

# ORPHANAGE TRAFFICKING, MODERN SLAVERY AND THE AUSTRALIAN RESPONSE

KATHRYN E. VAN DOORE\* AND REBECCA NHEP\*\*

*Orphanage trafficking is fast becoming a highly profiled form of child trafficking involving the transfer and recruitment of children into orphanages or institutional care for the purpose of exploitation and profit. In 2018, the Australian government stated that they were leading the world in recognising orphanage trafficking as a form of modern slavery under the newly enacted Modern Slavery Act 2018 (Cth). This article describes how orphanage trafficking occurs as a process of child trafficking. It then clarifies that whilst orphanage trafficking is a form of modern slavery, orphanage tourism and child institutionalisation are not. The article then considers Australia's recognition of orphanage trafficking as modern slavery, and the limits of that recognition. To maintain the growing momentum on curbing orphanage trafficking, the article argues that Australia needs to ensure that orphanage trafficking is criminalised as an offence. The article makes two alternative recommendations to achieve this. The first is to amend the elements of the current legislation on trafficking in Australia to ensure that orphanage trafficking is encapsulated. The second is for the Australian government to explicitly criminalise the offence of orphanage trafficking.*

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\* Kathryn (Kate) E. van Doore is an international child rights lawyer and academic at Griffith Law School, Australia. She researches the intersections of child rights, institutionalisation and human trafficking and was the recipient of the 2017 Anti-Slavery Australia Freedom Award recognising her research contribution to the issue of orphanage trafficking.

\*\* Rebecca Nhep is the Senior Technical Advisor at Better Care Network and co-founder of ReThink Orphanages Australia. Rebecca has 19 years of experience working in alternative care and care reform. Rebecca holds post graduate degrees in International Development and Anthropology.

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## I INTRODUCTION

In 2018, the Australian government stated that it was the first to recognise orphanage trafficking as a form of modern slavery.<sup>1</sup> Orphanage trafficking is regarded as an ‘emerging form of exploitation’<sup>2</sup> described as the transfer or recruitment of a child into an orphanage or residential care institution for the purpose of exploitation and profit.<sup>3</sup> Orphanage trafficking occurs in developing nation contexts which exhibit an over-use of institutional care for children in combination with a lack of appropriate gatekeeping, monitoring, or enforcement of child protection regulatory frameworks.

It is estimated that there are between 3.5 to 5.5 million children growing up in residential care institutions, or orphanages, globally,<sup>4</sup> and that up to 80% of these children have one or both parents living who, with the provision of support, could raise their children themselves.<sup>5</sup> In a 2019 report, the Independent Expert leading the United Nations Global

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<sup>1</sup> Assistant Minister for Home Affairs Senator the Hon Linda Reynolds CSC, ‘Modern Slavery Bill Passes the Parliament’ (Media Release, 30 November 2018) <<https://minister.homeaffairs.gov.au/lindareynolds/Pages/modern-slavery-bill-passes-parliament.aspx>>.

<sup>2</sup> Kevin Bales, Bodean Hedwards and Bernard Silverman, ‘Modern Slavery Research: the UK Picture’, (Report, Office of the Independent Anti-Slavery Commissioner and the University of Nottingham’s Rights Lab, 2018) 9.

<sup>3</sup> Kathryn E van Doore, ‘Paper Orphans: Exploring Child Trafficking for the Purpose of Orphanages’ (2016) 24(2) *International Journal of Children’s Rights* 378.

<sup>4</sup> Manfred Nowak, ‘Report of the Independent Expert leading the United Nations Global Study on Children Deprived of Liberty’ (2019) UN Doc A/74/136, 13/23.

<sup>5</sup> Corinna Csáky, ‘Keeping Children Out of Harmful Institutions: Why We Should Be Investing in Family-Based Care’ (Report, 2009) vii.

Study on Children Deprived of Liberty noted that child protection systems that favoured institutionalisation were characterised by ‘profit motives or the commodification of the care of children’.<sup>6</sup> Orphanage trafficking is a result of such systems. In some countries, the ‘orphanage industry’ has emerged due to the high levels of tourist, volunteer, and foreign donor interest in assisting orphaned children.<sup>7</sup> The orphanage industry relies upon orphanages harbouring a sufficient number of children in institutional care to meet the demands of orphanage tourism and foreign funding. Orphanage trafficking is a means by which the deficit between supply of children requiring institutional care and this demand for orphanage tourism and funding is met. The exploitation of institutional care as a profit driven business model has resulted in the commodification of the vulnerable child as a tourist attraction to manipulate the good intentions of tourists and volunteers.<sup>8</sup>

Orphanage trafficking is a global issue. Whilst the trafficking act takes place in low-and middle-income countries, demand for orphanage trafficking is often driven by funding, volunteers, and visitors sent from high income countries. As a high income country, Australia is impacted by orphanage trafficking in a ‘sending country capacity’, as the funding and volunteers sent to support institutional care overseas can create a demand for children to be trafficked into orphanages.<sup>9</sup> Additionally, Australian residents and citizens may be involved in the actual trafficking and exploitation of children in orphanages overseas. Orphanage trafficking was one of the major issues considered in the Inquiry into whether Australia should have a Modern Slavery Act in 2017 and was the subject of an entire chapter in the final report of the Inquiry, ‘Hidden in Plain Sight’.<sup>10</sup>

This article explores the recent emergence of orphanage trafficking being identified as a form of modern slavery globally and Australia’s efforts to combat it as a sending country. First, we describe the process of orphanage trafficking as a form of modern slavery.

