Oversimplified Narratives: Australian Judges' Construction of Women's Victimisation and Offending in Human Trafficking for Commercial Sexual Exploitation

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Abstract

This thesis examines all ten Australian Commonwealth cases of human trafficking for commercial sexual exploitation involving adult, women offenders with histories of victimisation, which occurred between 2005 to 2019. A qualitative research design is undertaken, including a thematic content analysis of court documents pertaining to each offender. These include sentencing remarks, appeal transcripts, and pre-sentence reports in conjunction with semi-structured interviews with selected judges and anti-trafficking experts. Deploying an original examination of these cases through court documents, this thesis examines the judge's construction of the narratives contained within the sentencing remarks to add to the understanding of the ways in which women offenders' narratives are constructed during sentencing. A critical legal feminist (Smart 1990; Hunter 2019) lens is combined with Anthony Giddens' (1979) theory of structuration to highlight the judge's construction of the relationship between structure and agency within these ten offenders' lives. Applying this framework enhances the understanding of the offending women's' choices when made within constraint, highlighting the space for agency and structure to co-exist. Four distinct layers of constraint are identified: situational constraints in the women's lives; constraint imposed by judges; systemic-level constraints; and finally, additional constraint imposed by judges due to systemic constraints. The minimisation of these elements, however, renders an understanding of the victim-offender cycle absent from the narrative within the sentencing remarks.

Declaration

I certify that this thesis does not incorporate without acknowledgment any material previously submitted for a degree or diploma in any university; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person except where due reference is made in the text.

Signed: 

Date: 1st December 2021

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Baxter, ALA (forthcoming 2022), 'She Should Have Known': Oversimplified narratives of the victim-offender cycle within women human trafficking 'offenders', in I Masson & N Booth (ed.), *Handbook of Women's Experiences of Criminal Justice*, Routledge, UK.

Baxter, ALA & Chazal, N (forthcoming 2022) 'It's About Survival': Court Constructions of Socio-Economic Constraints on Women Offenders in Australian Human Trafficking for Sexual Exploitation Cases, *Anti-Trafficking Review*.

Marmo, M, Chazal, N, Bandiera, R & **Baxter, ALA** (forthcoming 2022), *A Critical Approach to Modern Slavery in Australia: The Invisible Victim,* Routledge, UK.

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Acronyms

ACT – Australian Capital Territory

ACTCA – Australian Capital Territory Court of Appeal

ACTSC – Australian Capital Territory Supreme Court

CCN – Court-constructed narrative

CDPP – Commonwealth Department of Public Prosecutions

CJS – Criminal justice system

DFV – Domestic and family violence

GLOTiP – Global Report on Trafficking in Persons

HTCSE – Human trafficking for commercial sexual exploitation

ICMPD – International Centre for Migration Policy Development

NSW – New South Wales

NSWCCA – New South Wales Court of Criminal Appeal

NSWDC – New South Wales District Court

PSR – Pre-Sentence report

PR – Psychological/Psychiatrist report

SBREC – Social and Behavioural Research Ethics Committee

TCA – Thematic content analysis

UN.GIFT – United Nations Global Initiative to Fight Human Trafficking

UN.OHCHR – United Nations Human Rights Office of the High Commissioner

UNODC – United Nations Office on Drugs and Crime

UNICRI – United Nations Interregional Crime and Justice Research Institute

UK – United Kingdom

USA – United States of America

VCC – Victorian County Court

VIC – Victoria

VIS – Victim impact statement

VSC – Victorian Supreme Court

VSCA – Victorian Supreme Court of Appeal

WA – Western Australia

WADC – Western Australia District Court

Chapter 1: Introduction

This thesis examines the judicial construction of victimisation and offending within ten Australian cases of human trafficking for commercial sexual exploitation (HTCSE) where women were identified as acting in offending roles. These ten cases represent every Australian case of HTCSE where a woman was identified as the offender. A rich body of qualitative data has been used as all available material applicable to each case is analysed, including sentencing remarks, appeal transcripts, pre-sentence reports, and psychological reports, as illustrated in Figure 1. These text-based sources are supplemented by interviews with specific judges who were involved in the ten cases and individuals referred to as anti-trafficking experts who possess significant knowledge of HTCSE in the Australian context. The analyses within this thesis seek to comment on how the structures within which these women are situated, as identified from the various court documents analysed, help shape their agentic decisions, and how these decisions are constructed by judges. The primary focus of this thesis is the way that the relationship between the victimisation and offending within these ten cases is constructed by judges within a patriarchal legal setting. As such, the women and their own voices have not been included in this thesis.

