom to choose what was done with them in Australia.¹⁰¹

On a closer examination of the facts, his Honour concluded that consent was irrelevant because the quality of consent was undermined by the exploitative conditions to which the women were submitted.¹⁰²

This raises the question of whether, in a more borderline case, discussions of consent may have the effect of undermining the complainant's victim status. Despite the slight difference in approaches, neither of their Honours necessarily precluded a discussion of consent in determining whether or not a given victim was, in fact, enslaved. Indeed, Gleeson CJ expressly noted that, in certain cases, '[c]onsent may be factually relevant' to a determination of guilt.¹⁰³ Accordingly, whilst consent did not act as a bar in this case to a determination of guilt, this case left open the issue of whether consent could be relevant in future cases.

⁹⁸ *Tang I* (2008) 237 CLR 1, 21 [35].

⁹⁹ *R v Tang* (2007) 16 VR 454, 464 [41], cited in *R v Sieders* (2008) 72 NSWLR 417, 425 [94] (Campbell JA).

¹⁰⁰ *Tang I* (2008) 237 CLR 1, 63–4 [166]; see Harris and Gelber, above n 88, 570–2.

¹⁰¹ *Tang I* (2008) 237 CLR 1, 63 [166] (emphasis in original).

¹⁰² *Ibid* 63–4 [166]–[167].

¹⁰³ *Ibid* 21 [35].

B R v Sieders (2008)

The issue of consent was approached in a similar manner in the case of *R v Sieders* ('Sieders')¹⁰⁴ in relation to offences of sexual servitude.¹⁰⁵ The two appellants were convicted and sentenced for conducting a business that involved the sexual servitude of other persons contrary to s 270.6 of the *Criminal Code*. The charges related to five young Thai women who, whilst in Thailand, had voluntarily entered into an agreement to provide sexual services in Australia. Each woman had given her consent to the initial arrangement, with all but one having prior knowledge of the fact that they would be subject to a 'contract' debt of approximately A\$45 000, which they would be required to pay off by working at the appellants' brothels. The other victim, referred to by the pseudonym BB, was informed of the debt arrangement upon her arrival in Australia.¹⁰⁶

The principal issue before the New South Wales Court of Criminal Appeal was whether or not the women were 'in sexual servitude' despite their initial consent.¹⁰⁷ During the trial, various allegations had been made by the defence counsel, including allegations that the arrangements between the women and the accused were merely 'a commercial arrangement at the conclusion of which these women were free to continue in the sex industry and harvest the available rewards for themselves.'¹⁰⁸ The women were portrayed by counsel as 'business women in the business of sex' who had voluntarily entered into the arrangement for their own benefit. Such 'business women', it was stressed, could not possibly be regarded to be in a state of 'servitude'.¹⁰⁹

The Court ultimately rejected these allegations. Their Honours concluded that the mere fact that the women had consented to enter into the arrangement to provide sexual services, did not mean that they were 'free to cease' providing those services. Campbell JA noted that an essential condition for a person to be held in sexual servitude is that the person in question is either not free to cease providing those services, or not free to leave the place or area

¹⁰⁴ (2008) 72 NSWLR 417.

¹⁰⁵ *Criminal Code* s 270.6(2).

¹⁰⁶ *Sieders* (2008) 72 NSWLR 417, 421 [11] (Campbell JA).

¹⁰⁷ *Ibid* 423–7 [85]–[105].

¹⁰⁸ *R v Sieders* [2006] NSWDC 184 (8 December 2006) [24] (Bennett DCJ).

¹⁰⁹ *Ibid* [25]; discussed further in David, 'Trafficking of Women for Sexual Purposes', above n 7, 3, 5, 52.

where the services are provided.¹¹⁰ His Honour stressed that '[t]here is nothing in the notion of being not free to engage in a particular action that requires the person in question to actually want to engage in that action.'¹¹¹ His Honour disposed of the view that the victims' consent undermined the existence of sexual servitude, noting 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, or if their being not free to take that action is a consequence of something that they have freely agreed to.¹¹²