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<sup>6</sup> Nowak (n 4).

<sup>7</sup> Kristen Cheney and Karen Smith Rotabi, ‘Addicted to Orphans: How the Global Orphan Industrial Complex Jeopardizes Local Child Protection Systems’ in Kathrin Hörschelmann, Christopher Harker and Tracey Skelton (eds), *Geographies of Children and Young People* (Springer, 2015) vol 11.

<sup>8</sup> Tess Guiney, ‘“Hug-an-orphan Vacations”: “Love” and Emotion in Orphanage Tourism’ (2018) 184(2) *The Geographical Journal* 125, 126.

<sup>9</sup> Samantha Lyneham and Lachlan Facchini, ‘Benevolent Harm: Orphanages, Voluntourism and Child Sexual Exploitation in South-East Asia’ (2019) 574 *Trends and Issues in Crime and Criminal Justice* 1, 3.

<sup>10</sup> Commonwealth of Australia, *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia* (Report, Joint Standing Committee on Foreign Affairs Defence and Trade, 2017) (*‘Hidden in Plain Sight’*) chp 8.

Second, we clarify the differences between orphanage trafficking, orphanage tourism, and the institutionalisation of children. Third, we outline the emergence of orphanage trafficking as a phenomenon of modern slavery by considering Australia's approach to orphanage trafficking. Finally, we make recommendations for strengthening the legislative framework against orphanage trafficking in Australia.

## II WHAT IS ORPHANAGE TRAFFICKING?

Orphanage trafficking is not a term explicitly defined in law. Orphanage trafficking is described as a form of child trafficking where children are recruited or transferred into orphanages, or institutional care, for the purpose of exploitation and profit.<sup>11</sup> Regarded as an emerging form of child trafficking and exploitation,<sup>12</sup> the practice has been detailed in non-government organisation reports,<sup>13</sup> government reports,<sup>14</sup> a report by the United Nations Special Rapporteur on contemporary forms of slavery,<sup>15</sup> and recent academic research.<sup>16</sup>

In international law, child trafficking is detailed in article 3(c) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000*,<sup>17</sup> as the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation.<sup>18</sup> Article 3 elucidates that 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

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<sup>11</sup> van Doore (n 3).

<sup>12</sup> Bales, Hedwards and Silverman (n 2).

<sup>13</sup> See, eg, Martin Punaks and Katie Feit, *The Paradox of Orphanage Volunteering: Combating Child Trafficking Through Ethical Voluntourism* (Report, Next Generation Nepal, 2014); Georgette Mulheir and Mara Cavanagh, *Orphanage Entrepreneurs: The Trafficking of Haiti's Invisible Children* (Report, Lumos, 2016); Jamie Vernaelde, *Funding Haitian Orphanages at the Cost of Children's Rights* (Report, Lumos, 2017).

<sup>14</sup> *Hidden in Plain Sight* (n 10); United States Department of State, *Trafficking in Persons Report 2018* (Report, 2018).

<sup>15</sup> Urmila Bhoola, 'Report of the Special Rapporteur on Contemporary Forms of Slavery Including Its Causes and Consequences: Current and Emerging Forms of Slavery' (2019) UN Doc A/HRC/42/44.

<sup>16</sup> Martin Punaks and Katie Feit, 'Orphanage Voluntourism in Nepal and Its Links to the Displacement and Unnecessary Institutionalisation of Children' (2014) 1(2) *Institutionalised Children Explorations and Beyond* 179; van Doore (n 3); Lyneham and Facchini (n 9).

<sup>17</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) ('*Trafficking Protocol*').

<sup>18</sup> *Ibid* art 3(c).

organs'.<sup>19</sup> Article 3(d) provides that a 'Child shall mean any person under eighteen years of age'.<sup>20</sup>

As a form of child trafficking, orphanage trafficking involves the act (recruitment, transportation, transfer, harbouring, or receipt of a child) for a purpose of exploitation occurring within an orphanage or institutional care. The forms of exploitation present in orphanage trafficking may include those listed in article 3(a) of the *Trafficking Protocol* such as sexual exploitation, forced labour, or a practice similar to slavery, or exploitation may be experienced through ongoing institutionalisation for the purpose of profit or the use of children as a commodity in the orphanage tourism product. Recognition of these latter forms of exploitation are largely dependent on how domestic law interprets and applies the element of exploitation in its trafficking jurisprudence.

