A vulnerability approach to irregular migration and modern slavery in Australia

Jamal Barnes
*Edith Cowan University*

Mostafa M. Naser
*Edith Cowan University*

Joshua Aston
*Edith Cowan University*

Follow this and additional works at: [https://ro.ecu.edu.au/ecuworks2022-2026](https://ro.ecu.edu.au/ecuworks2022-2026)

Part of the Social and Behavioral Sciences Commons

10.1080/1323238X.2023.2229619


This Journal Article is posted at Research Online.

A vulnerability approach to irregular migration and modern slavery in Australia

Jamal Barnes, Mostafa Mahmud Naser & Joshua Aston

To cite this article: Jamal Barnes, Mostafa Mahmud Naser & Joshua Aston (2023) A vulnerability approach to irregular migration and modern slavery in Australia, Australian Journal of Human Rights, 29:1, 121-140, DOI: 10.1080/1323238X.2023.2229619

To link to this article: https://doi.org/10.1080/1323238X.2023.2229619

© 2023 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group

Published online: 06 Jul 2023.

Submit your article to this journal

Article views: 217

View related articles

View Crossmark data
A vulnerability approach to irregular migration and modern slavery in Australia

Jamal Barnes a, Mostafa Mahmud Naser b and Joshua Aston b

aSchool of Arts and Humanities, Edith Cowan University, Joondalup, Australia; bSchool of Business and Law, Edith Cowan University, Joondalup, Australia

ABSTRACT

It is widely recognised that migrants and irregular migrants are at risk of modern slavery and slavery-like practices worldwide. As migrants and irregular migrants make their way across state borders, or reach their destination countries, they have been victim to practices such as forced labour, exploitation, wage theft, torture and inhuman treatment and sexual servitude, among other practices. Australia is no exception, with just under 300 cases of modern slavery reported to the Australian Federal Police between 2021 and 2022. Although Australia has acted to stop slavery and slavery-like practices, it has focused on a law enforcement response, ignoring the role that laws and policies play in contributing to modern slavery in Australia. This article adopts a vulnerability approach to modern slavery, examining how legal, policy, institutional and structural factors within Australia contribute to exacerbating the vulnerability of migrants and irregular migrants to modern slavery and slavery-like practices. Utilising a vulnerability framework not only moves beyond the law enforcement approaches taken by the Australian government, but sheds important light on the need for policy, legal and institutional reform to effectively combat modern slavery in Australia and ensure there is redress and justice for its victims.

ARTICLE HISTORY

Received 30 January 2023
Accepted 5 May 2023

KEYWORDS

Modern slavery; irregular migration; migration; human rights; vulnerability approach; Australia

Introduction

Fifty million people worldwide are victims/survivors of modern slavery.¹ It is widely recognised that migrants and irregular migrants are particularly vulnerable to modern slavery and slavery-like practices as they make their way across state borders or continue to reside irregularly within a state. Along their migration journeys, migrants can become vulnerable to a wide-range of abuses including human trafficking, labour exploitation, slavery, forced

marriage and sexual servitude. Australia is no exception to these crimes. Between 2021 and 2022, just under 300 cases of modern slavery were reported to the Australian Federal Police (AFP). To help tackle the problem, the federal government has strengthened criminal laws to prosecute offenders, passing the *Modern Slavery Act 2018* (Cth) (MSA) to target company supply chains and practices, and adopting a National Action Plan to Combat Modern Slavery 2020–2025 (NAP) to guide policy actions.

Even though Australia has initiated important policy and legal initiatives, its approach has been inadequate, especially in protecting migrants and irregular migrants from harm. The reliance on using criminal laws, and a corporate responsibility model without sanctions for non-compliance, fails to recognise the state’s responsibility in exacerbating the vulnerability of migrants and irregular migrants to modern slavery. Australia’s strict visa system creates inequalities of power that leads to exploitation of migrants and makes it challenging for them to report their exploitation to authorities. A new approach to modern slavery in Australia is needed that moves beyond the law enforcement and corporate responsibility model to one that recognises how policy and legal frameworks can contribute to creating vulnerability to modern slavery, acknowledges state responsibility in producing this vulnerability, and better protects migrants and irregular migrants from harm in Australia.

To this end, this article adopts a vulnerability approach to modern slavery in Australia. Although there are many groups that remain vulnerable to abuse within business contexts, such as persons with disabilities, this article will focus specifically on the vulnerability of migrants and irregular migrants in Australia to argue that the institutional, policy, and legal frameworks within Australia exacerbate the vulnerability of migrants and irregular migrants to slavery-like practices. The vulnerability of migrants to modern slavery is not, therefore, natural or inevitable, but a product of individual, situational and structural factors that can either minimise one’s vulnerability or exacerbate it. Although all human beings are inherently vulnerable, and both citizens and migrants

---


have been subjected to modern slavery, migrants and irregular migrants are particularly vulnerable to exploitation due to the broader structural environment. It argues that for Australia to effectively combat modern slavery, a vulnerability approach can be utilised that better examines how vulnerability to slavery is constructed within Australia, reform policy and legal arrangements that are contributing to that vulnerability, and provide the necessary support to promote autonomy, resilience and agency of victims/survivors. This will require broadening the government’s strategy to include other areas of focus, ranging from reform of immigration laws to establishing a national compensation scheme.

A vulnerability approach makes important contributions to efforts of preventing modern slavery in Australia. First, it complements and strengthens current international efforts that have utilised the concept of vulnerability to understand risk factors and provide the foundation for international policy reforms. And second, it advances the scholarship on modern slavery in Australia. Much scholarship has tended to focus on corporate responsibility, supply chains and the MSA, the types of modern slavery occurring in Australia, how the Australian government has responded to modern slavery and their decision-making processes, and the challenges of access to justice for victims/survivors. This article argues that a vulnerability approach can help to better understand the environmental and situational factors that lead migrants and irregular migrants to become susceptible to modern slavery, identify areas of reform, and how best to support them when reintegrating back into society. It can also help bring more attention to state responsibility in creating the conditions that can increase the risk of modern slavery in the first place.

