

# *Honeymoon from hell: human trafficking and domestic servitude in Australia*

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## *Abstract*

Over the past decade policy and debate surrounding trafficking in persons in Australia have largely focused on trafficking into prostitution. The recent case of *R v Kovacs* changes that focus. The case involves the trafficking of a Filipina woman who was forced to work for a married couple as a domestic servant in their remote Queensland home and takeaway store. The outcome of a recent appeal in the case signifies an expansion to the definition of ‘slavery’ to deal with situations where more subtle forms of control are used effectively to enslave a person. This article explores the issue of trafficking for the purpose of domestic servitude and how the institution of marriage can be used to facilitate it, and analyses whether the relevant legislative and policy framework is set up to deal with cases of trafficking for the purpose of domestic servitude.

## **I Introduction**

Around the world, the fight against trafficking in persons has been a ‘war’ against prostitution for much of the 20th century. Government policy, law enforcement and media coverage of the issue in Australia have been preoccupied with stories about ‘sex slaves’ and the lurid nature of the prostitution industry. Indeed, the relevant case law in Australia tends to support this view of the issue, with the majority of cases involving sexual exploitation in legal and illegal brothels.

Other forms of trafficking in persons in Australia remain largely overlooked and have not been addressed systematically by relevant policies, legislation, and enforcement action. The recent case of *R v Kovacs* highlights that trafficking in persons in Australia is a crime that does not always fit preconceived notions.<sup>1</sup> The case involves a Filipina woman who was trafficked to Australia, facilitated by a sham marriage arranged by Mr and Ms Kovacs. Once the woman entered Australia, the married couple from Weipa in far north Queensland forced her to work in slave-like conditions in their home and takeaway store. It is also alleged that the woman was repeatedly raped by Mr Kovacs.

The case of *R v Kovacs* is unique for the fact that it highlights a number of previously unexamined aspects of human trafficking in Australia. In particular, the case demonstrates the issue of trafficking for the purpose of domestic servitude and how the institution of marriage can

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<sup>1</sup> [2009] 2 Qd R 51 (*Kovacs*).

be used to facilitate it. While there is substantial evidence of trafficking for the purpose of domestic servitude in other countries, there has been scarce investigation of the issue in Australia. The available research indicates that this form of trafficking is not so much rare as it is difficult to uncover and prosecute. Given the heavy focus in Australia on trafficking into the sex industry, it is questionable whether the relevant legislative and policy framework is sufficient to deal with cases of trafficking for the purpose of domestic servitude. In a legal context, the decision by the Queensland Court of Appeal in *R v Kovacs* expands on the ‘anti-slavery jurisprudence’ in Australia and the High Court’s decision in *R v Tang*.<sup>2</sup> In a practical way, the *Kovacs* decision expands the application of the relevant offences to forms of trafficking in persons beyond exploitation in the commercial sex industry.

This article examines the case of *R v Kovacs* and the wider issues pertaining to domestic servitude in Australia. It analyses the way in which the definition of ‘slavery’ in the *Criminal Code* (Cth) can be adapted to address situations of domestic servitude. The article identifies weaknesses and vulnerabilities of existing laws and explores avenues for future law reform and policy change.

## II *R v Kovacs*

### A *Summary of facts*

The case of *R v Kovacs* involves Mr Zoltan and Ms Melita Kovacs, a married couple who owned a takeaway food store in the small town of Napranum near Weipa in Far North Queensland. Sometime in December 2000, the couple decided to bring a woman from the Philippines to Australia to have her work in their shop and as a domestic helper in their home.<sup>3</sup> Subsequently, Mr Kovacs (an Australian citizen of Hungarian background) and his friend Mr Balint Olasz made plans to travel to Manila to find a suitable woman.<sup>4</sup> Mr Olasz later claimed that he travelled to the Philippines in 2001 intending to find a legitimate relationship with a Filipina woman after seeing his friend Mr Kovacs had a successful marriage to the Phillipines-born Melita. Because Mr Olasz was on an invalid pension and had little money, it was agreed that Mr Kovacs would pay for Mr Olasz’s airfares to the Philippines, provided the costs of this were offset by Mr Olasz’s new wife working for them for a short period.<sup>5</sup>

The first attempt made by Mr Olasz to marry failed when the woman returned to her boyfriend a few days after the ceremony.<sup>6</sup> Ms Kovacs then sought assistance from a woman she knew in the Philippines to identify a suitable person.<sup>7</sup> The woman in the Philippines suggested her niece, Ms G. At that time, the court later heard, Ms G was working with her aunt in a sewing factory and earning a little over \$10 a week. She was then 25 years of age and living in Manila with nine other family members in a one room, galvanised iron shack with no electricity, running water or telephone. The complainant was unmarried and had a son who was ill.<sup>8</sup>

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<sup>2</sup> (2008) 237 CLR 1 (*Tang*).

<sup>3</sup> *R v Kovacs* [2007] QCA 143, [2] (*Kovacs*).

<sup>4</sup> *Kovacs* [2009] 2 Qd R 51, [7].

<sup>5</sup> Margo Zlotkowski, ‘Marriage no sham, says man’, *The Cairns Post* (Cairns), 12 February 2010, 11.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Kovacs* [2009] 2 Qd R 51, [7].

<sup>8</sup> *Ibid.*

When Melita and Zoltan Kovacs approached Ms G's mother (who was in poor health at that time) with their plan, the mother encouraged Ms G to go with them so that Ms G could assist the family by sending remittances from Australia to the Philippines.<sup>9</sup>

On 8 January 2001 Ms G and Mr Olasz married in the Philippines.<sup>10</sup> According to court proceedings in 2008, Ms G was aware that the marriage was a sham only for the purpose of securing her visa to enter Australia.<sup>11</sup> This appears to conflict with a claim made by Mr Olasz in 2010 that he intended the marriage to be legitimate. Mr Olasz spent six weeks living with Ms G 'as husband and wife' in the Philippines before returning to Australia.<sup>12</sup> Following this, communication to his new wife ceased until September 2001 when he returned to Manila for three months. The purpose of this visit was to assist Ms G in her application for an Australian visa due to complications with an earlier application.<sup>13</sup>

Almost a year later, on 28 August 2002, Ms G arrived in Australia where she was met by Zoltan Kovacs at Cairns airport.<sup>14</sup> Mr Olasz was away on a sailing trip at that time.<sup>15</sup> They initially stayed in a motel in Cairns for several days where Mr Kovacs allegedly raped Ms G on at least three occasions.<sup>16</sup> In early September 2002, Mr Kovacs brought Ms G to Weipa and she began working in the shop during the day and in the Kovacs' house at night.<sup>17</sup>

The working conditions of Ms G can be described as nothing short of slavery. She had to work seven days a week, up to 17 hours per day, with little or no pay. At trial, the court heard evidence that on weekdays Ms G was working from 6am to 6 pm in the shop, followed by between four and five hours of domestic work at the Kovacs' house where she cared for three small children and did household duties. She also had to work in the shop on Saturdays between 6am and 12pm and performed domestic work the remainder of the weekend. She was not allocated any work free days.<sup>18</sup>

When Ms G was 'recruited' in the Philippines, Melita and Zoltan Kovacs said that she would receive \$800 for her work in Australia, which Ms G assumed was a sum to be paid monthly. Ms G was also told that some payment would be withheld to cover the expenses for her visa and travel to Australia. The total amount of these expenses was never revealed to her and she was not informed that she would have to do any domestic work in addition to working in the shop. Mr Kovacs did tell Ms G that she would 'have to work for five years before she could leave Australia.'<sup>19</sup> After arriving in Australia, Ms G never received a regular salary. At some point, she received two payments, one of \$400 and one of \$60. Ms G then gave some of that money, \$350, to Zoltan Kovacs to give to her family in Manila. The family later received about 7000 pesos, which converted to approximately \$180, and the Kovacs paid for some medical expenses for Ms G's son in Manila. It is not clear whether or not further payments were made to the family.<sup>20</sup>

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid 10.

<sup>11</sup> Ibid 9.

<sup>12</sup> Zlotkowski, above n 5, 11.

<sup>13</sup> *Kovacs* [2009] 2 Qd R 51 [10]; Zlotkowski, above n 5, 11.

<sup>14</sup> *Kovacs* [2009] 2 Qd R 51 [10].

<sup>15</sup> Kay Dibben, 'Man jailed for rape of sex slave "niece"', *The Sunday Mail* (Brisbane), 21 August 2005, 22.

<sup>16</sup> *Kovacs* [2009] 2 Qd R 51 [10]. The allegations of rape form the basis of additional charges. See below, 2.2: 'Before the Courts'.

<sup>17</sup> Ibid 9.

<sup>18</sup> Ibid 9–10.

<sup>19</sup> Ibid 8.

<sup>20</sup> Ibid 8–9.