Despite the high percentage of women identified as acting in offending roles in cases of human trafficking, the judicial understanding of women's roles as perpetrators of HTCSE is an under-researched area. In Australia, 10 of the 16, individuals charged with trafficking-related offences, between 2005 and 2019, involving commercial sexual exploitation, were women. Therefore, 63% of those individuals convicted as offenders in Australia, have been women. Globally, data from the United Nations Office on Drugs and Crime (UNODC) demonstrates that the percentages of women acting in offending roles in trafficking cases has remained consistent since 2009 (UNODC 2009; 2012; 2014; 2016; 2018), with offending rates for women rarely dropping below 30%. This suggests, the 'prominence of female offending rates related to trafficking in persons is a clear exception in the criminological taxonomy [as] few other crimes record this level of female participation' (UNODC 2012, p. 29). The high prevalence of women identified as acting in offending roles challenges the idea of who holds victim and offender roles in HTCSE: women are not *solely* the victim of these crimes, as

dominant narratives suggest, but they are also offenders. This is not just important to scholars or international non-government organisations, such as the United Nations, but also for people operating in the criminal justice system (CJS), such as judges, since this thesis has identified this as an overlooked area.

Dominant Gendered Human Trafficking Narratives

Trafficking for commercial sexual exploitation is viewed predominantly as a crime with distinct victims and offenders (Warren 2012). Traditionally, trafficking has been constructed as a 'heinous male perpetrated offense against women and girls' (Jones 2014, p. 144), consequently rendering women traffickers almost invisible. Myth-based, ideologically motivated master narratives have long dominated the professional and public discourse regarding HTCSE, influencing perceptions of victims and offenders (Kienast, Lakner and Neulet 2014). These narratives involve dominant constructions of the problem of human trafficking such as those that suggest women are mercilessly exploited by traffickers (Spencer & Broad 2012). This removes any space for women's agency to exist. Dominant gendered narratives do not accurately reflect the experiences of many women who migrate for greater economic opportunities due to the socio-economic structural constraints in their lives and therefore, do not accurately represent the victim-offender cycle present in many cases of HTCSE.

The current representation of the trafficked victim, strengthened by the image of the typical trafficker, conceals women's migratory agency. Portrayals of women trafficked for sexual exploitation often label these women either powerless victims or unworthy prostitutes (Jordan 2002). Stemming from 'ideal victim' narratives, such as Christie's (1986), which require victims to have played no role in their victimisation, women's agency is minimised or even denied when they are positioned as the vulnerable victim. Framing migrant women within these specific and narrow narratives, therefore, reduce and oversimplify their lives and choices. Creating a false dichotomy between ideal and *real* victims, this narrative employs a deceptive representation that portrays all women in the sex industry as coerced and imprisoned in brothels (Hoyle, Bosworth & Dempsey 2011). It further excludes any woman who falls outside this limited definition of who constitutes a victim (O'Brien 2013).

Consequently, many of these narratives remain deficient in considering and addressing the structural causes of trafficking (Kienast, Lakner and Neulet 2014).

Global monitoring frameworks, anti-trafficking media and activist groups have 'constructed a moral economy of gendered violence' (Warren 2012, p. 106). Within this construction, the same narrative emerges - innocent young women are captured and exploited by men who force them into sex work. Anti-trafficking approaches often reflect this enduring theme (Spencer & Broad 2012). The continued replication of this theme ignores the element of agency present in cases with victimised offenders and renders absent the space for women traffickers to exist. This results in a limited understanding of the victim-offender cycle present in HTCSE, in which women victims become the offenders.

Women Acting in Offending Roles in Human Trafficking and the Victim-Offender Cycle

A recurring element in cases of women acting in offending roles in HTCSE is the prevalence of those who were previously victims (Kienast, Lakner & Neulet 2014; UNODC 2020). Many women have been trafficked themselves (Hughes & Denisova 2003; UNODC 2012; UNODC 2020). Sex work and HTCSE do not equal one another. However, prior involvement in sex work can lead to women's participation in trafficking operations, specifically those involving commercial sexual exploitation. In situations where the commercial sex industry may be the only trade they know, many previously contracted and exploited women remain in it and become the traffickers (Kabance 2014). Victim's' options to exit are often restrained by an absence of prospects outside the trafficking business (Kienast, Lakner & Neulet 2014). Women may become the 'trafficker' to improve their own situations or to gain independence from their traffickers, and can be viewed, ultimately, as an expression of agency made amongst significant structural constraints. When women shift their position and mindset from that of victim to offender, empathy and emotional concerns are put aside. Having themselves been subjected to abuse and humiliation, women traffickers adopt the strategic survival approach of 'better her than me' (Kienast, Lakner & Neulet 2014, p. 9; Wijkman & Kleemans 2019).