9For example, in Australia, both citizens and migrants have been victim to modern slavery. See Walk Free, ‘Global Slavery Index’ (Walk Free, 2018) <https://www.walkfree.org/global-slavery-index/country-studies/australia/> accessed 22 January 2023.
10Galos and others (n 2); David, Bryant, and Joudo Larsen (n 2); International Centre for Migration Policy Development (ICMPD) (n 2); Malakooti (n 2).
The first section of this article outlines the efforts to combat modern slavery under international law and the recognition that migrants and irregular migrants are particularly vulnerable to modern slavery. The second section then outlines the vulnerability approach. The third section provides an overview of modern slavery in Australia. The fourth section details the Australian government’s current approach and identifies its weaknesses. The fifth section makes the case for a vulnerability approach, arguing that it can provide a holistic framework that targets and identifies areas for reform and allocation of responsibility.

**International frameworks to address modern slavery and irregular migration**

Under international law, slavery is prohibited by a plethora of statutes, treaties, declarations, conventions and principles. This includes the 1926 Slavery Convention, its Protocol, the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, and Conventions and Protocols that prohibit trafficking in persons. The International Labour Organization (ILO) has also adopted a number of conventions that prohibit forced labour and child labour, as well as offering wage protection and protections for domestic workers. These protections have also been complemented by the widespread prohibition of slavery and right to decent and fair work under international human rights laws.

The widespread prohibition against slavery and slavery-like practices exists in stark contrast to the continued existence of modern slavery worldwide. One of the most vulnerable communities prone to be exploited, particularly for labour and other forms of slavery, are migrant workers and their families. To protect them, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,

---

19Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956) ECOSOC Res 608 (XXII).
22Convention concerning Minimum Age for Admission to Employment (adopted 26 June 1973) 58th ILC session; Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (adopted 17 June 1999) 87th ILC session.
23Convention concerning Decent Work for Domestic Workers (adopted 1 June 2011) 100th ILC session.
commonly known as the Migrant Workers Convention was adopted by the United Nations in 1990. The Convention provides an extensive list of protections for migrants’ family members. Both documented and undocumented migrants are granted specific civil, social and labour rights under the Migrant Workers Convention, including the prohibition against slavery and servitude, as well as the same pay, hours, safety considerations and other workplace conditions that nationals enjoy. Further, the core human rights conventions recognise that all migrants and irregular migrants are entitled to legal protection within the international human rights regime.

Alongside strengthening international protections, it is recognised under international law that preventing modern slavery also involves addressing those situations that make migrants vulnerable to modern slavery in the first place. The UN Special Rapporteur on Contemporary Forms of Slavery, the International Organization for Migration (IOM) and the ILO all recognise that migrant vulnerability to modern slavery is not inevitable but created. Factors such as poverty, discrimination, dangerous migration journeys, criminal organisations and informal work, among others, all are factors that can lead to migrants being subjected to modern slavery. The Migrant Workers Convention recognises the ‘situation of vulnerability in which migrant workers and members of their families frequently find themselves’ because of ‘their absence from their State of origin and to the difficulties they may encounter arising from their presence in the State of employment’. Similarly, the ILO Domestic Workers Convention recognises that migrants carry out much domestic work, leaving them ‘vulnerable to discrimination in respect of conditions of employment and of work, and to other abuses of human rights’. Understanding the vulnerability of migrants to human rights abuses is also embedded throughout the Global Compact for Migration, which aims to create safe migration pathways and reduce situations of vulnerability to human rights abuses for migrants worldwide.

Although it is recognised that understanding situations of vulnerability is important to stop modern slavery, what the different sources of vulnerability are, what kinds of policies should be implemented to address this vulnerability, and how this can be done in a way that promotes the autonomy of victims/survivors is unclear and poorly understood. As discussed in detail below, Australia acknowledges how migrants can be vulnerable to modern slavery in its NAP on modern slavery. However, it has sought to target

---

27 Migrant Workers Convention (n 26); François Crépeau and Delphine Nakache, ‘Controlling Irregular Migration in Canada: Reconciling Security Concerns with Human Rights Protection’ (2006) 12(1) Immigration and Refugee Policy 1, 8.
28 Migrant Workers Convention (n 26).
29 Migrant Workers Convention (n 26) art 11.
30 Migrant Worker Convention (n 26) art 7.
31 See Crépeau and Nakache (n 27).
33 David, Bryant, and Joudo Larsen (n 34).
34 Convention concerning Decent Work for Domestic Workers (adopted 16 June 2011, entered into force 5 September 2013) (C189) 2222 UNTS 3 (Domestic Workers Convention).
35 David, Bryant, and Joudo Larsen (n 2).
36 Migrant Workers Convention (n 26).
37 Domestic Workers Convention (n 34).
offenders with tighter criminal laws and request companies to identify risks in their supply chains and practices. But this approach neglects the state’s role in producing vulnerability. Legal frameworks can help to both reduce vulnerability to modern slavery, but also exacerbate it, depending on how they are structured. Adopting a vulnerability approach aims to examine different sources of vulnerability to both ameliorate them, but also provide opportunities for empowerment and agency for migrants as well. The next section outlines how this is the case.

A vulnerability approach to irregular migration and modern slavery

The IOM defines vulnerability ‘as the susceptibility to harm of certain people relative to others as the result of exposure to a certain type of risk’ (italics in original). Although by virtue of being human we are all vulnerable to harm (we are all vulnerable to sickness, death and physical and mental suffering), it is important to recognise that some people are more vulnerable than others. This uneven distribution of vulnerability is largely the result of individual, situational and structural factors that can either minimise one’s vulnerability or exacerbate it. The age, gender and financial situation of migrants, whether they are displaced and irregular, what country they are passing through, and what types of laws that country has in place to protect migrants, are all factors that need to be considered in assessing vulnerability to slavery and other slavery-like practices.