Mr Kovacs continued raping Ms G in Weipa. At trial, the court heard evidence that:

Mr Kovacs had sexual intercourse with the complainant at the shop two to three mornings a week before the arrival at work of another employee, Ms Kris. On some of these occasions he gave her twenty or thirty dollars, which he described as “pocket money”. He also sexually assaulted her in the house when his wife was absent.<sup>21</sup>

Ms G did not initially complain of or report the rape because Zoltan Kovacs threatened that ‘they would all go to gaol’ if she spoke to police.<sup>22</sup> Ms G also continued to believe that she may be able to help her family abroad and did not want her mother to worry. Eventually Ms G made an attempt to flee from the Kovacs in October 2002, about two months after arriving in Australia. On that occasion she took a taxi to Ms Kris, a co-worker, who was the only person Ms G knew apart from the Kovacs. But Zoltan and Melita Kovacs found Ms G immediately, brought her back to their house and confiscated her passport.<sup>23</sup>

In December 2002, Ms G was able to flee from the Kovacs successfully with the help of Mr Kovacs’ estranged daughter, Ms Fabian, who was visiting her family for Christmas while her father was abroad. During that time she drove Ms G to the shop several times and on one of these trips Ms G told Ms Fabian that she had been repeatedly raped by her father and asked for her help to escape. Together with Ms Kris, Ms Fabian helped Ms G buy a ticket to fly from Weipa to Cairns.<sup>24</sup> She left Weipa with only a small handbag and the clothes she was wearing.<sup>25</sup> A former fishing buddy of Mr Kovacs, Mr Les Morvai, gave evidence in 2010 that he, too, helped to shelter Ms G while they were in Cairns and that together they went to the Kovacs to demand the return of her passport but were refused.<sup>26</sup> Ms G later contacted the Department of Immigration and Citizenship (DIAC) to inquire about obtaining a new passport and DIAC then referred the matter to police.

## B *Before the courts*

Zoltan and Melita Kovacs were tried together before the Supreme Court of Queensland sitting in Townsville in 2007.<sup>27</sup> At the end of the trial they were convicted of arranging the marriage between Ms G and Mr Olasz for the purpose of assisting Ms G to obtain a stay visa to enter Australia,<sup>28</sup> intentionally possessing a slave between 27 August 2002 and 5 February 2003,<sup>29</sup> and intentionally exercising power over/using a slave over the same period.<sup>30</sup> Zoltan Kovacs was sentenced to one year’s imprisonment for the marriage offence, and eight years’ imprisonment for the slavery offences, to be served concurrently. The court set a non-parole period of three years and nine months.<sup>31</sup> Melita Kovacs was sentenced to four years’ imprisonment for the slavery offences and one year’s imprisonment for arranging the sham marriage. The sentences were to be served concurrently and a non-parole period was set for her at 18 months.<sup>32</sup>

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<sup>21</sup> Ibid 11.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid 11–13.

<sup>24</sup> Ibid 13.

<sup>25</sup> Dibben, above n 15, 22.

<sup>26</sup> ‘Alleged slavery victim ‘ordered’ around, family friend says’, *The Cairns Post* (Cairns), 16 February 2010, 9.

<sup>27</sup> *Kovacs* [2007] QCA 143.

<sup>28</sup> *Migration Act 1958* (Cth) s 240(1).

<sup>29</sup> *Criminal Code* (Cth) s 270.3(1)(a) 1<sup>st</sup> alt.

<sup>30</sup> *Criminal Code* (Cth) s 270.3(1)(a) 2<sup>nd</sup> alt.

<sup>31</sup> *Kovacs* [2009] 2 Qd R 51 [4].

<sup>32</sup> Ibid 3.

On 21 December 2007, Mr and Ms Kovacs filed appeals against their convictions and sentences in the Court of Appeal. The appeal was heard on 29 October 2008 before de Jersey CJ, Muir and Fraser JJA. Between Mr and Ms Kovacs, a total of six grounds of appeal were contended at the hearing. On 23 December 2008, Muir JA delivered judgment with which de Jersey CJ and Fraser JA agreed.<sup>33</sup> The Court of Appeal held that a miscarriage of justice had occurred on the basis of two errors of the law. Accordingly, the appeal was allowed, the slavery convictions were set aside and a retrial was ordered. The convictions for arranging the sham marriage were upheld.<sup>34</sup> Part three of this article contains a more detailed consideration of the appeal and any subsequent contribution it has made to the Australian anti-slavery jurisprudence.

In February 2010, after a five-day trial in the Queensland Supreme Court at Cairns, Melita Kovacs was found guilty of using and possessing a slave while Zoltan Kovacs pleaded guilty to the same charges. Justice Stanley Jones subsequently sentenced Melita Kovacs to four years in jail, with a non-parole period of 18 months. Having served nine months in prison already, she will now be due for parole in December 2010. Mr Kovacs was sentenced to eight years in jail but is eligible for parole in May 2011 due to the fact that he is already serving a seven-year term for the rape and sexual assault of a different woman, Ms AV, in 1997.<sup>35</sup> Mr Kovacs' guilty plea and poor state of health were taken into account in the sentencing.<sup>36</sup>

Mr Kovacs has been charged with the rape of Ms G separately from the slavery matters, but this case has failed on a number of occasions. He was originally convicted of four counts of rape in 2005, but a retrial was ordered in 2006,<sup>37</sup> and again in 2007.<sup>38</sup> The retrial ordered in 2007 has since collapsed, but it has been reported that he will face trial for a fourth time in Townsville on a date yet to be fixed.<sup>39</sup>

Mr Kovacs was also convicted of two counts of rape and a single count of sexual assault against Ms AV, the niece of his wife, said to have occurred in 1997. Ms AV had been brought to Australia from the Philippines to act as a domestic cleaner for the couple. In similar circumstances to the case of Ms G, Ms AV allegedly told Ms Fabian of the rapes and Ms Fabian and her partner organised a plane ticket for Ms AV to fly from Weipa to Cairns.<sup>40</sup>

### III Trafficking for the purpose of domestic servitude

The case of *R v Kovacs* exposes a previously unexplored vulnerability in Australia's approach to trafficking in persons: trafficking for the purpose of domestic servitude. While the issue has not been flagged in Australia until now, it is interesting to note that in the United States involuntary domestic servitude accounts for 27 per cent of known trafficking cases.<sup>41</sup> The United States State Department's annual *Trafficking in Persons Report* describes involuntary domestic servitude as a 'unique form of forced labour' because the victims':

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<sup>33</sup> Ibid.

<sup>34</sup> Ibid 107.

<sup>35</sup> Evan Schwarten, 'Qld: Couple jailed for slavery', *Australian Associated Press* (Rhodes), 18 February 2010. See below, 2.2.3: 'Related Matters'.

<sup>36</sup> Zlotkowski, above n 5, 11.

<sup>37</sup> *R v KO* [2006] QCA 34.

<sup>38</sup> *Kovacs* [2007] QCA 143.

<sup>39</sup> Mark Oberhardt, 'Sex Slave Couple Appeal Judgements', *Courier Mail* (Brisbane), 1 January 2008.

<sup>40</sup> *R v Kovacs* [2007] QCA 441, [2], [14], [19]. AV is the pseudonym used to protect the real identity of the victim.

<sup>41</sup> Melynda H Barnhart, 'Sex and Slavery: An Analysis of Three Models of State Human Trafficking Legislation' (2009) 16 *William & Mary Journal of Women and the Law* 83, 86.

workplace is informal, connected to their off-duty living quarters, and not often shared with other workers. Such an environment is conducive to exploitation since authorities cannot inspect private property as easily as they can inspect formal workplaces.<sup>42</sup>

The case of *R v Kovacs* is by no means an isolated one but cases of domestic servitude rarely come to light in Australia, especially if they occur in rural and remote parts of the country. Moreover, relevant policy, law, and law enforcement in Australia is, by and large, preoccupied with trafficking into the sex industry,<sup>43</sup> and occasional investigations of allegations relating to labour trafficking.<sup>44</sup>

### A *The case law*

Apart from the *Kovacs* case, there are at present only a handful of documented cases with indicators relating to trafficking for the purpose of domestic servitude. None of these cases, however, involve criminal charges and without access to classified information it is not possible to classify accurately the following cases as instances of trafficking in persons.