The victims in this case may well have made a free and rational choice to engage in the work that they engaged in, and appeared to have at least a basic understanding of what that work would entail. There was no evidence that they had been forced or coerced into the sex work. This did not, however, necessarily mean that they were fully aware of the precise conditions of their arrangements, the physical limitations on their freedoms, or the exploitative nature of the work. Moreover, '[e]ven allowing for those possibilities being open on the evidence, there was still material on which a jury could conclude that all four of the women were not free to cease providing sexual services.'¹¹³ The women's movements were strictly regulated, their identity documents confiscated, and they were rendered vulnerable and dependent upon the appellants.¹¹⁴

As in the case of *Tang I*, it is noteworthy that the Court evinced a certain reluctance to completely dispose of the issue of consent. Whilst the decision confirms that consent is not a necessary element of the offence,¹¹⁵ it does suggest that discussions of consent may be relevant in determining whether or not those elements can be established. Applying the Court's reasoning, it is not inconceivable that, in a case where the women's movements were less strictly regulated, the consent given by those women may be regarded as more persuasive. The mere fact that consent was the subject of such protracted

¹¹⁰ *Sieders* (2008) 72 NSWLR 417, 424 [89].

¹¹¹ *Ibid* 424 [92].

¹¹² *Ibid* 425 [94].

¹¹³ *Ibid* 439 [142].

¹¹⁴ *Ibid* 438–9 [141].

¹¹⁵ *Ibid* 439 [142].

discussion by counsel, the trial judge, and the Court of Criminal Appeal is indicative of the highly complex nature of this issue. Allegations made by defence counsel — that the women were shrewd business women — were, arguably, only disposed of in this case because of the surrounding circumstances. In other, more borderline cases, such allegations may have greater force.

C Ho v The Queen (2011)

In 2011, the issue of consent was revisited by the Victorian Court of Appeal in *Ho v The Queen* ('Ho').¹¹⁶ In this case, the Court considered whether or not a verdict of guilty in relation to multiple counts of using and possessing a slave could be sustained where there was evidence that the women recruited had not only consented to the initial act but had operated as if in a 'joint enterprise' with applicants.¹¹⁷ This case highlights the difficulty that courts face in dealing with, and instructing juries on, the matter of consent and distinguishing between exploitative conduct and mere harsh working conditions.¹¹⁸

The three appellants had been charged with multiple counts of slavery, namely possession and use of a slave under s 270.3(1)(a) of the *Criminal Code*.¹¹⁹ The charges related to six women who had been recruited from Thailand to work as sex workers in Australia. Four of the six women had previously engaged in sex work and all of the women came to Australia voluntarily, knowing that they would be working in the Australian sex industry. Further, whilst not aware of the precise amount of debt that would be imposed, each woman was at least aware that some kind of 'payment' would need to be made to secure the opportunity to earn money in Australia. Upon arrival in Australia, each woman was informed that they would be required to service a specified number of clients, either 650 or 750, in order to extinguish the debt incurred. Even after the debt was paid, and the 'contract' had been fulfilled, the evidence before the Court suggested that the women

¹¹⁶ (2011) A Crim R 74. The High Court rejected an application for special leave in *Ho v The Queen* [2012] HCA Trans 199 (17 August 2012).

¹¹⁷ *Ho* (2011) 219 A Crim R 74, 85 [44] (Buchanan and Ashley JJA).

¹¹⁸ *Ibid* 85–6 [44]–[49].

¹¹⁹ *DPP (Cth) v Ho* [2009] VSC 437 (29 September 2009) [1]; *DPP (Cth) v Ho* [2009] VSC 495 (4 November 2009) [1].

were still expected to continue working for an additional 12 months, although they were allowed to keep a proportion of their earnings after this point.¹²⁰

One of the grounds of appeal raised was that the trial judge had failed to properly direct the jury as to the relevance of the victims' consent, and that the subsequent verdict of guilty could not be supported on the evidence.¹²¹ This is despite the fact that consent is neither an element nor a defence to a charge of trafficking in persons or a charge of slavery.