Migrant vulnerability to modern slavery, therefore, is not natural or inevitable. Rather, it is a social construction. This does not mean that it is ‘made up’ in our heads, but that it is constructed by the intertwining of social, cultural, individual, economic and legal factors that leave migrants at risk—or minimise their risk—of being exploited. It is important to recognise that vulnerability is both universal and situational. That is, it recognises that human beings are all vulnerable, but that the social environment can shape the extent of that vulnerability. By focusing on how vulnerability is created through social, political or legal structures, it avoids the danger of essentialising migrants as ‘vulnerable’ populations, which can not only strip them of autonomy and agency, but trigger opportunities for ‘paternalistic interventions’ by governments, NGOs or international organisations (IOs).

This article draws upon scholarship on vulnerability and argues that a vulnerability approach to modern slavery has several key elements. First, it recognises our inherent ontological vulnerability as human beings. In short, human vulnerability is universal. Second, it argues that vulnerability is at the same time also particular. That is, people become vulnerable to harm in specific contexts due to the wider social, political, institutional or legal environment. This is especially pertinent for migrants and irregular migrants. Migrant vulnerability to modern slavery is due to migrants being in situations where they are out of the reach of protection. Engaging in undocumented work, or

---

40 David, Bryant, and Joudo Larsen (n 2) 18.
41 Mackenzie, Rogers and Dodds, Vulnerability: New Essays in Ethics and Feminist Philosophy (n 6).
42 David, Bryant, and Joudo Larsen (n 2) 18.
43 Fineman (n 6) 10; Mackenzie, Rogers and Dodds, Vulnerability: New Essays in Ethics and Feminist Philosophy (n 6).
45 Mackenzie, Rogers and Dodds, Vulnerability: New Essays in Ethics and Feminist Philosophy (n 6).
46 David, Bryant and Joudo Larsen (n 2) 10.
working in informal industries such as cleaning, domestic work, construction or hospitality, among others, can leave migrants at risk because they are often hidden from authorities, making it easier for exploitation to take place.\(^{47}\) However, this vulnerability could also be due to taking irregular migration pathways, where they are at risk of human traffickers and exploitation by people smugglers.\(^{48}\)

Often, inherent and situational vulnerabilities can become intertwined. For example, the individual characteristics of migrants can also make them more vulnerable to modern slavery. Factors such as poverty, sexual orientation, language ability and education level, displacement, whether they have experienced exploitation before, their caste status and cultural norms could leave migrants at risk.\(^{49}\) Men, for example, are more vulnerable to being exploited in the construction industry.\(^{50}\) For women, they are vulnerable to slavery and forced labour in the sex industry, in domestic work, domestic servitude (which is often accompanied by sexual abuse), and forced marriages.\(^{51}\) Children have also been vulnerable to child marriage or child labour,\(^{52}\) and displaced families that live in poverty may require their children to work to bring in money, leaving the child exposed to exploitation and abuse.\(^{53}\)

The third source of vulnerability is structural vulnerability. This is where laws, policies, and institutional frameworks can produce vulnerability through factors such as oppression, exploitation, violence and domination, or when policies inadvertently produce vulnerability.\(^{54}\) Although vulnerability is often constructed by being outside the protection of laws, laws can also in turn create that vulnerability. Immigration policies, for example, can exacerbate vulnerability to modern slavery. Strict migration deterrence policies often force migrants and refugees to take more dangerous irregular migration routes.\(^{55}\) When a migrant’s visa is attached to their employer, they also become vulnerable to abuse.\(^{56}\) This is because when migrants are tied to their employer, their passports are often also held by their employer, and they can sometimes even be living with their employer, making monitoring of slavery practices challenging in private homes.\(^{57}\) Moreover, some countries, such as Australia, have prioritised law enforcement over protection from modern slavery, meaning the former takes precedence over the latter for policing agencies.\(^{58}\)

Structural factors can also become intertwined with other sources of vulnerability, making some individuals more vulnerable to exploitation and slavery. For example,
formal equality laws ignore the wider social, political, economic and racial inequalities in society, and as Samota and Ariyo have argued, exacerbate vulnerabilities by discriminating against people on racial grounds. In the context of modern slavery, it has resulted in differences in government responses of trafficked Black women and girls, which are forgotten, compared to White women and girls. Structural factors can also contribute to situational vulnerability in employment situations. Fudge has argued that it is the structural consequences of both immigration and labour laws in the UK that place people in situations that exacerbate vulnerability to exploitation and slavery-like practices. Restrictive migration laws also create risks for migrant women as insecure migrant status can leave them vulnerable to domestic violence. Focusing attention on laws and policies is, therefore, crucial to help explain how exploitative conditions are created that can exacerbate vulnerability to harm.

Part of a vulnerability approach also concerns how to reduce vulnerability. Vulnerability cannot be eliminated—and people cannot be made invulnerable—as vulnerabilities are inherent within human beings. However, the state, laws and institutions, play an important role in reducing vulnerability. As Fineman argues, ‘These institutions collectively form systems that can play an important role in lessening, ameliorating, and compensating for individual vulnerability, providing us with the resilience or resources with which to respond in specific times of crisis or opportunity’. That is, institutions do not just help to ameliorate vulnerability, but provide us with the resources and coping skills to be resilient in the face of future challenges. For Mackenzie, Rogers and Dodds, ensuring that institutions, laws and policies create conditions that both ameliorate vulnerability and promote autonomy is important to prevent paternalistic interventions that label whole groups as ‘vulnerable’, and in doing so, frame them as defenceless victims that lack agency. By ameliorating vulnerability, the state needs to also provide an environment in which people can gain control over their lives and help them reintegrate back into the community.