In *Masri v Santoso*,<sup>45</sup> which came before the New South Wales Industrial Relations Commission in 2004, a 27-year-old Indonesian woman claimed that she had come to Australia aged 18 to work as a ‘nanny and house servant’ for the Santoso family. Ms Masri claimed she arrived in the belief she would be paid for her services. The family, however, argued she was ‘brought to Australia as a favour to the driver of an Indonesian relative: it was never to be paid employment and any work performed she had volunteered’.<sup>46</sup> During her stay in Australia, she worked 17 hours a day, seven days a week carrying out domestic duties and helping to care for the couple’s three children in their waterfront mansion.<sup>47</sup> Over a period of two years, she was also required to give Mr Santoso a nightly massage.<sup>48</sup> During the four years she was working for the family she earned a total of \$5190. Half of this amount she sent home to her family, who were subsistence farmers in a village in Indonesia.<sup>49</sup> The Santoso family argued that she was free to leave but the judge found the family had taken her false passport, which they also allegedly arranged.<sup>50</sup> She was ultimately awarded \$95 000 in unpaid wages.<sup>51</sup>

In an unreported case, three domestic staff at a foreign embassy in Canberra were allegedly forced to work under slave-like conditions.<sup>52</sup> In this instance, a male cleaner from a Persian Gulf state presented himself at Legal Aid in Sydney in 2007. He stated that he had been performing similar domestic services in his Middle Eastern home country when he was invited to work at the embassy in Canberra. Once in Australia, the man’s passport was confiscated and he was not paid for the six months in which he worked as a domestic cleaner to the ambassador at night and performed office duties at the embassy during the day. Due to the *Diplomatic*

<sup>42</sup> United States Department of State, *Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report*, Washington (DC): Department of State, June 2009, 18.

<sup>43</sup> See also Andreas Schloenhardt, Genevieve Beirne and Toby Corsbie, ‘Human Trafficking and Sexual Servitude in Australia’ (2009) 32 *University of New South Wales Law Journal* 27, 31.

<sup>44</sup> *Ibid* 35–6; see also *Fryer v Yoga Tandoori House Pty Ltd* (2008) 60 AILR 100.

<sup>45</sup> (2004) 131 IR 184 (*‘Masri’*).

<sup>46</sup> *Ibid* 185 (Haylen J).

<sup>47</sup> Leonie Lamont, ‘Silent shame of our new slaves’, *The Sydney Morning Herald* (Sydney), 10 June 2004.

<sup>48</sup> *Masri* (2004) 131 IR 184, 193 (Haylen J).

<sup>49</sup> Leonie Lamont, ‘Hollow win for 20-cent-an-hour slave who may never see \$95,000 backpay’, *The Sydney Morning Herald* (Sydney), 8 May 2004.

<sup>50</sup> *Masri* (2004) 131 IR 184, 216, 223 (Haylen J).

<sup>51</sup> *Ibid* 227.

<sup>52</sup> Julie Lewis, ‘Out of the Shadows’ (2007) 45 *Law Society Journal* 24.

*Privileges and Immunities Act 1967* (Cth) the employment contract between the victim and the ambassador was unenforceable. There remained a possibility that the man would be able to sue his home state for breach of a secondary employment contract. Lyn Payne, the man's Legal Aid representative, stated that she was aware of at least two other cases, including one where a worker had remained unpaid after two years while being subjected to periodic physical abuse.<sup>53</sup>

A recent case, which was reported in the Australian media,<sup>54</sup> concerns a Family Court settlement of both property and custody.<sup>55</sup> Mr and Ms Columbia (both pseudonyms) lived in a small country town in northern Tasmania, and separated on 30 July 2007 after a Domestic Violence Order was issued against the husband. Mr Columbia, aged 55 at the time of the separation, was a man weighing around 200 kilograms and has been described as 'morbidly obese.'<sup>56</sup> He had been married five times prior to marrying Ms Columbia. Around 1997 Mr Columbia, aged 43 at the time, travelled to Thailand where he met Ms Columbia, who was then 26-years-old. He alleged she was working as a sex worker at the time. His wife denied this claim, stating that she was working in a factory. Mr Columbia brought his future wife to Australia for a short period in 1998, and then permanently in 1999. The couple ran a market in which Ms Columbia was forced to do the majority of the exceptionally labour-intensive work. It was alleged that Mr Columbia demanded 'his wants be attended to before anybody else's.'<sup>57</sup> It has also been reported that Mr Columbia was accustomed to sit on a stool while waving a stick and abusively yelling directions. At trial, the judge described him as 'overbearing and bullying', and 'loud' and 'abrasive'.<sup>58</sup> Special note was taken of the care Ms Columbia provided to her husband, which involved bathing and dressing him, as well as applying ointment to his haemorrhoids. There was evidence of physical violence having been used against the children of the couple by Mr Columbia, and of abusive language having been used against Ms Columbia.<sup>59</sup>

In 1999, during parliamentary debates regarding the proposed sexual slavery and servitude laws, the Hon Tanya Plibersek noted two further cases of domestic servitude:

The first case I will mention is one which was before the District Court yesterday and is continuing today. A man from Shanghai, Wei Ling Kang, is suing a woman for loss of wages and false imprisonment. His legal representatives say that he has no passport, no money and speaks no English. They allege that he is being physically restrained and that his employer or sponsor is threatening to tell Australian authorities that he is an illegal immigrant and to have him deported. He is in Villawood Detention Centre at the moment, and it will be very interesting to see the result of his case.

Not so long ago in another case, Mr Satyendra Nath Midya claimed that he also was being held in domestic servitude. The outcome of his case was that the judge found that he had received some payment for the work he had done—\$25 a week—and that he had overstated the amount of work that he had done, but that his employers had dramatically understated the work that he had done. An order was made to pay him for lost wages of \$21,840.<sup>60</sup>

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<sup>53</sup> Ibid 26.

<sup>54</sup> Caroline Overington, 'Fat Bully Loses to Thai Bride used as Servant', *The Australian* (Australia), 23 May 2009, 3.

<sup>55</sup> *Columbia & Columbia* [2009] FamCA 311 (8 April 2009).

<sup>56</sup> Ibid [13].

<sup>57</sup> Ibid [17].

<sup>58</sup> Ibid [20].

<sup>59</sup> Ibid [33].

<sup>60</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 August 1999, 8506 (Tanya Plibersek). Full reports of these cases are available at: *Midya v SAGRANI* [1999] NSWCA 187 (28 May 1999); *Kwan v Kang* [2003] NSWCA 336.

These cases convincingly illustrate situations that may be classified as trafficking for the purpose of domestic servitude in Australia. These situations, however, rarely feature in criminal proceedings and are more commonly uncovered in the course of proceedings in other areas of law. As with other types of domestic violence, cases of domestic servitude are frequently perceived as mere family disputes or employment issues.<sup>61</sup>

## B Sham marriages

The case of *R v Kovacs* also confirms longstanding concerns that marriage may be used as an avenue to bring women into Australia for the purpose of domestic exploitation. Despite frequent media reports, this practice remains poorly researched—and inadequately regulated—in Australia.

The term ‘sham marriages’ refers to situations where a person misuses the immigration system that permits Australian citizens and permanent residents to sponsor a partner who lives abroad so that the person may migrate to Australia permanently. The marriages are entered into purely for immigration purposes with no genuine intention that the two parties continue their relationship once the migrant is in Australia. Entering into a contrived marriage or relationship, or pretending to be in a ‘genuine and continuing relationship’ for immigration purposes, is recognised as a form of immigration fraud.<sup>62</sup> In a 2005 report, the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA, now DIAC) reported several incidents of contrived marriages and relationships. Of the 3,999 allegations of fraud received by the Department, 48 per cent were incidents of contrived or sham relationships.<sup>63</sup>

Partner visas are designed for persons who seek to enter and remain in Australia on the basis of their married or de facto relationship. Their partner must be an Australian citizen, Australian permanent resident, or an eligible New Zealand citizen. The visa requirements for spouses, fiancées, and de facto partners are very similar.<sup>64</sup> The spousal visa system has a two-year period of temporary residency. If the marriage or relationship is determined to be genuine and continuing, holders of subclass 820, 309 or 300 visas will be automatically granted permanent residency after the two-year waiting period.<sup>65</sup> It is possible that the two-year period of temporary residency requirement may actually force a bride to be dependent on her husband in order to gain residency, thus making her vulnerable to instances of domestic servitude. There is, however, an exception to the two-year waiting period for permanent residency that may be made in a case of domestic violence under div 1.5 of the *Migration Regulations 1994* (Cth). This allows for the victim of domestic violence who has not completed the two-year waiting period to remain in Australia if they leave their spouse.

In relation to trafficking in persons, two separate issues need to be examined. The first involves the subversion of the Australian spousal visa program for trafficking purposes, while the second involves ‘serial sponsorship’ where an individual may sponsor multiple persons to

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<sup>61</sup> See also, Heather Douglas and Lee Godden, ‘The decriminalisation of domestic violence: examining the interaction between the criminal law and domestic violence’ (2003) 27 *Criminal Law Journal* 32.

<sup>62</sup> *Migration Act 1958* (Cth) div 12, sub-div B.

<sup>63</sup> Department of Immigration and Multicultural and Indigenous Affairs, *Managing the Border: Immigration Compliance — 2004–05 edition* (2005) 89.

<sup>64</sup> For a general overview of the operation of partner visas, see the explanation of partner visa provisions at Department of Immigration and Citizenship, *Partner Visa Options — Family Members — Migrants — Visas & Immigration* (18 August 2010) <<http://www.immi.gov.au/migrants/family/family-visas-partner.htm>>.