Counsel for the applicants made a number of submissions on this point, stressing the material advantages enjoyed by the women, and pointing to the fact that the women were allowed to keep a proportion of the money earned once the debt was repaid. The women were described as 'mature, experienced businesswomen acting in their own interests in order to make money'.¹²² It was argued that the women were properly characterised as joint venturers in the arrangement, and 'business women in the business of sex'.¹²³

Buchanan and Ashley JJA, with whom Tate JA concurred, noted, however, that the jury was not bound to accept these submissions.¹²⁴ Whilst their Honours conceded that the women had freely entered into the arrangement, at least at the outset, the evidence before the Court 'warranted the conclusion that each of them was effectively imprisoned by their lack of knowledge and resources to deal with an alien environment'.¹²⁵ Although the women were not physically restrained, they were effectively imprisoned by their vulnerability and dependence upon the applicants. The women knew very little English, had contact with nobody other than their traffickers and had an inflated debt imposed upon them.¹²⁶ There was thus no doubt that the entire arrangement under which the women operated was highly exploitative.¹²⁷

Their Honours acknowledged the difficulties that may be faced in convincing juries that a victim has been 'trafficked' in cases which do not involve direct physical force and where the victim has given consent to at least some

¹²⁰ *Ho* (2011) 219 A Crim R 74, 80 [16]–[19] (Buchanan and Ashley JJA).

¹²¹ *Ibid* 83–6 [35]–[53].

¹²² *Ibid* 84 [38].

¹²³ *Ibid*.

¹²⁴ *Ibid* 85–6 [48]–[49].

¹²⁵ *Ibid* 85 [48].

¹²⁶ *Ibid* 80 [17]–[19]; see also *DPP (Cth) v Ho* [2009] VSC 495 (4 November 2009) [36] (Lasry J).

¹²⁷ *Ho* (2011) 219 A Crim R 74, 85–6 [48]–[52] (Buchanan and Ashley JJA).

stage of the trafficking. Convincing a jury that the given circumstances in a case constitute slavery, servitude, or trafficking can be particularly problematic where the behaviour of the suspected victim 'might be inexplicable to the average Australian'.¹²⁸ The prosecution faces particular difficulties where the behaviour of the alleged victim is not entirely consistent with general expectations and stereotypes as to how victims should behave.¹²⁹ In cases where the victim in question is not physically imprisoned, and could conceivably escape their situation, it is far more difficult to convince a jury that such a circumstance constitutes slavery.¹³⁰ Juries inevitably find it easier to identify with a victim where that victim, most often a woman, has been forcibly trafficked and physically restrained from escaping.¹³¹ It is widely believed that a 'true victim' would make all attempts to escape such a scenario and thus implies 'a story of rational and clear behaviour involving full and open disclosure'.¹³² Thus, where a victim has, by all accounts, consented to the initial movement, they fail to fit the 'ideal victim' narrative.¹³³

To this end, their Honours affirmed the direction made by the trial judge, when he had instructed the jury that

you may think, on reviewing the evidence, that in the course of wanting to earn the money she wanted to earn, [the complainant] consented to the conditions that she was in ... [However while] [h]er willingness to participate is something you can take into account in deciding whether she was or was not in a condition of slavery ... the consent does not mean the condition she was in was not slavery.¹³⁴

Whilst this case demonstrates that the existence of consent and a finding of slavery is not necessarily inconsistent, it does recognise the difficulties that

¹²⁸ David, 'Trafficking of Women for Sexual Purposes', above n 7, 39. This issue is recognised as being one that has affected a range of state parties to the *Trafficking in Persons Protocol*: see UNODC, 'The Role of "Consent" in the Trafficking in Persons Protocol', above n 43, 78.

¹²⁹ Attorney-General's Department, above n 14, 11 [52].

¹³⁰ David, 'Trafficking of Women for Sexual Purposes', above n 7, 39–40.

¹³¹ Cf Randall, above n 6, 398.

¹³² Quilter, above n 6, 48; see also Crowe, above n 6, 25; cf Larcombe, above n 6, 137.

¹³³ David, 'Trafficking of Women for Sexual Purposes', above n 7, 54; cf Hoyle, Bosworth and Dempsey, above n 3, 314–15.

