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SLAVERY, SEXUAL SERVITUDE, AND DECEPTIVE RECRUITING OFFENCES
Division 270 *Criminal Code (Cth)*
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Table of Contents

1. Introduction	2
2. Definition of 'slavery', s 270.1 Criminal Code (Cth)	3
3. Possessing or controlling a slave	4
4. Slave trading	6
5. Sexual servitude	8
6. Deceptive recruiting for sexual services	10
7. Offences involving minors.....	11

1. Introduction

The *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999 (Cth)*¹ represented the first attempt by an Australian Parliament to legislate against slavery and, in a general sense, address the issue of human trafficking.

The *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999 (Cth)* was introduced to

modernise Australia's laws on slavery and slave trading to make them more relevant to prevailing circumstances. The sexual servitude and deceptive recruiting offences will address the growing international trade in people for the purposes of sexual exploitation.²

The Act inserted a new Division 270 entitled 'Slavery, sexual servitude and deceptive recruiting' into Chapter 8 ('Crimes against humanity and related offences') of the *Criminal Code (Cth)*. Division 270 sets out the offences of slavery (s 270.3), causing another person to remain in sexual servitude (s 270.6), and deceptive recruitment into sexual services (s 270.7).

Prior to the passage of this legislation, slavery and the slave trade were governed by four 19th century British Imperial Acts³ which employed 'archaic language and relate to outdated circumstances and institutions that have either changed or long since fallen into disuse'.⁴ In 1990, the Australian Law Reform Commission recommended that these 'complex Imperial Acts with their uncertain punishments should be replaced with modern and concise Australian statutory offences'.⁵ The slavery offences now contained in the *Criminal Code (Cth)* are based on the recommendations of the Australian Law Reform Commission⁶ as supported by the Model Criminal Code Officers Committee (MCCOC).⁷

In addition to the modern slavery offences, the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999 (Cth)* includes a range of offences that are designed to 'deter the impact on Australia of a growing and highly lucrative international trade in people for the purpose of sexual exploitation'.⁸ As part of the Model Criminal Code project, MCCOC was asked by the Standing Committee of Attorneys-General (SCAG) to examine a Commonwealth proposal to enact laws dealing with slavery and sexual servitude. MCCOC's final report entitled *Model Criminal Code — Offences Against Humanity – Slavery*⁹ was released in November 1998 and formed the basis of the sexual servitude and deceptive recruiting for sexual services offences.¹⁰

Sections 270.1–270.3 set out the slavery offences in the *Criminal Code (Cth)*. Section 270.1 provides the definition of 'slavery'. Section 270.2 highlights that 'slavery remains unlawful and its abolition is maintained, despite the repeal by the *Criminal Code Amendment (Slavery and*

¹ No 104 of 1999.

² Australia (Cth), *Parliamentary Debates*, House of Representatives, 11 Aug 1999, 8514 (Murray Stone, Minister for the Environment and Heritage).

³ See, for example, *Act for the Abolition of the Slave Trade 1807 (UK)* c 36; *Slave Trade Act 1873 (UK)* c 88.

⁴ Australia (Cth), *Parliamentary Debates*, House of Representatives, 11 Aug 1999, 8495 (Murray Stone).

⁵ Australian Law Reform Commission, *Criminal admiralty jurisdiction and prize*, Report No. 48 (1990) 83.

⁶ Explanatory Memorandum, *Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth)* 2.

⁷ Model Criminal Code Officers Committee, *Model Criminal Code — Offences Against Humanity — Slavery* (1998) 31.

⁸ Australia (Cth), *Parliamentary Debates*, Senate, 24 Mar 1999, 3076 (Ian Macdonald).

⁹ Model Criminal Code Officers Committee, *Offences Against Humanity – Slavery* (1998).

¹⁰ Explanatory Memorandum, *Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth)* 5.