<sup>65</sup> *Migration Regulations 1994* (Cth) reg 2.08G.



enter Australia where they may then be subjected to exploitative situations. Sponsorship through other visa systems are not further examined here; those have been explored elsewhere.<sup>66</sup>

### 1 *Sham marriages and human trafficking*

The case of *R v Kovacs* is one of very few known cases linking sham marriages with human trafficking. As outlined earlier, Mr Kovacs and his wife wanted to employ a worker and domestic helper from the Philippines, so they organised a sham marriage between Ms G and Mr Olasz. Ms G was told that ‘she would need to marry a white Australian man in order to assist in obtaining a visa, but that the marriage would be fake.’<sup>67</sup> It did appear, however, that Mr Olasz was indeed looking for a legitimate relationship with a woman from the Philippines.<sup>68</sup> While the application for a visa failed on the first attempt due to a lack of evidence to support a genuine relationship, it was granted upon the second attempt. This was after Mr Olasz spent a three-month period living in the Philippines to support the application.<sup>69</sup> Mr Olasz claimed that the arrangement with the Kovacs was for Ms G to work for them until the costs of arranging the marriage were paid off.<sup>70</sup>

The principal trafficking element in the *Kovacs* case is the fact that the sham marriage was used to facilitate the victim’s transportation to Australia. Ms G was coerced into marrying Mr Olasz by offering promises of payment in return for domestic work, something Ms G was vulnerable to in her position of poverty. This was evidenced by the encouragement of her mother to comply with the plan so that she could send remittances back to the family. The marriage itself was fraudulent and the Kovacs were actively involved in applying for Ms G’s visa and setting up the marriage in order to facilitate her entry into Australia to work for them. The deception of the victim relates to the actual conditions of her work in Australia and the payment she would receive for it. This formed the basis of her exploitation.

The domestic nature of the *Kovacs* case can be contrasted with the case of *R v FAS*,<sup>71</sup> which links misuse of the spousal visa system with exploitation for commercial profit. In this case, the wife was the subject of an arranged marriage. She migrated from Egypt to Australia, but was forced to work in a brothel by her husband within two weeks of their arrival. This continued for two years before he attempted to abandon her. It is estimated that he made around \$200 000 from her prostitution, while he also forced her to have an abortion contrary to her wishes. The husband was convicted of procuring a person for prostitution and sentenced to three years’ imprisonment.<sup>72</sup>

### 2 *Sham marriages and serial sponsorship*

The term ‘serial sponsor’ refers to the immigration sponsorship of more than one partner, despite the fact that previous marriages through sponsorship have failed. The term usually also implies some form of abuse or exploitation in the partnership.<sup>73</sup> While there have been allegations in the

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<sup>66</sup> For example the link between Skilled–Regional Sponsored (Provisional) visas, subclass 457, has been examined in Schloenhardt, Beime and Corsbie, above n 43, 35–36.

<sup>67</sup> *Kovacs* [2009] 2 Qd R 51 [9].

<sup>68</sup> Zlotkowski, above n 5, 11.

<sup>69</sup> *Ibid*; *Kovacs* [2009] 2 Qd R 51 [10].

<sup>70</sup> Zlotkowski, above n 5, 11.

<sup>71</sup> [2008] NSWDC 53.

<sup>72</sup> *Crimes Act 1900* (NSW) s 91B.

<sup>73</sup> I Cabilao Valencia Minda, ‘Responding to the needs and interests of women in intermarriage: the Philippines experience’ (Speech delivered at the International Council on Social Welfare 31<sup>st</sup> International Conference, Kuala Lumpur, 20 August 2004) 162–3.

media that Mr and Ms Kovacs may have previously sponsored other women to immigrate to Australia to work for them, these reports can, at present, not be confirmed.<sup>74</sup>

Serial immigration sponsorship has been the subject of a study published in 1995, which reported that:

The field work conducted for DILGEA [Department of Immigration, Local Government and Ethnic Affairs, now Department of Immigration and Citizenship (DIAC)] over a three month period revealed a total of 110 active or recent (last two years) repeat sponsors. ... In 1992 DILGEA did not keep records of the number of sponsorships per applicant, except in Manila where a database had just been established. Fifty-three of the repeat sponsors had sponsored on two occasions and 57 had sponsored at least three times. The maximum number of sponsorships was five. ... Of the 110 cases of men involved in repeat sponsorship, 80 (73 per cent) were 'known' to have perpetrated some form of domestic violence. ... 101 (92 per cent) of the 110 cases detailed involved women from Asia.<sup>75</sup>

The report further noted that these figures probably underestimate the true scale of the problem, due to the manner in which the data was gathered (interviews, questionnaires and discussions with government and non-government organisations).<sup>76</sup>

The exploitation that occurs in these cases does not automatically amount to instances of human trafficking. This would only be the case if a person is brought into the country specifically for the purpose of exploitation. This must be distinguished from the type of situation where a person is sponsored and subsequently subjected to domestic violence in the relationship once in Australia. The available data, however, does not differentiate between these two situations.

Concerns about domestic violence against migrant partners led to legislative amendments in 2005.<sup>77</sup> Under regulation 1.20J, a person is now prevented from sponsoring more than two partners except in 'compelling circumstances'.<sup>78</sup> These amendments are a significant step forward in preventing human trafficking through immigration fraud.

### C *International matchmaking agencies*

Closely connected to the issue of 'sham marriages' are situations in which men use international matchmaking agencies to find potential wives who they can then use as domestic slaves. The term 'mail-order bride', which is frequently used in this context, is controversial and subject to misinterpretation. It commonly refers to a scheme whereby Western men are able to organise to marry women from other countries through an agency. The term carries negative connotations, relating to both the women and the men involved, but continues to be used widely.

The way in which marriage was used in the *Kovacs* case to exploit a foreign woman for domestic servitude raises concerns that the 'mail-order bride' process may be vulnerable to a similar activity. Multiple dating or introduction services operate in Australia, usually using internet sites which involve the payment of a subscription fee to allow male customers to view the profiles of women interested in meeting foreigners with a view towards marriage. Although only two of the sites surveyed for the purpose of this article appear to be Australian-owned and -

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<sup>74</sup> Peter Martinelli, 'Couple to face charge of slavery', *Cairns Post* (Cairns), 27 July 2006, 1; James O'Loan, 'Friend of accused tells court: Pair paid for trip not marriage', *Cairns Post* (Cairns), 28 July 2006, 7.

<sup>75</sup> Robyn Iredale, 'Serial Sponsorship: Immigration Policy and Human Rights' (1995) 3 *Just Policy* 37, 40-1.

<sup>76</sup> *Ibid* 38-9.

<sup>77</sup> *Migration Amendment Regulations 2005 (No 4)* (Cth) reg 5 sch 3.

<sup>78</sup> *Migration Regulations Act 1994* (Cth) reg 1.20J.

run, many American websites are available for use by Australian men. It is difficult to determine the exact number of women who migrate to Australia under these circumstances, as comprehensive information about how foreign women are initially introduced to their Australian partners is unavailable.

Starting in the late 1980s, several articles called for the end of Filipino ‘mail-order bride’ services and agencies, arguing that women usually enter such marriages as a result of desperation induced by poverty.<sup>79</sup> The Anglican Church specifically expressed concerns about the accessibility of support services in Australia, arguing that many ‘mail-order brides’ live in isolated or remote areas,<sup>80</sup> as was the case in *R v Kovacs*. In 1993, the disappearances and deaths of 18 Filipina women in the preceding six years prompted calls for a national inquiry into the Australian ‘mail-order bride’ industry.<sup>81</sup> In one case, a man had contacted an introduction agency seeking a Filipina wife, only days prior to killing the Filipina woman to whom he was already married.<sup>82</sup> A report published in 2000 found that between 1989 and 1992, Filipina women in Australia aged between 20 and 39 were six times more likely to be victims of homicide than Australian women.<sup>83</sup> A push for a Royal Commission in July 1993 and the reopening of some investigations, however, produced no outcomes.<sup>84</sup> More recently, the murder-suicide of a 24-year-old Filipina ‘mail-order bride’ and her eight-month-old son in 2004 was considered indicative of the isolation and lack of support felt by many new Filipina brides when they move to Australia.<sup>85</sup>

The *Introduction Agents Act 1997* (Vic) and the *Introduction Agents Act 2001* (Qld) were introduced ‘due to continuing unfair trading practices in parts of the industry, which have led to considerable consumer detriment’.<sup>86</sup> The Queensland legislation extends the requirement of notice in the Victorian legislation to require that any business—the work of which involves introducing people who are interested in having a personal relationship or attending a social gathering—must be licensed as an introduction agent.<sup>87</sup> There are a number of exclusions for community and not-for-profit organisations.<sup>88</sup> The legislation places restrictions on introduction agents’ conduct, particularly their advertising, hiring and management of staff and use of client information,<sup>89</sup> as well as requiring that clients and agents subscribe to certain agreements in the performance of introduction services.<sup>90</sup> The laws also provide for various methods of enforcement of relevant provisions.<sup>91</sup>

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<sup>79</sup> ‘Church Assails Bride-Ordering’, *The Globe and Mail* (Toronto), 12 May 1988, 14.

