

How the Court system might encounter forms of slavery in Australia

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SYNOPSIS

Experience shows that slavery can permeate social practices and institutions but remain un-recognised by mainstream society and institutions. Even when a situation of slavery comes to official notice it may be treated as an industrial matter, an issue of work place relations or occupational health. To counter such problems the United Nations High Commission for Human Rights and the International Labour Organisation have developed frameworks and guidelines to assist in recognising the signs of slavery and slave-like practices. This paper addresses some of the signs as they may appear in Australia and some of the responses that might be possible.

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INTRODUCTION

This handout is a summary of the written paper. Most footnotes have been deleted.

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ACKNOWLEDGEMENTS

Traditional owners are acknowledged; also the people who battled to stop slavery 200 years ago – campaigners against the trans Atlantic slave trade.

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SCOPE OF THIS PAPER

Our paper covers the forms of slavery that did NOT stop 200 years ago. We identify some legal starting points: the international instruments and the Commonwealth Criminal Code Act 1995. But the other starting point for our work is the experience of people who find themselves touched by slavery or trapped in some way.

WHAT DO WE MEAN BY MODERN SLAVERY?

By slavery we mean slavery in war as described by Division 268 of the Criminal Code; and the slavery offences described in Section 270. There are some changes in the wind, as expressed in the Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012.

Freedom from slavery is embedded in the Universal Declaration of Human Rights (UDHR). It is also mentioned in Article 8 of the International Convention of Civil and Political Rights (ICCPR). Yet it is only by reading the Supplementary Convention 1956 that any meaningful understanding can be given to Article 8 of the ICCPR. The Supplementary Convention defines slave and slavery in terms of ownership.⁴

CONTEMPORARY FORMS OF SLAVERY

The United Nations High Commission for Human Rights (UN HCHR) has a list known as the “Contemporary forms of slavery”.⁶ If we add slavery in war to the UN HCHR list we get eleven forms of modern slavery as listed below:

- Born into slavery
- Child labour
- Child soldiery
- Child trading
- Debt bondage
- Forced labour
- Forced marriage
- Human trafficking
- Labour trafficking
- Organ trafficking
- Slavery in war

It is necessary to tease out what refers to violence, abuse and exploitation and what refers to slavery.⁶ For example child workers may be doing hard or dangerous work, but are they owned? The form of work does not signify the status of the worker.

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HOW MANY SLAVES ARE THERE? WHERE?

In Australians and modern slavery we use Kevin Bales' figure of 27 million slaves in the world today. Most of Bales' 27 million, perhaps 18 – 22 million people, are debt bonded workers from south Asia. Bales' data do lend support to Hathaway's contention that no more than three per cent of the world's slaves are trafficked.⁷

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SYSTEMS OF SLAVERY

Some slaves are moved around the world. Many are enslaved close to where they were born, trapped by systems of slavery that have allowed child trading, debt bondage, forced marriage and peonage (serfdom) to persist for generations.

These slave-making systems were described in the Supplementary Convention 1956. Not only have these systems persisted for generations; they also have a long reach. Slave-making systems can follow a trapped person even if the person moves away from the site of entrapment. In our analysis, the persistence and long reach of slave-making systems does require practitioners in Australia to understand how systems of child trading, debt bondage, forced marriage or peonage (serfdom) operate in their countries of origin.

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ENGINES OF SLAVERY

By acknowledging that slavery can manifest in systems which have persisted across many generations, the Supplementary Convention recognises that whole groups or classes of people may be trapped by forces which make them vulnerable to being enslaved. Groups may be excluded from the main-stream based on their caste, disability, gender, race or religion.

In Australians and modern slavery we identify four 'engines' that keep these slave-making systems operating and allow them to persist. The four 'engines' operate in a summative way: which is to say that, in order to be effective, an anti-slavery program needs to address each of the engines, and all of them:

- Poverty and
- Powerlessness and
- Crime / corruption and
- Conflict

By defining slave systems, the Supplementary Convention directs attention to system change and the social development that is required to address slavery. In Section 5 of *Australians and modern slavery* we use case studies from south Asia to illustrate how criminal law, human rights law and civil law can work, together with community development, to minimize exclusion and risk of enslavement. As in Asia, it would be possible – necessary – for Australia to consider how to keep economic, justice, social and political systems operating to minimize the risks of exposure to slavery.

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HOW DO AUSTRALIANS ENCOUNTER SLAVERY?

Australians might encounter slavery within Australia, when travelling overseas or when doing business or consuming products.