Sexual Servitude) Act 1999 (Cth) of the Imperial Acts relating to slavery'. Section 270.3 creates offences of possessing a slave or exercising a power of ownership over a slave, engaging in slave trading, entering into a commercial transaction involving a slave and exercising control or direction over, or providing finance for, a commercial transaction involving a slave or an act of slave trading. While there are separate offences that deal with sexual servitude, the slavery offences 'may also apply if the control of the sex worker is so far-reaching that it effectively amounts to a right of ownership over him or her'.¹¹ These slavery offences are divided into intentional offences (s 270.3(1)) and offences involving recklessness (s 270.3(2)). The maximum term of imprisonment for the slavery offences is 25 years imprisonment.

To date there have been eight prosecutions for Division 270 offences.¹² In particular, the High Court's decision in **R v Tang** (2008) 237 CLR 1 has been instrumental in providing an interpretation of the definition of 'slavery' and the slavery offences, and will be discussed further below.

2. Definition of 'slavery', s 270.1 Criminal Code (Cth)

Section 270.1 *Criminal Code* (Cth) defines 'slavery' as:

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

This definition is modelled on the definition of 'slavery' in the *International Convention to Suppress the Slave Trade and Slavery* of 1926¹³ (and its 1953 Protocol¹⁴) and the 1956 *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*,¹⁵ to which Australia is a State Party.¹⁶ The definition in the *Criminal Code* (Cth), however, differs in two significant ways:

In the first instance, the [*Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999 (Cth)*] expands the definition of slavery so that it clearly states that slavery can also arise from debt or contract. This means that it is not enough for the debt to be simply exploited—a person can just hold another to engage in such practices because of the debt. Instead, there must be a relationship where there is a right of ownership.

In the second instance, the definition in the [*Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999 (Cth)*] differs from the previous conceptions in that it establishes a wider definition to ensure that people who drive the trade — the people who finance, manage and run the trade—are caught. The [*Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999 (Cth)*] also deals with inadequacies in the current Commonwealth, state and territory laws dealing with sex trafficking from Australia. It does this by ensuring that the traffickers—the financiers, managers and the organisers of this insidious trade—cannot slip through the net.¹⁷

The *Explanatory Memorandum* to the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) states that 'whether a person is a slave for the purposes of this Division is a matter to be determined by the courts on a case by case basis'.¹⁸ Further, the

¹¹ Australia (Cth), *Parliamentary Debates*, Senate, 24 Mar 1999, 3076 (Ian Macdonald).

¹² See further Section 4.1.2 below.

¹³ Opened for signature 25 Sep 1926, 60 LNTS 253 (entered into force 9 Mar 1927)

¹⁴ Opened for signature 7 December 1953 182 UNTS 51 (entered into force 9 December 1953).

¹⁵ Opened for signature 7 August 1956 226 UNTS 3 (entered into force 30 April 1957).

¹⁶ 1927 ATS 11, 1949 ATS 19, 1953 ATS 8 1958 ATS 3; cf Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) 18.

¹⁷ Australia (Cth), *Parliamentary Debates*, House of Representatives, 11 Aug 1999, 8512 (Teresa Gambaro).

¹⁸ Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) 19.

Explanatory Memorandum offers the following guidance as to when a person may be considered a slave:

It is where the power a person exercises over another effectively amounts to the power a person would exercise over property he or she owns. This power can arise in a variety of ways but the concluding words of the definition have been added to make it clear that, depending on the circumstances, it could also arise from a debt owed or contract entered into by the enslaved person.¹⁹

The definition of 'slavery' in s 270.1 is modelled on the previously mentioned international conventions, however, the federal Parliament added the phrase 'including where such a condition results from a debt or contract made by the person', which is not included in international law. Parliament also removed the term 'status' from the phrase 'status or condition of a person' contained in the 1926 *International Convention to Suppress the Slave Trade and Slavery*.²⁰ This may be attributable to fact that the Convention was made in contemplation of so-called de jure slavery, the status of chattel slavery, rather than any de facto conditions of slavery. Chattel slavery exists in instances where the slave is the legally recognised property of the owner. This form of slavery was abolished by the Imperial Acts, and this abolition is maintained in s 270.2 *Criminal Code* (Cth). Thus the addition of the 'debt or contract' provision to the definition in s 270.1 is aimed at expanding the scope of the offence in s 270.3 to the more modern forms of slavery such as debt bondage or extremely exploitative contracts, as chattel slavery is legally impossible in Australia.