<sup>80</sup> Wanda Jamrozik, ‘Mail-Order Marriages Concern Church’, *The Sydney Morning Herald* (Sydney), 23 January 1989, 6.

<sup>81</sup> Ian Munro, ‘Push For An Inquiry Into Filipino Deaths’, *The Sunday Age* (Melbourne), 4 July 1993, 4.

<sup>82</sup> Chris Cunneen and Julie Stubbs, ‘Male Violence, Male Fantasy and the Commodification of Women Through the Internet’, (2000) 7 (1–3) *International Review of Victimology* 5, 7.

<sup>83</sup> *Ibid* 6.

<sup>84</sup> As is evidenced by a search of Royal Commission reports available on the Australian Parliamentary Library’s website: Parliament of Australia, *List of Royal Commissions 1902 – (6 November 2010)* Parliamentary Library, <<http://www.aph.gov.au/library/INTGUIDE/law/royalcommissions.htm#1977>>.

<sup>85</sup> Duncan Macfarlane, ‘Murder-Suicide Highlights Plight of Mail Order Brides’, *The Australian* (Sydney), 16 February 2004, 4.

<sup>86</sup> Explanatory Memorandum, *Introduction Agents Bill 2001* (Qld) 1.

<sup>87</sup> *Introduction Agents Act 2001* (Qld) ss 9, 18.

<sup>88</sup> *Ibid* ss 11–14.

<sup>89</sup> *Ibid* part 4.

<sup>90</sup> *Ibid* part 5.

<sup>91</sup> *Ibid* part 6.

## IV Criminal offences

### A Legislative background and landscape

Mr and Mrs Kovacs were charged under s 270.3(1) *Criminal Code* (Cth) with intentionally possessing a slave and intentionally exercising over a slave a power attaching to the right of ownership. Division 270 was added to the *Criminal Code* (Cth) in 1999 in order to modernise Australia's slavery laws, but it also represented a first attempt at addressing human trafficking.<sup>92</sup> In 1990, the Australian Law Reform Commission (ALRC) reviewed the state of the Australian law in respect of slavery and the slave trade. It was found that these practices were still governed by four 19th century British Imperial Acts, and recommendations were made to repeal the Imperial Acts and create modern slavery offences in Australia.<sup>93</sup> In 1998, acting on the recommendations made by the ALRC in 1990, a Report by the Model Criminal Code Officers Committee (MCCOC) recommended a new section be introduced into the *Criminal Code* (Cth) in order to criminalise slavery, sexual servitude, and deceptive recruiting.<sup>94</sup>

In response to these recommendations, the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) added div 270 into the *Criminal Code* (Cth). The Division contains offences relating to slavery, sexual servitude, and deceptive recruiting. Sections 270.1–270.3 relate to slavery, which is further defined in s 270.1 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’. Section 270.2 highlights that ‘slavery remains unlawful and its abolition is maintained, despite the repeal by the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* of Imperial Acts relating to slavery’. Accordingly, ‘slavery does not exist under Australian law and ownership of a human being is impossible.’<sup>95</sup> 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. These slavery offences are divided into intentional offences (s 270.3(1)) and offences involving recklessness (s 270.3(2)).

In a separate development, on 15 November 2000, the United Nations (UN) *Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children*,<sup>96</sup> supplementing the *Convention Against Transnational Organized Crime*,<sup>97</sup> was adopted by the UN General Assembly. Australia signed the *Trafficking in Persons Protocol* on 11 December 2002. The definition of ‘trafficking in persons’ is set out in art 3(a) of the Protocol:

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

<sup>92</sup> *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth); Commonwealth, *Parliamentary Debates*, House of Representatives, 11 August 1999, 8514 (Sharman Stone, Minister for the Environment and Heritage).

<sup>93</sup> Law Reform Commission, *Criminal Admiralty Jurisdiction and Prize, Report No 48* (1990) 72, 82–101.

<sup>94</sup> See Model Criminal Code Officers Committee, Standing Committee of Attorneys-General, *Chapter 9 — Offences Against Humanity — Slavery: Report* (November 1998).

<sup>95</sup> Irina Kolodizner, ‘R v Tang: Developing an Australian Anti-Slavery Jurisprudence’ (2009) 31 *Sydney Law Review* 487, 490.

<sup>96</sup> Opened for signature 15 December 2000, 2237 UNTS 319, Annex II (entered into force 31 May 2004), (*Trafficking in Persons Protocol*).

<sup>97</sup> Opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003) (*Convention Against Transnational Organized Crime*).

benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Following allegations in the media of mishandling of cases of trafficked women by government agencies, the Parliamentary Joint Committee on the Australian Crime Commission was tasked with evaluating the adequacy of the current legislative framework in terms of trafficking for the purposes of sexual servitude in Australia.<sup>98</sup> The subsequent report of the *Inquiry into the Trafficking of Women for Sexual Servitude*, released in June 2004, noted that the existing offences in the Commonwealth law were ‘effective’ but that a ‘speedy review’ of the law and legislative amendments was required, particularly in relation to the necessary ratification of the *Trafficking in Persons Protocol*.<sup>99</sup> In response to these recommendations, the *Criminal Code Amendment (Trafficking in Persons and Debt Bondage) Act 2005* (Cth) was passed with the intention that it would comply with any obligations created by the *Trafficking in Persons Protocol*.<sup>100</sup> Specifically, this legislation inserted div 271 into the *Criminal Code* (Cth) creating a comprehensive set of offences in respect of international and domestic trafficking in persons, and debt bondage arrangements. This Act also made amendments to div 270 of the *Criminal Code* (Cth), including a significant extension to the scope of the existing deceptive recruiting offence and an alteration of the relevant jurisdictional requirements applied to the Division. On 14 September 2005, Australia ratified the *Trafficking in Persons Protocol*. Since this time there have been no substantive changes to divs 270 or 271 of the *Criminal Code* (Cth).

## B An expansion of the anti-slavery jurisprudence

The offences used in the prosecution of Mr and Ms Kovacs recently received the attention of the High Court in 2008 in the case of *R v Tang*.<sup>101</sup> In this case, the court upheld the convictions of the owner of a brothel in Melbourne, Ms Wei Tang, for slavery offences under s 270.3(1)(a) and, for the first time, sought to clarify the modern definition of ‘slavery’. Because slavery does not legally exist under Australian law, due to s 270.2, the court primarily had to decide ‘how to recognise and define slavery’.<sup>102</sup> In addressing this issue, a broad view of the definition of ‘slavery’ was accepted and given a meaning consistent with that at international law.<sup>103</sup> In particular, the court held that ‘more subtle forms of control and possession rather than physical threats and force can be used to establish ‘slavery’ under the *Criminal Code*.’<sup>104</sup> Jennifer Burn states that the kinds of indicia that demonstrate slavery will now ‘in fact apply to a person who is working in agriculture, or in a kitchen.’<sup>105</sup> However, Burn further notes that the ‘the High Court made it absolutely clear that harsh employment conditions are not necessarily slavery’.<sup>106</sup> The

<sup>98</sup> Parliamentary Joint Committee on the Australian Crime Commission, Senate, Parliament of Australia, *Inquiry into the trafficking of women for sexual servitude* (2004) vii.

<sup>99</sup> *Ibid* xiv.

<sup>100</sup> Revised Explanatory Memorandum, *Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004* (Cth) 1.

<sup>101</sup> (2008) 237 CLR 1.

<sup>102</sup> Kolodizner, above n 95, 491.

<sup>103</sup> *Ibid*; Bronwyn Byrnes, ‘Beyond Wei Tang: Do Australia’s human trafficking laws fully reflect Australia’s international human rights obligations?’ (Speech delivered at Workshop on Legal and Criminal Justice Responses to Trafficking in Persons in Australia: Obstacles, Opportunities and Best Practice, Monash University Law Chambers, Melbourne, 9 November 2009) [33].

<sup>104</sup> Byrnes, above n 103 [30].

<sup>105</sup> ABC — ‘The Law Report’, *The Wei Tang Decision*, 2 September 2008. (Damien Carrick, Interview with Jennifer Burn)

<sup>106</sup> *Ibid*.

case of *R v Kovacs* thus provides an interesting study of how this new approach to slavery would be applied.

It should be noted that in situations similar to *R v Kovacs* there might also exist the possibility that the offender can be prosecuted under the trafficking offences in s 271.2 *Criminal Code* (Cth). However, these offences, which were inserted along with other trafficking offences in 2005, did not exist at the time the *Kovacs* case came to light.