Applied in the context of modern slavery, what Fineman calls ‘a responsive state’ would therefore not only target and reform those policies, institutions and laws that produce situational and structural vulnerability to modern slavery, but also provide opportunities for rehabilitation, physical and psychological support, and redress for wrongdoing. As discussed below, Australia’s response to modern slavery falls short of these standards, as it does not address immigration laws that leave migrants and irregular

60 Ibid.
61 Pavlou (n 16).
64 Pavlou (n 16).
66 Ibid.
67 Mackenzie, Rogers and Dodds, ‘Introduction … ’ (n 44) 16.
68 Fineman (n 6) 1–23.
migrants susceptible to exploitation, it does not improve access to justice for victims/survivors, and the government has not yet implemented a national compensation scheme.\textsuperscript{69}

There are also ethical implications attached to a vulnerability approach. If policies are making people more vulnerable or are adversely impacting on people’s vulnerability, there is an ethical obligation to change that behaviour.\textsuperscript{70} This, therefore, requires establishing responsibility for producing or exacerbating vulnerability but also ensuring that any response is done in a way that promotes autonomy and agency of vulnerable persons.\textsuperscript{71} Australia’s anti-slavery strategy is not therefore just about fulfilling legal obligations, it is also an ethical obligation on behalf of the state to ensure that Australia’s policies, laws and institutions do not leave migrants and irregular migrants vulnerable to exploitative and harmful situations. As the next several sections show, a vulnerability approach identifies the weakness of Australia’s emphasis on law enforcement and sanction-less corporate responsibility, and how Australia is failing in meeting both its legal and ethical obligations to migrants and irregular migrants.

\section*{Irregular migration and modern slavery nexus in Australia}

Although migrants and refugees travelling between countries are vulnerable to modern slavery, Australia has also faced challenges in stopping modern slavery or slavery-like practices. According to the AFP, the financial year of 2021–2022 saw the highest amount of modern slavery and human trafficking cases reported to the agency at 294 reports for the year.\textsuperscript{72} The five most common practices reported were forced marriage, sexual servitude and exploitation, forced labour, exit trafficking in persons and trafficking in children.\textsuperscript{73} It is important to note that these are only the cases that were reported. It is estimated that for every one case of modern slavery, there are four more cases that go unreported.\textsuperscript{74}

Modern slavery victims/survivors include both citizens as well as migrants.\textsuperscript{75} There are estimated to be between 1,900 and 15,000\textsuperscript{76} people subjected to modern slavery in Australia, with migrants from countries such as Afghanistan, India, the Philippines and Thailand being particularly vulnerable to modern slavery practices.\textsuperscript{77} The disparity in these figures is due to a number of factors, including: the undetected and secretive nature of modern slavery; the fact that many cases go unreported; the differing methodologies used to ‘measure’ modern slavery; and the challenges of trying to document modern slavery when it does not have a definition under international law.\textsuperscript{78} Due to Australia’s

\textsuperscript{69}Simmons, Burn and Mcleod (n 15).
\textsuperscript{70}Goodin (n 6).
\textsuperscript{72}Australian Federal Police (n 3).
\textsuperscript{73}ibid.
\textsuperscript{75}Walk Free (n 9).
\textsuperscript{76}See Lyneham, Dowling, and Bricknell (n 74); Walk Free (n 9).
\textsuperscript{77}Walk Free (n 9).
\textsuperscript{78}See Lyneham, Dowling, and Bricknell (n 74); Anne T Gallagher, ‘What’s Wrong with the Global Slavery Index?’ (2017) 8 Anti-Trafficking Review <https://doi.org/10.14197/atrr.20121786> accessed 1 May 2023.
strict border control policies, it is difficult to enter Australia without a valid visa or on false documentation. Rather, it is often through the employer exploiting Australia’s visa system that people find themselves subjected to modern slavery practices. Migrants that come to Australia on temporary visas, such as international student visas, work visas, or holiday work visas, tend to work in industries that have either weak or no regulation, making it hard to monitor work conditions. This includes fruit and vegetable picking, farm work, domestic work, cleaning, or hospitality, among others.

Migrants can become entrapped in conditions of modern slavery in a number of different ways. Employers can confiscate migrant passports, invite people to Australia with the promise of work and then coerce them into sexual servitude and slavery until they work off alleged debts, threaten migrants that they will inform immigration that they have breached their visa conditions unless they continue to work, or deduct payments for food or accommodation from their pay, leaving them with very little money. Migration agents or brokers, by assisting with fraudulent visas, can also contribute to modern slavery. In several legal cases, women were brought to Australia on a student or tourist visa with the promise of work, often in the sex industry. However, once they arrived, they were subjected to debt bondage whereby they were coerced into doing sex work to pay off the alleged ‘debt’. International students have also been subjected to wage theft and exploitation, with the 7-Eleven store chain making national headlines when it was revealed that it was paying international students as low as $5 per hour.

Along with wage theft, exploitation and coercion, migrants subjected to modern slavery also experience cruel, inhuman or degrading treatment. An estimated 20 domestic workers inside diplomatic households located in Canberra were subjected to slavery. Although the domestic workers had received an Australian government-vetted contract in their home country, upon arrival, they were ‘told to ignore that contract and they were all paid a fraction of the salary the contracts stipulated’. They were forced to work every weekend and given no time off, working between 12 and 18 hours per day and not being permitted to leave the diplomatic residence. A Senate committee was

---

79 Parliamentary Joint Committee on Law Enforcement (n 58) 7.
80 Ibid.
81 Australian Senate (n 56).
85 Davy (n 12).
87 Australian Senate (n 56) 216–57.
89 Ibid.
90 Ibid.
told these domestic workers ‘suffered “horrendous abuse” and “absolutely, degrading treatment”.’