In *Australians and modern slavery*⁸ we sought a framework that would be useful for research, policy development and action into the future. We developed a typology to help us to understand what kinds of people may experience slavery in Australia. We identified three groups as follows:

- ‘Illegal’ and ‘invisible’
Some illegal workers have been hidden in legal businesses
- ‘Legal’ and ‘invisible’
Being in Australia ‘legally’ on a visa does not necessarily make a worker ‘visible’ in the sense of being recognised and protected. We give examples where workers have seemed invisible even while being mis-treated
- ‘Legal’ and ‘visible’

Humanitarian entrants are visible groups who have come to Australia legally. They may have experience or special needs or hurts⁹ to be considered and addressed by our governments, health services, schools, police and others.

AUSTRALIAN COURTS HAVE ENCOUNTERED SLAVERY

R v Kovacs and R v Wei Tang were important cases about slavery. Accuracy in this is important.

- Trafficking¹⁰ is identified in a crime Protocol. The Protocol defines trafficking in terms of exploitation. The action to be taken involves case finding and victim support.¹¹ Trafficking matters are dealt with under Section 271 of the Criminal Code. Following loss of freedom by capture, one's pathway to rehabilitation might start with recovery from trauma.
- Slavery is defined in a human rights treaty, the Supplementary Convention 1956. The Convention defines slave and slavery in terms of ownership (see Note 5). Slavery matters are dealt with under Section 270 of the Criminal Code. The action to be taken goes beyond individual case finding.

In *Australians and modern slavery* we consider the pathways to recovery for people who have been trapped by a persistent system of slavery. Case studies indicate pathways that would entail addressing the four engines of slavery (see Point 7). On these pathways are community based responses that embrace mutual support and ensure that former slaves develop and maintain 'agency' in their own emancipation.

DOES THE SUBJECT OF SEX PREOCCUPY US?

In our paper, we unpick what we say is a popular narrative: the idea that trafficking in Australia is about women, children and sex. We draw attention to trafficking of labour as an issue to be addressed.

CASE FINDING IN AUSTRALIA: MAINLY SEX

The Attorney General's Department (2011) Discussion Paper¹² does seem to confirm that sex predominates in Australian case finding. That needs to change.

CASE FINDING IN THE USA: LABOUR AND SOME SEX

In the United States,¹³ recent research has shown that there is a disparity between case-finding by the Police and case-finding by victim support groups. The majority of cases picked up by Police involved sex trafficking. However:

“Between January 2008 and June 2009, 64% of the victims served by OVC-funded¹⁴ service providers were identified as victims of labor trafficking only, 22% as victims of sex trafficking only, and 10% as victims of both labor and sex trafficking.”¹⁵

What is happening with these data? It appears that in the United States the Police define their roles in terms of the legal instruments including the Trafficking Protocol; so they seek, and find, mainly victims of sex trafficking. On the other hand, victim support agencies seem to define their roles in terms of the experience of victims; so they seek, and find, mainly victims of labour trafficking.

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POSSIBLE CATEGORY ERRORS

Our paper gives eleven examples of possible category errors or dilemmas which might arise in relation to slavery and which may have a bearing on the administration of justice in Australia. Each situation invites the reader to reflect on what he or she would do with the case.

POSSIBLE SLAVERY DEFINED AS A WORKPLACE PROBLEM

A report from the Thai Human Rights Commission identified thirty eight deaths among sailors trapped on factory fishing vessels which had spent three years at sea¹⁶ Where a situation is categorised as a workplace relations problem, there may be an expectation that an outcome can be negotiated. On the other hand, if the situation is categorised as involving trafficking or slavery, then it would be recognised that the victim is not in a position to negotiate.

HOW AUSTRALIA CONNECTS TO FACTORY FISHING

A factory fishing vessel Oyang 70 sank off New Zealand in 2010. Five crew members plus the Korean skipper died. The Indonesian crew were flown in a roundabout way from Indonesia to New Zealand via Australia. Some were said to be quite young.

What would you or your court do if young people from such a crew appeared for an inquest or after being intercepted in Australian waters or in an Australian port?

POSSIBLE FORCED LABOUR DEFINED AS A 'FAIR WORK' PROBLEM

Melbourne's Chinatown dumpling chef, who worked 13-hour days, six days a week with only five-minute breaks, was defined as a 'fair work' problem.¹⁷ Reportedly, he was awarded \$200,000. Could this situation be construed as a forced labour case?

Could a child be caught up in such a case; and what would your court do?