In *R v Kovacs* the Queensland Court of Appeal considered six grounds of appeal contended by the appellants. The Court of Appeal dismissed the first ground of appeal that the trial judge had both misdirected and failed to direct the jury in relation to the elements of the slavery charges against both Melita and Zoltan Kovacs.<sup>107</sup> It confirmed the approach of the High Court in stating that there are three elements to the offence of slavery.<sup>108</sup> On the first ground of appeal it was also argued that there was a failure to give adequate directions regarding the fault element of the slavery offence because the meaning of ‘intention’ and how it relates to the physical element of ‘conduct’ had not been explained.<sup>109</sup> The court, however, did not find that this amounted to a miscarriage of justice.<sup>110</sup>

The Court of Appeal also rejected the second ground of appeal that ‘the primary judge erred in directing the jury that to find [Ms Kovacs] guilty they did not need to be satisfied that [Ms G] was in the condition of slavery for the duration of the period charged.’<sup>111</sup> This contention necessitated a consideration of what amounted to the condition of slavery. The trial judge directed the jury that ‘you do not have to be satisfied that 24 hours a day, seven days a week that condition existed.’<sup>112</sup> Instead he directed the jury that they only had to be satisfied beyond reasonable doubt ‘that during that period she was at some time or times in a condition of slavery and that at the time or times she was in a condition of slavery she was possessed or used by the accused’.<sup>113</sup> Counsel for the Kovacs argued that reducing a person to the condition of slavery ‘cannot be transitory in nature’ because it would be inconsistent with the concept of legal ownership of property.<sup>114</sup> In rejecting this ground of appeal the Court of Appeal held that:

The offence of slavery is not one constituted by the doing of prescribed acts. It is an offence which, in this case at least, is constituted by a course of conduct which comprises a number of acts over an extended period.<sup>115</sup>

As such it was held that the prosecution did not need to establish ‘that the subject offences occurred on every day between the dates alleged.’<sup>116</sup> This finding reflects the expansion of the modern definition of slavery espoused in the *Wei Tang* decision, whereby the victim does not need to be under total ‘lock and key’ control in order to prove the offence of slavery.

A third ground of appeal that the verdicts were unreasonable and against the weight of evidence, was also dismissed.<sup>117</sup> In support of this ground of appeal it was contended that Ms G had ‘a degree of personal freedom inconsistent with the existence of slavery as defined in the

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<sup>107</sup> *Kovacs* [2009] 2 Qd R 51, 14–19.

<sup>108</sup> *Ibid* 18.

<sup>109</sup> *Ibid* 20–5.

<sup>110</sup> *Ibid* 27.

<sup>111</sup> *Ibid* 33–43.

<sup>112</sup> *Ibid* 33.

<sup>113</sup> *Ibid*.

<sup>114</sup> *Ibid* 36.

<sup>115</sup> *Ibid* 41.

<sup>116</sup> *Ibid* 43.

<sup>117</sup> *Ibid* 44–8.

Code.<sup>118</sup> Evidence of this, it was submitted, was that she was not locked in her room, was not prevented from leaving the store or house, had access to a telephone, sent and received letters, and was aware money was being paid to her family, despite not receiving wages herself.<sup>119</sup> The court held, however, that this ‘freedom’ was ‘largely illusory or non-existent’.<sup>120</sup> It is on this issue that the court embraced the approach of the High Court in *R v Tang*. Justice Muir noted in his judgment that a number of factors combined to prevent Ms G from leaving:

The complainant's family were in circumstances of dire poverty. The receipt of money from the appellants was important in alleviating the effects of that poverty. The complainant knew this and had allowed herself to be persuaded to come to Australia in order to provide financial assistance to her family. The complainant's mother was sick and the complainant did not want to let her down or trouble her. The complainant gave evidence to the effect that Mr Kovacs told her not to say anything to the police or they would all go to jail. Having regard to the manner in which she had gained entry to Australia, Mr Kovacs' warning would not have appeared exaggerated.

Other factors operating to the complainant's disadvantage were: her limited knowledge of the English language, at least in the first few months of her stay; her lack of Australian friends or associates; the unspecified amount of debt of which she had been informed and and the remote location of the shop and house.<sup>121</sup>

Ms G was also forcibly returned after attempting to escape and had her passport confiscated.<sup>122</sup> It was on consideration of this evidence that the court rejected this ground of appeal. This decision highlights that despite the apparent freedom of a person to leave, they may still be enslaved by a number of more subtle factors.

The fourth ground of appeal, that ‘the primary judge erred in failing to order separate trials’ for the two defendants was also held to be unsustainable.<sup>123</sup>

The Kovacs’ appeal was, however, successful on the basis of two errors of law. First, the Court of Appeal held that the trial judge erroneously admitted evidence of the complaints made by Ms G to Ms Fabian and that he failed to direct the jury to ignore that evidence.<sup>124</sup> Second, the Court of Appeal held that the trial judge failed to give adequate directions when one witness gave evidence from behind a screen.<sup>125</sup> Because a screen was used the presiding judge must, according to s 21A(8) of the *Evidence Act 1977* (Qld), direct that the jury should not draw inferences as to the defendant’s guilt, increase or decrease the probative value of the evidence or give it any greater or lesser weight. It was held that the directions given by the trial judge did not address all of these elements.<sup>126</sup> The court highlighted a number of inconsistencies in the evidence but ultimately found that the ‘natural limitations’ on the Court of Appeal’s ‘ability to evaluate and find the relevant facts prevent a finding of guilt beyond a reasonable doubt.’<sup>127</sup>

In the wake of the *Wei Tang* decision, the decision of the Court of Appeal in *R v Kovacs* serves to reinforce the direction of Australia’s anti-slavery jurisprudence. In particular, the

<sup>118</sup> Ibid 46.

<sup>119</sup> Ibid 44.

<sup>120</sup> Ibid 46.

<sup>121</sup> Ibid 47–8.

<sup>122</sup> Ibid 48.

<sup>123</sup> Ibid 49–53.

<sup>124</sup> Ibid 76.

<sup>125</sup> Ibid 77–84.

<sup>126</sup> Ibid 84.

<sup>127</sup> Ibid 85–106.

expanded meaning of ‘slavery’ accepted by the High Court in *R v Tang* was used to facilitate the — ultimately successful — prosecution of a novel case that involved domestic servitude. The decision recognises the view in *R v Tang* that there are cases of trafficking and slavery where more subtle forms of coercion are used to prevent the victim from leaving.

## V Lessons learned

The *Kovacs* case is the first case of trafficking for domestic servitude to be prosecuted under slavery laws in Australia. As such, it provides an interesting insight into the unique nature of trafficking for the purpose of domestic servitude. The victim, Ms G, worked in a takeaway food shop, in the view of the public, on a daily basis and yet it took five months for her to escape. The subtle factors that served to prevent Ms G from escaping any earlier have been canvassed in earlier parts of this article. The very fact that Ms G was not under ‘lock and key’ or ‘total’ ownership is indicative of the level of subtle control the Kovacs had over her. Indeed, when asked why she did not attempt to leave or report the situation or rapes to relatives, Ms G stated that ‘shame and embarrassment in Filipino society, not just to her but also her ailing mother, had stopped her saying anything’.<sup>128</sup> This perhaps explains why cases such as this are so difficult to detect.

Another lesson from the *Kovacs* case is the way in which persons from developing nations may be vulnerable to promises of paid domestic work in Australia. It is quite clear from the case that Ms G was coming to Australia in order to provide for her family, in particular her son and mother who were in poor health. As such, Ms G was in a very vulnerable position.

The *Kovacs* case also highlights how remote locations can make detection of trafficked persons extremely difficult. Justice Muir specifically noted that ‘the remote location of the shop and house’ served further to disadvantage Ms G.<sup>129</sup> A number of media reports allege that the Kovacs had a history of holding female foreign workers against their will.<sup>130</sup> It was reported that Mr Kovacs’ daughter told the court her father had previously held two Hungarian women at Weipa against their will in the 1990s. It was claimed that he withheld their passports, forced them into domestic work to repay the cost of their flights and that they were subjected to abuse.<sup>131</sup> While these reports are currently unsubstantiated by any court proceedings, they further emphasise the way in which remote areas may provide perfect ‘hiding spots’ for those seeking to traffic domestic servants.

The key observation from the *Kovacs* case is that in cases of trafficking for domestic servitude, a multitude of different factors can combine effectively to enslave a person, despite their apparent physical ability to leave or report the situation. In particular, remote locations clearly enhance a sense of hopelessness for those trafficked for the purpose of domestic servitude. What worsens this situation is that the domestic servitude may not be overtly obvious to others given that the victim may have certain illusory freedoms and yet still feel isolated and unable to leave.

The fact that so few cases of domestic servitude have been uncovered in Australia raises the question: are such cases just rare or difficult to detect and prosecute? It is here that Australia may be able to learn from the experiences of countries with higher rates of trafficking for the purpose of domestic servitude.

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<sup>128</sup> ‘I could have left, alleged slave says’, *Cairns Post* (Cairns), 29 November 2007, 7.

<sup>129</sup> *Kovacs* [2009] 2 Qd R 51 [48].

<sup>130</sup> Peter Martinelli, above n 74, 1; Loan, above n 74, 7.

<sup>131</sup> Martinelli, above n 74, 1.