The conviction of Melbourne brothel owner Ms Wei Tang under s 270.3 *Criminal Code* (Cth) was appealed to the High Court of Australia in 2008 on the basis that the expansion of the definition in s 270.1, going beyond the 1926 Convention on which the offence is purportedly based, was not within the legislative power of the Commonwealth under the external affairs power in s 51(xxix) of the *Australian Constitution*.

Chief Justice Gleeson of the High Court considered the phrasing of the definition in s 270.1, noting that the word 'including' is used to clarify that de facto slavery arising from a debt or contract falls within the definition of slavery when that debt or contract gives rise to a condition where any or all of the powers of ownership are exercised over a person. As such it does not expand the definition, as the condition must be met regardless.²¹ Justice Kirby also supported this conclusion.²² It was unanimously held that the offences were reasonably capable of being considered an 'appropriate and adapted'²³ implementation of Australia's international obligations.

3. Possessing or controlling a slave

Section 270.3(1)(a) makes it an offence for a person to intentionally possess a slave or exercise over a slave any of the other powers attaching to the right of ownership. The term 'possession', as used in this offence, has an

accepted judicial meaning of 'control'. A person would possess another if the other is under that person's physical dominion or control. However, the focus is on the practical capacity for control, rather than the mere geographical nexus. One or more persons may possess another person.²⁴

¹⁹ Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) 19-20.

²⁰ Article 1 *International Convention to Suppress the Slave Trade and Slavery* states that '[s]lavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.

²¹ *R v Tang* (2008) 237 CLR 1 at 20–21 per Gleeson CJ.

²² *R v Tang* (2008) 237 CLR 1 at 41 per Kirby J.

²³ *Victoria v Cth* (1996) 187 CLR 416 at 486–487.

²⁴ Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999

Intention is defined in s 5.2(1) *Criminal Code* (Cth) as ‘meaning’ to engage in that conduct.²⁵ Accordingly, the *Explanatory Memorandum* notes that if ‘the defendant does not mean to exercise a power of ownership over a slave, the fault element for that offence will not be satisfied and the defendant will not commit the offence’.²⁶

Figure 1 Elements of s 270.3(1)(a) *Criminal Code* (Cth)

S 270.3(1)(a) <i>Criminal Code</i> (Cth): Intentionally possessing a slave or exercising over a slave any of the powers attaching to the right of ownership		
Elements	Physical Elements	Fault Elements
	<ul style="list-style-type: none"> • Possessing a slave or • exercising over a slave any of the powers attaching to the right of ownership 	<ul style="list-style-type: none"> • Intention to possess or exercise the powers
Exceptions/Defences	<ul style="list-style-type: none"> • A person who engages in any conduct with the intention of securing the release of a person from slavery is not guilty of an offence against this section. The defendant bears a legal burden of proving this. 	
Penalty	<ul style="list-style-type: none"> • Imprisonment for 25 years 	

As mentioned earlier, the elements of s 270.3(1)(a) were examined by the High Court in the case of Melbourne brothel owner Ms Wei Tang. The Victorian Court of Appeal found that the trial judge had not directed the jury’s consideration sufficiently²⁷ to the requisite mental element, intention,²⁸ which was this ‘critical issue’ in the case.²⁹ As a result a retrial was ordered.

On appeal to the High Court the majority of the judges favoured an interpretation of the offence that required intention only in relation to the exercise of any the powers attaching to ownership, following the ‘common exercise of relating the fault element to the physical elements of the offence’.³⁰ Justice Kirby disagreed, requiring the prosecution to show that the accused intentionally exercised those powers in relation to a person the accused knew to be a slave.

