

MODERN SLAVERY AND MATERIAL JUSTICE: THE CASE FOR REMEDY AND REPARATION

FRANCES SIMMONS,* JENNIFER BURN** AND FIONA MCLEOD AO SC***

In all its different manifestations modern slavery involves the abuse of power and the violation of human rights. In this article, we examine whether Australia is meeting its international obligations to provide access to effective remedies to survivors of modern slavery. We argue that Australia must squarely confront the violations of human rights suffered by survivors of modern slavery by improving access to remedies, including compensation. We recommend establishing a national compensation scheme, providing survivors with greater assistance to apply for reparation orders, and improving access to support and protection. These reforms are necessary to give effect to Australia's commitment to prevent, address and remedy the human rights abuses and enable survivors to access effective remedies.

I INTRODUCTION

In July 2015, an elderly woman was discovered lying on a bathroom floor, barely conscious, and was taken to a Melbourne hospital by ambulance. On arrival, she weighed 40 kilograms and was suffering from extreme hypothermia. Her feet and hands were crusted with lesions, and she had no teeth. In intensive care, she was treated for blood poisoning – septicaemia – and uncontrolled type II diabetes. The ambulance had arrived after a call to Triple Zero (000), but the caller claimed she did not know the surname of the woman, and the woman was admitted to hospital under a false name. Doctors, nurses, social workers, and police were told lies about the woman to conceal who she was and her circumstances in Australia. It was not until much later, after the police and border officials began inquiring into the circumstances that led to her admission to hospital, that her true name became known. It was at this time that Mrs N, a national of India who left school at six years of age, found the strength to speak about what happened to her between 2007, when she travelled to

* PhD candidate Monash University Law Faculty. The views expressed in this article are the personal views of the author.

** Director, Anti-Slavery Australia, Professor of Law, University of Technology Sydney. The authors are grateful to Yat Hing Elsie Cheung for research assistance and to the two anonymous reviewers for their helpful comments on the draft article. Any errors are the responsibility of the authors.

*** Senior Counsel at the Victorian Bar.

Australia in the hope of earning money for her family in India, and July 2015, when the ambulance carried her from a suburban home to a hospital.¹

In April 2021, Kumuthini Kannan and Kandasamy Kannan were each convicted of two offences of slavery in the first case of slavery in Australia relating solely to domestic servitude, after a trial of 49 sitting days and additional weeks of pre-trial argument.² In sentencing Kumuthini Kannan to eight years' imprisonment and her husband, Kandasamy Kannan, to six years' imprisonment, Champion J stated:

To understand the concept of slavery, we must rid ourselves of ingrained images of rows of men chained together at the oars of a galley, or men and women working in fields in bondage. Slavery can be much more subtle than that and may not involve physical restraint. What must be reaffirmed is that possessing or using a person in a condition of slavery is repugnant, degrading of the human condition, and a gross breach of human rights.³

Under international law, a breach of human rights requires a remedy.⁴ But despite the social opprobrium that modern slavery attracts, the question of what is required to remedy the violation of the victim's rights is rarely considered. Remedies can take many different forms,⁵ but in this article we focus on why access to material justice, in the form of compensation, remains elusive. In Part II, we explore why Australia's response to modern slavery has overlooked the issue of compensation and reparation, notwithstanding Australia's international obligations to ensure that victims have access to effective remedies. In Part III, we map the pathways to remedies that are currently available to survivors of modern slavery. We argue that the existing mechanisms for redress are difficult to access and inadequate to address the complex forms of harm suffered by survivors of modern slavery. Despite recognition of the significant barriers that survivors face accessing remedies, neither the criminal justice response nor the corporate reporting regime established by the *Modern Slavery Act 2018* (Cth) ('*Modern Slavery Act*') provide adequate and accessible pathways for victims of modern slavery to seek redress for the harm that they suffered. In Part IV, we make the case for a national compensation scheme for survivors of modern slavery and underline the importance of procedural aspects of the right to an effective remedy, such as access to legal representation and the right to remain in Australia while claiming compensation.

1 These facts are drawn from the judgment in *DPP (Cth) v Kannan* (2021) 359 FLR 181 ('*Kannan*').

2 Ibid 201 [103] (Champion J). Cf *R v Kovacs* [2008] QCA 417 ('*Kovacs*').

3 *Kannan* (2021) 359 FLR 181, 201 [103].

4 *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 999 UNTS 171 (entered into force on 23 March 1976) art 2(3) ('*JCCPR*'); Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) 354–60. In the context of trafficking, see Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children: Addendum, Mission to Australia*, UN Doc A/HRC/20/18/Add.1 (18 May 2012) ('*Report of the Special Rapporteur: Mission to Australia*'); Inter-Agency Coordination Group against Trafficking in Persons, 'Providing Effective Remedies for Victims of Trafficking in Persons' (Issue Paper No 3, United Nations Office on Drugs and Crime, January 2016).

5 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN Doc A/RES/60/147 (21 March 2006, adopted 16 December 2005) 7 [18] ('*Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims*').

II MODERN SLAVERY AS AN ABUSE OF POWER AND THE RIGHT TO EFFECTIVE REMEDIES

A Modern Slavery in Australia

In this article, we focus on the issue of access to compensation for survivors of modern slavery who have experienced exploitation in Australia. Australia's response to slavery and human trafficking has evolved rapidly since it codified the offence of slavery in 1999,⁶ but for most victims the possibility of receiving compensation remains unrealised. While Australia's initial response to human trafficking and slavery was characterised by a narrow focus on slavery and trafficking in the sex industry, in 2013, federal offences of forced marriage and forced labour were introduced into the *Criminal Code Act 1995* (Cth) ('*Criminal Code*')⁷ as part of reforms to expand the suite of slavery and human trafficking offences in divisions 270 and 271 of the *Criminal Code* 'to ensure the broadest range of exploitative behaviour is captured and criminalised'.⁸ These reforms were followed by the introduction of the *Modern Slavery Act*, which establishes a reporting regime whereby Australian companies with an annual turnover of more than AUD100 million are required to publish annual reports on how they identify and address modern slavery in their operations and supply chains.⁹

The *Modern Slavery Act* defines 'modern slavery', an umbrella term that is often used to describe a broad range of exploitative conduct, as conduct that is criminalised under divisions 270 or 271 of the *Criminal Code*, which captures the offences of slavery, forced labour, forced marriage, servitude as well as trafficking in persons as defined in the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* ('*Trafficking Protocol*')¹⁰

-
- 6 The *Hidden in Plain Sight* report contained only a brief acknowledgment of Australia's past practices of slavery and slavery-like practices in relation to Aboriginal and Torres Strait Islander people and the "blackbirding" of South Sea Islanders': Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia* (Report, December 2017) 55 [3.96] ('*Hidden in Plain Sight*'). See generally Victoria Stead and Lucy Davies, 'Unfree Labour and Australia's Obscured Pacific Histories: Towards a New Genealogy of Modern Slavery' (2021) 45(3) *Journal of Australian Studies* 400; Stephen Gray, 'The Elephant in the Drawing Room: Slavery and the "Stolen Wages" Debate' (2007) 11(1) *Australian Indigenous Law Review* 30.
- 7 *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth) sch 1 items 8, 12 ('*Crimes Legislation Amendment (Slavery)*').
- 8 Explanatory Memorandum, *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012* (Cth) 2. The *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth) added the offences of trafficking in persons (section 271.2), trafficking in children (section 271.4), domestic trafficking in persons (section 271.5) and debt bondage arrangements (section 271.8). See *R v Tang* (2008) 237 CLR 1, 16 [21]–[23] (Gleeson CJ) (explaining the legal meaning of slavery). The *Crimes Legislation Amendment (Slavery) Act 2013* (Cth) introduced offences of forced labour (section 270.6A), harbouring a victim of trafficking (section 271.7F), forced marriage (section 270.7B) and organ trafficking (section 271.7B).
- 9 *Modern Slavery Act 2018* (Cth) s 3.
- 10 *United Nations Convention against Transnational Organised Crime*, GA Res 55/25, UN Doc A/RES/55/25 (8 January 2001, adopted 15 November 2000) annex II ('*Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*') art 3 ('*Trafficking Protocol*'). As of December 2021, 178 United Nations member states have ratified the *Trafficking Protocol*: United Nations, '12.a

and ‘the worst forms of child labour’, whether or not such conduct occurred in Australia or not.¹¹ The term ‘modern slavery’ has no precedent in international law but is often used loosely to describe a wide array of exploitative practices, provoking concern that its unfocused application to a spectrum of exploitative practices will encourage sensationalism while failing to address or remedy specific violations of human rights.¹² In this article we adopt the definition of modern slavery in the *Modern Slavery Act* and recognise that, while this definition covers varied manifestations of modern slavery, all of these practices involve the violations of human rights.

When the *Modern Slavery Act* entered into force on 1 January 2019, it reframed efforts to address modern slavery to look beyond the prosecution of individual offenders and examine the role of large entities in identifying and addressing modern slavery in their operations and supply chains.¹³ But experts caution that the transformative potential of mandatory corporate supply chain reporting regimes have been overstated, noting that such schemes fail to protect the rights of vulnerable workers, particularly in sectors that have been identified as at high risk of modern slavery,¹⁴ provide financial penalties for companies that fail to meet reporting requirements¹⁵ or address concerns that immigration policies may sometimes exacerbate modern slavery risks.¹⁶ Early evaluation of the impact of the *Modern Slavery Act* reveals most companies are failing to fully comply with mandatory reporting standards. Over half failed to identify obvious modern slavery risks, and less than a third were able to show that they were taking action to address modern slavery risks.¹⁷ As the recent Australian Law Reform

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime’, *United Nations Treaty Collection* (Web Page) <https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-12-a&chapter=18>.

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

12 For a critique of the use of the term ‘modern slavery’ see Janie A Chuang, ‘Exploitation Creep and the Unmaking of Human Trafficking Law’ (2014) 108(4) *American Journal of International Law* 609; Janie Chuang, ‘The Challenges and Perils of Reframing Trafficking as “Modern-Day Slavery”’ [2015] 5 *Anti-Trafficking Review* 146–9.

13 The Act requires entities with an annual consolidated revenue of more than AUD100 million to prepare annual modern slavery statements that describe how the entity assesses and addresses modern slavery risks in their operations and supply chains: *Modern Slavery Act 2018* (Cth) s 3. In 2018, NSW passed its own Modern Slavery Act, and this Act as amended came into force on 1 January 2022: *Modern Slavery Act 2018* (NSW) s 2.

14 See Ingrid Landau and Shelley Marshall, ‘Should Australia be Embracing the Modern Slavery Model of Regulation?’ (2018) 46(2) *Federal Law Review* 313.

15 Amy Sinclair and Justine Nolan, ‘Modern Slavery Laws in Australia: Steps in the Right Direction?’ (2020) 5(1) *Business and Human Rights Journal* 167; *ibid*.

16 Australian Law Reform Commission, *Corporate Criminal Responsibility: Final Report* (Report No 136, April 2020) 468 [10.101] (‘*Corporate Criminal Responsibility: Final Report*’).

17 Amy Sinclair and Freya Dinshaw, *Paper Promises? Evaluating the Early Impact of Australia’s Modern Slavery Act* (Report, 2022) 2, 54. In analysis of 102 company statements only 23% fully addressed all of the mandatory reporting requirements with ‘areas such as risk assessment, remediation, measuring effectiveness and consultation particularly poorly handled’ and only 27% of companies were able to demonstrate they were taking action to reduce modern slavery risks by addressing root causes or improving the conditions of workers: at 2.

Commission ('ALRC') report on corporate criminal responsibility observed, while the *Modern Slavery Act* 'encourages corporate transparency, it does not impose any requirements to actually address modern slavery risks'.¹⁸

In this article, we argue that legislative and policy reform is necessary to improve the ability of survivors of modern slavery to access remedies for the harm that they have suffered. The report of a parliamentary inquiry into establishing a Modern Slavery Act in Australia, *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia* ('*Hidden in Plain Sight*'), recommended that the *Modern Slavery Act* should include 'measures to support victims of slavery, including establishing a national compensation scheme'.¹⁹ Improving protection and support for victims was a key focus of the inquiry, reflecting concerns that the criminal justice response to modern slavery is primarily focused on prosecuting perpetrators rather than the rights of survivors, including their ability to access compensation.²⁰ However, the *Modern Slavery Act* is narrowly focused on the role of the business community in addressing modern slavery and does not contain direct provisions to improve support for victims or improve access to remedies, including via state-based compensation or civil claims.²¹ As we explain below, the result is that neither the corporate reporting regime established by the *Modern Slavery Act*, nor the criminal justice response²² provide a framework that prioritises access to effective remedies for survivors of modern slavery.

The number of people who fall victim to modern slavery in Australia every year is not known, but conservative estimates suggest that the number of victims between 2015–17 was between 1,300 and 1,900 people.²³ Since 2013, the Australian Federal Police ('AFP') has identified an increasingly diverse group of victims who have been exploited in a range of industries, including in domestic servitude in private homes and within family settings, including a sharp rise in reports of forced marriage.²⁴ In 2020–21, the AFP received 224 reports of modern slavery and 57

18 *Corporate Criminal Responsibility: Final Report* (n 16) 448–9 [10.15].

19 *Hidden in Plain Sight* (n 6) 27–8 [2.72].