Migrant workers in the farming, fruit and vegetable picking industries that arrive in Australia on temporary work visas have been heavily exploited and poorly treated. Workers have been paid as low as $5 an hour and significant wage deductions by employers. In one case in Victoria, fruit pickers from Fiji and Tonga were paid $9 a week after pay deductions for their ‘accommodation, flights, visas, bedding, food and gloves’. In a case that made it to the Federal Court, several workers came from Vanuatu to work for a fruit picker in Queensland under the federal government’s Seasonal Worker Program. This program gives workers a minimum of 30 hours of work per week. Despite signing a contract stating they would be paid over $16 an hour, the court stated that one of the workers, Mr Aru, ‘did not always have food to eat. Sometimes for lunch he would have half a sandwich, but on other occasions he had no food’. The workers were moved to different farms and forced to sleep on the bus because accommodation was not provided. At other times, they had to sleep on chairs. After being transferred to a new farm, ‘They worked the full day picking tomatoes. They were not given any breakfast or any other food or drink throughout the day. Mr Aru, Mr Malsokle and Mr Arubuti were so hungry that they resorted to eating some of the tomatoes they were picking.’ When they asked about payment, they were told, ‘Stop asking questions about payment. If you keep asking I will send you back to Vanuatu.’ As a result, ‘None of the employees were paid what they were entitled to be paid, either under their respective employment agreement or under the Award that governed their employment. Thirteen employees received no payment at all.’

**Australia’s approach to modern slavery**

How has Australia sought to respond to these cases of modern slavery? Australia has ratified and/or accepted the key human rights, anti-slavery, and ILO treaties mentioned above, with a few exceptions. Australia is also a member state of the Bali Process on People Smuggling, Trafficking in Persons and Transnational Crime (Bali Process), which aims to tackle the crimes of trafficking in persons and people smuggling...
through transnational law enforcement and intelligence cooperation, public awareness campaigns, criminalisation under domestic law, supporting victims/survivors and managing asylum processes.103

At the national level, the Commonwealth Government has also developed a number of policy strategies to tackle modern slavery. In 2014, the Australian government adopted a National Action Plan to Combat Human Trafficking and Slavery 2015-19,104 which has since been updated to the 2020–2025 NAP.105 Under the NAP, Australia has identified five strategic priorities: to prevent modern slavery, disrupt, investigate, and prosecute offenders, support victims/survivors, partner with organisations to prevent and stop modern slavery, and support research on the issue.106 Australia has also launched an international strategy in 2016 to guide its international engagement on the issue.107 Through advocacy and engagement by government ministers, departments and the Ambassador for People Smuggling and Human Trafficking, Australia is prioritising measures to combat human trafficking, forced labour, and forced marriage within the Indo-Pacific. The strategy aims to work with other states, law enforcement agencies, and businesses, and contribute to regional and multilateral forums, such as the United Nations, ASEAN, and the Bali Process, to tackle modern slavery.108

Australia has also sought to act against modern slavery and slavery-like practices under domestic law. The Criminal Code Act 1995 (Cth) makes slavery and slavery-like practices a criminal offence under sections 270 and 271.109 The Migration Act 1958 (Cth) also makes it an offence for ‘allowing a person to work, or referring a person for work, if the person is an unlawful non-citizen or a lawful non-citizen in breach of a visa condition’.110 The Fair Work Ombudsman (FWO) can also apply—and has applied—penalties against employers and has information-gathering powers to help identify unlawful employer behaviour.111

Alongside targeting perpetrators of modern slavery, the government adopted the MSA which was effective from 1 January 2019. The Act requires Australian business entities with a minimum annual consolidated revenue of $100 million to periodically report on the risk of modern slavery in the operations and supply chain and the steps it has taken to respond to the risks identified.112 Company reports are then kept on the Modern Slavery Statements Register, which are accessible to the public.113 Most notably, the MSA does not codify slavery, servitude and forced labour as offences, but

---

106ibid.
111Simmons, Burn and Mcleod (n 15).
112MSA, s 3.
113MSA, s 17.
rather, it was constrained to reporting mechanisms to maintain transparency in supply chains. Moreover, it does not result in any sanctions if companies do not comply.

Australia’s MSA draws upon similar efforts by other countries. For example, the United Kingdom adopted the Modern Slavery Act 2015 (UK), which combines a series of offences into a single piece of legislation.\textsuperscript{114} The Act requires UK businesses with worldwide revenues of at least £36 million ($45 million) to publish a slavery statement annually.\textsuperscript{115} In 2017, France adopted the ‘Duty of Vigilance Law’ requiring businesses to identify risks associated also with human rights and the environment in their operations and supply chain and to take actions to address those risks.\textsuperscript{116} This law allows victims/survivors and parties to approach a competent court of law if an organisation defaults on its binding duty\textsuperscript{117} and, unlike the UK and Australian Acts, contains substantive penalty provisions.\textsuperscript{118}

However, relying on the criminal justice system, as well as voluntary compliance with the MSA, has resulted in significant weaknesses in Australia’s anti-slavery approach. First, prosecuting offenders can be challenging.\textsuperscript{119} Australian courts have prosecuted numerous cases concerning modern slavery practices,\textsuperscript{120} with 31 people convicted of slavery or slavery-like practices between 2004 and 2021.\textsuperscript{121} However, this represents a low level of convictions considering that 1,446 cases were reported to the AFP between 2004 and 2020.\textsuperscript{122} And second, relying on companies to submit compliance reports without threat of sanction has resulted in low compliance, with an evaluation of the MSA finding that ‘77% of companies are failing to address all mandatory reporting criteria in their statements’.\textsuperscript{123} Although the Australian Government tabled a report in Parliament in 2023 that reviewed the MSA,\textsuperscript{124} unless there is reform of the Act to strengthen it, there is a risk that the MSA will fail to bring about behavioural change and business modern slavery reports may become nothing more than ‘paper promises’.\textsuperscript{125}

