

Introducing a Modern Slavery Defence:

Victim-Centred Approach

Submission to the Legal and Social Issues Committee,

Parliament of Victoria

Professor Felicity Gerry QC¹, Jennifer Keene-McCann², Cate Read³, Riccardo Pagano⁴, Dr
David Ferguson⁵⁶

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Introduction

1. We welcome this inquiry into the Victorian criminal justice system and appreciate the opportunity to make a submission to the Legal and Social Issues Committee.
2. The inquiry's terms of reference indicate that submissions may address 'various issues associated with the operation of Victoria's justice system, including, but not limited to' the factors related to Victoria's growing prison population and judicial education related to sentencing or causes of crime. This submission argues for research and reforms to address

¹ Crockett Chambers and Deakin University, Melbourne, Libertas Chambers and Salford University, UK.
Corresponding author ferryqc@vicbar.com.au

² International lawyer, independent researcher and Victorian Solicitor.

³ Trial Division Researcher, Supreme Court of Victoria.

⁴ Thompson and Co Solicitors, City University of London, Kingston University, UK.

⁵ Contributed to this submission in part-completion of a Graduate Diploma of Legal Practice from the College of Law

⁶ Authors have various degrees of expertise in modern slavery law spanning several jurisdictions; earlier research for this submission was provided by volunteers for the International Commission of Jurists Victoria in 2019 and 2020.

a particular cohort within Victoria's criminal justice system: victims of human trafficking, slavery, and slavery-like offences (henceforth 'modern slavery').⁷

3. Victoria has led the way in human rights by enacting the Victorian *Charter on Human Rights and Responsibilities Act 2006* ('the Charter'). This submission argues that Victoria can lead the way in ensuring a non-prosecutorial and non-punishment strategy towards victims of modern slavery who are accused of criminal offences, where those victims have been compelled to commit crime by the means and purposes of traffickers.

Recommendations

- Recommendation 1: Introduce a legislative defence to all crimes for victims of modern slavery as an amendment to the *Crimes Act 1958* (Vic). This ensures that the individual's status as a victim of modern slavery is recognised, while also encouraging their cooperation in the prosecution of those ultimately responsible.
- Recommendation 2: Immediately, develop and publish a non-prosecution policy to protect victims of human trafficking, recognising non-liability through the 'public interest' test.
- Recommendation 3: Invest in greater research into the percentage and experiences of the Victorian remand and prison population in relation to possible modern slavery.
- Recommendation 4: Commission the Sentencing Advisory Council to undertake a consultation for the purpose of developing sentencing guidelines that provide guidance to judicial officers and legal practitioners on non-punishment or reduced punishment of victims of modern slavery before the courts.
- Recommendation 5: Train all stakeholders on identifying trafficked persons, typologies of modern slavery in the criminal justice system and available protective services.

⁷ Slavery in Australia has been a criminal offence since 1824 due to the application of the Slave Trade Act 1824 (UK). In 1999, slavery offences were inserted into Division 270 of the Criminal Code (Cth) and have since been amended and updated. These offences apply to all persons, regardless of whether the conduct occurs within, or outside of, Australia. These offences have a maximum penalty of 25 years imprisonment. 33. Section 270 and 271 of the Criminal Code (Cth) criminalise a range of relevant exploitation including 'slavery' and slavery like conditions, sexual servitude, deceptive recruiting for sexual services, trafficking in persons, 'debt bondage', trafficking in children and 'forced labour'.

Recognition of the Problem

4. The Commonwealth Government has prioritised preventing and addressing modern slavery and protecting victims of modern slavery under its obligations as a signatory to the *UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children*⁸ ('the Protocol').
5. In 2017, the Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry into establishing an Australian Modern Slavery Act produced a report entitled, *Hidden in Plain Sight*.⁹ The report recognised that 'a victim-centred approach that prioritises support for victims is central to improving criminal justice responses to modern slavery' and acknowledged 'that a defence for victims who are compelled to commit a crime due to exploitation is not currently available under Australia's legislative and policy frameworks'.¹⁰ The report notes that a criminal defence, similar to what is available under the UK *Modern Slavery Act (2015)* would encourage victims to come forward and receive additional support.¹¹ The report finds that 'the UK model could be improved to provide clearer guidance for judicial officers and a path to appeal for victims who have already been convicted'.¹²
6. Notably the Committee's recommendations included:

Recommendation 22

6.101 The Committee recommends that the Australian Government introduce defences for victims of modern slavery offences who are compelled to commit a crime due to exploitation, similar to but improving on section 45 of the UK Modern Slavery Act 2015 and drawing from international best practice. This should include a pathway for appeal and/or expungement of criminal convictions for victims of modern slavery who have legitimate defences.