20 See, eg, *ibid* ch 6.

21 The only reference to remedies for survivors of modern slavery can be found in section 16(1)(d) of the *Modern Slavery Act 2018* (Cth), which provides that '[a] modern slavery statement must, in relation to each reporting entity covered by the statement ... describe the actions taken by the reporting entity and any entity that the reporting entity owns or controls, to assess and address those risks, including due diligence and remediation processes'. Official guidance for reporting entities notes that 'remediation can take more forms, including steps to ensure the harm cannot recur, formal apologies, compensation, or stopping certain activities': see Commonwealth of Australia, 'Commonwealth *Modern Slavery Act 2018*: Guidance for Reporting Entities' (Guide, 2019) ('Commonwealth *Modern Slavery Act 2018*: Guidance for Reporting Entities').

22 Slavery, 'slavery-like offences' and trafficking in persons are defined and proscribed in divisions 270 and 271 of the *Criminal Code Act 1995* (Cth). The *Crimes Act 1914* (Cth) makes provision for reparations for victims of Commonwealth crime: at s 21B.

23 Samantha Lyneham, Christopher Dowling and Samantha Bricknell, 'Estimating the Dark Figure of Human Trafficking and Slavery Victimisation in Australia' (Statistical Bulletin No 16, Australian Institute of Criminology, 15 February 2019) 6.

24 The Australian Federal Police ('AFP') received 79 reports of forced marriage in 2020–21 and 92 reports in 2019–20, compared to just 11 reports in 2013–14: Australian Federal Police, 'Victims' Voices Lead the Way on World Day against Trafficking in Persons' (Media Release, 30 July 2021); Australian Federal

referrals were made to the government-funded victim support program, the Support for Trafficked People Program ('STPP').²⁵ From 2004 to 30 June 2020, 1,446 cases of modern slavery have been referred to the AFP, and 546 people have been referred to the STPP.²⁶ However, the Australian Institute of Criminology ('AIC') estimates that four in five modern slavery victims in Australia, representing between 928 and 1,483 victims, are undetected and our understanding of different manifestations of modern slavery continues to evolve.²⁷ Of the cases that are referred to the STPP, very few result in prosecutions; as at June 2020 there had been 25 convictions in relation to offences in divisions 270 and 271 of the *Criminal Code*.²⁸

Individuals who are identified as victims of 'modern slavery' by the authorities may be able to access victim support under the government funded STPP, administered by the Department of Social Services and delivered by Australian Red Cross.²⁹ To access this support, a person must have been identified as a victim – or a potential victim – of a modern slavery crime by law enforcement.³⁰ If a suspected victim does not hold a valid visa, the AFP can also support that person to obtain a temporary visa under the Human Trafficking Visa Framework.³¹ There is significant attrition between the number of modern slavery referrals made to the

Police, 'Stop Human Trafficking Happening in Plain Sight' (Media Release, 30 July 2020); Australian Federal Police, 'Forced Marriage Awareness Campaign Launched at Australia's Busiest Airport' (Media Release, 15 October 2019). See also Australian Red Cross, *Forced Marriage: Community Voices, Stories and Strategies* (Report, May 2019).

- 25 Australian Federal Police, 'Victims' Voices Lead the Way on World Day against Trafficking in Persons' (Media Release, 30 July 2021); Australian Red Cross Society, *Modern Slavery Statement 2020/21* (Statement, 24 December 2021) 7.
- 26 Interdepartmental Committee on Human Trafficking and Slavery, Parliament of Australia, *Trafficking in Persons: The Australian Government Response 1 July 2017 – 30 June 2020* (Report No 10, 2021) 40, 62 ('*Trafficking in Persons: The Australian Government Response 2017–2020*').
- 27 Lyneham, Dowling and Bricknell (n 23) 6.
- 28 *Trafficking in Persons: The Australian Government Response 2017–2020* (n 26) 47. For case details, see Joanna Menagh, 'Malaysian Woman Jailed After Trafficking Friend for Sex Work in Perth Brothel', *ABC News* (online, 28 November 2017) <<https://www.abc.net.au/news/2017-11-28/woman-jailed-after-trafficking-friend-for-sex-in-perth-brothel/9202148>>; *R v Pulini* [2019] QCA 258; *R v Kanbut* [2019] NSWDC 931; *R v Grey (No 3)* [2020] ACTSC 43; *DPP v Shaik* [2020] VCC 909; Laura Chung, 'Carer Forced to Work in Supermarket, Stopped From Going Out by Sydney Couple', *The Sydney Morning Herald* (online, 22 April 2021) <<https://www.smh.com.au/national/nsw/carers-forced-to-work-in-supermarket-stopped-from-going-out-by-sydney-couple-20210421-p57189.html>>; *Kannan* (2021) 359 FLR 181; Lane Saintry, 'Man Issued Death Threats to Force Woman, Baby onto Plane Bound for India', *News.com.au* (online, 21 January 2021) <<https://www.news.com.au/national/nsw-act/courts-law/man-issued-death-threats-to-force-woman-baby-onto-plane-bound-for-india/news-story/ce1120f341204286b0aa0a52d0118912>>.
- 29 All suspected victims referred to the STPP by the AFP can access an initial 45 days of intensive support, and after this time, victims may access a further 45 days of support if they are willing to assist with an investigation or prosecution. Since 2018, children or victims of forced marriage have been able to access up to 200 days of support: 'Support for Trafficked People Program', Department of Social Services (Web Page, 23 December 2020) <<https://www.dss.gov.au/women/programs-services/reducing-violence/anti-people-trafficking-strategy/support-for-trafficked-people-program>>.
- 30 See Jennifer Burn and Frances Simmons, 'Trafficking and Slavery in Australia: An Evaluation of Victim Support Strategies' (2006) 15(4) *Asian and Pacific Migration Journal* 553.
- 31 To access the STPP, victims who need to regularise their immigration status may be granted a temporary Bridging Visa F under the Human Trafficking Visa Framework: *Migration Regulations 1994* (Cth) sch 1 item 1306; *Migration Regulations 1994* (Cth) reg 2.20B.

AFP and the number of referrals the AFP makes to the STPP.³² While there may be various reasons for this attrition (for example, an assessment of whether there are indicators of modern slavery or a decision by a suspected victim that they do not want to be referred by the STPP), with the exception of forced marriage cases, there is no referral pathway to the STPP for individuals who do not want to engage with law enforcement.³³

Very few cases that are referred to the STPP result in criminal charges and most cases that have been referred for prosecution have not resulted in convictions. Research by the Australian Institute of Criminology highlights that there is a high rate of attrition as cases move through the criminal justice system, with an attrition rate of 73 per cent between defendants referred to prosecution and conviction.³⁴ The fact that very few cases of modern slavery result in prosecutions and even fewer result in convictions is a stark reminder of the limitations of the criminal justice system in addressing modern slavery.³⁵ This underscores the importance of ensuring that victims of modern slavery have access to effective remedies outside the criminal justice system, including compensation.³⁶ However, as we discuss below, because Australia's response to modern slavery has evolved in a crime control paradigm, existing data records law enforcement outcomes: there are no reliable statistics on how many of the individuals who have received support under the STPP have obtained compensation, as a result of action taken to recover unpaid wages, or as a result of reparations orders.

B Modern Slavery as an Abuse of Power

Modern slavery has many different manifestations, but in all its pernicious formations, it involves the abuse of power and the violation of human rights. Although the phrase 'modern slavery' has no antecedents in international law, there are many international instruments that illustrate the international community's intention to prohibit slavery,³⁷ most notably the *Convention to Suppress the Slave Trade and Slavery*, which defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership

32 See generally Nerida Chazal and Kyla Raby, 'The Impact of COVID-19 on the Identification of Victims of Modern Slavery and Their Access to Support Services in Australia' (2021) 6(2) *Journal of Modern Slavery* 30; Frances Simmons and Grace Wong, 'Learning from Lived Experience: Australia's Response to Forced Marriage' (2021) 44(4) *University of New South Wales Law Journal* 1619.

33 Simmons and Wong (n 32) 1628. The referral process for suspected victims of forced marriage differs from the referral process for other manifestations of modern slavery: Simmons and Wong (n 32) 1655.

34 Samantha Lyneham, 'Attrition of Human Trafficking and Slavery Cases through the Australian Criminal Justice System' (Trends & Issues in Crime and Criminal Justice No 640, Australian Institute of Criminology, 30 November 2021) 9.

35 See, eg, Marie Segrave and Sanja Milivojević, 'Auditing the Australian Response to Trafficking' (2010) 22(1) *Current Issues in Criminal Justice* 63. See also Marie Segrave, 'Human Trafficking and Human Rights' (2009) 14(2) *Australian Journal of Human Rights* 71.

36 See *Report of the Special Rapporteur: Mission to Australia*, UN Doc A/HRC/20/18/Add.1 (n 4) 15–16.

37 For an overview of the international instruments prohibiting slavery, see M Cherif Bassiouni, 'Enslavement as an International Crime' (1991) 23(2) *New York University Journal of International Law and Politics* 445.

are exercised'.³⁸ This definition has 'proved to be abiding' and is now accepted to define slavery in international customary law,³⁹ even if the exact circumstances that amount to slavery are still contested.⁴⁰ In the landmark case of the *R v Tang*, the High Court recognised that, in borderline cases, the distinction between slavery, which involves the exercise of any or all of the powers attaching to the right of ownership, and harsh employment will turn on questions of fact and degree.⁴¹ As the courts have acknowledged, people may remain in situations of slavery and servitude, not because of physical constraints, but because of 'the combined effect of multiple factors', including fear of authorities, the abuse of the power imbalance between the victim and the offender, and manipulation of immigration laws and the immigration status of the victim.⁴²

To date, most of the victims of modern slavery who have been identified by the authorities have been adult women who entered Australia holding temporary visas and who have subsequently been exploited and abused.⁴³ A persistent critique of the criminal justice response to modern slavery is that it leaves untouched the structural inequalities that create a conducive context for exploitation⁴⁴ and fails to address the role of migration regimes in contributing to slavery and trafficking risks.⁴⁵ The way in which immigration policies may contribute to the vulnerability of victims of modern slavery is evident in the recent cases of domestic servitude and slavery.⁴⁶ For example, while Champion J considered it was impossible to 'precisely determine when the condition of slavery first existed',⁴⁷ his Honour observed that shortly after Mrs N arrived in Australia and began living at the Kannans' home, her passport was removed, her visa expired, and she found herself

38 *Convention to Suppress the Slave Trade and Slavery*, signed 25 September 1926, 60 LNTS 253 (entered into force 9 March 1927) art 1(1) ('1926 Slavery Convention').

39 *Prosecutor v Kunarac (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) 178 [519]. The definition of slavery has also been reproduced in the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, opened for signature 7 September 1956, 266 UNTS 3 (entered into force 30 April 1957) art 1, and the *Rome Statute* defines enslavement as 'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of the trafficking of persons, in particular women and children': *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 7(2)(c).

40 Gulnara Shahinian, *Report of the Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences*, UN Doc A/HRC/9/20 (28 July 2008) 12 [38]; Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) 189–91; Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (n 12).

41 (2008) 237 CLR 1, 61 [155] (Hayne J).

42 *Ibid* 61 [158] (Hayne J); see also *Kannan* (2021) 359 FLR 181; *R v Pulini* [2019] QCA 258 [81]; *R v Kovacs* (2008) 192 A Crim R 345, 369–71.

43 See, eg, *R v Tang* (2008) 237 CLR 1.

44 Landau and Marshall (n 14) 322.

45 Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (Report, November 2017) ('*Wage Theft in Australia*'). See also Laurie Berg, *Migrant Rights at Work: Law's Precariousness at the Intersection of Immigration and Labour* (Routledge, 2016) ch 8.

46 *Kannan* (2021) 359 FLR 181; *R v Pulini* [2019] QCA 258; *R v Kovacs* (2008) 192 A Crim R 345.

47 *Kannan* (2021) 359 FLR 181, 200 [98].

living and working in circumstances where she had ‘no power, little money and nowhere to go’.⁴⁸

The abuse of power involved in slavery is so egregious that a person cannot consent to such abuse.⁴⁹ For example, the powers attaching to the right of ownership that were exercised over Mrs N’s daily life were exercised over a prolonged period in circumstances where Champion J remarked that any ‘consent’ that the victim gave to the prolonged deprivation of her liberty reflected ‘her desperation to alleviate her life of poverty and that of her family in India’; a desperation that the perpetrators knowingly abused and exploited.⁵⁰ In sentencing the offenders, Champion J stated:

It matters little that Mrs [N] may have been ‘happy’ for some or even a significant part of that period defined by the condition of slavery. Whatever happiness to her may have meant, such a state, if it existed, must be evaluated in the context of her overall life experience and the circumstances in which she had previously been living. What matters is the fact of the powers being exercised over her. She was a largely uneducated, illiterate and vulnerable woman who you both took advantage of, irrespective of whether she ever comprehended that she was in a condition of slavery.⁵¹

Judge Champion did not address the specific indignities (such as being hit with a frozen chicken and scalded with boiling water) that Mrs N alleged that she endured during the eight years in which she was enslaved in the Kannans’ family home, but focused on the ‘massive power imbalance’⁵² between the offenders and the victim and the deliberate nature of the offenders’ conduct over a ‘lengthy period’⁵³ during which time they ‘developed almost absolute control over all aspects of her day-to-day life’,⁵⁴ a situation that began when they took her passport from her and removed her freedom to choose when she would return to India. The Kannans controlled how and when she worked, her contact with her family, and ‘how and when she received health care’⁵⁵ and, over a period of eight years, ‘grossly exploited’⁵⁶ their victim, only ever paying her ‘a pathetically low amount of remuneration’.⁵⁷ Whether Mrs N will obtain a reparation order is as yet unclear – in sentencing, Champion J noted that:

[T]he prosecution recently filed an application for an order that you pay a sum in reparation to Mrs [N]. The application is directed towards a payment to her for unpaid wages for the period of time she was in a condition of slavery. The making of such an order is part of the sentencing process and is additional to any sentence imposed. It is a matter in the discretion of the sentencing court. In all the

48 Ibid 223 [230].

49 The fact that a victim consented to the conduct is not a defence to a slavery offence: *Criminal Code Act 1995* (Cth) s 270.11; *ibid* 222 [224].