POSSIBLE SERVILE LABOUR DEFINED AS A WORKPLACE PROBLEM

The case of Lakeside Packaging illustrated that possible forced or servile labour could be mis-construed as a workplace or occupational health and safety problem. Two Chinese-speaking employees were injured. Lakeside Packaging pleaded guilty to seven charges including failing to provide a safe workplace and failing to provide information, instruction, training and supervision in a language understood by the employees, between March and September 2006.

Our paper refers to an ILO training manual which indicates how to recognise the trafficking of migrant labour. This manual may be of interest to court officers.¹⁸

FORCED MARRIAGE

The Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012 defines forced and servile marriage. Slavery Links has made a submission to the Inquiry of the Senate Legal and Constitutional Committee. It requests the Committee to consider the desirability of framing forced marriage offences in line with the definition of three limbs which is given in the Supplementary Convention (i.e. in line with Australia's international obligations).¹⁹

DOMESTIC SERVICE: HOW OLD WAS THE 'HILLINGDON SLAVE GIRL'?

The so-called 'Hillingdon slave girl', was born in Nigeria, brought to Britain at age 5 years and kept as a domestic servant by people she thought were her parents. She escaped after years of abuse, but she could not prove her age. The local Council, the London Borough of Hillingdon, ruled she was not eligible for care, education and support as a child. The matter went to the Court of Appeal in Britain.

INTER COUNTRY ADOPTION AND CHILD TRADING

There have been news reports²⁰ of children brought to Australia and adopted apparently in good faith; but where a child appears to have been traded before being entered into the inter-country adoption process. What would your court do if such a child was identified and two sets of parents appeared eligible to claim custody?

EDUCATING JURORS ABOUT THE NATURE OF BONDAGE

The Explanatory Memorandum for the Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012 speaks to the importance of educating jurors about the nature of bondage and how bondage works. In our paper we identify a possible down-side to making such information public.

SlaveryLinks has affirmed the desirability of applying the indica²¹ of slavery that were used by the High Court in *R v Wei Tang* to discern when ownership has occurred. The indica do explicate how bondage or control can operate.

THE 'DEAF MEXICANS': DISABILITY AND SLAVERY

Slaves can be harvested because they are vulnerable, often coming from the most excluded and marginalized groups or classes of people. Our paper refers to an instance in the United States²² where Mexicans (who were deaf) were trafficked and set to work to beg in New York. They were trapped, unable to communicate with passers by.

IN A FINANCIAL CRISIS DEBTS MAY BE 'SOLD' TO CRIMINALS

In May 2009 the BBC World Service reported that the global financial crisis had affected migrant workers in Europe. Migrant workers owed money to the people who had helped them or their family financially. As the financial crisis set in, these 'benefactors' were calling in their debts (or selling the debt to criminal enforcers) just in the time period when the workers were finding it more difficult to find or hold their jobs. Workers were being harvested as drug mules, money carriers, or worse.

WHAT IF A PERPETRATOR IS DEBT BONDED IN SOME WAY?

Our paper refers to some Australian cases which involved people with no prior convictions and no history of drug use being apprehended as bit players in large scale scams. One common theme appears to be financial need and pressure to settle debt.

Such people are not slaves and may not have been bonded in a strict sense. But they may challenge us to consider how we differentiate a perpetrator from a victim.

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CONCLUSIONS AND IMPLICATIONS

Slavery permeates and insinuates in obscure ways. In our paper we have defined slavery in terms of ownership. The underlying condition of ownership can be expressed in different ways, through different forms of slavery. Research needs to be done to measure the extent to which cases coming before the courts have had a component of over-control: ownership and slavery or forcing of work or other relationships. It will be interesting to read the results of the [hoped-for] study by the Australian Institute of Criminology (AIC); and the AIC’s assessment of the overall situation.

There are further implications to be considered, as regards the reference in the Explanatory Memorandum to educating jurors. Explaining matters may lead to longer trials, where there is a need for an expert witness to explain the psychological pressure that slaves may experience.²³ It may be part of the implications of such trials that defence lawyers would want to offer a defence in the form of some sort of duress.

Insofar as people who have been captured are concerned, the government has provided resources for victim support. However there is an as-yet-unmet need for expertise and resources in support of people who have been trapped by one of the persistent systems of slavery; people who come from a class or group that is vulnerable to being harvested as slaves. Having recognized these people, we need government to allocate the resources to do the program development work that will enable people so trapped to develop and retain ‘agency’ as they move towards becoming liberated.