Orphanage trafficking largely occurs in developing nations where children may be subject to a range of vulnerabilities including poverty and a lack of access to medical, educational, and social services. Child finders, recruiters, and traffickers may recruit children into institutional care by offering families an opportunity for their child to access education, medical care, or better opportunities. Families accept these offers often believing their child will be attending an educational facility and that their life opportunities will be enhanced. In other instances, families may be duped or coerced into placing their children in institutional care.<sup>21</sup>

At this juncture, new documentation may be created for the child, including death certificates for parents or abandonment documentation, to identify them as an 'orphan'. This process is known as 'paper orphaning'.<sup>22</sup> This construction as an orphan means that their placement in care is able to be commodified through orphanage tourism (where people pay to visit or volunteer in an orphanage) and foreign aid funding. The orphan narrative and associated notion of vulnerability is then used to elicit the sympathy of tourists, volunteers and overseas donors to solicit funding. Orphanages have been documented as proliferating in tourist hot spots where there is no associated increase in

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<sup>19</sup> Ibid art 3(a).

<sup>20</sup> Ibid art 3(d).

<sup>21</sup> Punaks and Feit (n 16).

<sup>22</sup> van Doore (n 3).

child vulnerability that might require higher rates of institutional care.<sup>23</sup> Once in the orphanage, children are sometimes kept in poor conditions, malnourished, and without proper healthcare or schooling in order to encourage donations and further funding from volunteers and visitors.<sup>24</sup> In some instances, children from orphanages are made to perform traditional dances and concerts for visitors and volunteers to raise money. There have been cases of children being sent out to beg for funds in bars at night and to hand out flyers promoting visits to the orphanage.<sup>25</sup>

In 2018, the United States Department of State Trafficking in Persons Report included a special interest topic on 'Child Institutionalization and Human Trafficking'<sup>26</sup> which acknowledged that children were being trafficked into orphanages for the purpose of exploitation by espousing that:

Voluntourism not only has unintended consequences for the children, but also the profits made through volunteer-paid program fees or donations to orphanages from tourists incentivize nefarious orphanage owners to increase revenue by expanding child recruitment operations in order to open more facilities. These orphanages facilitate child trafficking rings by using false promises to recruit children and exploit them to profit from donations. This practice has been well-documented in several countries, including Nepal, Cambodia, and Haiti.<sup>27</sup>

As espoused in the report, the primary motivation driving orphanage trafficking is profit made from volunteer and visitor fees and donations. Such links between profit, the recruitment of children into institutional care, and an inappropriate over-reliance on child institutionalisation without due gatekeeping process have been reported in low and

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<sup>23</sup> P Jane Reas, "'So, Child Protection, I'll Make a Quick Point of It Now": Broadening the Notion of Child Abuse in Volunteering Vacations in Siem Reap, Cambodia' (2015) 18(4) *Tourism Review International* 295.

<sup>24</sup> Better Volunteering Better Care, 'Collected Viewpoints on International Volunteering in Residential Care Centres: An Overview' (Report, 2014).

<sup>25</sup> UNICEF, *With the Best Intentions: A Study of Attitudes Towards Residential Care in Cambodia* (Report, UNICEF & Ministry of Social Affairs, Veterans and Youth Rehabilitation, Cambodia, 2011).

<sup>26</sup> United States Department of State, *Trafficking in Persons Report 2018* (Report, 2018) 22.

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

middle income countries including Liberia,<sup>28</sup> Uganda,<sup>29</sup> Ghana,<sup>30</sup> Nepal,<sup>31</sup> Guatemala,<sup>32</sup> Haiti,<sup>33</sup> Cambodia,<sup>34</sup> Indonesia,<sup>35</sup> Botswana,<sup>36</sup> and South Africa,<sup>37</sup> as well as many other countries,<sup>38</sup> indicating that the enabling environment for orphanage trafficking is prevalent globally.

### III ORPHANAGE TRAFFICKING, ORPHANAGE TOURISM, AND THE INSTITUTIONALISATION OF CHILDREN

It is important to delineate the differences between orphanage trafficking, orphanage tourism, and the institutional care of children. Some reports have intimated that either orphanage tourism or institutional care and modern slavery are synonymous.<sup>39</sup> This is not the case. As discussed above, orphanage trafficking is a form of modern slavery that has links to the orphanage industry and the broader issue of the inappropriate over-use of institutional care. However, it must be made clear that institutionalisation is not synonymous with modern slavery. Orphanage trafficking is a serious crime involving the exploitation of children and as such must be addressed via criminal law mechanisms. Because the over-use of institutional care has been regarded as a child protection or social welfare issue, potential criminal actions including the recruitment of children into orphanages for profit have not been examined as systemic breaches of criminal law.