50 *Kannan* (2021) 359 FLR 181, 191 [50].

51 *Ibid* 201 [101].

52 *Ibid* 201 [102].

53 *Ibid* 220 [218].

54 *Ibid* 221–2[223].

55 *Ibid* 201 [102].

56 *Ibid* 221–2 [223].

57 *Ibid* 222 [225].

circumstances, particularly as the application appears to be resisted on a number of grounds, I do not propose to make an order today.⁵⁸

Australia's obligations to remedy the abuse of power that characterises modern slavery crimes requires law and policy makers to recognise that the criminal justice process has not delivered remedies to victims for the harm that they have suffered and to consider what justice means from the perspective of survivors of modern slavery.⁵⁹ *DPP (Cth) v Kannan* ('Kannan')⁶⁰ illustrates how victims of modern slavery may experience complex and multiple psychological, physical, and economic harms over a prolonged period. Victims may suffer economic loss because of under payment or non-payment of wages, be deprived of their liberty, and be required to work in degrading and inhumane conditions. The family members of victims may be indirect victims of modern slavery (for example, in circumstances where the victim dies for reasons that are related to their victimisation).⁶¹

The question of accountability for the abuse of power involved in modern slavery requires looking beyond the actions of individual offenders or the conduct of corporations to also examine the role of the state and the social and legal context in which victims become vulnerable to abuse and exploitation.⁶² To date, prosecutions of modern slavery in Australia have involved individual offenders.⁶³ However, the introduction of the *Modern Slavery Act* has provoked a broader discussion about the responsibility of corporations for the failure to prevent slavery whether in Australia or abroad, particularly in the context of the responsibility of Australian corporations to identify, address, prevent and remedy modern slavery in complex transnational supply chains where the victims of modern slavery are offshore. In 2020, the ALRC observed that, in a transnational setting, crimes like modern slavery 'are more likely to occur in the form of an omission or failure to prevent the relevant conduct by a person associated with the corporation, rather than as a specific act knowingly or intentionally committed by a corporation'

58 Ibid 220 [217] (emphasis added).

59 On survivor-informed responses to modern slavery, see Australian Government, *National Action Plan to Combat Modern Slavery 2020–25* (Action Plan, 9 December 2020) 21, 28 ('*National Action Plan to Combat Modern Slavery 2020–25*'); Anti-Trafficking Monitoring Group, *Agents for Change: Survivor Peer Researchers Bridge the Evidence and Inclusion Gap* (Report, 2021); Andrea Nicholson, Minh Dang and Zoe Trodd, 'A Full Freedom: Contemporary Survivors' Definitions of Slavery' (2018) 18 *Human Rights Law Review* 689; United Nations General Assembly, *Contemporary Forms of Slavery, Including its Causes and Consequences: Note by the Secretary-General*, UN Doc A/73/139 (10 July 2018) 20 [55]; United Nations Office on Drugs and Crime, 'Statement by the United Nations Network on Migration on the World Day against Trafficking in Persons "Victims' Voices Lead the Way"' (Press Release, 30 July 2021) <<https://www.unodc.org/unodc/press/releases/2021/July/statement-by-the-united-nations-network-on-migration-on-the-world-day-against-trafficking-in-persons.html>>.

60 (2021) 359 FLR 181.

61 Victim impact statements have been provided in court by the family members of deceased victims: Jennifer Burn, 'Legal Narratives, Human Trafficking and Slavery in Australia' (2017) 15(5) *History Compass* 1, 2. See also *Rantsev v Cyprus and Russia* (European Court of Human Rights, First Section, Application No 25965/04, 7 January 2010).

62 *Corporate Criminal Responsibility: Final Report* (n 16) 468 [10.101].

63 Frances Simmons et al, 'Human Trafficking and Slavery Offenders in Australia' (Trends & Issues in Crime and Criminal Justice No 464, Australian Institute of Criminology, 28 November 2013) 4; *Trafficking in Persons: The Australian Government Response 2017–2020* (n 26) 47; Lyneham (n 34) 1–2.

before recommending that the Australian Government should consider applying the ‘failure to prevent’ offence in the Crimes Legislation Amendment (Combating Corporate Crime) Bill 2019 to serious human rights violations, such as modern slavery, that might arise in the context of transnational business.⁶⁴

C The Right to Access Effective Remedies

In this section, we provide a brief overview of Australia’s obligations under international law to provide access to effective remedies to victims of human trafficking, slavery and slave-like practices.⁶⁵ The international legal regime that defines and prohibits trafficking in persons was established under the umbrella of the *United Nations Convention against Transnational Organized Crime* (‘UNTOC’), and pays only ‘fleeting attention to the rights of victims’.⁶⁶ The *Trafficking Protocol*, which defines and prohibits trafficking in persons, and its parent instrument, UNTOC, obliges state parties to offer trafficked people the legal possibility of obtaining compensation.⁶⁷ Article 6(6) of the *Trafficking Protocol* requires state parties to ensure that their domestic legal system ‘contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered’. Such compensation can be sought from offenders or from the state.⁶⁸ However, while almost all countries in the world have introduced domestic legislation to address trafficking in persons,⁶⁹ and the practical

64 *Corporate Criminal Responsibility: Final Report* (n 16) 448 [10.12]. Recommendation 19 states that the Government should consider applying the new model of ‘failure to prevent’ offences to misconduct overseas by Australian corporations: at 447.

65 For a more detailed discussion, see ‘Providing Effective Remedies for Victims of Trafficking in Persons’ (n 4).

66 Anne T Gallagher, ‘Two Cheers for the Trafficking Protocol’ [2015] (4) *Anti-Trafficking Review* 14, 14.

67 *United Nations Convention against Transnational Organized Crime*, GA Res 55/25, UN Doc A/RES/55/25 (8 January 2001, adopted 15 November 2000) annex 1 (‘*United Nations Convention against Transnational Organized Crime*’) art 25(2). *Trafficking Protocol*, UN Doc A/RES/55/25 (n 10) art 3(a). defines ‘trafficking in persons’ as

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.

68 While the *Trafficking Protocol* does not specify what type of damage compensation should cover, the concept of compensation is generally understood as encompassing both material and non-material damages. For example, Principle 20 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, 60th sess, 64th plen mtg, Agenda Item 71(a), UN Doc A/RES/60/147 (21 March 2006, adopted 16 December 2005) (‘*Principles and Guidelines on the Right to a Remedy and Reparation*’) describes several areas of damages for which compensation should be provided: (a) physical or mental harm; (b) lost opportunities, including employment, education and social benefits; (c) material damages and loss of earnings, including loss of earning potential; (d) moral damage; (e) costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

69 United Nations Human Rights Council, *Summary of the Consultations Held on the Draft Basic Principles on the Right to Effective Remedy for Victims of Trafficking in Persons: Report of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/26/18 (2 May 2014) (‘*Consultations Summary*’); see also Katarina Schwarz and Jean Allain, *Antislavery in Domestic Legislation: An Empirical Analysis of National Prohibition Globally* (Report, February 2020) 11.

and symbolic benefits of compensation for survivors is widely recognised,⁷⁰ access to remedies remain out of reach for most survivors.⁷¹ A succession of UN reports have expressed concern that the issue of access to compensation continues to be neglected, with states adopting law-enforcement approaches that prioritise ‘investigation and prosecution of traffickers over victims’ support, empowerment and long-term social inclusion’.⁷²

Following the adoption of the *Trafficking Protocol*, the UN Office of the High Commissioner for Human Rights (‘OHCHR’) sought to reframe the issue of trafficking in persons within the regime of international human rights law by issuing the *Recommended Principles and Guidelines on Human Rights and Human Trafficking*.⁷³ As victims of human rights violations and victims of crime, victims of modern slavery have a right to effective remedies for the harm they have suffered. The principle that victims of human rights violations are entitled to remedies is protected by international human rights law,⁷⁴ as well as by international labour law. While the right to an effective remedy is broader than a right to claim compensation for harm suffered, the UN Human Rights Committee has made it clear that article 2(3) of the *International Covenant on Civil and Political Rights*, which requires states to ensure that any person whose rights or freedoms under the Covenant are violated shall have an effective remedy, encompasses an obligation to provide reparations.⁷⁵ The 2014 protocol to the widely ratified International Labour Organization (‘ILO’) *Forced Labour Convention* requires countries to provide effective remedies, including compensation, to victims of forced labour irrespective of their immigration status.⁷⁶

The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International and Human Rights Law and Serious Violations of International Humanitarian Law*⁷⁷ provide that victims of human rights violations should have access to remedies, including adequate, effective and prompt reparation for harm suffered, and identify five different forms

70 Katarina Schwarz, Ana Valverde-Cano and Hannah Baumeister, *What Works to End Modern Slavery? A Review of Evidence on Policy and Interventions in the Context of Justice* (Report, December 2020) 47.

71 Maria G Giammarinaro, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, UN Doc A/HRC/44/45 (6 April 2020); *ibid* 47–8.

72 Giammarinaro (n 71).

73 United Nations Economic and Social Council, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council – Addendum*, UN Doc E/2002/68/Add.1 (20 May 2002) (‘*Recommended Principles and Guidelines on Human Rights and Human Trafficking*’).

74 ICCPR (n 4) art 2(3); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 2(b).

75 Human Rights Committee, *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 6 [16].

76 International Labour Organization, *Protocol of 2014 to the Forced Labour Convention, 1930*, Protocol 29, 103rd sess (11 June 2014) arts 1(1), 4(1); International Labour Organization, *Forced Labour (Supplementary Measures) Recommendation, 2014*, Recommendation 203, 103rd sess (11 June 2014) art 12.

77 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims*, UN Doc A/RES/60/147 (n 5).

that reparation can take: restitution, compensation, rehabilitation, satisfaction and protection from further harm though guarantees of non-repetition.⁷⁸

The right to an effective remedy has procedural and substantive aspects: the substantive enjoyment of the right to an effective remedy (eg, the compensation paid to a victim) will remain out of reach unless the procedures by which that person can claim compensation are fair and accessible. This approach is reflected in the *Recommended Guidelines and Principles on Human Rights and Trafficking*, which provide that:

Trafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies. This right is often not effectively available to trafficked persons as they frequently lack information on the possibilities and processes for obtaining remedies, including compensation, for trafficking and related exploitation. In order to overcome this problem, legal and other material assistance should be provided to trafficked persons to enable them to realize their right to adequate and appropriate remedies.⁷⁹

States must not only ensure that mechanisms to effective remedies exist but that these remedies are accessible. This means protecting the procedural rights – such as the right to information about available remedies, as well as access to free legal assistance – that give survivors of modern slavery the tools they need to access reparations and other remedies.⁸⁰ Care should be taken to avoid ‘re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation’.⁸¹

The former UN Special Rapporteur on Trafficking in Persons championed the issue of the right to effective remedies for victims of trafficking,⁸² and recommended that Australia establish a national compensation scheme.⁸³ A national compensation scheme recognises the reality, borne out in both Australian and international experience, that most victims will never see those responsible for their exploitation convicted and will only be able to access compensation for the harm that they have suffered through a state-funded compensation mechanism. Australia is responsible for providing victims with access to remedies for the harm they have suffered as the result of the actions of non-state actors. Under the *Trafficking Protocol*, for example, state parties are required to establish a legal mechanism that enables victims of trafficking to claim compensation and to provide domestic legal remedies to victims of human rights violations that occur within their jurisdiction.⁸⁴ In the last decade, the ILO has adopted two new instruments focusing on protecting the

78 Ibid 7 [18].

79 *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (n 73) 13–14.

80 ‘Providing Effective Remedies for Victims of Trafficking in Persons’ (n 4) 12–18.

81 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims*, UN Doc A/RES/60/147 (n 5) 6 [10].

82 See, eg, Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, UN Doc A/HRC/17/35 (13 April 2011); United Nations General Assembly, *Trafficking in Persons, Especially Women and Children: Note by the Secretary-General*, UN Doc A/66/283 (9 August 2011) 4–7; *Consultations Summary*, UN Doc A/HRC/26/18 (n 69).

83 *Report of the Special Rapporteur: Mission to Australia*, UN Doc A/HRC/20/18/Add.1 (n 4) 21 [82].