6.102 The Committee recommends that specific guidance (including sentencing guidance) be developed to support the introduction of

⁸ UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children. <https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx>.

⁹ 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) ('*Hidden in Plain Sight*'). https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Final_report

¹⁰ *Hidden in Plain Sight*, [6.97]–[6.98].

¹¹ *Hidden in Plain Sight*, [6.99].

¹² *Hidden in Plain Sight*, [6.99].

these defences which takes into account the impact of modern slavery, exploitation, coercion and vulnerability on victims.

7. These recommendations have not yet been enacted at a Commonwealth level. Victoria has a need and the ability to enact them at a state level. We urge the Committee undertaking this inquiry to adopt these recommendations and take steps towards their implementation.

Modern Slavery in Victoria

8. The Commonwealth Government has recognized the 'unique and important' role¹³ of state governments in combatting modern slavery and human trafficking. Furthermore, the Victorian *Charter of Human Rights and Responsibilities*¹⁴ requires public authorities to act in a way that upholds the rights available in the Charter. The Charter recognises modern slavery in s 11, 'Freedom from Forced Work'.¹⁵
9. Specialist teams exist within the Australian Federal Police (AFP) to investigate trafficking and sexual exploitation offences. Victorian police are particularly likely to be a point of contact for victims in minor offending or through joint taskforce operations but, it appears that no such speciality exists and the latest edition of the Victorian Police Manual¹⁶ appears to have no guidance for police officers on identifying or addressing victims of modern slavery within the criminal justice system. Neither the Office of Public Prosecutions, Victoria nor the Judicial College of Victoria appear to have specific resources relevant to this concern.
10. The absence of guidance regarding victims of modern slavery at the state level is not surprising, given that slavery and slavery-like offences have been criminalised under the Commonwealth Criminal Code.¹⁷ Furthermore, the Commonwealth Government's approach to addressing modern slavery primarily relates to supply chain reporting by corporations with operations overseas.¹⁸ While this is commendable, it is an approach that has not yet fully addressed the levels of potential exploitation and abuse occurring within Australia's state jurisdictions.
11. Modern slavery clearly exists in Victoria; however, the extent to which it occurs is unknown. For example, in 2017, workers in fruit picking farms at Swan Hill were promised

¹³ Australian Government, *National Action Plan to Combat Modern Slavery 2020–25* (2020) 4.

¹⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁵ Section 11(1) states that: 'A person must not be held in slavery or servitude.' Sub-section (2) states that: 'A person must not be made to perform forced or compulsory labour.'

¹⁶ Copy with one author; public may request and pay for copies from Victoria Police.

¹⁷ *Commonwealth Criminal Code Act 1995* (Criminal Code) divs 270 and 271.

¹⁸ Modern Slavery Act (Cth) 2018.

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a high income but instead ‘were paid a pittance, kept in overcrowded homes with exorbitant rent and effectively trapped in debt bondage’.¹⁹ In 2018, a Melbourne man was charged ‘with intentionally reducing a person to slavery’ for allegedly ‘reducing his wife to a slave forced her to remain in their bedroom unless she was cooking and cleaning, while she survived on little more than bread and pickles’.²⁰ Finally, in 2021, a Mount Waverley couple was convicted of keeping a woman in domestic servitude for eight years.²¹

12. Data is opaque. The Global Slavery Index 2018 estimates that on any given day in 2016, there were 15,000 people living in slavery conditions in Australia. It is not known how many are exploited in organised crime. As reported in the *Hidden in Plain Sight* report, the Australian Federal Police received the following numbers of referrals for human trafficking and slavery offences across Victoria:

14 referrals in 2013–2014;
39 referrals in 2014–2015;
57 referrals in 2015–2016; and
29 referrals in 2016–2017.²²

Moreover, the report noted that, ‘intelligence suggests that some regional areas may be subject to a higher prevalence due to specific industries in those regions, such as the horticultural industry in the Mildura/Robinvale area of Victoria’.²³

13. Although it is unknown how many individuals entering Victoria’s criminal justice system are victims of modern slavery,²⁴ the coercive yet covert circumstances of modern slavery and the experience overseas suggest that a significant minority of such individuals may be victims of trafficking, slavery, or slavery like conditions.
14. Thus, modern slavery is a Victorian concern as much as it is a Commonwealth concern. It is important that Victoria recognises and addresses victims of modern slavery in its criminal justice system.

Modern Slavery Defence: Preventing ‘Victims in the Dock’

15. A defence for victims of modern slavery who commit offences related to or because of their experiences is necessary to prevent the criminal justice system from placing ‘victims

¹⁹ <https://www.theguardian.com/world/2017/oct/30/australian-slavery-inquiry-told-fruit-pickers-brainwashed-and-trapped-in-debt>

²⁰ <https://mobile.abc.net.au/news/2018-02-19/woman-ordered-to-stay-room-unless-cooking-cleaning-court-hears/9462390?pfm=sm&pfmredirect=sm>

²¹ <https://www.theage.com.au/national/victoria/couple-jailed-for-keeping-woman-as-a-domestic-slave-20210721-p58bl4.html>

²² *Hidden in Plain Sight*, 60 (Table 3.3).

²³ *Hidden in Plain Sight*, [3.109].

²⁴ The authors have proposed a separate qualitative study on this matter, modelled on similar work by the United Kingdom’s Sentencing Council. See https://www.sentencingcouncil.org.uk/wp-content/uploads/Drug_mules_bulletin.pdf.

in the dock'. Both non-prosecution and non-punishment of victims of modern slavery is recognised as international best practice.

16. For example, in 2009, the Working Group on Trafficking in Persons recommended that State Parties should 'consider, in line with their domestic legislation not punishing ... trafficked persons ... for unlawful acts committed by them as a consequence of their situation'.²⁵ In 2010, the Working Group went further and suggested that provisions for non-punishment and non-prosecution of trafficked persons should be incorporated into domestic legislation.²⁶

17. Principle 7 of the UN Trafficking Principles and Guidelines states that:

Trafficked Persons shall not be detained, charged or prosecuted for their illegal entry into or residence in countries of transit or destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.²⁷

18. Article 4(2) of the International Labour Office (ILO) Protocol of June 2014 (updating the existing ILO Convention 29 on Forced Labour) requires States to

take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour.²⁸

19. Importantly, the Working Group on Trafficking in Persons identified that fear of prosecution and punishment often prevents victims from seeking protection and assistance.²⁹

²⁵ United Nations, *Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009*, CTOC/COP/WG.4/2009/2 (21 April 2009).

http://www.unodc.org/documents/treaties/organized_crime/Final_report_English_TIP.pdf

²⁶ United Nations, *Report on the meeting of the Working Group on Trafficking in Persons held in Vienna from 27 to 29 January 2010*, CTOC/COP/WG.4/2010/6 (17 February 2010).

https://www.unodc.org/documents/treaties/organized_crime/2010_CTOC_COP_WG4/CTOC_COP_WG4_2010_final_report_E.pdf

²⁷ United Nations Office of the High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, UN Doc E/2002/68/Add.1 (20 May 2002). https://www.unodc.org/e4j/data/university_uni/recommended_principles_and_guidelines_on_human_rights_and_human_trafficking.html?lng=en

²⁸ International Labour Organisation, *P029 – Protocol of 2014 to the Forced Labour Convention, 1930* (2014).