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<sup>28</sup> Samantha Chaitkin et al, *Towards the Right Care for Children: Orientations for Reforming Alternative Care Systems — Africa, Asia, Latin America* (Report, European Union, 2017).

<sup>29</sup> Hope Among, *Study on Legal Guardianship and Adoption Practices in Uganda* (Report, Ministry of Gender, Labour and Social Development and UNICEF, 2015).

<sup>30</sup> Kwabena Frimpong-Manso, 'Residential Care For Children in Ghana: Strengths and Challenges' (2016) *Global Perspectives* 172.

<sup>31</sup> Punaks and Feit (n 16).

<sup>32</sup> Red Latinoamericano de Acogimiento Familiar, *Children and Adolescents Without Parental Care in Latin America: Contexts, Causes and Consequences of Being Deprived of the Right to Family and Community Life* (Report, RELAF & SOS Children's Villages International, 2010).

<sup>33</sup> Mulheir and Cavanagh (n 13).

<sup>34</sup> UNICEF (n 26).

<sup>35</sup> Florence Martin and Tata Sudrajat, *Someone that Matters: The Quality of Care in Childcare Institutions in Indonesia* (Report, Save the Children, 2007).

<sup>36</sup> Kelly Virginia Phelan, 'Elephants, Orphans and HIV/AIDS: Examining the Volun tourist Experience in Botswana' (2015) 7(2) *Worldwide Hospitality and Tourism Themes* 127.

<sup>37</sup> Linda M Richter and Amy Norman, 'AIDS Orphan Tourism: A Threat to Young Children in Residential Care' (2010) 5(3) *Vulnerable Children and Youth Studies* 217.

<sup>38</sup> Better Volunteering Better Care (n 24).

<sup>39</sup> 'Australia Officially Recognises Orphanage Tourism as Modern Slavery', *Travel Weekly* (online, 30 November 2018) <<http://www.travelweekly.com.au/article/australia-officially-recognises-orphanage-tourism-as-modern-slavery/>>.

Orphanage tourism includes the 'donation of money and goods, attending performances, or volunteering on a short-term basis at orphanages as part of one's holiday'.<sup>40</sup> Orphanage tourism activities often comprise 'informal English practice, and can also include formal lessons, medical or other professional services, playing sports or games, participating in art or music activities or watching dance performances'.<sup>41</sup> This definition covers a wide range of activities, from short visits to orphanages to engage with the children; to structured activities held between tourists and orphans; to long term volunteer positions where tourists may stay onsite at the orphanage for a period of months. The demand for orphanage tourism is a driver for the recruitment and trafficking of children into orphanages. However, orphanage tourism is not a form of modern slavery, as has been reported in some instances.<sup>42</sup>

The use of institutional care as a first port of call for vulnerability has become prolific in some countries and poses a serious child protection issue. The inappropriate use of institutional care violates a number of rights enshrined in the *Convention on the Rights of the Child*.<sup>43</sup> The issue of over-use of institutional care must be addressed through child protection and alternative care systems reforms and by securing time bound commitments to deinstitutionalisation from governments. These reforms should incorporate strategies to encourage foreign donor and volunteer sending countries and entities to divest from supporting institutional care. The United Nations *Guidelines for the Alternative Care for Children*<sup>44</sup> operate as an approved set of principles guiding 'desirable orientations for policy and practice'<sup>45</sup> for the alternative care of children for the 'protection and well-being of children who are deprived of parental care or who are at risk of being so'.<sup>46</sup> The purpose of the Guidelines is to 'support efforts to keep children in, or return them to, the care of their family or, failing this, to find another appropriate and

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<sup>40</sup> Tess Guiney and Mary Mostafanezhad, 'The Political Economy of Orphanage Tourism in Cambodia' (2014) 15(2) *Tourist Studies* 132.

<sup>41</sup> Kathie Carpenter, 'Using Orphanage Spaces to Combat Envy and Stigma' (2014) 24(1) *Children, Youth and Environments* 124, 136.

<sup>42</sup> Ruby Jones, 'Campaign Against Orphanage Tourism Builds, As Second Global Agency Quits Business', *ABC News* (online, 8 November 2017) <<https://www.abc.net.au/news/2017-11-08/campaign-against-orphanage-tourism-builds/9127950>>.

<sup>43</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*Convention on the Rights of the Child*').

<sup>44</sup> *United Nations Guidelines for the Alternative Care of Children*, UN Doc A/RES/64/142, (18 December 2009, adopted 24 February 2010) ('*Alternative Care Guidelines*').

<sup>45</sup> *Ibid* guideline 2.

<sup>46</sup> *Ibid* guideline 1.



permanent solution'.<sup>47</sup> The *Guidelines* provide a best-practice framework for preventing family separation,<sup>48</sup> and promote family reintegration where separation has already occurred.<sup>49</sup> They are not binding, and do not impose mandatory obligations on States. Enshrining the Guidelines in child protection legislation provides a robust child rights-based response to the over-use of institutional care for children which forms part of the enabling environment for orphanage trafficking.