Chief Justice Gleeson found that the Victorian Court of Appeal erred³¹ in requiring the defendant to have an ‘appreciation of the character’³² of her actions. He instead held that ‘[i]t was not necessary for the prosecution to establish that the respondent had any knowledge or belief concerning the source of the powers exercised over the complainants’.³³ He noted that although there was an oral ‘contract’ between MS Wei Tang and her victims, the inclusive language of s 270.1 made it clear that the existence of this contract did not exclude the finding of a condition of slavery. Thus it was irrelevant to construct what he termed a ‘false dichotomy’ between employment and ownership as the source of the constitutional powers being exercised.³⁴

(Cth) 23.

²⁵ *Criminal Code* (Cth) s 5.2(1); Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) 24.

²⁶ Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) 24.

²⁷ *R v Wei Tang* (2007) 16 VR 454 at 487.

²⁸ *R v Wei Tang* (2007) 16 VR 454 at 471–472.

²⁹ *R v Wei Tang* (2007) 16 VR 454 at 469.

³⁰ *He Kaw The v R* (1985) 157 CLR 523 at 568.

³¹ *R v Tang* (2008) 237 CLR 1 at 23 per Gleeson CJ.

³² *R v Wei Tang* (2007) 16 VR 454 at 487.

³³ *R v Tang* (2008) 237 CLR 1 at 26 per Gleeson CJ.

³⁴ *R v Tang* (2008) 237 CLR 1 at 24 per Gleeson CJ.

Justice Hayne agreed with the reasons of Gleeson.³⁵ He gave extensive consideration to the definition of slavery, and the situations from which it could be inferred.³⁶ He considered that the offence under s 270.3(1)(a) poses two interlinked questions: ‘first, did the accused possess, or exercise some other power attaching to the right of ownership over, the complainant and second, was the complainant a slave?’³⁷ He noted that if it could be shown that the accused had exercised any of those powers, such as possession, it would be sufficient to show that the accused had contravened the offence, and that the complainant was a slave within s 270.1.

It was on this point that Justice Kirby dissented, agreeing with the Court of Appeal that a re-trial was the correct course. He considered the structure of the offence, specifically, that the adverb ‘intentionally’ was placed in the *château* of the offence, thus applying to all subsequent clauses. He surmised that

it is not enough for the accused to ‘possess’ a slave or to ‘exercise’ control over a slave ‘any of the other powers attaching to the right of ownership’. To be guilty of the offence provided by the Code, the accused must do these things, and all of them, ‘intentionally’.³⁸

He thus agreed with the Court of Appeal that there must be an intention on the part of the accused to deal with the complainants as a slave, as if they were mere property.³⁹ He found support for this premise in that a penal statute which operates to deprive an individual of their liberty is traditionally construed strictly.⁴⁰ It must be noted that despite the criticisms of Chief Justice Gleeson and Justice Hayne, Justice Kirby does not require an appreciation of the source of the powers exercised, but merely an appreciation of the result of exercising those powers, specifically, that it renders the complainant a slave.⁴¹

What follows from the High Court’s decision in *R v Tang* is that the offence of slavery is a viable option for use against trafficking in persons, as there is no requirement to prove consideration on the part of the traffickers that they were dealing with their victims as slaves, because, as noted by Chief Justice Gleeson, such evidence would be ‘rare’.⁴² The majority probably found comfort in the fact that even if such consideration was required, in this case, there was sufficient evidence for the jury to convict.⁴³ However, this may result in the watering down of the high threshold historically required for a conviction for serious criminal offences.

4. Slave trading

Section 270.3(1) sets out several offences for persons engaging in slave trading and for other commercial transactions involving slaves. The term ‘slave trading’ is defined in s 270.3(3) to include (a) the capture, transport or disposal of a person with the intention of reducing the person to slavery or (b) the purchase or sale of a slave. The term ‘commercial transaction’ is not further defined in the *Criminal Code* (Cth).

With the exception of s 270.3(1)(b), these offences may be committed intentionally, subs (1), or recklessly, subs (2). The difference in fault element is also reflected in the maximum penalty of 17 years imprisonment for offences involving recklessness and 25 years for offences involving intention. In relation to these offences an accused will be taken to be “reckless” if she or he is

³⁵ *R v Tang* (2008) 237 CLR 1 at 54 per Hayne J.