Although Australia has implemented many positive laws to combat modern slavery, and prosecuting offenders is an integral part of anti-slavery responses, it has not acted against those policy decisions and laws that can exacerbate the vulnerability to modern slavery. Many of Australia’s responses recognise the vulnerability of people

\begin{footnotes}
\item[114]Modern Slavery Act 2015 (UK).
\item[115]Modern Slavery Act 2015 (UK), s 54.
\item[116]See Fiona McGaughey and others, ‘Corporate Responses to Tackling Modern Slavery: A Comparative Analysis of Australia, France and the United Kingdom’ (2022) 7(2) Business and Human Rights Journal 249–70.
\item[118]McGaughey and others (n 116).
\item[120]Simmons and others (n 12); Davy (n 12).
\item[122]Simmons, Burn and Mcleod (n 15) 152–53.
\item[125]Sinclair and Dinshaw (n 122).
\end{footnotes}
subjected to modern slavery. The NAP, for example, recognises that there are individuals and groups that are particularly vulnerable to being subjected to modern slavery, including migrants.\textsuperscript{126} The MSA also implicitly recognises that some people in supply chains may have been vulnerable to modern slavery and therefore, certain entities are required to report on their efforts to identify and address risks of modern slavery in their operations and supply chains.\textsuperscript{127} However, despite the Australian government recognising that some people are more vulnerable than others, it does not address the sources of vulnerability, choosing instead to focus on offenders. This neglects the laws and policies currently in place that exacerbate vulnerability and create barriers to justice. Australia needs a more holistic approach that also looks at the state’s responsibility in contributing to situational vulnerability and supports the autonomy, agency and resiliency of migrants and irregular migrants. One step towards this is through a vulnerability approach.

\textbf{The need for a vulnerability approach}

Australia’s approach, at present, focuses on punishing offenders of modern slavery and pressuring companies to act to eliminate the practice in their supply chains. Although these are welcome efforts to deal with offenders, what is currently lacking is shaping policy to reduce as much as possible the vulnerability people face to being subjected to modern slavery and slavery-like practices. This includes a close examination of the effects Australia’s laws are having in contributing to the problem. For example, what has not been adequately addressed within Australia has been how its temporary visa programs can leave migrants situationally vulnerable to slavery. Australia’s temporary visa system has been identified as a risk factor by a parliamentary inquiry\textsuperscript{128} as well as the US Department of State.\textsuperscript{129} Many of Australia’s visas, such as international student visas, work visas, or holiday worker visas, involve being ‘tied’ to the employer for a certain length of time to keep the visa, or having restricted work hours. This leaves the visa holder in a dependent relationship with the employer and leaves them vulnerable to exploitation.\textsuperscript{130} For example, in the case of the exploitation of the Vanuatu workers in the Seasonal Workers Program mentioned above, they were reliant on their sponsor to provide them with food, accommodation and other essentials. However, when these provisions were not adequately provided, the visa holders were too scared to report their abuse at the time because they were concerned their visa would be revoked and they would be deported.\textsuperscript{131}

The Australian government has made modern slavery a law enforcement and corporate responsibility problem, which blames these crimes on criminal gangs, exploitative migrant agents or corporations.\textsuperscript{132} Although these elements certainly need to be part of the mix of policy tools available, what is missing is how the state has created situational and structural vulnerability that has increased the risk of people being exploited.

\begin{footnotesize}
\footnotesuperscript{127}MSA s 3.
\footnotesuperscript{128}Australian Senate (n 56).
\footnotesuperscript{130}Australian Senate (n 56).
\footnotesuperscript{131}Fair Work Ombudsman v Maroochy Sunshine Pty Ltd & Anor (n 94).
\footnotesuperscript{132}O’Brien (n 5) 340–61.
\end{footnotesize}
According to the Scarlet Alliance, Australia’s anti-slavery strategy is ‘skewed to policing, surveillance and prosecutions, at the expense of victim protection and human rights and the prevention of circumstances that create trafficking’. The responsibility of the state is not considered in Australia’s current approach. O’Brien argues that the government has created ‘a restrictive migration system, a political culture antagonistic to migrant populations and weak regulation of corporate enterprise’ that has exacerbated the risk of modern slavery. The disengagement of responsibility in this case leaves the policy settings that exacerbate vulnerability in place, making it harder to stop modern slavery.

The Australian government’s emphasis on adherence to visa conditions over support for victims/survivors of slavery has led to a risk where Australia has deported people that have potentially been subjected to modern slavery. When it was discovered that a market garden north of Perth was exploiting migrants whose visas had expired, the workers were deported ‘despite strong indicators of slavery-like conditions and police referring to the situation as a “human tragedy”’. This doubly-punishes victims/survivors. First, because they are exploited in a situation that benefits the employer, and second, because they were deported for breaching visa conditions that were the result of that exploitation. However, efforts to ameliorate situations of vulnerabilities for migrants, especially those that have been exploited and are fearful of being deported because they breached visa conditions, have yet to be adequately addressed.

The fact that a breach of visa conditions could lead to deportation makes it less likely that a visa holder will report exploitative work conditions and exacerbates the vulnerability to slavery-like practices. A parliamentary committee investigation found that in some situations, employers ‘coerce a temporary visa worker into breaching a condition of their visa in order to gain leverage over the worker’. Employers can therefore profit from exploiting their workers as they calculate the costs and benefits of the likelihood of being reported. The US State Department has noted that, ‘Observers reported some victims may have been reluctant to communicate with law enforcement officers due to fear of detention and deportation and the existence of language barriers.’