¹³⁴ *Ho* (2001) 219 A Crim R 74, 91 [83] (Buchanan and Ashley JJ), citing *DPP (Cth) v Ho* [2009] VSC 495 (4 November 2009) [37] (Lasry J).

may be faced in convincing juries that a ‘consenting victim’ is still a victim of trafficking. Indeed, the position that emerges from the case law is that consent, whilst not a defence, has been considered a relevant factor to take into account when assessing whether the relevant elements of the charge can be established. Although the courts are reluctant to allow the actions of the trafficker to go entirely unpunished simply because the victim supposedly consented to the trafficking in question, none of the cases pronounce that consent is necessarily irrelevant.¹³⁵

VI CONSENT AND SENTENCING

Whether or not a victim’s consent is relevant for the purpose of sentencing offenders who commit trafficking in persons offences remains an unresolved matter in Australian law and there is a marked absence of any express legislative guidance on this issue.¹³⁶

The primary source of guidance can be found in the *Crimes Act 1914* (Cth), which governs the sentencing of all federal offenders. According to s 16A of this Act, in determining the sentence to be passed, the court must impose a sentence or make an order ‘that is of a severity appropriate in all the circumstances of the offence’. In addition to other matters, in determining what constitutes a sentence of appropriate severity, the court may consider, *inter alia*:

16 Matters to which court to have regard when passing sentence etc. — federal offences

- (a) the nature and circumstances of the offence; ...
- (d) the personal circumstances of any victim of the offence;
- (e) any injury, loss or damage resulting from the offence; ...
- (k) the need to ensure that the person is adequately punished for the offence ...¹³⁷

¹³⁵ *Ho* (2011) 219 A Crim R 74; *Sieders* (2008) 72 NSWLR 417; *Tang* (2008) 237 CLR 1.

¹³⁶ Matthew Cameron and Andreas Schloenhardt, ‘Punishing Trafficking in Persons: International Standards and Australian Experiences’ (2013) 24(1) *Bond Law Review* 1, 19–21; see also Fiona David, ‘Prosecuting Trafficking in Persons: Known Issues, Emerging Responses’ (Trends & Issues in Crime and Criminal Justice No 358, Australian Institute of Criminology, June 2008).

¹³⁷ *Crimes Act 1914* (Cth) s 16A.

In the reported case law, consent appears to have been treated as a mitigating factor by the courts, and as a factor that could potentially limit the culpability of the offender.¹³⁸ It may be argued that the offender is less culpable for the exploitation and harm caused to the victim if the victim has consented to the initial movement to Australia and to engagement in sex work. In turn, absence of consent could be seen as aggravating the seriousness of the offence.

A R v Tang (2009)

In *R v Tang* ('*Tang II*'), the facts of which are detailed above, one of the grounds raised in the appeal against sentence was that the sentencing judge had failed to pay proper regard to the fact that the complainants had consented to the arrangement and the conditions under which they had worked.¹³⁹ It was argued that while the existence of consent is not a defence to slavery, it is 'highly relevant to an assessment of the level of culpability of the applicant.'¹⁴⁰

The Court ultimately rejected this ground, noting that the conditions under which the women were forced to work rendered them effectively enslaved.¹⁴¹ However, it was nonetheless stated that consent could still play a role in affecting the culpability of the offender. Their Honours noted, in obiter, that:

Had this been a case where the victims had been kidnapped or coerced into agreeing to come to Australia to work in the sex industry, the applicant's culpability would undoubtedly have been much higher. Such circumstances would have significantly aggravated the seriousness of the offending.¹⁴²

This case would appear to suggest that a sentencing judge may take the consent of the victim into account when determining the sentence of federal offenders. If lack of consent can 'aggravate the seriousness of offending', it is not inconceivable that presence of consent could be treated as a mitigating factor. Such an approach has been taken and adopted in subsequent cases.

¹³⁸ *R v Tang* (2009) 23 VR 332; *Ho* (2011) 219 A Crim R 74; *R v McIvor* (2010) 12 DCLR (NSW) 77.

¹³⁹ (2009) 23 VR 332, 341–2 [42] (Maxwell P, Buchanan and Vincent JJA).

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid* 342 [43].

¹⁴² *Ibid* 341–2 [42].

B Ho v The Queen (2011)

One of the grounds of appeal against sentence advanced by defence counsel in *Ho*, the facts of which are detailed above, was that the sentencing judge had failed to take into account the role of victim consent.¹⁴³ All but one of the female victims had prior experience in the sex industry and on the facts appeared to have voluntarily entered into the 'contract' with the offender.¹⁴⁴ Moreover, as Buchanan and Ashley JJA acknowledged, while the contracts entered into were undoubtedly harsh, they appeared to have been freely made, and were, in fact, honoured by the applicant.¹⁴⁵ Their Honours also noted that there was nothing to suggest that trickery or threats had been used.¹⁴⁶ The behaviour of the alleged victims did not align with that of the 'ideal' trafficking victim.