³⁶ *R v Tang* (2008) 237 CLR 1 at 91 per Hayne J.

³⁷ *R v Tang* (2008) 237 CLR 1 at 57 per Hayne J.

³⁸ *R v Tang* (2008) 237 CLR 1 at 44 per Kirby J.

³⁹ *R v Tang* (2008) 237 CLR 1 at 44–45 per Kirby J.

⁴⁰ *He Kaw Teh v R* (1985) 157 CLR 523 at 583.

⁴¹ *R v Tang* (2008) 237 CLR 1 at 52–53 per Kirby J.

⁴² *R v Tang* (2008) 237 CLR 1 at 23 per Gleeson CJ.

⁴³ *R v Wei Tang* (2007) 16 VR 454 at 496.

aware of a substantial risk that the commercial transaction involves a slave or slavery or that the act is an act of slave trading, and having regard to the circumstances known to the defendant it is unjustifiable to take that risk.⁴⁴ The question of whether taking a risk is unjustifiable is one of fact.⁴⁵

Under s 270.3(1)(b) it is an offence to intentionally engage in slave trading.

Figure 2 Elements of s 270.3(1)(b) *Criminal Code* (Cth)

S 270.3(1)(b) <i>Criminal Code</i> (Cth): Intentionally engaging in slave trading		
Elements	Physical Elements	Fault Elements
	<ul style="list-style-type: none"> Engaging in slave trading, s 270.3(3) 	<ul style="list-style-type: none"> Intention
Exceptions/Defences	<ul style="list-style-type: none"> A person who engages in any conduct with the intention of securing the release of a person from slavery is not guilty of an offence against this section. The defendant bears a legal burden of proving this. 	
Penalty	<ul style="list-style-type: none"> Imprisonment for 25 years 	

Subsections 270.3(1)(c) and 270.3(2)(a)(i) make it an offence to enter into any commercial transaction involving a slave.

Figure 3 Elements of s 270.3(1)(c) *Criminal Code* (Cth)

S 270.3(1)(c) <i>Criminal Code</i> (Cth): Intentionally entering into any commercial transaction involving a slave		
Elements	Physical Elements	Fault Elements
	<ul style="list-style-type: none"> Entering into any commercial transaction involving a slave 	<ul style="list-style-type: none"> Intention
Exceptions/Defences	<ul style="list-style-type: none"> A person who engages in any conduct with the intention of securing the release of a person from slavery is not guilty of an offence against this section. The defendant bears a legal burden of proving this. 	
Penalty	<ul style="list-style-type: none"> Imprisonment for 25 years 	

Figure 4 Elements of s 270.3(2)(a)(i) *Criminal Code* (Cth)

S 270.3(2)(a)(i) <i>Criminal Code</i> (Cth): Entering into any commercial transaction involving a slave		
Elements	Physical Elements	Fault Elements
	<ul style="list-style-type: none"> Entering into any commercial transaction Transaction involves a slave 	<ul style="list-style-type: none"> Intention Reckless as to whether the transaction involves a slave or slavery
Exceptions/Defences	<ul style="list-style-type: none"> A person who engages in any conduct with the intention of securing the release of a person from slavery is not guilty of an offence against this section. The defendant bears a legal burden of proving this. 	
Penalty	<ul style="list-style-type: none"> Imprisonment for 17 years 	

Subsections 270.3(1)(d) and 270.3(2)(a)(ii), (iii) and create offences for exercising control or direction over, or providing finance for any act of slave trading or for a commercial transaction involving a slave.

⁴⁴ *Criminal Code* (Cth) ss 5.4(1), 5.4(2); Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) 31-34.

⁴⁵ *Criminal Code* (Cth) s 5.4(3); Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) 31-34.