It cannot be said that orphanage tourism and/or child institutionalisation are synonymous with either orphanage trafficking or modern slavery. It is very important that this distinction is made clear, as a lack of clarity risks inappropriate mechanisms being implemented to address each of the issues. In practice, due to the interwoven nature of this issue, criminal law mechanisms designed to combat orphanage trafficking cannot be unlinked from child protection reform processes which should include measures to address the potential harms of orphanage tourism.

#### IV IDENTIFYING ORPHANAGE TRAFFICKING AS MODERN SLAVERY: THE CASE OF AUSTRALIA

It has been reported that Australia is amongst the largest donor and volunteer sending country investing in overseas orphanages, particularly those in the South East Asian region.<sup>50</sup> A mapping report of Australia's contribution to residential care overseas found that orphanage volunteering and tourism is promoted and offered through university placements (comprising both volunteer placements and overseas internships for course credit), international volunteering and travel agencies, private and public school overseas trips, mission trips facilitated by churches or faith-based organizations, volunteer placements organised by Australian NGOs, corporate social responsibility programs, and general tourism.<sup>51</sup>

In 2017, a substantial number of submissions regarding how Australia contributes to 'orphanage trafficking' internationally were made to a Parliamentary Inquiry into

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<sup>47</sup> Ibid guideline 2(a).

<sup>48</sup> Ibid guidelines 39–48.

<sup>49</sup> Ibid guideline 45.

<sup>50</sup> Christopher Knaus, 'The Race to Rescue Cambodian Children from Orphanages Exploiting Them for Profit', *The Guardian* (online, 19 August 2017) <<https://www.theguardian.com/world/2017/aug/19/the-race-to-rescue-cambodian-children-from-orphanages-exploiting-them-for-profit>>.

<sup>51</sup> Kathryn E van Doore, Laura Healy and Megan Jones, *Mapping Australia's Support for the Institutionalisation of Children Overseas* (Report, ReThink Orphanages, 2016) 4.

whether Australia should establish a Modern Slavery Act. As part of the Parliamentary Inquiry, the Committee heard extensive evidence from non-government organisations and academics pertaining to Australia's potential involvement in orphanage trafficking through the charity, tourism, education, and faith-based sectors.<sup>52</sup>

The final report of the Modern Slavery Inquiry, 'Hidden in Plain Sight', made significant recommendations with respect to orphanage trafficking.<sup>53</sup> On the basis of the evidence submitted, the Committee undertaking the Inquiry concluded that orphanage trafficking should be recognised as a form of modern slavery:

The Committee agrees that orphanage trafficking should be recognised as a form of modern slavery in Australia's legislative and policy frameworks, and under the proposed Modern Slavery Act. The Committee agrees that this formal recognition would assist in raising awareness of orphanage trafficking and assist in the implementation of policies to combat it.<sup>54</sup>

Chapter Eight of the report made eleven recommendations concerning orphanage trafficking including advocating for awareness raising, funding stream reforms, support for divestment and transition of charity and other organisation's involvement in residential care institutions, a mechanism to register organisations operating institutional care for children in accordance with the *Convention on the Rights of the Child* and *United Nations Guidelines for the Alternative Care of Children*; it also recommended

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<sup>52</sup> See, eg, ReThink Orphanages, Submission 23 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017; Cambodian Children's Trust, Submission 25 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017; Kathryn E van Doore, Submission 52 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017; ACFID Child Rights Community of Practice, Submission 55 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017; Save the Children, Submission 97 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017; Andrea Nave and Forget Me Not, Submission 114 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017; ACC international, Submission 140 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017; Forget Me Not Nepal, The Himalayan Innovative Society, Adara Development, Submission 155 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017.

<sup>53</sup> *Hidden in Plain Sight* (n 10).

<sup>54</sup> *Ibid* 237 [8.45].

the introduction of offences under the potential *Modern Slavery Act*.<sup>55</sup> Pertinent to the criminalisation of orphanage trafficking, recommendation 43 provided:

The Committee recommends that the Australian Government introduce offences and penalties for individuals, businesses, organisations and other entities that facilitate, enable, organise, benefit from, or profit from tourist visits to overseas residential institutions, and/or who donate to or fund overseas residential institutions, that do not operate in compliance with the United Nations Convention on the Rights of the Child, the United Nations Guidelines for the Alternative Care for Children and the proposed Australian Government register.<sup>56</sup>

As a result, Australia became the first government to consider legislating for orphanage trafficking as a form of modern slavery. However, the resulting *Modern Slavery Act 2018* (Cth) failed to realise the recommendations of the Joint Standing Committee in many respects, including recommendation 43. Whilst the Committee had recommended a robust modern slavery law, the Australian government instead passed an Act focused on supply chain reporting that did not incorporate offences.