Their Honours hastened to stress that proof of consent on the part of the victim to the trafficking in question does not reduce the seriousness of offending. A consenting victim is still a victim and is entitled to relief. Moreover, distinguishing between the consenting and non-consenting victim is not intended to indicate that one victim is more 'worthy' than another, but is rather simply one of a number of factors that sentencing judges may, in their discretion, take into account.¹⁴⁷

Nonetheless, despite the gravity of the offences committed, Buchanan and Ashley JJA noted that such factors tended to mitigate the culpability of the defendant, and placed his activities on the lower scale of offending.¹⁴⁸ The consenting victim, it is assumed, suffers relatively less harm than a victim who has been coerced and forced into the trafficking in question. Where the victim has had prior 'experience', this assumption is magnified.

There is no suggestion in the judgment that their Honours considered the circumstances under which consent was given. The fact that the victims each

¹⁴³ (2011) 219 A Crim R 74, 87 [58] (Buchanan and Ashley JJA).

¹⁴⁴ *Ibid* 87 [59].

¹⁴⁵ *Ibid* 87 [61].

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid*.

¹⁴⁸ *Ibid*. The defendant's original sentence of 14 years, with a non-parole period of 11 years, was set aside and he was re-sentenced to an effective sentence of eight years imprisonment, with a fixed non-parole period of five years.

had 'prior experience' in the sex industry was repeatedly stressed,¹⁴⁹ despite the fact that 'prior experience' has no direct legal relevance to either the prosecution or sentencing of the offence. While it is important for sentencing judges to be able to distinguish between different incidents of offending, discussing consent in this context risks undermining the individual experiences of victims.

C R v McIvor (2010)

The judgment of Williams DCJ in *R v McIvor* ('*McIvor*') is a particularly poignant illustration of the risk of sidelining victims who do not fit within the societally imposed idea of who a 'true victim' should be.¹⁵⁰ The case against Mr McIvor and Ms Tanuchit was regarded as a particularly heinous incidence of trafficking.¹⁵¹ It concerned the recruitment of five women from Thailand to work in the couple's Sydney brothel between June 2004 and June 2006. All but one of the women were aware that they would be engaging in sex work whilst in Australia, and upon their arrival were informed that they had a debt of between A\$35 000 and A\$45 000 which they had to repay by working at the couple's brothel.¹⁵² Evidence produced at trial revealed that all of the victims were forced to work seven days a week, on average 16 hours a day. They were forced to work and sleep in locked premises, their passports were confiscated, and they were required to work through menstruation and severe illness.¹⁵³

The sentences imposed in relation to each victim were determined by Williams DCJ in relation to both the period of time for which each victim was enslaved and the level of exploitation and harm suffered by each victim.¹⁵⁴ Whilst his Honour noted that the offences were 'undoubtedly serious offences deserving of both condemnation in the strongest possible terms as well as substantial punishment',¹⁵⁵ his Honour made several comments in sentencing

¹⁴⁹ Ibid 80 [16], 85 [45], 93–4 [89].

¹⁵⁰ (2010) 12 DCLR (NSW) 77.

¹⁵¹ Andreas Schloenhardt and Laura-Rose Lynch, 'McIvor and Tanuchit: A Truly "Heinous" Case of Sexual Slavery' (2012) 35 *University of New South Wales Law Journal* 175, 175–6.

¹⁵² *McIvor* (2010) 12 DCLR (NSW) 77, 78–9 [8] (Williams DCJ).

¹⁵³ Ibid.

¹⁵⁴ Ibid 91–2 [65]–[73].

¹⁵⁵ Ibid 91 [63].

the offenders that would suggest that consent, and prior experience as a sex worker, might mitigate the length of the sentencing granted.