Figure 5 Elements of s 270.3(1)(d) *Criminal Code* (Cth)

S 270.3(1)(d) <i>Criminal Code</i> (Cth): Intentionally exercising control or direction over, or providing finance for any act of slave trading or for a commercial transaction involving a slave		
Elements	Physical Elements	Fault Elements
	<ul style="list-style-type: none"> Exercising control or direction over, or providing finance for (i) any act of slave trading or (ii) for a commercial transaction involving a slave. 	<ul style="list-style-type: none"> Intention
Exceptions/Defences	<ul style="list-style-type: none"> A person who engages in any conduct with the intention of securing the release of a person from slavery is not guilty of an offence against this section. The defendant bears a legal burden of proving this. 	
Penalty	<ul style="list-style-type: none"> Imprisonment for 25 years 	

Figure 6 Elements of 270.3(2)(a)(ii), (iii) *Criminal Code* (Cth)

S 270.3(2)(a)(ii), (iii) <i>Criminal Code</i> (Cth): Exercising control or direction over, or providing finance for, any act of slave trading a commercial transaction involving a slave		
Elements	Physical Elements	Fault Elements
	<ul style="list-style-type: none"> Exercising control or direction over, or providing finance for (ii) commercial transaction involving a slave; or (iii) act of slave trading 	<ul style="list-style-type: none"> Intention Reckless as to whether the transaction involves a slave or slavery, or slave trading
Exceptions/Defences	<ul style="list-style-type: none"> A person who engages in any conduct with the intention of securing the release of a person from slavery is not guilty of an offence against this section. The defendant bears a legal burden of proving this. 	
Penalty	<ul style="list-style-type: none"> Imprisonment for 17 years 	

5. Sexual servitude

The two offences contained in s 270.6 *Criminal Code* (Cth) concern situations in which a victim enters into an arrangement to provide sexual services but where the victim is not free to leave.

The definition of 'sexual servitude' is the central element in these offences. The term is defined in s 270.4(1) as the condition of a person who provides sexual services and who, because of the use of force or threats is not free (a) to cease providing sexual services; or (b) to leave the place or area where the person provides sexual services. The force or threats need not be against the sex worker but may be against another person, such as the sex worker's child or other relative.⁴⁶

The difference between the slavery and servitude offences is further explained in the *Explanatory Memorandum to the Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999* (Cth):

To establish slavery it must be shown that the accused exercises a power of ownership over the victim. Servitude falls short of ownership but the domination over the victim is such as to effectively deny her or his freedom in some fundamental respects. In relation to the sexual servitude offences in the [Act] it is only if the victim's freedom is denied in respect of one of the two matters listed in this subclause that an offence is committed. Whether a person is 'not free' in relation to the matters specified in the definition will be determined on the facts of each case and in the context of

⁴⁶ Explanatory Memorandum, *Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999* (Cth) 43.

the mischief the legislation is directed against; namely, sexual 'servitude'. The fact that a person may suffer a penalty under the terms of a typical employment contract would not of itself amount to being 'not free'. It is only if the force or threats effectively denies the person her or his freedom in relation to the two specified matters that sexual servitude can be made out. In borderline cases, where there is doubt about whether a person is 'not free' in relation to the matters listed in the definition, it is expected that the courts will resolve the matter in favour of the defendant.⁴⁷

According to Senator Ian Macdonald who introduced the Bill in 1999, the offence under s 270.6(1), or the 'causing' offence, is aimed at

both those who are directly or indirectly involved in bringing about a person's entry into, or continued participation in, sexual servitude. The primary targets of this offence are the recruiters and brothel owners involved. But it would also catch those whose conduct contributes in a significant way towards a person entering or remaining in sexual servitude.⁴⁸

Figure 7 Elements of 270.6(1) *Criminal Code* (Cth)

S 270.6(1) <i>Criminal Code</i> (Cth): Intentionally or recklessly causing a person to enter into or remain in sexual servitude		
Elements	Physical Elements	Fault Elements
	<ul style="list-style-type: none"> A person whose conduct causes another person to enter into or remain in sexual servitude 	<ul style="list-style-type: none"> Intention or recklessness as to causing the sexual servitude
Penalty	<ul style="list-style-type: none"> Imprisonment for 15 years 	