²⁹ Working Group on Trafficking in Persons, *Non-punishment and non-prosecution of victims of trafficking in persons: Administrative and judicial approaches to offences committed in the process of such trafficking – Background paper prepared by the Secretariat*, UN Doc CTOC/COP/WG.4/2010/4 (9 December 2009), para 5. https://www.unodc.org/documents/treaties/organized_crime/2010_CTOC_COP_WG4/WG4_2010_4_E.pdf.

See also, Hannah Andrevski, Jacqueline Joudo Larsen and Samantha Lyneham, 'Barriers to trafficked persons involvement in criminal justice proceedings: An Indonesia case study' (2013) 451 *Trends & Issues in Crime and Criminal Justice* 1, 4.

20. A defence for victims of modern slavery who commit offences related to, or because of, their exploitation provides an incentive for them to come forward and exercise their rights—as well as an providing Victorian authorities with an opportunity to pursue those ultimately responsible. The creation of such a defence—which would enable Victoria to demonstrate international best practice in this area—plays an important role in establishing a victim-centred approach to addressing modern slavery.

Current Victorian Criminal Defences are Inadequate

21. Unfortunately, current legislative protections for victims of modern slavery charged with crimes related to their exploitation in Victoria are inadequate to prevent their prosecution or punishment. What follows is necessarily an overview:

Duress

22. The statutory defence of duress relocates the responsibility away from the immediate accused, because of pressure exerted upon them at the time that the offence occurred. However, raising this defence requires the defendant to establish several factors, including that:

- 1) They reasonably believed that a threat of harm had been made;³⁰
- 2) The threat will be carried out unless the threatened individual commits the act(s) leading to the offence charged;³¹
- 3) Carrying out the conduct is the only reasonable way that the threatened harm can be avoided;³² and
- 4) The conduct is an objectively reasonable response to the threat made,³³ having taken into account the action and words of the threat.³⁴

23. Under the *Crimes Act 1958* (Vic), duress cannot be claimed where the person is voluntarily associating for the purposes of carrying out violent conduct,³⁵ and the defence only applies in murder cases if the person believes that the threat involves the infliction of death or really serious injury.³⁶

24. While the statutory defence of duress does recognise the power dynamics at play in situations of family violence,³⁷ it does not provide for the power dynamics—and therefore the harms—that arise in situations of modern slavery. This is because ‘threat of harm’ in situations of modern slavery is more likely to manifest as on-going intimidation and victimisation including abuse of vulnerability. This contrasts with the finite verbal threat

³⁰ *Crimes Act 1958*, s 3320(2)(a)(i).

³¹ *Crimes Act 1958*, s 3320(2)(a)(i).

³² *Ibid* s 3320(2)(a)(ii).

³³ *Ibid* s 3320(2)(b).

³⁴ *R v Harding* [1976] VR 129.

³⁵ *Ibid* s3220(3).

³⁶ *Ibid* s3220(4).

³⁷ *Ibid* s322P.

to do harm which is recognised in duress case law.³⁸

25. The requirement that an accused present evidence that their conduct was the 'only reasonable way that threatened harm [could] be avoided' invites challenge from prosecutors where, for example, a trafficked person has limited liberty but did not report their situation to the police. Particularly in the case of trafficked persons, but more broadly concerning all victims of modern slavery, this approach ignores the reality of an accused who may fear for their safety and that of their family, in addition to fearing prosecution for trafficked migrants, deportation is another factor which makes silence dominant and militates against protection. This fear would be particularly acute in Victoria, and in Australia more generally, where mandatory immigration detention is applicable.
26. Thus, the statutory defence of duress does not adequately prevent prosecution or punishment of victims of modern slavery charged with crimes related to their exploitation in Victoria.

Innocent Agency

27. The principle of the innocent agent (or 'innocent agency') is an extension of the *Crimes Act 1958* (Vic) s 323. Like duress, it relocates responsibility for criminal conduct away from a victim of modern slavery to another person who intentionally directs the victim/accused to commit all or some of the elements of the crime. Here, the victim is the 'agent.' Liability is established by proving that the individual intentionally caused the victim/accused to perform the acts which constitute the offence charged; the individual had the state of mind necessary to commit the offence; and the agent is innocent of the offence.
28. However, innocent agency only removes liability from, for example, the *victim of trafficking* provided that prosecution can be secured for the *trafficker*. Yet, prosecution of those running human trafficking rings is exceedingly rare.
29. This is clearly inappropriate and grossly unfair when applied to the specific circumstances of modern slavery. Natural justice suggests that a defence should be available for individuals based on their status as *victims* of modern slavery, regardless of whether a prosecution is secured for those responsible for abusing them.
30. Thus, like duress, innocent agency does not adequately prevent prosecution or punishment of victims of modern slavery charged with crimes related to their exploitation in Victoria.