It is widely recognised that cases of trafficking for sex tend to be more visible, in that persons trafficked to work in brothels will come in contact with third parties far more regularly than those trafficked into domestic work. Suzanne Jackson notes that ‘although cases of women trafficked into homes for domestic servitude or sexual exploitation do reach the attention of the police and have been prosecuted successfully, these cases also show how long exploitation may persist’.<sup>132</sup>

It is possible that this difficulty in detection in some way accounts for the higher rates of detection of trafficking cases involving prostitution. International literature tends to suggest, however, that a major issue is the way in which governments, the media, and even citizens perceive the issue of trafficking in persons.<sup>133</sup> Nilanjana Ray argues that the typical approach to dealing with trafficking in persons involves a ‘morality framework’ whereby there is a focus on forced prostitution that ignores other forms such as domestic servitude.<sup>134</sup> There is perhaps a prevailing view that prostitution is morally harmful and thus sex trafficking is a far more heinous crime than trafficking for the purpose of domestic servitude. Ray notes that

cases of trafficking for marriage or domestic servitude, which result in sexual exploitation that cannot be termed as prostitution, are often ignored. While this may not be considered trafficking, a woman may end up as a trafficked victim in a servile marriage and may be exploited as a domestic worker and sexual slave. She may be confined to the house, denied opportunity to contact her family, kept isolated, and even prostituted by her husband.<sup>135</sup>

Melynda Barnhart argues that there is a blurry distinction between the two forms of trafficking given that many ‘traffickers use whatever coercive tools they have at their disposal, and sexual abuse is common.’<sup>136</sup> This was true in the case of *R v Kovacs* where Ms G was regularly raped and this served to prevent her telling family or attempting to leave. It is possible that cases similar to that of *R v Kovacs* may also be treated as incidents of serious domestic violence or sexual assault rather than trafficking.<sup>137</sup>

The key lesson from the international literature is that cases of domestic servitude should not be viewed as inherently less severe than those of prostitution. Kevin Hsu argues that to combat trafficking for the purposes of domestic servitude effectively, ‘anti-trafficking, labour, and immigration policy must reflect the reality that a social discourse which does not recognise the humanity of domestic workers invites abuse and trafficking.’<sup>138</sup>

## VI The way ahead

### A *The legal position in Australia*

The current laws in Australia recognise the offence of ‘slavery’ generally, and ‘sexual servitude’ in particular.<sup>139</sup> The difference between the slavery and servitude offences is further explained in

<sup>132</sup> Suzanne H Jackson, ‘To Honor and Obey: Trafficking in “Mail-Order Brides”’ (2002) 70 *George Washington Law Review* 475, 560.

<sup>133</sup> See also Nilanjana Ray, ‘Looking at Trafficking Through a New Lens’ (2005) 12 *Cardozo Journal of Law & Gender* 909, 911; Barnhart, above n 41, 91; Kevin Shawn Hsu, ‘Masters and Servants in America: The Ineffectiveness of Current United States Anti-Trafficking Policy in Protecting Victims of Trafficking for the Purposes of Domestic Servitude’ (2007) 14 *Georgetown Journal on Poverty Law and Policy* 489, 490.

<sup>134</sup> Ray, above n 133, 911.

<sup>135</sup> *Ibid.*

<sup>136</sup> Barnhart, above n 41, 91.

<sup>137</sup> Jackson, above n 132, 560.

<sup>138</sup> Hsu, above n 1353, 491.

<sup>139</sup> See also *Criminal Code* (Cth) div 270.

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 [whether the person 'is not free to cease providing sexual services; or is not free to leave the place or area where the person provides sexual services': *Criminal Code* (Cth) s 270.4(1)(a)–(b)] 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 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.<sup>140</sup>

This raises questions as to why 'sexual servitude' was addressed by the legislation, but not other forms of servitude, in particular domestic servitude. When the Model Criminal Code Officers Committee (MCCOC) first proposed the div 270 offences in November 1998 there were a number of submissions that the notion of 'sexual servitude' should be 'broadened to deal with either: (a) servitude of a non-sexual kind; or (b) what was alleged to be sexual malpractice that did not amount to servitude as such but could be said to have similar effects'.<sup>141</sup> One submission argued that 'the problems encountered by illegal workers in the sex industry are labour related issues. Non-recognition of such suggests a moral agenda'.<sup>142</sup> It was also submitted that the 'offences should extend to other *non-commercial* sexual relationships, notably the specific area of "mail order brides"'.<sup>143</sup> The reasoning for this, it was argued, is that the distinction between commercial and domestic sexual servitude is an irrelevant one.<sup>144</sup>

In response to these submissions the MCCOC argued that:

it was not and is not part of the brief given to the Committee, which was slavery in general and sexual servitude in particular. In general terms, the Committee is of the opinion that to describe such practices in law or in fact as "slavery" devalues the core meaning of the word and the very serious nature of the crime against humanity involved in chattel slavery and true debt bondage and involuntary servitude. It may be that the Committee's recommended "sexual servitude" offence can provide a useful model with which to address any proposed criminalisation of illicit outworker practices in other industries. But that is not a matter for the Committee. Nor will the Committee be party to the criminalisation of some forms of domestic violence as "crimes against humanity", however much the forms of domestic violence described in the submission are to be appropriately condemned by society.<sup>145</sup>

Despite the committee recognising the potential importance of the issue, the failure to address more substantially it at the time because it was 'not a matter for the Committee' is unfortunate to say the least. What is more concerning is that a subsequent Parliamentary Inquiry in 2004 into

<sup>140</sup> Explanatory Memorandum, *Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999* (Cth) 44–5.

<sup>141</sup> Model Criminal Code Officers Committee, above n 94, 19.

<sup>142</sup> *Ibid* 20.

<sup>143</sup> *Ibid* (emphasis in original).

<sup>144</sup> *Ibid*.

<sup>145</sup> *Ibid* 21.

trafficking in persons focused solely on sex trafficking.<sup>146</sup> The Parliamentary Joint Committee of the Australian Crime Commission acknowledged ‘that people trafficking results in the exploitation of people in a range of settings beyond just the sex industry, including the construction, clothing and textiles, domestic service and hospitality industries’.<sup>147</sup> These issues were, however, ignored in the report, without justification. Miriam Cullen and Bernadette McSherry note that the later inquiry undertaken by the Senate Legal and Constitutional Affairs Committee on the Criminal Code Amendment (Trafficking in Persons Offences) Bill 2005 had an ‘almost exclusive focus on sex-trafficking’.<sup>148</sup> Cullen and McSherry also share the view that there has been ‘a moral focus on sex trafficking’ in Australia but that ‘criminal law should not be the exclusive bastion of sex-trafficking and slavery’ with other forms of trafficking and slavery ‘perceived as less serious and not warranting any police or governmental inquiry’.<sup>149</sup>

Internationally, the concept of slavery and its legal boundaries remains the subject of a significant and complex debate. While the scope of this article does not allow for an in-depth analysis of this debate, there are some observations worth making. First, the concepts of ‘slavery’ and ‘servitude’ are very closely linked. Jean Allain, a leading authority on slavery in international law, notes that forms of servitude ‘can slip into slavery, if a condition of ownership emerges’.<sup>150</sup> Anne Gallagher distinguishes the concept of ‘servitude’ from ‘slavery’ on the basis that ‘servitude’ is separate from and broader than ‘slavery’, concerned with ‘less far reaching forms of restraint’.<sup>151</sup> She makes the observation that ‘as the concept of slavery expands to fit the needs of scholar-activists, its legal worth diminishes’.<sup>152</sup> Gallagher concludes though that the ‘core element’ of the slavery definition at international law, the ‘exercise of any or all of the powers attached to the right of ownership’, remains intact despite some evolution.<sup>153</sup> Other authors, however, tend to advocate an expansionist approach to defining slavery. James Hathaway, for example, contends a broader legal concept of slavery that encompasses ‘any form of dealing with human beings leading to the forced exploitation of their labour’ including ‘the exercise of any or all of the powers attaching to the right of ownership over a person’.<sup>154</sup>

What is clear from the literature is that the legal confines of what actually constitutes slavery are far from settled and the way in which other forms of exploitation relate to slavery is highly contested. Gleeson CJ held in *R v Tang* that slavery and various related concepts such as forced labour and debt bondage were not mutually exclusive concepts and ‘those who engage in the traffic in human beings are unlikely to be so obliging as to arrange their practices to conform to some convenient taxonomy’.<sup>155</sup>

In the absence of specific legislation defining ‘servitude’ or ‘slavery’ in any detail, the cases of *R v Tang* and *R v Kovacs* have both worked to somewhat expand the reach of the slavery offences to cover situations that involve domestic servitude. However, it does seem to be

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<sup>146</sup> Parliamentary Joint Committee of the Australian Crime Commission, above n 98.

<sup>147</sup> Ibid viii.