This fear, alongside Australia’s failure to introduce a national compensation scheme for modern slavery victims/survivors, the lack of knowledge among migrants of workplace rights, language barriers and the fact that seeking justice often requires pursuing complex legal claims, leaves migrants that breach their conditions in a vulnerable place where they can be abused.

Contributing to this vulnerability is also Australia’s failure to ratify key international legal conventions that aim to protect migrants. Australia has not yet ratified the

---

134 O’Brien (n 5) 358.
135 United States Department of State (n 129) 96.
136 Australian Senate (n 56) 207.
137 United States Department of State (n 129) 96.
138 ibid 211.
139 ibid 209.
140 United States Department of State (n 129) 96.
141 ibid 97. See Joint Standing Committee on Foreign Affairs, Defence and Trade (n 133) 164–71; Simmons, Burn and Mcleod (n 15).
142 United States Department of State (n 129) 97; Farbenblum and Berg (n 15); Australian Senate (n 56).
Migrant Workers Convention, which provides guidance on national migration policies to ensure that minimum standards of human dignity are protected. The Convention came into force 13 years after it was opened for ratification and still, as of May 2023, Australia—as one of the major migration-receiving countries—is not among the 58 state parties of the Convention. Each year, the Australian Government repeatedly provides the same brief statement that a combination of strong international and domestic protections are in place for the human rights protection of all migrants and temporary entrants which are deemed ‘sufficient’.

The reasons provided by Australia for not ratifying the Convention do not seem plausible. If the rights of migrant workers are already protected it is not fathomable why Australia is reluctant to reaffirm its commitment to the human rights protection of migrant workers by ratifying the treaty. Rather, this non-ratification creates scope for Australian employers to access a labour force exposed to multifarious vulnerabilities and ‘without the equal protection of their human rights’. Although some domestic legislations such as the Migrant Legislation Amendment (Worker Protection) Act 2008 (Cth), the Fair Work Act 2009 (Cth), the Sex Discrimination Act 1984 (Cth), the Age Discrimination Act 2004 (Cth) and the Racial Discrimination Act 1975 (Cth) provide migrant workers important protections such as equal protection of law and non-discrimination, as claimed by the Australian Government, the special vulnerabilities of migrant workers—that may impede them enforcing their rights—are not necessarily addressed in those domestic legislations. The Migrant Workers Convention was particularly adopted to address those vulnerabilities and provide ‘a common, authoritative, normative, and internationally agreed framework to guide legislative changes as well as future policy and practice’. Therefore, ratification of this treaty will reaffirm Australia’s commitment to the human rights protection of migrant workers and help close any remaining gaps in Australian domestic legislation.

A vulnerability approach focuses on not only preventing modern slavery and reforming the conditions that help to produce it, but also supporting human vulnerabilities of victims/survivors as they re-integrate back into communities and overcome the negative physical and psychological effects of being subjected to modern slavery. Key to this is access to justice. Although Australia’s national anti-slavery strategies claim to be taking a victim/survivor-centred approach, there continues to be challenges in accessing justice and redress. Migrant workers are hesitant to approach the Fair Work Ombudsman (FWO), for example, because of a lack of knowledge regarding ways to access justice, whether it would be appropriate to complain, concern about losing their job and

147 ibid 7.
148 ibid.
concern from workers that complaining could negatively affect their visa status and they could be deported if they have breached their visa. At present, there is no firewall between the FWO and the Department of Home Affairs, meaning a person could be deported if they lodge a claim with the FWO and they are in breach of their visa conditions. Although there is now an ‘assurance protocol’ in place whereby Home Affairs will provide assurances that it will not cancel a visa if referred by the FWO, this is only on the condition that the individual cooperates with the FWO, that there is no other reason to cancel the visa, and a promise that in the future visa conditions will not be violated. However, as Farbenblum and Berg argue, ‘It remains unclear whether the protocol will offer sufficient comfort to enable visa-holders with work rights to come forward and report exploitation.’

What is also substantively lacking in Australia’s approach is a redress system at the federal level for victims/survivors. The Palermo Protocol, which supplements the Convention against Transnational Organized Crime, aims to not only prevent trafficking in persons, but also places obligations on states to provide compensation for victims/survivors of human trafficking. According to Anti-Slavery Australia, a national compensation scheme could, among other functions, ‘Provide financial security to reduce vulnerability and the risk of re-trafficking.’ Moreover, a national compensation scheme would support a victim/survivor-centred approach to modern slavery by improving access to justice.

Not only is there not a federal compensation scheme in Australia, but there are also problems in regard to redress. For example, the Support for Trafficked People Program, which assists victims/survivors of human trafficking, needs the AFP to refer victims/survivors, which creates challenges if victims/survivors are not comfortable approaching policing agencies or being involved in criminal proceedings to receive support. Moreover, those subjected to modern slavery are relying on state-based crime compensation schemes for remedy. These schemes operate in each state and territory and are compensation schemes for victims of crime. According to Simmons, Burn, and McLeod, ‘The advantage of such schemes is that they can provide compensation for victims without the admission of any liability from the state and in circumstances where a criminal prosecution has not occurred or has not resulted in a conviction.’ However, they also note that these schemes are riddled with problems. These schemes are not specifically for federal crimes like modern slavery, and the amount of compensation, and eligibility for access to the schemes, vary between different jurisdictions. As Jennifer Burn, the Director of Anti-Slavery Australia, stated before a federal parliamentary committee, the compensation schemes

---

149 Farbenblum and Berg (n 15) 318–21.
151 Farbenblum and Berg (n 15).
152 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (n 20).
153 Joint Standing Committee on Foreign Affairs, Defence and Trade (n 133) 164–65.
155 Joint Standing Committee on Foreign Affairs, Defence and Trade (n 133) 141–43.
156 ibid 149–52.
157 Simmons, Burn and Mcleod (n 15) 166.
do not provide a pathway for compensation for people who have been trafficked or who may be held in forms of labour exploitation that are not contemplated by the states. Additionally, each of the schemes has different limitations of time, different areas of compensation payable and different processes. It is quite confusing and it is inadequate.\textsuperscript{158}

Access to justice and redress is not only harmful to human dignity, but if people are not comfortable reporting their exploitation, they do not know how to, or do not receive adequate compensation for wrongdoing, it exacerbates vulnerability to modern slavery by not holding perpetrators to account. But it also exacerbates vulnerability because victims/survivors will not be receiving necessary support, making them vulnerable to victimisation again in the future. These deficiencies show that the Australian government, at present, is not what Fineman calls a ‘responsive state’, and significant reform is needed to address structural, policy and institutional and legal frameworks to prevent modern slavery in Australia.