84 *Trafficking Protocol*, UN Doc A/RES/55/25 (n 10) art 6(6).

labour rights of domestic workers and ensuring that victims of forced labour have ‘access to appropriate and effective remedies, such as compensation’.⁸⁵

Mapping the rights violations that occur as a result of modern slavery can result in a picture that traverses multiple jurisdictions and brings into focus the responsibility of business enterprises for human rights violations that occur within their operations and supply chains. The *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework* (‘UNGPs’) provide guidance on the role of the state and businesses in facilitating access to an effective remedy for victims of human rights violations that are a consequence of business activities.⁸⁶ The UNGPs are underpinned by three pillars: the first is that states have a duty to respect, protect and fulfil human rights and fundamental freedoms.⁸⁷ The second pillar recognises that business enterprises have a responsibility ‘to comply with all applicable laws and to respect human rights’.⁸⁸ The third pillar brings into focus the lived experience of victims of rights violations and requires ‘rights and obligations to be matched to appropriate and effective remedies when breached’.⁸⁹ In 2018, the UN Human Rights Council highlighted the challenges that victims of business-related human rights abuses face when accessing remedies, observing that:

Ensuring the accountability of business enterprises and access to effective remedy for victims is a vital part of a State’s duty to protect against business-related human rights abuses, as required by international human rights law and reflected in the Guiding Principles. While effective judicial mechanisms are at the core of ensuring access to remedy ... administrative, legislative and other non-judicial mechanisms play an essential role in complementing and supplementing judicial mechanisms ...⁹⁰

The right to an effective remedy is a foundational principle of the UNGPs and requires both the state and business enterprises to enable victims of modern slavery to access remedies for human rights abuses.⁹¹ This may occur through facilitating access to judicial and non-judicial complaints mechanisms and by ensuring that migration and labour legislation facilitates, rather than frustrates, the provision of evidence by survivors of modern slavery who seek remedies for the harm that they have suffered. However, while work is underway to provide guidance about establishing grievance mechanisms,⁹² greater attention must be given to improving

85 International Labour Organization, *Protocol of 2014 to the Forced Labour Convention, 1930*, Protocol 29, 103rd sess (11 June 2014) arts 1(1), 4(1); International Labour Organization, *Forced Labour (Supplementary Measures) Recommendation, 2014*, Recommendation 203, 103rd sess (11 June 2014) art 12.

86 United Nations Office of the High Commissioner for Human Rights, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (Guiding Principles, 2011).

87 Ibid 1.

88 Ibid.

89 Ibid.

90 United Nations Human Rights Council, *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse Through State-Based Non-Judicial Mechanisms: Report of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/38/20 (14 May 2018) 3 [5].

91 Justine Nolan and Martijn Boersma, *Addressing Modern Slavery* (University of New South Wales Press, 2019) 170.

92 Sinclair and Dinshaw (n 17) 64–5.

the ability of individuals who experience modern slavery as a result of the action or inaction of Australian companies to access effective remedies. This involves examining the liability of Australian companies who fail to prevent modern slavery,⁹³ and developing more detailed guidance on providing remediation, including in the form of compensation for harm suffered, to victims in the overseas operations or supply chains of Australian companies.⁹⁴

D The Implementation Gap

In the early years of Australia's response to human trafficking and slavery, the issue of civil remedies for people who had been trafficked and enslaved was overlooked. The operating assumption was that the criminal trial was where justice is sought and remedial action taken, even though very few cases were prosecuted and, in the unlikely event a prosecution resulted in a conviction, there were no opportunities for victims to seek reparations. Because Australia's response to trafficking and slavery was formulated in a criminal justice paradigm, there was a failure to pay attention to the capacity of other regulatory contexts, including labour law and immigration law, to reduce or, conversely, exacerbate modern slavery risks or to provide remedies for survivors of modern slavery. In this section, we argue that there is an implementation or remedy gap⁹⁵ visible in the lack of a co-ordinated national approach to the issue of compensation for survivors of federal modern slavery crimes; the barriers that survivors continue to face when claiming compensation, even where criminal proceedings result in a conviction;⁹⁶ and the failure to monitor or evaluate the ability of survivors of modern slavery to access compensation.⁹⁷

The 2020–25 National Action Plan to Combat Modern Slavery declares that '[w]e must afford victims and survivors of modern slavery access to effective remedies' and promises to prioritise 'holistic and tailored victim centred support and protection'.⁹⁸ Remedies can take many different forms, but we focus on the issue of compensation because of the critical role it can play in remedying the harm caused by modern slavery. Firstly, compensation can help support survivors to rebuild their lives, support their families, reassert their agency and autonomy, and avoid further harm (financial security may reduce the risk of re-victimisation and support recovery and reintegration into the community after a period of sustained deprivation and economic exploitation).⁹⁹ Secondly, despite the recognition that modern slavery can result in destitution, the issue of compensation

93 *Corporate Criminal Responsibility: Final Report* (n 16) 448–9 [10.15].

94 See, eg, 'Commonwealth *Modern Slavery Act 2018*: Guidance for Reporting Entities' (n 21).

95 'Insight 8: Remedy and Reparations for Modern Slavery and Human Trafficking', *Finance Against Slavery and Trafficking* (Web Page, 2021) <https://www.fastinitiative.org/resources/insight_8/>.

96 Jennifer Burn, Fiona McLeod and Nicola Knackstredt (Anti-Slavery Australia and the Law Council of Australia), *Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime* (Report, 2016) 4, 8; Frances Simmons, 'Making Possibilities Realities: Compensation for Trafficked People' (2012) 34(3) *Sydney Law Review* 511.

97 Currently no records are kept of the number of survivors who successfully claim compensation.

98 *National Action Plan to Combat Modern Slavery 2020–25* (n 59) 3, 19.

99 Schwarz, Valverde-Cano and Baumeister (n 70) 47–9.

is often overlooked in favour of a heavy focus on criminal justice outcomes.¹⁰⁰ Victims typically suffer both economic and non-economic loss. However, while the National Action Plan declares it is underpinned by the principle that survivors of modern slavery should have access to effective remedies, it is silent on the subject of compensation and, although it promises to monitor the need for a federal victims of crime financial assistance scheme, it does not set out how survivors can access remedies, or what steps will be taken to evaluate the accessibility and adequacy of the existing remedies.

It is widely accepted that survivors of modern slavery face significant obstacles to accessing compensation.¹⁰¹ On the international and national stage, the victims of modern slavery are disproportionately women.¹⁰² The gendered dimensions of modern slavery call attention to states' failure to address the gendered impacts of economic policies, labour regulations, and migration and asylum regimes on creating the circumstances in which women and girls can become vulnerable to modern slavery. Article 2(b) of the *Convention on the Elimination of All Forms of Discrimination against Women* requires states to provide appropriate and effective remedies to women whose Convention rights have been violated,¹⁰³ a right that is of critical importance to women and girls who have been trafficked. The most recent General Comment issued by the Committee on the Elimination of Discrimination against Women recognises that victims of trafficking may be unable to claim remedies because they are not correctly identified as victims of crimes or have been returned to their home countries.¹⁰⁴ Remedies might also be conditional on cooperation with law enforcement or, in the case of compensation, might be unavailable or difficult to access because of a lack of legal representation.¹⁰⁵

100 Research in other jurisdictions suggests that victims consider that financial compensation helps satisfy a need for justice. See Jeltsje Cusveller and Edward Kleemans, 'Fair Compensation for Victims of Human Trafficking? A Case Study of the Dutch Injured Party Claim' (2018) 24(3) *International Review of Victimology* 297 and studies cited therein.

101 *Consultations Summary*, UN Doc A/HRC/26/18 (n 69).

102 71 per cent of victims are women and girls: Walk Free and The Minderoo Foundation, *Stacked Odds: How Lifelong Inequality Shapes Women and Girls' Experience of Modern Slavery* (Report, 2020) 20. In 2017, the ILO included forced marriage in its global estimates of 'modern slavery', estimating that in 2016, 40.3 million people were living in modern slavery, of whom 15.4 million were living in forced marriage (88 per cent of whom were women and girls), and of whom 24.9 million were in forced labour: International Labour Organization and Walk Free Foundation, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (Report, 19 September 2017) 9–11.

103 United Nations Committee on the Elimination of Discrimination against Women, *General Recommendation No. 38 (2020) on Trafficking in Women and Girls in the Context of Global Migration*, UN Doc CEDAW/C/GC/38 (20 November 2020) 10 [43].

104 *Ibid.*

105 In *ibid.*, the United Nations Committee on the Elimination of Discrimination against Women stated that victims of trafficking often encounter significant difficulties in claiming compensation and other forms of reparation, including damages, for the harm suffered for reasons including where: it is made conditional upon cooperation with law enforcement authorities; victims do not have access to high-quality, gender-sensitive, trauma informed legal aid and representation; residency permits are tied to criminal justice processes and repatriation occurs prior to seeking or obtaining civil remedies; the victim bears the burden of proof in civil claims; survivors of trafficking are not identified as victims of a crime for the purpose of reparations owed under law; or where monetary compensation is unavailable or the proceeds of crimes are not redistributed to victims.

In Australia, most of the modern slavery cases that have resulted in convictions involve the egregious exploitation of women with insecure visa status in highly feminised industries, such as domestic work and the sex industry, that have a poor track record of protecting workers' rights.¹⁰⁶ The intimate and private setting of a family home can hide many different controlling, coercive and abusive practices, and further research is required into the intersections between the issue of family violence and specific manifestations of modern slavery that occur in an intimate family setting, including domestic servitude, slavery,¹⁰⁷ and exit trafficking. A study on domestic servitude in Australia concluded that poor or no regulation of most private domestic work creates a context that is conducive to exploitation, which is especially pronounced in cases where workers do not understand their rights and entitlements and are working without a valid visa or without control over their immigration and travel documents in sectors with weak labour protections.¹⁰⁸ These issues are illustrated by the plight of Mrs N, who found herself isolated in the Kannans' home, dependent upon them for accommodation and food, and without a passport or a valid visa, or information about her rights under Australian law.

Improving access to effective remedies for survivors of modern slavery requires a co-ordinated national approach that addresses the regulatory environment that creates modern slavery risks and seeks to understand and overcome the barriers that prevent survivors of modern slavery from accessing remedies, including compensation. A core principle of a human rights-based approach to modern slavery is the active, free and meaningful participation of rights-holders in the development and implementation of policies and programs that affect their interests.¹⁰⁹ This extends beyond mere consultation and involves the inclusion of victims' views and experiences in the development of legislative responses to modern slavery and in realising their rights to reparation and compensation.¹¹⁰ The voices of survivors have been missing in the development of Australia's response to modern slavery, and learning from their experiences will be important in designing compensation procedures that are simple and accessible.

-
- 106 See, eg, *R v Tang* (2008) 237 CLR 1; *McIvor v The Queen* (2009) 247 FLR 363; *R v Sieders* (2008) 72 NSWLR 417; *R v Dobie* (2009) 236 FLR 455; *Ho v The Queen* (2011) 219 A Crim R 74; *R v Kovacs* (2008) 192 A Crim R 345; *R v Netthip* [2010] NSWDC 159; *Nantakum v The Queen* (2013) 279 FLR 148. However, there have also been convictions involving the labour exploitation of men: see, eg, *R v Trivedi* (District Court of New South Wales, 8 May 2012) (unreported) as cited in *Ram* [2015] FCCA 389, [9]; Louisa Rebgetz and Josh Bavas, 'Taiwanese Pair to be Deported over Brisbane Slave House Scam', *ABC News* (online, 8 February 2017) <<https://www.abc.net.au/news/2017-02-08/taiwanese-pair-deported-over-brisbane-slave-house-scam/8252234>>.
- 107 See, eg, Emma Younger, 'Melbourne Man Made Wife a Slave, Court Hears', *ABC News* (online, 19 February 2018) <<http://www.abc.net.au/news/2018-02-19/woman-ordered-to-stay-room-unless-cooking-cleaning-court-hears/9462390>>.
- 108 Heather Moore, *Service or Servitude: A Study of Trafficking for Domestic Work in Australia* (Report, May 2019).
- 109 United Nations High Commissioner for Refugees et al, *Prevent. Combat. Protect. Human Trafficking: Joint UN Commentary on the EU Directive: A Human Rights-Based Approach* (Report, 2012) 25, 28.
- 110 Ibid. While Australia's initial response to human trafficking evolved without paying attention to the voices of survivors, a welcome inclusion in the most recent National Action Plan is a commitment to ensuring that 'the voices of victims and survivors, particularly women and children, inform our responses to modern slavery': *National Action Plan to Combat Modern Slavery 2020–25* (n 59) 21.

III IN SEARCH OF MATERIAL JUSTICE: OPTIONS AND OBSTACLES

This section considers the existing pathways to material justice for survivors of modern slavery in Australia. Access to an effective remedy depends on a person who experienced modern slavery being identified by the authorities. The uncomfortable reality is that most cases of modern slavery in Australia are still unrecognised and unremedied. It is beyond the scope of this article to address why many cases are unidentified, although improving identification procedures is an essential precondition to the realisation of the right to an effective remedy. However, even where victims are identified they face significant obstacles claiming compensation and opportunities for redress often remain out of reach. In this section, we map the four main avenues that currently exist for survivors of modern slavery to access material justice. Broadly speaking, survivors of modern slavery may be able to access compensation via four different pathways: reparation orders for federal criminal offences in the (statistically unlikely) circumstances that a perpetrator is convicted; through state and territory victims of crime compensation schemes; under the civil remedy provisions of the *Fair Work Act 2009* (Cth) (*Fair Work Act*) in cases involving unpaid wages; or by seeking remedies in a tort action. In addition, consideration is given to the *Modern Slavery Act* and the role of business in establishing remediation processes to remedy the harm caused by slavery that is connected to the actions of business enterprises.¹¹¹

A Statutory Victims of Crime Compensation Schemes

In 1995, a 13-year-old girl was trafficked to Australia from Thailand. Upon arrival in Australia, Jetsadophorn Chaladone, who was known as ‘Ning’ was told that she owed a ‘debt’ to her traffickers of \$35,000, which she would pay off by having sex with 650 clients. Ten days after her arrival in Sydney, Ning was discovered at the brothel following a customer tip-off, leading to a joint AFP and Immigration raid. Following the raid, Ning was deported to Thailand where she found her way to a women’s shelter. A senior AFP officer involved in the raid, Chris Payne, collaborated with a documentary filmmaker, Luigi Acquisto, to find Ms Chaladone and, with pro bono legal support, they pursued a claim for victims of crime compensation in New South Wales (‘NSW’).¹¹² In 2007, Ms Chaladone became the first survivor of trafficking to be awarded compensation in Australia.¹¹³

In the last decade, a growing number of survivors of modern slavery have successfully applied for compensation under statutory victims’ compensation scheme, notably in NSW and Victoria where most cases of slavery have been

111 *Modern Slavery Act 2018* (Cth) s 16(1)(d).