The resulting *Modern Slavery Act 2018* (Cth) commenced on 1 January 2019. Section 4 of the *Modern Slavery Act 2018* (Cth) states:

*modern slavery* means conduct which would constitute:

(a) an offence under Division 270 or 271 of the *Criminal Code*;

or

(b) an offence under either of those Divisions if the conduct took place in Australia; or

(c) trafficking in persons, as defined in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, done at New York on 15 November 2000 ([2005] ATS 27); or

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<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid* 267 [8.159].

(d) the worst forms of child labour, as defined in Article 3 of the ILO Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, done at Geneva on 17 June 1999 ([2007] ATS 38).

As can be seen, the definition of modern slavery in the Act does not elucidate the contexts in which exploitation occurs and there is no explicit reference to orphanage trafficking in the Act itself. However, the 'Commonwealth Modern Slavery Act 2018 Guidance for Reporting Entities' clarifies that 'the Act defines modern slavery as including eight types of serious exploitation' and identifies orphanage trafficking as falling into at least two types of exploitation: trafficking in persons,<sup>57</sup> and the worst forms of child labour.<sup>58</sup> Indeed, on the occasion of the passing of the Act by Parliament, the Honourable Senator Linda Reynolds CSC, the Assistant Minister for Home Affairs at the time, expressly noted that 'the passage of this Bill also means Australia is now the first nation to recognise orphanage trafficking as a form of modern slavery'.<sup>59</sup>

There are two ways that orphanage trafficking can be construed as falling within the definition of modern slavery for the purposes of the Act. The first is that orphanage trafficking can be regarded as falling within the definition of child trafficking found in article 3 of the *Trafficking Protocol* as specified in section 4(c) of the *Modern Slavery Act 2018* (Cth). This argument has been made in academic research.<sup>60</sup> The second is that orphanage trafficking may be regarded as falling under the existing sections of the *Criminal Code 1995* (Cth) regarding slavery and trafficking referred to in section 4(a) of the *Modern Slavery Act 2018* (Cth). The Explanatory Memorandum accompanying the Modern Slavery Bill 2018 (Cth) supports this interpretation by explicitly stating:

The offences in Divisions 270 and 271 of the Criminal Code apply irrespective of the purpose for which a person is trafficked, or the industry or context in which they are exploited. For example, these

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<sup>57</sup> Commonwealth of Australia, *Commonwealth Modern Slavery Act 2018 Guidance for Reporting Entities* (Legislative Guidance, 2019) 76.

<sup>58</sup> *Ibid* 78.

<sup>59</sup> Assistant Minister for Home Affairs Senator the Hon Linda Reynolds CSC (n 1).

<sup>60</sup> van Doore (n 3).

offences could apply to exploitation in mining and agricultural contexts, as well as the trafficking and/or exploitation of children in orphanages.<sup>61</sup>

The result of orphanage trafficking being identified as a form of modern slavery means that for the purpose of the current *Modern Slavery Act 2018* (Cth), large businesses with a consolidated revenue of over AUD\$100 million over a 12 month reporting period who have links to orphanages or institutional care in their operations or supply chains should report on how they are assessing and mitigating the risk of orphanage trafficking and child exploitation in orphanages. This is particularly pertinent for any large travel companies still offering orphanage tourism products or large corporations with charitable foundations that support orphanages. Although it is mandatory for reporting entities to prepare annual statements, there are no penalties for entities who fail to report.

For large tourism companies who facilitate orphanage tourism products, the associated *Commonwealth Modern Slavery Act 2018* Guidance for Reporting Entities provides a case study illustrating how tourism companies may be involved in orphanage trafficking:

Everfree Travel is an Australian wholesale travel company that specialises in arranging overseas volunteering ‘adventures’ for students and young adults. Everfree’s packages are sold by many of the large travel retailers in Australia. The most popular package Everfree offers is a ‘volunteering experience’ at an overseas orphanage. This involves participants taking part in short-term placements at the orphanage to provide ‘social and emotional support’ to children. The orphanage operators appear legitimate and claim fees paid by Everfree are directly used to support the children. Everfree has not taken any steps to verify this is the case. After several years, Everfree is approached by an NGO with evidence the orphanage is trafficking children and exploiting them in the orphanage, including for the purpose of orphanage tourism. The orphanage actively recruits children from poor communities, often ‘purchasing’ children from their families. The children are not permitted to have contact with their families or leave the facility and are regularly abused by staff. The children are forced to lie to volunteers about being orphaned or abandoned. Further investigation revealed that donations

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<sup>61</sup> Explanatory Memorandum, *Modern Slavery Bill 2018*, 8 [50].

from volunteers and fees paid by Everfree were pocketed by the orphanage operators.<sup>62</sup>