This is particularly evident in his Honour's discussion of two of the five victims, referred to by the pseudonyms Yoko and Mickey. Yoko was recruited by one of the couple's contacts in Thailand, and came to Australia under the impression that she would only be performing massage work, and that the sex work would be optional. Upon her arrival in Australia, she was informed that because the massage work paid significantly less, it would take far longer for her to pay back her A\$45 000 debt. Yoko had no prior experience in the sex industry and gave evidence to the effect that, whilst she had neither the intention nor the desire to engage in the sex work, she felt that in the circumstances 'she had no other choice but to accept prostitution'.¹⁵⁶ Mickey, by contrast, was aware that she would be performing both sex and massage work in Australia. She was also the only victim to have previously worked in the sex industry, having previously engaged in sex work in Bahrain.¹⁵⁷

In distinguishing between the sentences imposed, his Honour remarked that Yoko's lack of consent 'must have been a source of additional distress to her'.¹⁵⁸ The absence of consent was regarded as something that would render her experience far more distressing than that of Mickey, who had initially consented and had prior experience in the sex industry.¹⁵⁹ On the count of using a slave in relation to Mickey, the offenders were sentenced to three years' imprisonment.¹⁶⁰ On the same count in relation to Yoko, they were sentenced to four years.¹⁶¹

This outcome seems to infer that Mickey's 'prior experience' in the sex industry, and initial consent to the trafficking in question, mitigated the gravity of the offence.¹⁶² Although it is acknowledged that there was a slight difference in the treatment of victims, it must be noted that, unlike Yoko, Mickey was detained constantly at the brothel, and serviced nearly twice as

¹⁵⁶ Ibid 83 [28].

¹⁵⁷ Ibid 83 [29].

¹⁵⁸ Ibid 83 [28].

¹⁵⁹ Ibid.

¹⁶⁰ Ibid 91 [65].

¹⁶¹ Ibid [66].

¹⁶² See further discussion of the treatment of sexual assault of sex workers in Janice Du Mont and Margaret J McGregor, 'Sexual Assault in the Lives of Urban Sex Workers: A Descriptive and Comparative Analysis' (2004) 39(3) *Women & Health* 79, 82-3.

many clients over a shorter period of time.¹⁶³ Moreover, the causes and conditions of Mickey's prior experience in the sex industry do not appear to have been taken into account. There was no discussion in the case as to whether her prior 'experience' was, in fact, exploitation.¹⁶⁴

Victims of trafficking may give their consent at an early stage, unaware of the conditions and nature of the work. Even if the victim has consented to the sex work itself, it does not necessarily follow that they consent to the harsh, exploitative and demeaning conditions that are subsequently imposed upon them. Entry into the arrangement may be entirely voluntary, but this does not mean that the individual is any less a victim of exploitation, or any less entitled to relief.¹⁶⁵

VII OBSERVATIONS AND CONCLUSIONS

This article has shown that, despite multiple attempts to clarify the issue of consent, guidance on this issue remains, for the most part, minimal and fragmented. Whilst both the *Trafficking in Persons Protocol* and Australia's domestic provisions under divs 270 and 271 of the *Criminal Code* explicitly provide that consent is neither a necessary factor to establish the offence, nor a defence to a charge, the issue of consent continues to be raised and discussed in the case law. The issue of consent continues to permeate the prosecutorial and judicial process, and further direction is required in order to dispel popular stereotypes and prejudices that infiltrate the trafficking debate. It is the intention and actions of the offender that should be the focus of discussion, rather than the intention or actions of the victim. Whether or not the victim has previously worked as a sex worker or had consented to the movement to Australia and to the work itself should not be discussed in the context of determinations of criminal guilt.

¹⁶³ *McIvor* (2010) 12 DCLR (NSW) 77, 83–4 [28]–[31] (Williams DCJ).

¹⁶⁴ See generally Felicity Rousseaux, 'The Psychological Impact of Sexual Slavery of Trafficked Women: Parallels with Torture, Sexual Abuse and Domestic Violence' (2003) 14 *Women Against Violence* 4.

¹⁶⁵ Ramona Vijayarasa, 'Exploitation or Expectations: Moving Beyond Consent' (2010) 7 *Women's Policy Journal of Harvard* 11, 19–20.

A Towards Victim-Free Trials?