112 Fiona McLeod, ‘Human Trafficking and Modern Day Slavery – An Affront to Human Dignity’ (2014) 2(1) *Griffith Journal of Law and Human Dignity* 144, 153. Ms McLeod represented the applicant whose account and claims are featured in the films *Trafficked* (Film Australia, 2005), and *Trafficked – The Reckoning* (FairTrade Films, 2011).

113 Natalie Craig, ‘Sex Slave Victim Wins Abuse Claim’, *The Age* (online, 29 May 2007) < <https://www.theage.com.au/national/sex-slave-victim-wins-abuse-claim-20070529-ge5043.html>>.

identified.¹¹⁴ The advantage of such schemes is that they can provide compensation for victims without the admission of any liability from the state and in circumstances where a criminal prosecution has not occurred or has not resulted in a conviction. However, the existing state and territory-based schemes were not designed to compensate Commonwealth modern slavery offences and awards are limited to injuries that occurred within the relevant jurisdiction.¹¹⁵ While NSW has established a framework to address modern slavery through the *Modern Slavery Act 2018* (NSW), state-based reform cannot resolve the problems that arise when victims of federal crimes must turn to statutory state or territory schemes to apply for compensation or financial assistance because of inconsistency between compensation schemes in different jurisdictions. Further challenges arise when modern slavery occurs in multiple jurisdictions within Australia or in the offshore supply chains of Australian companies.¹¹⁶

The consequences of relying on state and territory compensation schemes to compensate victims of federal crimes are confusion about the application process and inconsistent and unfair outcomes. First, modern slavery does not respect state boundaries; a person may be exploited in different locations across Australia during the period of their enslavement.¹¹⁷ Second, the criteria for the award of compensation and the quantum of compensation available will differ depending on the jurisdiction in which the application is made, and this results in unfair and inconsistent outcomes. There are significant variations in the eligibility criteria for compensation, and the amount of funds available, under existing state and territory schemes:¹¹⁸ the compensation available to victims of modern slavery could be less than \$10,000 or just over \$100,000 depending on where they were exploited.¹¹⁹ Third, certain manifestations of modern slavery (for example, where an individual is subject to debt bondage or forced labour but there is no overt violence) may not be compensable under state or territory legislation because there is not a relevant act of violence. Coercion and the abuse of a position of power or vulnerability¹²⁰ is just as serious, or potentially just as serious, as physical abuse, but it does not qualify for compensation under those state and territory schemes.

A hypothetical example illustrates the problem of relying on a state-based victims of crime compensation scheme to address cases of forced labour or debt bondage. ‘J’ arrived in Australia on a working holiday visa. During the COVID-19

114 Burn, McLeod and Knackstredt (n 96) 4.

115 See, eg, *DRJ v Commissioner of Victims Rights* [2019] NSWCATAD 195.

116 The *Modern Slavery Amendment Act 2021 No 39* (NSW) (items [53]–[56]) amended the *Modern Slavery Act 2018* (NSW) to provide support for victims of acts of violence and acts of modern slavery. Recognition payments will be available for victims of ‘an act of modern slavery’ in the same way that payments would be made for a victim of an ‘act of violence’: at [64]. However, while this will improve access to compensation for survivors who experience modern slavery within NSW, it does not resolve the problem of inconsistency between jurisdictions or access to compensation for victims who are exploited in multiple state and territory jurisdictions or offshore.

117 See, eg, *R v Netthip* [2010] NSWDC 159.

118 Simmons (n 96); Burn, McLeod and Knackstredt (n 96) 4.

119 Burn, McLeod and Knackstredt (n 96) 4.

120 In the context of slavery and slavery-like offences, the *Criminal Code Act 1995* (Cth) defines ‘coercion’ to include coercion by the abuse of power or by taking advantage of a person’s vulnerability: at s 270.1A.

pandemic, he overstayed his visa, became an unlawful non-citizen, and lost his accommodation as he was unable to afford the rent. A friend of a friend offered him a job in a restaurant with an hourly rate of \$25 and said he could sleep on the premises. He was never paid that amount and instead received \$3 an hour, and worked 15-hour days, six days a week. Out of this income, he had to pay \$100 for food. He slept in the storeroom of the restaurant. He bathed in the restaurant bathroom and was told he risked being picked up by police if he went out. He injured his hand at work and was not allowed to receive medical treatment, leaving him permanently disfigured. He did try to escape and was beaten so badly that he could not walk for a week. He lived like this for 12 months until he fled the restaurant. Police charged the restaurant owner with a forced labour offence, and the Commonwealth Director of Public Prosecutions ('CDPP') is currently considering the case.

State and territory schemes identify compensable injuries as offences that occur at a particular point in time (for example, assault) but do not include references to forced labour or recognise the impact of criminal conduct that involves the use of coercion to exploit a person over a prolonged period of time. For the purposes of this example, we have limited the analysis to a review of a forced labour offence.¹²¹ J has experienced multiple serious indicators of the federal offence of forced labour, including being subject to violence and threats, having limited access to earnings and being threatened that, if he tried to escape, he would be at risk of being taken into immigration detention. He did not have access to medical care, lived in confined and degrading conditions and was coerced, threatened, and deceived over a prolonged period of time. However, the question of whether J can seek compensation as a victim of crime and what quantum of compensation or financial assistance that is potentially available will depend on the state where the exploitation occurred and whether there is a relevant act of violence. As noted above, the schemes do not operate consistently across each jurisdiction. Each of the schemes has a different application process, time-limit to apply, categories of compensable harm and amounts payable, varying from a maximum payment of \$45,000 to \$100,000.¹²²

B Reparation Orders

Where an offender has been convicted of a modern slavery offence under the *Criminal Code*, victims may be able to obtain monetary redress under section 21B

121 The scenario involving J involved elements of the serious criminal offences of slavery, and slavery-like offences including servitude and forced labour.

122 In the Australian Capital Territory, the maximum payment is \$55,041: *Victims of Crime (Financial Assistance) Regulation 2016* (ACT) r 5(1)(a). In New South Wales, the maximum payment is \$45,000: *Victims Rights and Support Regulation 2019* (NSW) rr 10, 14. In the Northern Territory, the maximum payment is \$40,000: *Victims of Crime Assistance Act 2006* (NT) s 38(1). In Queensland, the maximum payment is \$75,500: *Victims of Crime Assistance Act 2009* (Qld) s 38. In South Australia, the maximum payment is \$100,000: *Victims of Crime Act 2001* (SA) s 20(3)(c). In Tasmania, the maximum payment is \$50,000: *Victims of Crime Assistance Regulations 2010* (Tas) r 4(1)(a)–(b). In Victoria, the maximum payment is \$70,000: *Victims of Crime Assistance Act 1996* (Vic) ss 8–8A. In Western Australia, the maximum payment is \$75,000: *Criminal Injuries Compensation Act 2003* (WA) s 31(1).

of the *Crimes Act 1914* (Cth) ('*Crimes Act*'). Because convictions in modern slavery cases are rare, this remedy will not be an option for many survivors. However, even where a conviction is obtained, reparation orders may remain out of reach. Since Australia first introduced slavery offences, there have been 25 offenders convicted of crimes in divisions 270 and 271 but there is significant attrition throughout the criminal justice process and a recent study found there was an overall attrition rate of 73 per cent between defendants referred for prosecution and the number of convictions.¹²³ The successful prosecutions have involved multiple victims and, in most cases, multiple offenders, but there have only been two reports of offenders providing reparations to their victims following convictions for modern slavery type offences.¹²⁴ Under section 21B, courts have the discretionary power to order convicted federal offenders to make reparation, monetary or otherwise, to the victim of the offence. This is in addition to the penalty imposed on the offender. A reparation order is treated as a final judgment of the court and can be enforced as a civil debt but there can be significant enforcement challenges, particularly where an offenders' assets have been confiscated. A reparation order does not affect a victim's right to commence civil proceedings.

Reparations can be awarded to any person who suffers any loss or expense 'by reason of' the offence.¹²⁵ In 2013, section 21B was amended with the stated aim of assisting in 'addressing the impact of crime by improving the availability of reparation orders to individual victims of Commonwealth offences, including slavery and people trafficking'.¹²⁶ However, reparation orders are discretionary and there is no requirement for a court to consider making an order. The statutory provision is silent on the operation and determination of the reparation order and does not set out an application process for a victim or their representation to apply for a reparation order. Further, the provision does not provide any guidance about the process of determining the order including the standard of proof and the use of evidence adduced through the trial process. In the absence of statutory or operational guidance, victims have depended on the CDPP to facilitate the process of seeking reparation orders.¹²⁷ However, the CDPP has indicated they do not act for a person seeking a reparation order and may only be able to assist the court in relation to 'straightforward matters' involving 'clearly quantifiable amounts' that the evidence in the criminal proceeding shows has been incurred by reason of the offence.¹²⁸

123 Lyneham (n 34) 8–9.

124 As of February 2021, the outcome of the application for reparations in *Kannan* (2021) 359 FLR 181 is unknown.

125 Reparations were originally awarded to victims who suffered loss as a 'direct result' of the offence, but following the 2013 amendments, this was expanded to allow reparations to be awarded to any person who suffers any loss or expense 'by reason of' the offence: *Crimes Legislation Amendment (Slavery) Act 2013* (Cth) sch 2.

126 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 May 2012, 6228 (Nicola Louise Roxon, Attorney-General). See generally Simmons (n 96).

127 Commonwealth Director of Public Prosecutions, 'Reparation Orders' (National Legal Direction, 17 September 2021) ('Reparation Orders').

128 *Ibid* 1 [3].

Reparation orders are often used where the Commonwealth is the victim of federal offences,¹²⁹ but rarely in cases involving victims of modern slavery. There is uncertainty about how the reparations scheme applies in circumstances where the individual suffers both economic loss and non-pecuniary damages such as pain and suffering,¹³⁰ although guidelines issued by the CDPP indicate that reparation orders can be made for both economic and non-economic loss.¹³¹ Without pro bono representation, victims may lack support to make an application for reparations or may be unaware that it is possible to seek reparations as part of the criminal justice process. The issue of whether the CDPP should have carriage of reparation orders should be clarified. While the provision was intended to broaden the availability of redress for victims, the absence of statutory guidance or other agreed upon and consistent approaches on the operation of the provision have been impediments to victims seeking the benefit of the provision. Although there have been 25 convictions, there have not been any cases of modern slavery where the court has received an application for reparations on behalf of a victim or witness where the court has made such an order.

The authors are aware of two recent cases where a reparation order has been made by a court in cases involving offences in division 270 and 271,¹³² while the question of whether a reparation order will be made in the *Kannan* case remains unresolved. In the case of *McAleer*, a couple enslaved a woman to care for and clean for their family.¹³³ Although an offer of \$70,000 was made to the survivor by the defendants, the Judge ordered this sum to be paid as reparations.¹³⁴ The challenges of applying section 21B were also apparent in the case of Geoffrey Moyle, who was recently convicted of crimes involving the sexual exploitation of children in Cambodia.¹³⁵ The prosecutor in that case was reported as indicating to the Court that reparations were not supported by the prosecution because the victims could

129 See, eg, *R v McDougall* [2021] ACTSC 102, in which the offender pleaded guilty to the offence of dishonestly causing loss to the Commonwealth contrary to section 135.1(5) of the *Criminal Code Act 1995* (Cth) and was ordered to make reparations in respect of the offence to Services Australia in the amount of \$59,731.60, pursuant to section 21B of the *Crimes Act 1914* (Cth); *R v Thomson* [2020] NSWDC 337, in which the offender was ordered to pay a sum of \$169,986 to the Commonwealth as repayment of monies dishonestly obtained from Newstart and the Disability Support Pension; *R v Tham* [2019] NSWDC 766, in which the offender pleaded guilty to offences relating to Australian travel documents and was ordered to pay reparations pursuant to section 21B in the amount of \$103,873.22; *R v Baker* [2019] ACTSC 316, in which the offender was convicted of dishonestly obtaining the Disability Support Pension and ordered to pay reparations pursuant to section 21B in the sum of \$77,382; *R v Inia* [2019] NSWDC 927, in which the offender pleaded guilty to dishonestly obtaining Medicare benefits and was ordered to pay reparations to the Commonwealth to the sum of \$224,246.80.

130 Simmons (n 96).

131 'Reparation Orders' (n 127) 1 [2], [5], 2 [13].

132 Australian Federal Police, 'Sydney Couple Sentenced for Forced Labour' (Media Release, 25 June 2021); Chung (n 28).

133 This detail is drawn from Australian Federal Police, 'Sydney Couple Sentenced for Forced Labour' (Media Release, 25 June 2021); Chung (n 28).