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REFERENCES

1. Roscoe Howell, BA (Hons), Grad Dip Bus Admin (Swinburne). Roscoe is the Public Officer of Slavery Links Australia Inc. He is the author of *Australians and modern slavery*. Copyright of this article belongs to Roscoe Howell.
2. Robert C. Evans, LL.B (Hons), LLM (Lond.). Of the Inner Temple Barrister at Law, Barrister and solicitor of the Supreme Court of Victoria. Former Senior Lecturer and Sub-Dean of the Faculty of Law, University of Melbourne. Co-author *Australian Criminal Laws* (Federation Press). Secretary: Slavery Links Australia Inc.
3. Slavery Links Australia Inc published *Australians and modern slavery* (300 pp) by Roscoe Howell with a Foreword by The Hon Catherine Branson QC, President of the Australian Human Rights Commission
4. The Supplementary Convention, Article 7 reads: For the purposes of the present Convention:
 - (a) "Slavery" means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and "slave" means a person in such condition or status
5. United Nations, Office of High Commissioner for Human Rights (n.d.) *Contemporary forms of slavery*, Fact Sheet 14. Go to: www.ohchr.org/documents/publications/Fact-Sheeten.pdf
6. Some 43 pages of *Australians and modern slavery* are devoted to untangling the gaps and overlaps between the conditions covered or not covered by these treaties
7. James C. Hathaway (2008) The Human Rights Quagmire of "Human Trafficking", *Virginia Journal of International Law*, Vol 49, No 1, October, page 4. We acknowledge that the numbers proposed in Hathaway's analysis [of the condition of *slavery*] have been challenged in Gallagher's analysis [of *trafficking*]: We would expect the numbers to differ. See Gallagher, A. T. (2009) Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway, *Virginia Journal of International Law*, Vol 49, No 4, May
8. The typology is described in Howell (2011) *Op. Cit.*, Pp 61 – 65
9. In 2011 the first author delivered a workshop for public servants [from the state Attorney General's Department], humanitarian entrants, local government and service providers; to explore how humanitarian entrants may have encountered some forms of slavery before arriving in Australia. The workshop [for Multicultural SA] was entitled: 'Humanitarian entry and the experience of modern-day slavery'. Contact Slavery Links if such information may assist you
10. In *Australians and modern slavery* we apply Bales' eight-stage model of trafficking, to identify when enslavement may occur in the trafficking process
11. United Nations Office On Drugs And Crime (UNODC) (2009) *Anti-Human Trafficking Manual For Criminal Justice Practitioners* Module 1: Definitions Of Trafficking In Persons And Smuggling Of Migrants UNODC, Vienna

12. Attorney General's Department (2011) Discussion Paper: The Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protections, Para 47 – 48
13. The following paragraph is a quote from *Australians and modern slavery*, Page 47; and also refers to Page 73
14. OVC: Office for Victims of Crime, in the Office of Justice Programs, U.S. Department of Justice
15. [United States, Bureau of Justice Statistics \(2011\) Characteristics of suspected human trafficking incidents, 2008 – 2010, U.S. Department of Justice, Office of Justice Programs, April.](#)
16. 'The misery of male slavery', *The Nation* newspaper (Thailand). (2007) Refers to report from Thai Human Rights Commission. Article dated 14 May 2007
17. 'Chinese dumpling worker underpaid', *Herald Sun*, 17April 2011
18. [ILO Handbook](#)
19. Section 2 of *Australians and modern slavery* defines forced marriage. Section 3.4 discusses forced marriage in Australia. Section 5 discusses programs to counter forced marriage. Section 8.4 places forced marriage in context of official attempts to control slavery
20. On 22 and 29 August 2008 the *Herald Sun* reported that "30 children kidnapped in India were sold to an adoption agency which farmed them out to parents. 13 are in Australia." [Indian sources](#) commented too.
21. The indicia used by the High Court of Australia in the case of *R v Wei Tang* were used in a trial, by the International Tribunal for the Former Yugoslavia, (Prosecutor v. Kunarac, Kovac and Vukovic, Case No IT-97-25-T, Judgement, ¶1353 and nn. 955-57 [Mar. 15, 2001]). The case was cited in Anne Gallagher (2009) 'Human Rights and Human Trafficking: A Quagmire or Firm Ground? A response to James Hathaway', *Virginia Journal of International Law*, Vol 49, No 4, page 807
22. Kevin Bales (2005) *Understanding Global Slavery* (University of California Press), page 164
23. Slavery Links has expertise in distinguishing slavery from general oppression