The key feature of this offence is the 'causing' of sexual servitude. While the concept of causation is complex, the basic notion is that 'the connection must be sufficiently strong to justify attributing criminal responsibility to the conduct.'⁴⁹ Because the offence requires the defendant to intend to cause, or be reckless as to causing, the sexual servitude a person who inadvertently causes another's sexual servitude cannot be criminally liable.⁵⁰

Section 270.6(2) makes it an offence for a person to conduct any business that involves the sexual servitude of another if the person knows or is reckless as to whether the business involves the sexual servitude of other persons. A defendant will be taken to 'know' that the business she or he conducts involves the sexual servitude of another person, if the defendant is aware that the sexual servitude exists or will exist in the ordinary course of events.⁵¹ This offence is an important one in the context of trafficking in person in that it is 'directed at the principles involved in this activity, namely the organisers, managers and financiers of the trade.'⁵²

⁴⁷ Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) 44-45

⁴⁸ Australia (Cth), *Parliamentary Debates*, Senate, 24th March 1999, 3076 (Ian Macdonald).

⁴⁹ Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) 45. See *Royall v R* (1991) 172 CLR 378.

⁵⁰ Australia (Cth), *Parliamentary Debates*, Senate, 24th March 1999, 3076 (Ian Macdonald).

⁵¹ Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) 59.

⁵² Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) 48.

Figure 8 Elements of 270.6(2) *Criminal Code* (Cth)

S 270.6(2) <i>Criminal Code</i> (Cth): Conducting any business that involves the sexual servitude of other persons		
Elements	Physical Elements	Fault Elements
		<ul style="list-style-type: none"> • A person who conducts any business • The business involves the sexual servitude of other persons
Penalty	<ul style="list-style-type: none"> • Imprisonment for 15 years 	

6. Deceptive recruiting for sexual services

Deceptive recruiting for sexual services is a 'preparatory offence [...] aimed at a very limited class of deceptions designed to recruit sex workers by concealing the fact that the engagement will be one involving the provision of sexual services'.⁵³ This offence does not require proof that the prospective sexual service would involve any element of servitude.⁵⁴ Such a situation would be covered, for instance, by attempts in relation to the offence of actual sexual servitude under s 270.6 *Criminal Code* (Cth).⁵⁵ MCCOC thus designed this offence to penalise the type of conduct that frequently leads to sexual servitude.⁵⁶

Deceptive recruiting would occur not only when the victim is deceived about the fact that they will be required to provide sexual services but also if the person is deceived about other matters, such as the extent to which they will be free to leave the place where they provide sexual services, the extent to which they will be free to cease providing sexual services or the extent to which they will be able to leave their place of residence.⁵⁷ This offence would, for example, apply if a defendant tells a potential recruit that she or he will be employed as a waitress when in fact she is being recruited to work as a prostitute.⁵⁸

Deception is understood to 'involve inducing a person to believe that a thing is true which is false' and that 'the representation can be in the form of words or conduct but silence by itself will normally not constitute a deception'.⁵⁹

⁵³ Australia, Model Criminal Code Officers Committee, *Model Criminal Code - Offences Against Humanity – Slavery* (1998) 37.

⁵⁴ Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) 6.

⁵⁵ Australia, Model Criminal Code Officers Committee, *Model Criminal Code - Offences Against Humanity – Slavery* (1998) 37.

⁵⁶ Australia, Model Criminal Code Officers Committee, *Model Criminal Code - Offences Against Humanity – Slavery* (1998) 37.

⁵⁷ Bills Digest, *Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004* (Cth) 10

⁵⁸ Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) 54.

⁵⁹ Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) 56.