134 Australian Federal Police, 'Sydney Couple Sentenced for Forced Labour' (Media Release, 25 June 2021).

135 Meagan Dillon, 'Cambodian Children Abused by Paedophile Geoffrey Moyle Could Receive Compensation', *ABC News* (online, 27 January 2021) <<https://www.abc.net.au/news/2021-01-27/victims-of-paedophile-geoffrey-moyle-could-be-compensated/13094642>>.

launch civil action against the offender; however the judge questioned how a ‘poor individual in Cambodia [would] run a civil case in Australia’.¹³⁶ This case illustrates the difficulties of assessing appropriate reparations for victims living overseas and the absence of a clear, efficient and cost-proportionate method of pursuing reparations for victims under current Commonwealth laws. Ultimately, the offender paid reparations only after a victim sought a formal order for reparations.¹³⁷ In sentencing, payment of reparations was considered as a mitigating factor in sentencing; however, in the circumstances of the case, where the payment was made 16 months after the offender was advised the victim had been located and the payment ‘did not reduce the psychological harm caused to the victim’, the judge considered that the payment demonstrated ‘a limited degree of contrition’.¹³⁸

Victims of modern slavery lack support in seeking a reparation order: it is unclear who should make the application on behalf of witnesses; the evidence that should be provided; how the evidence is assessed; what impact a reparation order will have on sentencing, and when victims will be advised that they require a legal representative to make an application directly to the court. Furthermore, there is no guarantee that any orders will be made – reparation orders depend on a conviction, they are discretionary and are dependent on the financial capacity of the offender to make reparations. The limited use of reparation orders in the context of modern slavery underscores the need for training and guidance: quantifying the loss suffered by victims is likely to be complex and victims require support to make application for reparation orders.¹³⁹ There would be utility in establishing a working group including representatives from the CDPP, judiciary, criminal bar, the AFP, the Law Council of Australia and other key stakeholders to develop procedures and guidelines about the operation of section 21B of the *Crimes Act* in cases involving modern slavery.

C Recovery of Unpaid Wages

Modern slavery crimes often involve the exploitation of one person’s labour for the benefit of another without commensurate compensation. Victims of criminal labour exploitation may be able to recover unpaid wages under the civil remedy provisions of the *Fair Work Act*. While the Fair Work Ombudsman (‘FWO’) is not responsible for addressing modern slavery crimes, slavery and human trafficking exist on a continuum of exploitation¹⁴⁰ that spans the gamut of relatively minor cases of underpayment to egregious cases of forced labour and slavery, with most cases falling ‘somewhere short of slavery or trafficking in persons’ with lesser

136 Ibid.

137 Case details drawn from Meagan Dillon, ‘Cambodian Children Abused by Paedophile Geoffrey Moyle Could Receive Compensation’, *ABC News* (online, 27 January 2021) <<https://www.abc.net.au/news/2021-01-27/victims-of-paedophile-geoffrey-moyle-could-be-compensated/13094642>>.

138 Ibid.

139 Publicly available guidance is silent on this issue: see, eg, ‘Working with Vulnerable Victims and Witnesses’, *Commonwealth Director of Public Prosecutions* (Web Page, 2019) <<https://www.cdpp.gov.au/case-reports/working-vulnerable-victims-and-witnesses>>.

140 Klara Skrivankova, ‘Between Decent Work and Forced Labour: Examining the Continuum of Exploitation’ (Program Paper, Joseph Rowntree Foundation, November 2010).

forms of exploitation that are ‘arguably precursors to more serious criminal conduct’.¹⁴¹ Situations of slavery, forced labour, and other slave-like practices can evolve gradually over time and often as a result of the precarious immigration status of the person who is being exploited.¹⁴² In some cases, a charge of forced labour has failed to result in a conviction, but a civil claim has succeeded.¹⁴³

The FWO has broad powers to promote compliance with the *Fair Work Act* and Fair Work instruments including by providing advice and assistance to employees and employers. FWO powers also include the power to inquire into and investigate any acts or practices that may breach the *Fair Work Act*, to commence proceedings in court or the Fair Work Commission to enforce the *Fair Work Act*, and to ‘refer matters to relevant authorities’.¹⁴⁴ The Migrant Workers’ Taskforce found that migrant workers have a low level of understanding of Australian workplace rights and laws; almost 80 per cent have not heard of the FWO,¹⁴⁵ yet a significant portion of the legal proceedings commenced by the FWO concern migrant workers.¹⁴⁶ The vulnerability of temporary migrant workers to exploitation by family, friends or social networks is compounded by the fact these groups are sometimes workers’ main source of workplace information,¹⁴⁷ while research suggests that they may not object to conditions that they know are not in accordance with Australian standards because they may believe that they do not have any prospect of obtaining work in better conditions.¹⁴⁸

While there is no impediment to civil action being pursued before or during criminal proceedings, in most cases where a person has been identified as a suspected victim of a modern slavery offence, claims for civil remedies have either not been made or only occurred after criminal proceedings have concluded.¹⁴⁹ In 2010, Mr Trivedi became the first person in Australia to be convicted of

141 Fiona David, *Labour Trafficking* (Report, Research and Public Policy Series No 108, November 2010) 49–50.

142 Skrivankova (n 140) 19.

143 See, eg, *Fryer v Yoga Tandoori House Pty Ltd* [2008] FMCA 288 (‘*Fryer*’).

144 Significantly, the Fair Work Ombudsman (‘FWO’) has the power to represent employees or outworkers who are, or may become, a party to court proceedings brought under the *Fair Work Act* or a fair work instrument, if the FWO considers that representing the employees or outworkers will promote compliance with this Act or the Fair Work instrument: *Fair Work Act 2009* (Cth) s 682.

145 Multicultural Marketing and Management Australia, Department of Jobs and Small Business and Fair Work Ombudsman, *Appendix D to the Report of the Migrant Workers’ Taskforce: The Information Needs of Vulnerable Temporary Migrant Workers About Workplace Laws* (Report, 7 March 2019) 41 (‘*Information Needs of Vulnerable Temporary Migrant Workers About Workplace Law*’). Only a minority of migrant workers thought they needed more workplace information and topics of interest were diverse. This varied between visa types; for example, working holiday makers wanted more information on minimum wages while 457 visa holders were the least interested and focused more on issues such as pay deductions and working hours: at 10.

146 In 2019–20, migrant workers accounted for 44 per cent of litigation initiated by the FWO: Fair Work Ombudsman and Registered Organisations Commission Entity, *Annual Report 2019–20* (Report, 2020) 21.

147 *Information Needs of Vulnerable Temporary Migrant Workers About Workplace Laws* (n 145) 11; Berg and Farbenblum, *Wage Theft in Australia* (n 45).

148 Berg and Farbenblum, *Wage Theft in Australia* (n 45) 35.

149 See, eg, *Fryer* [2008] FMCA 288; *Ram v D&D Indian Fine Food Pty Ltd* [2015] FCCA 389 (‘*Ram*’).

the offence of trafficking for forced labour.¹⁵⁰ The conviction resulted from his conduct in trafficking an Indian national, Mr Dulo Ram, to work in forced labour in a restaurant in the Blue Mountains. Mr Ram, a father with a family of young children, travelled to Australia alone holding a 457 visa and spent 16 months sleeping in the storeroom of the kitchen where he laboured, with little pay and believing he owed his employer \$7,000. Mr Ram, who was functionally illiterate, spoke no English and had no contacts in the Australian community, had one day off in 16 months.¹⁵¹ Mr Trivedi pled guilty to trafficking under division 271.2(1B) of the *Criminal Code*. His sentence – 250 hours of community service and a fine of \$1,000 – did not attract comment.¹⁵² After the criminal proceedings concluded, in July 2011, the FWO finalised Mr Ram’s complaint after being unable to identify any underpayment based upon the time and wages records provided by Mr Trivedi.¹⁵³ Then in December 2012, the FWO calculated that Mr Ram was entitled to \$5,053.57 in unpaid annual leave entitlements, and made several (unsuccessful) attempts to recover these in late 2012 – early 2013.¹⁵⁴

With pro bono legal representation, Mr Ram commenced proceedings in the Federal Circuit Court against Mr Trivedi and his company for unpaid wages and damages. In 2015, five years after Mr Trivedi was fined \$1,000 for the offence of trafficking for forced labour, Driver J accepted that Mr Ram was trafficked from India to Australia and held in forced labour, working 12 hours a day, seven days a week, without pay for 16 months in an Indian restaurant, and ordered Mr Trivedi and his restaurant to pay \$125,431.22 in unpaid wages to Mr Ram.¹⁵⁵ A thorough criminal investigation meant that his lawyers were armed with sufficient corroborative documentation to support the claims of underpayment and to counter claims that Mr Ram had breached his contract of employment. However, there appears to be no principled reason why a reparation order could not have been sought following the conviction of Mr Trivedi. Mr Ram’s case also illustrates the importance of legal advice and representation: this outcome was only possible because Mr Ram was a resilient individual with pro bono representation from a law firm with the resources and expertise to pursue a novel case.

In the more recent case of *DPP v Shaik*, where a restaurant owner pled guilty to conduct that caused the victim to work in forced labour and threatening her with deportation, Fair Work proceedings occurred before the criminal proceedings and the issue of reparation was considered in sentencing. Before the criminal prosecution commenced,¹⁵⁶ action taken for contravention of the *Fair Work Act* resulted in an order that Mr Shaik pay a total penalty of \$50,872.50 in fines to the

150 Kieran Gair, ‘Migrant Worker Lured to Australia, Held Captive in Restaurant for 16 Months’, *The Sydney Morning Herald* (online, 18 July 2015) <<https://www.smh.com.au/national/nsw/migrant-worker-lured-to-australia-held-captive-in-restaurant-for-16-months-20150717-gieud6.html>>.

151 These facts are drawn from the judgment in *Ram* [2015] FCCA 389.

152 *R v Trivedi* (District Court of New South Wales, 8 May 2012) (unreported) as cited in *Ram* [2015] FCCA 389, [9].

153 *Ram* [2015] FCCA 389, [163].

154 *Ibid* [51].

155 *Ibid* [76], [188]–[204].

156 *DPP v Shaik* [2020] VCC 909 [19] (‘*Shaik*’).

victim.¹⁵⁷ While no consideration was given to making a reparation order under the *Crimes Act*, the offender's legal representative submitted that the offender had been ordered to pay \$50,872 in fines for failing to pay proper wages to the victim and her husband, and that Mr Shaik had been making monthly instalments of \$100 and had very recently paid a lump sum of \$7,872.¹⁵⁸ In sentencing remarks, Cahill J reflected on the way in which the offender abused his power over the victim, who was particularly vulnerable because of her insecure immigration status (when the victim asked for her wages the offender told her to think not of her wages but of her visa and he claimed to have police friends).¹⁵⁹ He observed:

Before she met you, she was living a good life and happy. Because you forced her to work without wages, she was in a constant state of stress, insecurity and worry. She struggled financially and you made her feel hopeless and useless. She was a migrant worker. You abused the power you had over her and exploited her on threat of deportation for your own financial gain. You told her no-one would catch you out because you are an Australian citizen. By your crime, you caused her great hardship and uncertainty about her future.¹⁶⁰

Judge Cahill went on to observe that while the offender had made 'some reparation' to the victim since the Fair Work proceeding, he still owed the victim approximately \$25,000, and his repayment of the fines imposed by the Federal Circuit Court had been slow.¹⁶¹ Nonetheless Cahill J accepted to the extent that some reparation had been made, Mr Shaik had not profited from his crime and due to the seven year delay between the offence and prosecution as well as the interests of rehabilitation, the offender was released on the condition of good behaviour for three years.¹⁶² These cases highlight the need for further research on the interaction between Fair Work proceedings and criminal proceedings, particularly in relation to the issue of reparation and mitigation in sentencing.

D Other Remedies

The avenues for victims to claim compensation in circumstances where it is alleged that the state is responsible, either directly or indirectly, for the harm suffered by the victim or where the state fails to identify a victim or protect that person from further harm is unclear. The only publicly known case of *ex gratia* payment in the context of modern slavery offences in Australia concerns the payment to the family of a Thai woman, Puangthong Simaplee. In September 2001, Ms Simaplee died in immigration detention due to failures of medical care.¹⁶³ A coronial inquest into her death generated media attention of the trafficking of women into sexual servitude

157 *Fair Work Ombudsman v Shaik* [2016] FCCA 2345.

158 *Shaik* [2020] VCC 909 [44]–[45].

159 *Ibid* [6]–[7].

160 *Ibid* [25].

161 *Ibid* [45], [58]–[59].

162 *Ibid* [59], [66], [79]–[80].