The *Trafficking in Persons Protocol* was established to not only prevent and combat trafficking in persons, but to also protect and assist the victims of such trafficking, giving due respect to their human rights.¹⁶⁶ It appears incongruous with this aim that successful prosecutions should be obtained at the expense of a victim's psychological welfare. Cross-examination of victims on the basis of their prior sexual experience and their alleged consent to the trafficking in question is not only inappropriate, and unnecessary to prove the offence, but can cause the victim great distress and, in extreme cases, may result in their refusal to participate in the prosecutorial process.

A somewhat radical solution to this problem would be to remove the victim entirely from the prosecutorial process such that the trial of the trafficker would be 'victim free'. Such an approach has been trialled in the United States in an attempt to deal with the evidential hurdles posed by victim withdrawal. Several states in the United States have implemented measures 'to facilitate the prosecution of domestic violence without the participation of the alleged victim; so-called "victimless" prosecutions'.¹⁶⁷

It is beyond the scope of this article to engage in the broader academic debate as to what role the victim has, and should play, in the criminal justice process.¹⁶⁸ Indeed, it must also be noted that the very use of the word 'victim' is highly contentious. Whether or not the introduction of victim-free trials is feasible or even desirable in this context is not a matter that can be resolved in this article. However, what should be noted is that there are very strong debates on either side. Whilst some argue that the involvement in the criminal justice process can force victims to re-live their trauma, thus affecting a sort of re-victimisation, others argue that the involvement of the victim in the criminal trial is not only essential to a fair trial but acts as a form of empowerment.¹⁶⁹ Thus, this article does not propose that victim-free trials necessarily be adopted in the Australian context, but merely that some kind of consid-

¹⁶⁶ UNODC, 'Travaux Préparatoires', above n 44, 338.

¹⁶⁷ Louise Ellison, 'Prosecuting Domestic Violence without Victim Participation' (2002) 65 *Modern Law Review* 834, 835.

¹⁶⁸ See generally Louise Shelley, 'Keynote Address: Victim Participation in Criminal Trials' (2000) 27 *Syracuse Journal of International Law and Commerce* 45, 46; Andrew Sanders, 'Victim Participation in Criminal Justice' (2002) 49 *Criminal Justice Matters* 30, 31.

¹⁶⁹ Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32 *Journal of Law and Society* 294, 297-8.

eration needs to be given to the particularly vulnerable status of victims of trafficking in persons and to their needs in this process.

B *Jury Directions on Consent*

One of the major challenges facing prosecutors of trafficking in persons offences is that victims of trafficking frequently do not conform to the popular portrayal of a victim of crime. Trafficking victims frequently fall outside the 'ideal victim' narrative, as they often give their consent to some stage of the trafficking process. It may even appear that the victim has willingly engaged in the trafficking process and has obtained some financial or other benefit as a consequence. Actual violence may not be required and subtle rather than overt means of coercion are common.

It is clear that consent is not a relevant factor in determining whether or not the offender is guilty of the trafficking in question. Thus, whether or not the victim has consented should never preclude them from being regarded as a victim of trafficking. In such cases, where the victim may not have behaved in a manner that is consistent with societal expectations of how a victim should act, directions instructing the jury as to the irrelevance of consent would operate as a safeguard against the influence of prejudice and stereotypes. While this does not affect the burden of proof, or the presumption of innocence, such measures may serve to assist in cases where the behaviour of the victim is inconsistent with expectations of how such a victim should behave.

C *Sentencing Guidelines*

While non-consent is not a pre-requisite to establishing the offence, the presence of consent raises questions as to the potential culpability of the offender. There is at least some suggestion in the case law that would indicate that consent has been treated as a factor which could mitigate the relative 'harm' suffered by the victim and thus lessen the sentence of the offender. The discussion of consent in terms of sentencing is particularly problematic, as it appears to imply that a victim who consented suffers less harm than one who does not. Moreover, it perpetuates the traditional dichotomy between the consenting and non-consenting victim and does not take into account the complexity of this issue. Consent is not a simple matter and just because a

victim has consented does not necessarily mean that they are more prepared for, or less vulnerable to, the exploitation that follows.

The development of detailed sentencing guidelines in relation to trafficking in persons would assist in ensuring that such a consideration does not undermine Australia's efforts to protect and assist the trafficked person. At a minimum, these guidelines should provide that the consent of the victim and a victim's prior experience as a sex worker is irrelevant to a determination of culpability. Consent should not be taken as an indicator of the relative harm suffered by the victim.