In the context of orphanage trafficking, the *Modern Slavery Act 2018* (Cth) requires reporting entities who have relationships with orphanages or residential care institutions to prepare a Modern Slavery Statement that describes the risks of orphanage trafficking in their operations and supply chains; describes the actions that the reporting entity has taken to assess and address these risks; describes how the reporting entity assesses the effectiveness of these actions; and describes how they have consulted with any entity they own or control.<sup>63</sup>

#### V RECOMMENDATIONS

Whilst the intended incorporation of orphanage trafficking for the purposes of modern slavery reporting is clear, whether orphanage trafficking could be prosecuted as an offence under the current *Criminal Code 1995* (Cth) provisions is not as straightforward. This is due to the construction of the clauses criminalising trafficking found in the Code. In this section, we make recommendations for how Australia can strengthen the response to orphanage trafficking via either a broadening of the present trafficking provisions, or alternatively, explicit criminalisation.

The offence of ‘trafficking in children’ is found in section 271.4 of the *Criminal Code 1995* (Cth) and reads as follows:

##### 271.4 Offence of trafficking in children

(1) A person (the *first person*) commits an offence of trafficking in children if:

(a) the first person organises or facilitates the entry or proposed entry into Australia, or the receipt in Australia, of another person; and

(b) the other person is under the age of 18; and

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<sup>62</sup> Commonwealth of Australia (n 57) 12.

<sup>63</sup> *Ibid* 29.

(c) in organising or facilitating that entry or proposed entry, or that receipt, the first person:

(i) intends that the other person will be used to provide sexual services or will be otherwise exploited, either by the first person or another, after that entry or receipt; or

(ii) is reckless as to whether the other person will be used to provide sexual services or will be otherwise exploited, either by the first person or another, after that entry or receipt.

Penalty: Imprisonment for 25 years.

(2) A person (the *first person*) commits an offence of trafficking in children if:

(a) the first person organises or facilitates the exit or proposed exit from Australia of another person; and

(b) the other person is under the age of 18; and

(c) in organising or facilitating that exit or proposed exit, the first person:

(i) intends that the other person will be used to provide sexual services or will be otherwise exploited, either by the first person or another, after that exit; or

(ii) is reckless as to whether the other person will be used to provide sexual services or will be otherwise exploited, either by the first person or another, after that exit.

Penalty: Imprisonment for 25 years.

The jurisdiction for trafficking offences is extended extra-territorially for Australian residents and citizens by section 15.2 (extended geographical jurisdiction — category B) of the *Criminal Code 1995* (Cth). However, as can be seen above, the definition of trafficking in children for the purposes of the *Criminal Code 1995* (Cth) limits the crime

of trafficking in children to offences involving the 'entry or proposed entry to, or exit or proposed exit from' Australia.<sup>64</sup> This means that actual or proposed border crossing into or out of Australia is currently a required element of the offence of trafficking in children. As orphanage trafficking does not take place entering or exiting Australia, but rather in foreign jurisdictions, this precludes Australian offenders being able to be prosecuted under Australian law.

We suggest that there are two different ways to address this issue and ensure that orphanage trafficking can be prosecuted under Australian law. The first is to broaden the current definitional contours of the offence by removing the words 'entry or proposed entry to, or exit or proposed exit from' Australia in the relevant provisions. This would have the effect of enabling operation of the extraterritorial effect of the trafficking provisions such that Australian citizens, residents, or entities that commit the offence of orphanage trafficking in other jurisdictions are able to be prosecuted under Australian law. This would have the added benefit of also encompassing trafficking in persons offences in which Australian citizens, residents, and entities may be involved in other jurisdictions, which are not predicated on entering or exiting Australia, and which are therefore not able to be prosecuted under the existing provisions.

The second is to establish an explicit offence for orphanage trafficking in the *Criminal Code 1995* (Cth). This would see recommendation 43 of the 'Hidden in Plain Sight' Report enacted, cementing Australia's growing reputation as world leaders in addressing orphanage trafficking. We recommend that the proposed offences be included in the *Criminal Code 1995* (Cth) under Division 271 which currently provides for the offence of trafficking. The recommended inclusion of an offence for orphanage trafficking in the *Criminal Code 1995* (Cth) accords with the existing legislative framework on human trafficking providing a consistent criminal response to the offence. The term 'orphanage trafficking' is suggested as it succinctly encapsulates the offence as a form of trafficking. The offence of orphanage trafficking could be included as an additional form of trafficking in Division 271 in the *Criminal Code 1995* (Cth) with a tailored section as follows:

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<sup>64</sup> *Criminal Code 1995* (Cth) s 271.4.



## Subdivision BC 271.8 Offence of orphanage trafficking in children

A person commits an offence of orphanage trafficking in children if:

- (a) the first-mentioned person organises or facilitates the transportation of another person to an orphanage or institutional facility; and
- (b) the other person is under the age of 18; and
- (c) in organising or facilitating that transportation, the first-mentioned person:
  - (i) intends that the other person will be exploited, either by the first-mentioned person or another, during or following the transportation to that other place; or
  - (ii) is reckless as to whether the other person will be exploited, either by the first-mentioned person or another, during or following the transportation to that other place.