\textbf{Conclusion}

This article applies a vulnerability framework to understand how migrants and irregular migrants become subjected to modern slavery in Australia. At present, Australia’s approach to modern slavery has emphasised law enforcement of offenders and corporate responsibility. Although these approaches should be included in strategies to tackle modern slavery, what is lacking is an approach that focuses on the institutional, political, and legal structures that lead people in becoming vulnerable to modern slavery and how to create conditions that can further agency, autonomy and resilience of victims/survivors. This includes examining state responsibility for creating conditions that lead people to becoming vulnerable, such as Australia’s visa system, barriers to access to justice, and no national compensation scheme that can help people re-integrate into society.

The Australian Government needs to give more attention to the protection of irregular/undocumented migrants. It should draw more explicitly upon human rights standards that it has already committed to uphold. The core international human rights treaties provide comprehensive norms and standards upon which government can draw to ameliorate vulnerability associated with irregular migration and modern slavery in a proactive and consistent manner.\textsuperscript{159} But in addition, it should engage in policy and legal reform to ameliorate sources of vulnerability. This includes, firstly, establishing a national compensation scheme for victims/survivors.\textsuperscript{160} Secondly, establishing a firewall between the FWO and the Department of Home Affairs to encourage people subjected to modern slavery or slavery-like practices to approach the FWO for assistance.\textsuperscript{161} Thirdly, the government needs to reform Australia’s visa system by identifying those restrictions and arrangements outlined in this article that are exacerbating vulnerability.\textsuperscript{162} Fourthly, establish an anti-slavery commissioner to help identify sources of vulnerability that could lead to modern slavery.\textsuperscript{163} When elected in 2022, the Albanese Labor government promised to

\textsuperscript{158}Joint Standing Committee on Foreign Affairs, Defence and Trade (n 133) 165.
\textsuperscript{159}See Landau and Marshall (n 16).
\textsuperscript{160}Simmons, Burn and Mcleod (n 15).
\textsuperscript{161}Farbenblum and Berg (n 15).
\textsuperscript{162}Joint Standing Committee on Foreign Affairs, Defence and Trade (n 133).
\textsuperscript{163}ibid.
establish an anti-slavery commissioner, based in the Attorney-General’s office.\textsuperscript{164} However, at the time of writing this is yet to occur. And finally, the Australian Government should focus on pressuring companies to identify risks in their practices and supply chains by implementing financial penalties against those who fail to comply with obligations under the MSA.\textsuperscript{165} Unless the Australian Government addresses these sources of vulnerability, migrants will continue to be trapped within restrictive policy frameworks that inhibit access to justice and exacerbate their vulnerability to modern slavery.

Acknowledgements

We wish to thank Mr Nathan Thompson for his excellent research assistance for this project. We would also like to thank the editors of the \textit{Australian Journal of Human Rights} and several anonymous reviewers for their constructive feedback.

Disclosure statement

No potential conflict of interest was reported by the author(s).

Funding

This work was supported by the DVCR Small Grants 2021 – Society and Culture (Grant No 12450).

Notes on contributors

\textbf{Jamal Barnes} is a Lecturer in the School of Arts and Humanities at Edith Cowan University. He has published on the issues of refugees and migration, torture, international security, and international norms. He is the author of \textit{A Genealogy of the Torture Taboo} (Routledge, 2017), and has published in journals such as \textit{International Affairs}, \textit{Review of International Studies}, and \textit{Journal of Refugee Studies}.

\textbf{Mostafa Naser} is a Lecturer in the School of Business and Law at Edith Cowan University, Australia. Mostafa has previously taught law at Macquarie University, Federation University Australia, and the University of Chittagong, Bangladesh. He also worked as a Research Consultant of IOM—a related organisation to the UN in PNG. Mostafa has been serving on the Executive Council of the Asian Society of International Law (AsianSIL) since 2017. Mostafa has been an expert reviewer of the draft Intergovernmental Panel on Climate Change (IPCC) 6th Assessment Report. Mostafa publishes widely in the domain of international law, environmental law, and human rights with a focus on the correlation of international and domestic law and climate-related human mobility.

\textbf{Joshua Aston} is the Associate Dean (Law) and a member of the Executive team in the School of Business and Law, Edith Cowan University, Western Australia. He is the author of the acclaimed texts ‘Trafficking of Women and Children, Article 7 of the Rome Statute’ and ‘Torture Behind Bars’ Role of the Police Force in India’, both published by Oxford University Press. He is a recipient of the (Deutscher Akademischer Austauschdienst) DAAD scholarship and was invited as a Research Scholar by the Institute of Air, Space and Cyber Law, University of Cologne, Germany for a period of three months. He is an Asian Law Institute Fellow of the National University of Singapore, Singapore.


ORCID

Jamal Barnes http://orcid.org/0000-0003-4075-8302
Mostafa Mahmud Naser http://orcid.org/0000-0002-3795-0216
Joshua Aston http://orcid.org/0000-0002-7850-081X