163 *Inquest into the Death of Puangthong Simaplee* (Westmead Coroners Court, Coroner Milovanovich, 24 April 2003) 10 ('*Inquest into the Death of Puangthong Simaplee*'); 'Inquest into the Death of a Detainee', *ABC* (13 March 2003) <<https://www.abc.net.au/pm/content/s806508.htm>> ('Inquest into the Death of a Detainee').

in Australia,¹⁶⁴ and was followed by the 2002 signing of the *Trafficking Protocol* and a \$20 million package of anti-trafficking measures and in 2004 the Attorney-General's Department published the *National Action Plan to Eradicate Trafficking in Persons* but this plan did not address the issue of access to civil remedies.¹⁶⁵ Nearly a decade after her death, a claim supported by pro bono counsel resulted in an ex gratia payment to Ms Simaplee's family by the Australian government.¹⁶⁶ This payment might be characterised as a payment for wrongful death or nervous shock, where negligence of the Commonwealth in the provision of medical services to Ms Simaplee in immigration detention was alleged to have contributed to her death. Ex gratia payments are generally only available in case of maladministration, and usually only considered as payments of last resort when other remedies have been exhausted and where there is no legal requirement to make a payment.¹⁶⁷

There is scope to consider civil claims for trafficking, rape, trespass and assault to the person or false imprisonment, but the impediments to bringing these claims are significant.¹⁶⁸ In the case of underpaid or bonded labour, there are potential claims for moneys owing and setting aside of illegitimate or illegal contracts.¹⁶⁹ However, there are many features of tortious claims that render them impractical for victims of trafficking and slavery type offences and the authors are unaware of any successful actions in tort in Australia. First, a significant disincentive for any potential victim of abuse is that a civil claim necessarily involves the direct confrontation of the perpetrator, recounting of traumatic events to lawyers, the court and expert witnesses and potential for re-traumatisation through cross examination. While the award of damages has the potential to be more significant, with a restorative component available in respect of pain and suffering damages and awards for loss of earning capacity, these claims are traditionally supported with expert evidence requiring a significant initial outlay of costs and disbursements. Many jurisdictions have thresholds that must be met in terms of minimal damages or seriousness of injury before proceedings may be commenced and/or caps on the amount recoverable by way of damages.¹⁷⁰ Additionally, the risk of adverse costs orders can be prohibitive. Finally, sophisticated defendants can be expected to conceal assets, rendering them effectively insolvent and leading to the risk of an empty judgment.

164 *Inquest into the Death of Puongtong Simaplee* (n 163) 10; 'Inquest into the Death of a Detainee' (n 163).

165 See Janet Phillips, 'People Trafficking: An Update on Australia's Response' (Research Paper No 5, Parliamentary Library, 22 August 2008); Segrave and Milivojević (n 35).

166 Ms McLeod represented the applicant's family whose account and claims are featured in the films *Trafficked* (Film Australia, 2005), and *Trafficked – The Reckoning* (Fair Trade Films 2011).

167 These discretionary payments are contemplated by the *Public Governance, Performance and Accountability Act 2013* (Cth).

168 See Pam Stewart, 'Tortious Remedies for Deliberate Wrongdoing to Victims of Human Trafficking and Slavery in Australia' (2011) 34(3) *University of New South Wales Law Journal* 898 (note the discussion of practical impediments: at 929–36).

169 See Bassina Farbenblum and Laurie Berg, *Migrant Workers' Access to Justice for Wage Theft: A Global Study of Promising Initiatives* (Report, 2021).

170 See *ibid*.

E The *Modern Slavery Act* and Civil Remedies

The *Modern Slavery Act* establishes a statutory reporting scheme that requires reporting entities with a consolidated revenue of at least \$100 million over the previous 12 month financial reporting period to prepare and lodge an annual modern slavery statement.¹⁷¹ An Australian entity or a foreign entity doing business in Australia during the reporting period must submit a Modern Slavery Statement addressing the risks of modern slavery in the entity's operations and supply chains.¹⁷² Modern Slavery Statements are published on an online register maintained by the Australian government, and must describe the risks of modern slavery practices in the operations and supply chains of the reporting entity and the actions taken to assess and address the risks, including due diligence and remediation processes.¹⁷³ However, while the *Modern Slavery Act* promotes transparency, it does not improve access to remedies for survivors of modern slavery: the *Modern Slavery Act* did not incorporate the *Hidden in Plain Sight* report's recommendations to introduce a right to a civil remedy for victims of modern slavery¹⁷⁴ and establish a national compensation scheme for survivors of modern slavery.¹⁷⁵

The first statutory review of the *Modern Slavery Act*, which will commence in 2022, will provide an opportunity to examine how the legislation can improve access to remedies for survivors of modern slavery. In its current incarnation the *Modern Slavery Act* only requires reporting entities to report on how they identify and address modern slavery risks including though due diligence and remediation processes. Not unexpectedly, to date, there appears to be a strong focus on compliance and, with the exception of work undertaken by the UN Global Compact Network Australia,¹⁷⁶ there has been little attention to remediation. Remediation, which can be broadly described as 'an attempt to right a wrong, to correct – as far as possible – an injustice',¹⁷⁷ can comprise of state-based mechanisms (judicial and non-judicial) and non-state grievance mechanisms.¹⁷⁸ However, companies appear reluctant to contemplate providing compensation to survivors of modern slavery: early evaluation of the *Modern Slavery Act* identified remediation as 'one of the weakest areas in efforts to address modern slavery' with only 27 per cent of companies revealing a willingness to remediate modern slavery harms, and only 4 per cent prepared to consider fully compensating victims.¹⁷⁹

The barriers that survivors of modern slavery face in accessing remedies have prompted calls to establish a right to a civil remedy for 'serious human rights violations committed by Australian companies and subsidiary companies that they

171 *Modern Slavery Act 2018* (Cth) ss 3, 5, 16.

172 *Ibid.*

173 *Ibid* s 16.

174 *Hidden in Plain Sight* (n 6) 176 [6.158].

175 *Ibid* 171 [6.133].

176 Global Compact Network Australia, *Implementing Effective Modern Slavery Grievance Mechanisms: A Guidance Note for Business* (Guidance Note, March 2021) ('*Implementing Effective Modern Slavery Grievance Mechanisms*').

177 'Providing Effective Remedies for Victims of Trafficking in Persons' (n 4) 2.

178 *Implementing Effective Modern Slavery Grievance Mechanisms* (n 176) 7.

179 Sinclair and Dinshaw (n 17) 67.

control'.¹⁸⁰ A key argument in support of a specific civil remedy is that it improves access to a remedy by removing the need to 'shoehorn' a civil claim by a survivor into an existing cause of action.¹⁸¹ The Australian government has previously indicated that it would consider the need for a right to a statutory civil remedy for survivors of modern slavery, having regard to the fact that victims can already pursue tortious remedies and the recommendations of the National Roundtable's Labour Exploitation Working Group for improving access to existing civil remedies.¹⁸² As noted above, the report of the Working Group has not been made public and civil proceedings brought by victims of modern slavery are extremely rare. At the time of writing, the Australian government had not made any comment on whether it supports a statutory civil remedy.

IV IMPROVING ACCESS TO REMEDIES

The question of how to improve access to remedies for survivors of modern slavery should be a key focus during the first review of the *Modern Slavery Act*.¹⁸³ This review should evaluate the different pathways to remedies for victims of modern slavery who are exploited as a consequence of the actions of Australian companies (whether the exploitation occurs within or outside of Australia),¹⁸⁴ the establishment of appropriate grievance mechanisms whereby people who are subject to modern slavery can seek remedies from business enterprises, and the possible role of an independent Anti-Slavery Commissioner in monitoring, evaluating or administering a national compensation scheme and promoting compliance with the *Modern Slavery Act*.¹⁸⁵ While the *Modern Slavery Act* is still in its infancy, it is clear that the question of how businesses can establish non-state based grievance mechanisms to ensure those exposed to modern slavery in their supply chains can access effective remedies, including compensation for harm suffered, requires sustained attention. We suggest that the introduction of a national compensation scheme for survivors of modern slavery in Australia is now overdue and its establishment could signal a more meaningful commitment

180 Australian Human Rights Commission and Australian Human Rights Institute UNSW, *At the Crossroads: 10 Years of Implementing the UN Guiding Principles on Business and Human Rights in Australia* (Report, September 2021) 41 ('*At the Crossroads*').

181 Anti-Slavery International et al, *Joint Civil Society Report on Trafficking and Modern Slavery in the UK to the UN Human Rights Committee* (Report, January 2020) 12.

182 Australian Government, 'Australian Government Response to the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade Reports: *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia* and *Modern Slavery and Global Supply Chains: Interim Report of the Joint Standing Committee on Foreign Affairs, Defence and Trade's Inquiry into Establishing a Modern Slavery Act in Australia*' (Response, October 2020) 39 ('Australian Government Response to Joint Standing Committee Reports').

183 *Modern Slavery Act 2018* (Cth) s 24.

184 *At the Crossroads* (n 180) 34.

185 *Hidden in Plain Sight* (n 6) 87 [4.51], 88 [4.53].

to enabling survivors of modern slavery access to compensation for the harm that they have suffered.¹⁸⁶

A Procedural Reform: De-Linking Access to Information, Support, and Legal Assistance

Without effective legal representation and clear information about their legal rights, survivors of modern slavery are unlikely to be aware of opportunities to claim compensation or understand what evidence is required to establish a claim. Improving access to remedies requires paying attention to the procedural guarantees that are necessary to access appropriate and effective remedies, including ensuring suspected victims have access to information in a language they understand and recognising the primordial importance of free legal assistance. Access to effective remedies involves identifying the relevant laws, understanding the different redress procedures and the prospects of success, and enabling victims to decide how best to satisfy their own needs.¹⁸⁷ Providing survivors of modern slavery with clear and consistent information about avenues to seek compensation is a complex and challenging task which requires federal leadership and a firm commitment to the rights of survivors.

The Australian Government's response to modern slavery identifies five strategic priorities, one of which is victim support and protection.¹⁸⁸ However, despite sustained criticism, access to the STPP remains conditional on victims having contact with the AFP.¹⁸⁹ The *Hidden in Plain Sight* report recommended de-linking access to the STPP and the Human Trafficking visa framework from the requirement to engage in the criminal justice process.¹⁹⁰ But to date the Australian Government has maintained that a complete de-linking of victim support from criminal justice participation may affect the success of prosecutions, which rely heavily on witnesses, and limit the deterrent effect of Australia's modern slavery laws.¹⁹¹ Under the current referral process, the AFP has the exclusive power to determine who is a suspected victim of modern slavery and who has access to

186 The *Hidden in Plain Sight* report highlighted the important role that an independent Anti-Slavery Commissioner could have in raising awareness of modern slavery, ensuring compliance with relevant legislation, and advocating for the rights of survivors: *ibid.*

187 Katarina Schwarz, 'Chapter 6: After Enslavement Ends: Ensuring Redress for Victims' in Kevin Bales and Zoe Trodd (eds), *The Antislavery Usable Past: History's Lessons for How We End Slavery Today* (The Rights Lab University of Nottingham, 2020) 133.

188 Various iterations of Australia's National Action Plan have described Australia's response to human trafficking and slavery as 'victim-centred' and identified victims' rights and needs as an 'overarching consideration': *National Action Plan to Combat Modern Slavery 2020–25* (n 59) 2–3; Australian Government, *National Action Plan to Combat Human Trafficking and Slavery 2015–19* (Action Plan, 2014) 22.

189 Multiple inquiries into human trafficking have recommended that access to victim support should not be conditional on contact or cooperation with law enforcement: see, eg, *Hidden in Plain Sight* (n 6) 159 [6.79].

190 Recommendation 21 recommends that 'the Australian Government de-links access to the Support for Trafficked People Program and the Human Trafficking Visa Framework (including the Bridging F visa and Referred Stay (Permanent) visa) from compliance with criminal investigations': *ibid.*

191 'Australian Government Response to Joint Standing Committee Reports' (n 182) 39.

the STPP.¹⁹² Once a referral has occurred, an STPP caseworker facilitates referrals to legal representation and other support services. In our view, implementing recommendations to broaden the referral pathways to the STPP will improve access to legal representation, which is essential to obtaining advice and assistance in relation to civil claims, the availability of statutory compensation, and, in the event of criminal proceedings, reparation orders.

The precarious immigration status of survivors of modern slavery may frustrate or complicate their ability to access remedies. Even where there is no legal impediment to a survivor who has experienced modern slavery in Australia pursuing a claim while outside Australia without access to Australian lawyers and interpreters, the person may be unaware of their rights and entitlements or the practical barriers to making a civil claim may be insurmountable.¹⁹³ For example, the FWO has obtained significant penalties against employers who have grossly underpaid migrant workers,¹⁹⁴ sometimes in conditions that are so extreme as to constitute modern slavery or forced labour.¹⁹⁵ Such penalties potentially have a deterrent effect and practically provide financial redress to people who were exploited. However, unlike the AFP, who have a broad discretionary power to support people who are assessed as victims of trafficking to obtain temporary and, in certain circumstances, permanent visas,¹⁹⁶ the FWO does have the power to bring legal proceedings under the *Fair Work Act* on behalf of exploited workers but no power to initiate the grant of a temporary bridging visa to a person who the FWO believes has been exploited and is co-operating with the FWO's enforcement activities.

The report of a parliamentary inquiry into the impact of Australia's temporary work visa programs, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, recommended immigration reform to ensure that 'adequate bridging arrangements [are provided] for all temporary visa holders to pursue meritorious claims under workplace and occupational health and safety legislation'.¹⁹⁷ With respect to survivors of modern slavery, the Human Trafficking Visa Framework should have the flexibility to enable them to remain lawfully in Australia while their application for compensation or any other civil remedy is considered and

192 Ibid 40; Interdepartmental Committee on Human Trafficking and Slavery, Parliament of Australia, *Trafficking in Persons: The Australian Government Response 1 July 2016 – 30 June 2017* (Report No 9, 2020) 15, 81.

193 Senate Standing Committee on Education and Employment, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Report, 17 March 2016) 150–1 ('*A National Disgrace*').

194 See, eg, *Fair Work Ombudsman v Mhoney Pty Ltd* [2017] FCCA 811. The underpayment of wages to an Afghani refugee resulted in a \$500,000 penalty against the café owner who employed him.