Penalty: Imprisonment for 25 years.

It is suggested that the offences be given an extra-territorial application, modelled on section 273.2 of the *Criminal Code* (Extended geographical jurisdiction — Category C) which reads:<sup>65</sup>

## 273.2 Who can be prosecuted for an offence committed outside Australia

A person must not be charged with an offence against this Division that the person allegedly committed outside Australia unless, at the time of the offence, the person was:

- (a) an Australian citizen; or
- (b) a resident of Australia; or

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<sup>65</sup> *Criminal Code* 1995 (Cth) s 273.2(a)–(d).

(c) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or

(d) any other body corporate that carries on its activities principally in Australia.

This would apply to both Australian citizens and residents, but also include any incorporated bodies (such as charities or not for profit organisations) and any organisations that may be registered or incorporated overseas but have their principal place of activity in Australia in accordance with section 273.2(d).<sup>66</sup>

The recommendation for an explicit offence does not represent a unique innovation for Australia. Having recognised the issue of Australian tourists travelling internationally for the purpose of sexually abusing children, Australia legislated to criminalise child sex tourism implementing a similar framework in the *Criminal Code 1995 (Cth)* in 2017.<sup>67</sup> Australia was the first country to legislate to allow a competent government authority to request that the Minister of Foreign Affairs and Trade refuse to issue, cancel, or order the surrender of a person's Australian passport if that person's name is entered on a child protection offender register of an Australian state or territory and has reporting obligations in connection with that entry.<sup>68</sup> As such, this recommendation for an explicit provision aligns with previous legislative action the Australian government has taken.

## VI CONCLUSION

Australia's decision to regard orphanage trafficking as a form of modern slavery set a global precedent, not only for other countries looking to legislate against modern slavery, but also for countries with a high prevalence of children in institutional care. In identifying orphanage trafficking as a form of modern slavery, Australia has sought to address the demand drivers of orphanage trafficking by ensuring that reporting entities that have orphanages or residential care in their supply chains and operations are required to report on how they identify and mitigate the risks of orphanage trafficking. However, whilst the inclusion of orphanage trafficking as a form of reportable modern slavery is a commendable and proactive step, whether Australian citizens, residents, or

<sup>66</sup> *Criminal Code 1995 (Cth)* s 273.2(d).

<sup>67</sup> *Ibid* s 272.

<sup>68</sup> *Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Act 2017 (Cth)*.

entities that commit orphanage trafficking could be prosecuted under the trafficking in children provisions of the *Criminal Code 1995* (Cth) is doubtful. This is because the definitional contours of the offence of trafficking in children are limited to entry into or out of Australia. As such, Australian citizens, residents, or entities who commit orphanage trafficking in other jurisdictions presently have impunity under the trafficking provisions found in Australian law.

To rectify this, we argue that amendment is required to the trafficking provisions in Division 271 of the *Criminal Code 1995* (Cth). We provide two alternative mechanisms for ensuring that orphanage trafficking is able to be prosecuted under Australian law. The first mechanism is to remove the requirement for trafficking offences to either occur, or intend to occur, entering or exiting the Australian border. Removal of this requirement would broaden the offence of trafficking in persons to include trafficking offences occurring in foreign jurisdictions that are committed by Australian citizens, residents, and entities. The removal of this requirement would mean that orphanage trafficking is able to be prosecuted under the trafficking in children provision found in section 271.4 of the *Criminal Code 1995* (Cth).

The second proposed mechanism is to explicitly criminalise the offence of orphanage trafficking. This proposal is akin to the explicit criminalisation of child sex tourism found in the *Criminal Code 1995* (Cth) despite being just one form of child sexual exploitation. Explicit criminalisation has the potential to provide a clear pathway to the prosecution of Australian citizens, residents, and entities that commit the offence of orphanage trafficking. We posit that explicit criminalisation may have the added benefit of reducing the potential confusion regarding orphanage trafficking, orphanage tourism, and institutionalisation being regarded as synonymous by delineating orphanage trafficking as a criminal offence.

However, it would be remiss to believe that such an amendment would resolve the intersected issues of child institutionalisation, orphanage trafficking, and child exploitation entirely. It is clear that orphanage trafficking predominantly occurs in contexts where the over-use of institutionalisation is the first port of call as a means of addressing child vulnerability. As such, ensuring that orphanage trafficking can be prosecuted in a country such as Australia is a small but important part of addressing the

overlapping issues of child institutionalisation and child exploitation. Criminal law mechanisms, such as those addressing orphanage trafficking, must be coupled with social mechanisms for addressing child vulnerability to trafficking and exploitation to see significant impact.

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