Necessity

31. The defence of necessity puts the responsibility for the relevant conduct on the victim of modern slavery but deflects intent by recognising that there are circumstances in which

³⁸ *R v Abusafiah* (1991) 24 NSWLR 531 (NSWCCA).

the law has to be broken in order to avoid terrible consequences. The application of necessity is narrow and is rarely argued successfully.

32. To make out the defence of necessity, a victim of modern slavery must show, inter alia, that:

- 1) The criminal act was only done to avoid certain circumstances where the victim/accused or their family would be subject to 'irreparable evil';
- 2) The victim/accused honestly and reasonably believed that they were in a situation of 'imminent peril'; and
- 3) A reasonable person in the same position would also believe that they had no alternatives to the action taken.³⁹

33. This high bar of imminent harm makes the defence of necessity irrelevant for many victims of modern slavery—for example, with sex trafficking, the way some traffickers compel their victims to break the law by facilitating their dependency on drugs means that the criminal conduct is not related to 'irreparable evil'.⁴⁰

34. Thus, the defence of necessity does not adequately prevent prosecution or punishment of victims of modern slavery charged with crimes related to their exploitation in Victoria.

Marital Coercion

35. The defence of marital coercion may be available to some victims of modern slavery forced into marriage.⁴¹ However, marital coercion only applies in very limited circumstances.

36. Marital coercion provides women with a defence to criminal offences where a husband has coerced an act through pressure or threats. The coercion must be 'sufficient to cause a woman of ordinary good character and normal firmness of mind, placed in circumstances in which the woman was placed, to conduct herself in the manner charged'.⁴²

37. Unlike duress, which is available as a defence to all offences and to any accused person, marital coercion is not available for the offences of treason or murder,⁴³ and is only available to married women.

38. Thus, the defence of marital coercion does not adequately prevent prosecution or punishment of victims of modern slavery charged with crimes related to their exploitation in Victoria.

³⁹ *R v Loughnan* [1981] VR 443. See also *R v Rodgers* (1996) 86 A Crim R 542.

⁴⁰ See *People v LG*, 972 NYS 2d 418, 425–28 (Crim Ct 2013).

⁴¹ *Crimes Act 1958*, s 336.

⁴² *Crimes Act 1958*, s 336(3).

⁴³ *Crimes Act 1958*, s 336(2).

Available Model⁴⁴ and Possible Improvements

39. The defence created by the *Modern Slavery Act 2015* (UK) ('MSA') provides a useful example of how a Victorian defence might be modelled and improved.⁴⁵ Section 45 of the MSA introduced a statutory defence for adults and children who are compelled to commit an offence as a direct result of being a victim of modern slavery. The statutory defence is designed to provide further encouragement to victims of modern slavery to come forward and give evidence without fear of being convicted for offences connected to their slavery or trafficking situation.⁴⁶
40. The s 45 defence provides a useful framework but is limited by Schedule 4 to certain offences which can be particularly troubling in the context of accessories compelled to assist or encourage more serious organised crime.⁴⁷
41. The UK also has a mechanism for quashing the convictions of trafficked persons wrongly convicted although this is also limited by type of criminality. The focus is currently from the *circumstances of the victims/accused* to the *nature of the crime* and thus not entirely protective.

A 2019 Independent Review of the MSA showed significant use of the defence—predominantly in drug trafficking cases—but also included criticism.⁴⁸ The criticisms outlined in the review provide important 'lessons learned' for developing and introducing an adequate defence in Victoria. This includes encouraging police to contemplate when a statutory defence might apply, correctly discontinuing an investigation against a victim of modern slavery but failing to continue to investigate the traffickers most responsible for causing or compelling the crime and practitioners raising the defence late in the proceedings.