<sup>148</sup> Miriam Cullen and Bernadette McSherry, ‘Without Sex: Slavery, trafficking in persons and the exploitation of labour in Australia’ (2009) 34(1) *Alternative Law Journal* 4, 7.

<sup>149</sup> Ibid 10.

<sup>150</sup> Jean Allain, ‘A Legal Consideration ‘Slavery’ in Light of the *Travaux Préparatoires* of the 1926 Convention’ (Paper presented at the Conference: Twenty-First Century Slavery: Issues and Responses, Wilberforce Institute for the Study of Slavery and Emancipation, Hull, United Kingdom, 23 November 2006), 1.

<sup>151</sup> Anne T Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’ (2009) 49 *Virginia Journal of International Law* 789, 803.

<sup>152</sup> Ibid 799.

<sup>153</sup> Ibid 810.

<sup>154</sup> James C Hathaway, ‘The Human Rights Quagmire of “Human Trafficking”’ (2008) 49 *Virginia Journal of International Law* 1, 9.

<sup>155</sup> *Tang* (2008) 237 CLR 1, 12.

accepted by some commentators that the definition of ‘slavery’ espoused in *R v Tang* is coherent with international law.<sup>156</sup> Nevertheless, it may be prudent, perhaps, to reconsider the issue and debate the value, if any, of separate ‘servitude’ offences in light of an expanding definition of ‘slavery’ in Australia. MCCOC, too, admitted that the ‘sexual servitude’ offence might one day provide a useful model if a proposal to criminalise such acts was made.<sup>157</sup>

It is worth noting that the *Model Law against Trafficking in Persons* recently released by the United Nations Office on Drugs and Crime provides two suggested definitions of ‘servitude’ that may be instructive in this debate:

‘Servitude’ shall mean the labour conditions and/or the obligation to work or to render services from which the person in question cannot escape and which he or she cannot change.

‘Servitude’ means a condition of dependency in which the labor or services of a person are provided or obtained by threats of serious harm to that person or another person, or through any scheme, plan or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm.<sup>158</sup>

These definitions signify a lowering of the threshold traditionally required to prove the condition of slavery: that is, the exercising of ‘any or all of the powers attaching to the right of ownership’. They are perhaps better adapted to addressing situations like that in the *Kovacs* case where subtle techniques and factors are used to prevent a person from leaving.

Where the elements needed to prove a trafficking offence cannot be made out, such as facilitating or organising the entry/exit of a victim, it is clear that the slavery offence can provide a useful and important alternative. However, the existence of domestic servitude laws, like the sexual servitude laws, may better address situations where the traditionally higher threshold of the slavery offence cannot be proven. This would serve to ensure that situations of trafficking for domestic servitude are not simply treated as domestic violence, employment or family law disputes. Such legislation may also address the initial concerns the MCCOC had about devaluing the ‘core meaning’ of ‘slavery’ to address situations of servitude.<sup>159</sup> While this article does not attempt to propose a specific route for reform, it is contended that it would be constructive to debate the advantage or disadvantage of a ‘servitude offence’ in light of what appears to be an expanding legal concept of ‘slavery’.

## B Law reform

It is important that domestic servitude and the use of fraudulent marriages are recognised as potential tools of trafficking in persons. In June 2009, Australia’s Anti-People Trafficking Interdepartmental Committee released its inaugural report on *Trafficking in Persons and the Australian Government Response between January 2004 and April 2009* which noted that:

[t]he Attorney-General’s Department is considering possible reforms to implement Australia’s obligation to criminalise the practice of servile marriage in addition to the

<sup>156</sup> See also Byrnes, above n 103, [32]; Kolodizner, above n 95, 491; Jean Allain, ‘R v Tang: clarifying the definition of ‘slavery’ in international law’ (2009) 10 *Melbourne Journal of International Law* 246.

<sup>157</sup> Model Criminal Code Officers Committee, above n 94, 21.

<sup>158</sup> United Nations Office of Drugs and Crime, *Model Law against Trafficking in Persons* (2009) 18–19.

<sup>159</sup> Model Criminal Code Officers Committee, above n 94, 21.

existing Commonwealth slavery and sexual servitude offences in Division 270 of the *Criminal Code*.<sup>160</sup>

It was further reported that the Attorney-General's Department is also considering a specific offence in relation to forced marriage.<sup>161</sup> Although the Australian Government is yet to elaborate on these plans, they appear to be aimed at addressing the type of criminal behaviour uncovered in *R v Kovacs*.

The Kovacs were sentenced to one year's imprisonment for arranging a marriage to obtain permanent residency. This penalty arguably fails to recognise the exploitative nature of their conduct by forcing the marriage upon Ms G such that she could work for them. Offences criminalising servile and forced marriage would undoubtedly go some way toward addressing the types of situations so often seen in cases of trafficking for the purpose of domestic servitude.

On a related point, some commentators have expressed the view that the trafficking in persons offences contained in div 271 *Criminal Code* (Cth) do not accurately implement the *Trafficking in Persons Protocol*.<sup>162</sup> Under the *Trafficking in Persons Protocol*, 'exploitation' is defined to:

include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>163</sup>

It has been contended that the current definition of 'exploitation' in the *Criminal Code* (Cth) (a definition that is critical to a number of the trafficking in persons offences) does not adequately incorporate all of these elements. Specifically, it is argued that servile and forced marriage may be considered practices 'similar to slavery' for the purposes of art 1(c) of the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*.<sup>164</sup> John von Doussa contends that the trafficking of persons into servile and forced marriage could therefore be considered trafficking for the purposes of exploitation under art 3(a) *Trafficking in Persons Protocol* and as such the definition of 'exploitation' in the *Criminal Code* (Cth) should be amended to include them.<sup>165</sup> Bronwyn Byrnes highlights that while it may be conceivable that 'forced marriage' is a form of 'sexual servitude', the proposed amendments to the definition of 'exploitation' will bring greater 'clarity' and 'certainty' to the legislation.<sup>166</sup>

While the proposed stand-alone offences relating to servile and forced marriage would be a significant step forward, amending the definition of 'exploitation' to incorporate these two forms of exploitation would undoubtedly improve the suite of possible offences that could be used against traffickers. Furthermore, it would serve to ensure greater compliance of Australian legislation with the requirements of the *Trafficking in Persons Protocol*.

<sup>160</sup> The Anti-People Trafficking Interdepartmental Committee, Parliament of Australia, *Trafficking in Persons: The Australian Government Response, January 2004–April 2009* (2009) 48 (emphasis added).

<sup>161</sup> *Ibid.*

<sup>162</sup> See also Byrnes, above n 103, [58]–[62]; Human Rights and Equal Opportunity Commission, Submission No 3 to Parliamentary Joint Committee on the Australian Crime Commission, Inquiry into the future impact of serious and organised crime on Australian society, 27 February 2007.

<sup>163</sup> *Trafficking in Persons Protocol* art 3(a).

<sup>164</sup> Opened for signature 30 April 1956, 226 UNTS 3 (entered into force 30 April 1957).

<sup>165</sup> Human Rights and Equal Opportunity Commission, above n 162, [14], [24].

<sup>166</sup> Byrnes, above n 103, [62].

## VII Conclusion

*R v Kovacs* highlights the difficulty in identifying cases of trafficking for the purpose of domestic servitude and the potential vulnerabilities of the prospective marriage visa, particularly when this area of law is so poorly researched. The available evidence—domestic and international—suggests that both of these practices are more prevalent than previously thought. As such, while trafficking in persons for the purpose of domestic servitude may not seem to be widespread in Australia, the potential loopholes in Australia's approach to combating trafficking in persons exposed by the case cannot be ignored.

The primary focus in Australian efforts to fight trafficking in persons has been—and continues to be—on sex trafficking. Little consideration has been given to other types of human trafficking. The outright disregard of trafficking for the purpose of domestic servitude from the outset has meant that this issue has never been properly researched or considered by law and policy makers. The *Kovacs* case, fortunately, goes a long way in developing the Australian anti-slavery jurisprudence to address future situations of domestic servitude. Nevertheless, it is perhaps time to reconsider whether the legislative framework in Australia truly addresses all forms of trafficking with sufficient clarity and certainty. While sex trafficking is a heinous crime and likely to be the most prominent form of trafficking, this is no justification for ignoring other forms.

The proposed offences criminalising servile and forced marriage, although yet to be fleshed out, are a step in the right direction in terms of addressing activities that may facilitate trafficking. Amending the definition of 'exploitation' in the *Criminal Code* (Cth) to include these practices would also go some way in closing potential legislative loopholes. There is, however, a clear need for a comprehensive review of the potential vulnerabilities of the prospective marriage visa. In particular, the possible link between international matchmaking agencies and trafficking needs to be explored further. But legislative change alone is not sufficient. The way in which policymakers, law enforcement, and the media view human trafficking needs to be adapted to recognise the insidious practice of trafficking for the purpose of domestic servitude. This means that immigration officials, the police, the justice system, and the public, need to be aware of the indicia of domestic servitude in order to prevent and suppress this phenomenon more effectively.