195 See, eg, *Fair Work Ombudsman v Shaik* [2016] FCCA 2345.

196 *Migration Regulations 1994* (Cth) reg 2.07AK.

197 *A National Disgrace* (n 193) xii [6.96].

finalised¹⁹⁸ so that victims of modern slavery may be able to access remedies irrespective of their immigration status.¹⁹⁹

B Substantive Reform: A National Compensation Scheme for Survivors of Modern Slavery

In this section, we examine the case for a national compensation scheme for survivors of modern slavery.²⁰⁰ To date, the Australian Government has resisted calls to establish a national compensation scheme,²⁰¹ observing that ‘victims’ compensation has traditionally been a matter for the states and territories’ and that each state and territory ‘has a victims’ compensation scheme, which may be available to people who have been subject to human trafficking and slavery-related offences’.²⁰²

While some victims have obtained compensation under state and territory schemes, relying on the patchwork quilt of state and territory schemes to compensate victims of federal crimes results in unfair, uncertain, and inconsistent outcomes. There are different legal criteria to satisfy in each state and different payments available. A national scheme would promote consistency and fairness, instead of offering different remedies to survivors based on the criterion of whichever state or territory the federal offence was committed in. The scheme will not replace or duplicate the existing state and territory compensation schemes but would be designed to complement these already established schemes and provide a pathway to compensation for victims of federal modern slavery crimes. It would enable the Commonwealth to monitor and evaluate access to remedies for survivors of modern slavery and focus attention on the question of how to remedy the damage caused by slavery.

Compensation for survivors can play a vital role in supporting their recovery and reintegration to society and enabling them to provide for themselves and their family members. The starting point for the design of a national compensation scheme should be that a person who experienced modern slavery in Australia should be able to apply for compensation irrespective of when the victimisation occurred. This approach recognises the importance of providing remedies to victims who were exploited in Australia before slavery and slavery-like practices were specifically criminalised and that commencing civil proceedings may be unduly onerous, or, in cases where offenders cannot be identified or lack assets, either impossible or impracticable to pursue. Understanding the trauma suffered

198 *Hidden in Plain Sight* (n 6) 170 [6.131]; see also *Consultations Summary*, UN Doc A/HRC/26/18 (n 69) annex (‘*Basic Principles on the Right to an Effective Remedy for Victims of Trafficking in Persons*’), principle 7(g).

199 International Labour Organization, *Forced Labour (Supplementary Measures) Recommendation, 2014*, Recommendation 203, 103rd sess (11 June 2014), paragraph 12(e).

200 It has been suggested that the external affairs power can be used to support legislation for a national compensation scheme: Burn, McLeod and Knackstredt (n 96) 10–11.

201 The view that a national compensation scheme is required to provide victims of slavery and human trafficking with access to effective remedies has been reached by civil society, scholars, parliamentary inquiries, and international human rights bodies tasked with scrutinising Australia’s compliance with international human rights law. See *ibid*; *Hidden in Plain Sight* (n 6) 165.

202 ‘Australian Government Response to Joint Standing Committee Reports’ (n 182) 11, 43.

by victims, and the challenges survivors can face with quantifying the harm they have suffered, should inform the design of the scheme, the eligibility criteria, and the standard of proof. For example, the federal scheme should ensure that victims are not precluded from claiming compensation in circumstances where, as a consequence of their victimisation, they have been involved in a criminal conduct, including breaches of migration legislation.

The *Hidden in Plain Sight* report recommended establishing a national compensation scheme for survivors of modern slavery and suggested that this scheme could be modelled on other Commonwealth schemes such as the Australian Victims of Overseas Terrorism Payments Scheme ('AVTOP') and the Defence Abuse Reparation Scheme ('DARS') (closing in June 2022), which provided reparation payments to individuals who may have experienced serious abuse while employed by the Defence Force.²⁰³ Like the more recently established National Redress Scheme ('NRS'), these schemes were designed to provide a streamlined remedy in the form of a monetary payment to particular classes of people without any requirement of an admission of liability. The payments were determined against specified guidelines and the processes were not constrained by the legal burden of proof. The schemes permitted recipients to receive a monetary payment that would not impact on their entitlement to continue to access social security payments, including Medicare.²⁰⁴ While lessons can be learned from the DARS and AVTOP schemes, as noted above the design of a national compensation scheme should be informed by the voices of survivors.

In this respect the approach adopted by the NRS for survivors of institutional child sexual abuse, which commenced on 1 July 2018 and will operate for 10 years, is instructive. In recognition of the significant barriers victims of child sexual abuse face in accessing redress, the NRS endeavours to establish an accessible, survivor-focused and trauma-informed application process that facilitates access to redress which consists of a monetary payment in recognition of the wrong suffered by survivors of past institutional sex abuse, counselling and support, and a direct response from institutions.²⁰⁵ The redress payment is determined on an individual basis, and ranges from less than \$10,000 to up to \$150,000.²⁰⁶ Any earlier payments related to the abuse may be deducted from the payment, adjusted to today's value, however past payments for support with medical bills will not be taken into account.²⁰⁷ Such payments are non-taxable, exempt from income tests relevant to Commonwealth government payments, and exempt from creditors where a person

203 *Hidden in Plain Sight* (n 6) 170 [6.133], [6.129]. The Committee recommended that eligibility for compensation not be contingent on participation in criminal investigations or prosecutions: at 171 [6.134].

204 In the case of the Defence Abuse Reparation Scheme, the reparation payments were classified as an exempt lump sum for the purposes of income testing, with the effect that entitlement to Centrelink payments would not be affected by the lump sum payment: Burn, McLeod and Knackstredt (n 96) 7.

205 *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) s 3. See also Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (Report, September 2015) 8.

206 'What can you apply for?', *National Redress Scheme* (Web Page) <<https://www.nationalredress.gov.au/applying/what-can-you-apply>>.

207 *Ibid.*

is bankrupt.²⁰⁸ This process has a different standard of proof than required in a court setting: if the decision-maker determines that there is a ‘reasonable likelihood’ that the events happened, an offer of redress will be made.²⁰⁹ If an applicant for redress is dissatisfied with the outcome of the application, they have a right to ask for a review by another decision-maker and the scheme itself subject to an independent review, informed by the input of survivors, to improve survivor experiences and ‘embed the survivor voices’ in the governance of the scheme.²¹⁰ Evaluation is an important feature of the NRS²¹¹ and a Survivor Roundtable has been established to ‘provide a mechanism for survivors and their advocates to give feedback on Scheme policies, processes and operations’.²¹²

The establishment of a national compensation scheme prompts the question, ‘who pays?’. It is our view that the scheme should be funded primarily by the proceeds of confiscated assets,²¹³ with consideration given to amending the *Proceeds of Crime Act 2002* (Cth) to require that the proceeds of crime in human trafficking and slavery cases be used to fund compensation or reparation for victims. However, the upcoming review of the *Modern Slavery Act* will provide an opportunity to have a broader debate about various contributory models and, in particular, how businesses might contribute to a national compensation scheme. For example, one possibility is that, at the time of lodgement of Modern Slavery Statements, companies pay a lodgement fee with the fees contributing to a victims support fund. Other considerations could be an opt-in mechanism or a claw back provision for companies and/or supply chains where victims of modern slavery are identified and compensated. An appropriate cap on the amount payable under a national compensation scheme for trafficked people would be in the range of \$100,000–150,000, as an amount in this range would reflect the seriousness of slavery and human trafficking, and the damage suffered by trafficked people, particularly in cases of prolonged duration.²¹⁴

208 Ibid.

209 Department of Social Services, ‘National Redress Guide: 3.2.1 What Does “Reasonable Likelihood” Mean?’, *Guides to Social Policy Law* (Web Publication, 1 July 2019) <<https://guides.dss.gov.au/national-redress-guide/3/2/1>>.

210 Robyn Kruk, *Second Year Review of the National Redress Scheme* (Final Report, 26 March 2021) 152.

211 Annual reviews of the National Redress Scheme (‘NRS’) provide important insights into the challenges of creating a redress scheme that is accessible to survivors and the importance of targeted outreach to promote awareness and understanding of the scheme. For example, the most recent NRS review highlights the importance of ensuring that NRS is promoted by targeted outreach to specific stakeholders including communities at risk, service providers, legal and migration professionals, health providers, educators, judicial and administrative review bodies, members of parliament and government agencies. Information about the scheme should be translated into relevant community languages and the application process should be accessible and claimants should be supported to make claims: *ibid.*

212 *Ibid.* 38.

213 In 2020, the Confiscated Assets Account had a starting balance of \$144,940,000 and increased by \$48,883,000 (total: \$193,823,000). Following deductions/pay-outs, the concluding balance for 2020 was \$128,099,000: Australian Financial Security Authority, *Annual Report 2019–20* (Report, 2020) 116.

214 See generally discussion in Burn, McLeod and Knackstredt (n 96) which suggests that the Australian Victims of Overseas Terrorism Payments Scheme (‘AVTOP’) and DARS models could provide guidance as to the upper limits for payments. Payments made under the AVTOP are capped at \$75,000, DARS payments

Where an offender has been identified and convicted clear guidance will be required on the application process for a statutory compensation scheme, how it interacts with reparation orders and other related payments, including claims to recover unpaid wages or prior payments under state and territory-based schemes, and the procedures for seeking financial recompense from the offender. The persistently low number of convictions suggests reparation provision in the *Crimes Act* will not benefit many victims of modern slavery in Australia, but this mechanism should be retained with the introduction of a national victims' compensation scheme to ensure that survivors are not restricted in their ability to access assistance. This approach has been adopted the United Kingdom ('UK'), where a trafficked person can receive a reparation order under the *Modern Slavery Act 2015* (UK), or compensation under the Criminal Injuries Compensation Scheme ('CICS').²¹⁵ A person cannot receive both a reparation order and a compensation order for the same offence.²¹⁶ While there are concerns that inadequate access to legal representation has frustrated the ability of survivors of modern slavery to access compensation,²¹⁷ the UK approach recognises – in theory at least – that although reparation orders are not suitable as the only remedy for survivors of trafficking, they remain a useful avenue in situations where the defendant has been identified, convicted, and has sufficient assets to be able to pay for the harm caused. However, the UK CICS has been criticised as not 'genuinely accessible' for survivors of modern slavery, due to a range of issues including the failure to define modern slavery and human trafficking as crimes of violence and the lack of legal aid for survivors.²¹⁸

A national compensation scheme has the potential to improve access to remedies for survivors of modern slavery. However, its success will depend on survivors having accessible information about their rights and appropriate legal assistance. The *Hidden in Plain Sight* report recommended the establishment of an Anti-Slavery Commissioner to provide oversight of Australia's response to modern slavery, including by identifying solutions to gaps in Australia's response and improving access to services for victims.²¹⁹ The Australian Government declined to implement this recommendation on the grounds that there is adequate infrastructure within the machinery of government to perform many of the functions proposed for an Anti-Slavery Commissioner.²²⁰ However, as this article has discussed, there is no independent oversight or monitoring of the ability of survivors of modern slavery

were capped at \$50,000 and the National Redress Schemes has an upper limit of \$150,000. By comparison, the highest amount payable through state and territory victims' compensation schemes is now \$100,000.

215 *Modern Slavery Act 2015* (UK) s 8; Anti-Trafficking Monitoring Group et al, *Response to the Third Evaluation Round of the Questionnaire for the Evaluation of the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings: Access to Justice and Effective Remedies for Victims of Trafficking in Human Beings in the United Kingdom* (Report, 28 February 2020) 80.

216 *Modern Slavery Act 2015* (UK) s 10(1).

217 United Kingdom Independent Anti-Slavery Commissioner, *Independent Anti-Slavery Commissioner Strategic Plan 2019–2021* (Policy Paper, October 2019) 10 [1.4.5].

218 Anti-Trafficking and Labour Exploitation Unit, *Survivors of Trafficking and the Criminal Injuries Compensation Scheme* (Policy Paper, November 2020) 23.

219 *Hidden in Plain Sight* (n 6) 88–9 [4.59].

220 'Australian Government Response to Joint Standing Committee Reports' (n 182) 18–19.

to access remedies, including compensation, and an Anti-Slavery Commissioner could potentially play an important role in the administration and evaluation of the impact of a national compensation scheme.

V CONCLUSION

Modern slavery is an egregious abuse of power that is readily condemned but rarely remedied. There is an uncomfortable disjuncture between the National Action Plan, which promises to prioritise access to effective remedies for survivors, and the outcomes of legal proceedings involving survivors of modern slavery where the issue of compensation is, at best, an afterthought. Addressing modern slavery requires asking what happens to survivors in the years after the abuse ceases and recognising that the same factors that leave people vulnerable to slavery in the first place (precarious immigration status, weak protection for human rights, and socio-economic disadvantage) can also frustrate their access to remedies for the harm that they have suffered. To date, neither the criminal justice response to modern slavery nor the corporate reporting regime established by the *Modern Slavery Act* address the issue of compensation for survivors of modern slavery. In 2022, the first statutory review of the *Modern Slavery Act* will commence. This review must address how Australia can improve access to effective remedies for survivors of modern slavery, including through the establishment of a national compensation scheme and the development of guidance on applying for reparation orders. We recommend establishing a national compensation scheme, providing survivors with greater assistance to apply for reparation orders, and improving access to support and protection. These reforms are necessary to give effect to Australia's commitment to prevent, address and remedy the human rights abuses and enable survivors to access effective remedies.