42. The UK Sentencing Council recently completed a lengthy consultation on sentencing guidelines for modern slavery offences.⁴⁹ Prior to August 2021, offences under the MSA did not have specific guidelines; however, the Council has now provided guidelines in relation to offences under ss 1, 2, 4, and 30 of the MSA.⁵⁰ In support of our submission

⁴⁴ Although the UK *Modern Slavery Act 2015* is the only legislative alternative discussed here, it should be noted that protection for trafficked persons who commit crime, through implementation of the non-punishment principle, is more developed across Europe, in the United States of America and ASEAN. Further research is available from the authors on request.

⁴⁵ *Modern Slavery Act 2015 c 30* (UK).

⁴⁶ Secretary of State for the Home Department, *Independent Review of the Modern Slavery Act 2015: Final Report* (CP 100, May 2019) 61 [1.4].
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf

⁴⁷ *Modern Slavery Act 2015*, sch 4.

⁴⁸ Secretary of State for the Home Department, *Independent Review of the Modern Slavery Act 2015: Final Report* (CP 100, May 2019) 61 [1.4].
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf

⁴⁹ See <https://www.sentencingcouncil.org.uk/publications/item/modern-slavery-offences-consultation/>

⁵⁰ See <https://www.sentencingcouncil.org.uk/crown-court?s&collection=modern-slavery>

that the Victorian Government create a modern slavery defence, we also urge it to consider commissioning the Victorian Sentencing Advisory Council to undertake a similar consultation for the purposes of providing the judiciary and legal practitioners with guidance on sentencing in this area.

Conclusions

43. Recommendations from the *Hidden in Plain Sight* report included that ‘the Australian Government introduce defences for victims of modern slavery offences who are compelled to commit a crime due to exploitation, similar to but improving on section 45 of the *UK Modern Slavery Act 2015* and drawing from international best practice’.⁵¹ It was also recommended that specific guidance on sentencing be developed to support the introduction of these defences.
44. The Commonwealth *National Action Plan to Combat Modern Slavery (2020–25)*⁵² also made it a strategic priority to: ‘[U]ndertake a targeted review of support and legislative protections, defences and remedies available to modern slavery victims and survivors, particularly women and children, taking into account existing reviews and inquiries.’⁵³
45. The Victorian government has made a commitment to international human rights under the Victorian Charter—s 11 of which specifically addresses slavery, servitude, forced and compulsory labour.⁵⁴ A legislative defence to all crimes for victims of modern slavery should be introduced in Victoria to ensure that the individual’s status as a victim is protected, whilst also encouraging their cooperation in the prosecution of those responsible. It prevents Victoria from placing ‘victims in the dock’ and, instead, enhances law enforcement understanding of modern slavery and promotes the prosecution of those responsible for exploiting the victims of human trafficking.
46. Until such legislation is enacted, protective investigative practices, a non-prosecution policy and non-punishment guidance should be developed and published to protect victims of modern slavery in Victoria.
47. We respectfully urge our above recommendations on the Inquiry and welcome further consultation on these matters at your convenience.

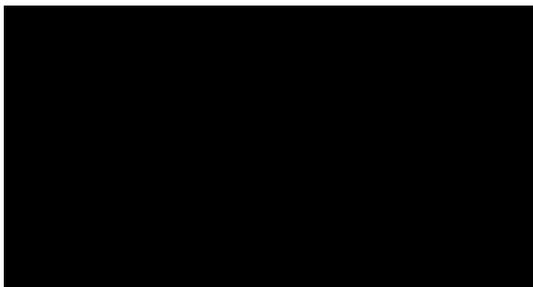
⁵¹ Recommendation 22.

⁵² <https://www.homeaffairs.gov.au/reports-and-publications/submissions-and-discussion-papers/combat-modern-slavery-2020-25>

⁵³ Australian Government, *National Action Plan to Combat Modern Slavery 2020–25* (2020) Action Item 26.

⁵⁴ *Charter of Human Rights and Responsibilities Act 2006*, s 11.

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Felicity Gerry QC