Figure 9 Elements of 270.7 *Criminal Code* (Cth)

S 270.7 <i>Criminal Code</i> (Cth): Deceptive recruiting for sexual services		
Elements	Physical Elements	Fault Elements
	<ul style="list-style-type: none"> • A person who induces another person to enter into an engagement to provide sexual services 	<ul style="list-style-type: none"> • Intention to induce
	<ul style="list-style-type: none"> • Other person is deceived about <ul style="list-style-type: none"> ○ the nature of sexual services to be provided (for example, whether those services will require the person to have unprotected sex); or ○ the extent to which the person will be free to leave the place or area where the person provides sexual services; or ○ the extent to which the person will be free to cease providing sexual services; or ○ the extent to which the person will be free to leave his or her place of residence; or ○ if there is or will be a debt owed or claimed to be owed by the person in connection with the engagement—the quantum, or the existence, of the debt owed or claimed to be owed; or ○ the fact that the engagement will involve exploitation, debt bondage or the confiscation of the person's travel or identity documents; 	<ul style="list-style-type: none"> • Intention to deceive
Matters to consider	<p>In determining whether a person has been deceived about any matter referred to in the offence above, a court, or if the trial is before a jury, the jury, may also have regard to any of the following matters:</p> <ul style="list-style-type: none"> • the economic relationship between the person and the alleged offender; • the terms of any written or oral contract or agreement between the person and the alleged offender; • the personal circumstances of the person, including but not limited to: <ul style="list-style-type: none"> ○ whether the person is entitled to be in Australia under the <i>Migration Act 1958</i>; ○ and the person's ability to speak, write and understand English or the language in which the deception or inducement occurred; and ○ the extent of the person's social and physical dependence on the alleged offender. 	
Penalty	<ul style="list-style-type: none"> • Imprisonment for 7 years 	

7. Offences involving minors

Under ss 270.6 and 270.7 *Criminal Code* (Cth) aggravated offences with higher penalties apply if the sexual servitude or deceptive recruiting for sexual services involves a minor. In order to prove these aggravated offences it must be shown that the defendant intended to commit, or was reckless as to, committing the offence against a person under the age of 18 years. A defendant will be taken to 'intend' to commit an aggravated offence if the defendant believes the person is under 18 years of age.⁶⁰ If the defendant is 'aware of a substantial risk that the person against whom the offences are being committed is under 18 years of age and having regard to the circumstances known to the defendant it is unjustifiable to take that risk' then the defendant is taken to have been 'reckless'.⁶¹ If the arbiter of fact⁶², is not satisfied that the

⁶⁰ Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth) 63. See subsection 5.2(2) of the *Criminal Code* (Cth).

⁶¹ Explanatory Memorandum, Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 (Cth)

defendant is guilty of the aggravated offence, but is satisfied that he or she is guilty of the lesser offence, it may find the defendant not guilty of the aggravated offence, but guilty of the lesser offence.

Figure 10 Elements of 270.8, 1st alt *Criminal Code* (Cth)

S 270.8 <i>Criminal Code</i> (Cth): Aggravated sexual servitude		
Elements	Physical Elements	Fault Elements
	<ul style="list-style-type: none"> • Offence against s 270.6 (sexual servitude offences) 	<ul style="list-style-type: none"> • Intention
	<ul style="list-style-type: none"> • Offence committed against a person under 18 	<ul style="list-style-type: none"> • Intention or recklessness
Penalty	<ul style="list-style-type: none"> • Imprisonment for 19 years 	

Figure 11 Elements of 270.8, 2nd alt *Criminal Code* (Cth)

S 270.8 <i>Criminal Code</i> (Cth): Aggravated deceptive recruiting for sexual services		
Elements	Physical Elements	Fault Elements
	<ul style="list-style-type: none"> • Offence against s 270.7 (deceptive recruiting for sexual services) 	<ul style="list-style-type: none"> • Intention
	<ul style="list-style-type: none"> • Offence committed against a person under 18 	<ul style="list-style-type: none"> • Intention or recklessness
Penalty	<ul style="list-style-type: none"> • Imprisonment for 9 years 	

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63. See subsection 5.4(1) and (2) of the *Criminal Code* (Cth).

⁶² Where the trial is for an aggravated offence, the court, or if the trial is before a jury, the jury.