The role of women in the trafficking process is often observed as one that requires frequent interaction with the perceived or actual victims. Women, therefore, are often the most visible actor in the trafficking organisation. Global data suggests there is a strong correlation between the citizenships of victims and offenders (UNDOC 2016). Traffickers and their victims often share similarities including language and backgrounds (Simmons et al. 2013).

Despite the possibility that many sex workers may be operating with a degree of choice and have the ability to create power and autonomy for themselves (Nestle 1987; Sandy 2014), anti-trafficking policies are often born from a radical viewpoint and are in the interest of the paternalistic need to rescue those in sex work (Fouladvand & Ward 2019). Policies, interventions and different forms of media have all become powerful tools to reproduce and perpetuate the trafficking rhetoric that views women only as coerced. Within this narrative, women can never make the free choice to engage in sex work. These representations, however, leave little room for agency or empowerment on behalf of the women and fail to challenge the structural and causal factors of inequality that force them to migrate (Andrijasevic & Mai 2016). Framing the lives of women in terms of specific narratives results in a reduction and simplification of the lives and choices of migrant women. They also hinder a more nuanced understanding of how socio-economic inequalities produce structural constraints in the lives of these women, and how the constraints are overcome.

The in-depth study of female criminality can bring a profound understanding of crime to the field of criminology. Nevertheless, the significance of gender has often remained focused on victimhood, and the ways in which women are victimised rather than on offending and forms of female criminality (Heidensohn 1987; Barberet 2014). While more attention is now being devoted to women offenders generally, this gendered analysis has yet to be applied comprehensively to women acting in offending roles in Australian situations of HTCSE. Further still, limited attention has been allocated to the manner in which the experiences of these women have been constructed by the CJS and by judges, in particular.

Judicial Construction of Victimisation and Structural Constraints

Much of the existing literature on HTCSE focuses on the victims: specifically, on those who identify as *only* the victim. As such, academics and researchers have often failed to address the full spectrum of trafficking victims (Wolken 2006), including those individuals who are identified by the CJS as offenders but are simultaneously victims. Existing gendered dominant narratives that focus on the female victim/male perpetrator paradigm, suggest 'a victim can never be a perpetrator, and a woman, therefore, can never be involved as a perpetrator …' (Wijkman & Kleemans 2019, p. 56). As a result, limited knowledge exists of those offenders identified as women. Even less is known about the victimisation histories of these women, the socio-economic structural constraints in their lives that influenced their choices, and the way in which these are constructed by judges within a patriarchal court environment. This continues to be the case despite the UNODC commenting consistently on the prevalence of women holding offender roles in human trafficking, as discussed above. The United Nations Global Initiative to Fight Human Trafficking (2008, p. 2) has also highlighted the need to understand how and why people become traffickers to provide ways to prevent people from becoming traffickers in the future. The focus on those identifying as *only* the victim, has resulted in the complete examination of *all* victims, including those also identified as the offender, despite sustaining significant victimisation experiences, being non-existent.

An understanding of women's roles as perpetrators of human trafficking thus remains limited (McCarthy 2020). Women traffickers have been largely ignored and seldom studied (Choi-Fitzpatrick 2016; Wijkman & Kleemans 2019). As a result of dominant gendered narratives and the lack of focus placed on understanding women who act in offending roles in HTCSE, little is known about the way judges' sentencing of these women constructs their offending in relation to their victimisation experiences and the various constraining structures present in their lives. An analysis of the judge's' construction of these elements in an Australian context is the primary objective of this thesis as it speaks to the judicial understanding of the victim-offender cycle within HTCSE cases.

The Agency/Structure Paradigm within Australian Courts

Human Trafficking for Commercial Sexual Exploitation in Australia: A rich body of Qualitative Data

To address this gap in knowledge, this thesis brings together a rich body of qualitative material to analyse ten Australian cases of HTCSE in which women were identified as acting in offending roles. These cases occurred between 2005 and 2019 and represent every case that occurred in Australia during this time period. Cases that occurred after 2019 were not considered due to time constraints. Five cases occurred in Sydney, New South Wales; three occurred in Melbourne, Victoria; one occurred in Canberra, the Australian Capital Territory; and one occurred in Perth, Western Australia. A detailed analysis of each case is undertaken in Chapters 5.1 and 5.2. The cases analysed are outlined below in Table 1.

Table 1: Australian cases of HTCSE analysed in this thesis, arranged chronologically.

Woman Offender	**Case Citation**	**Location**
DS	R v DS [2005] VSCA 99	Melbourne, Victoria
Wei **TANG**	R v Tang, Wei [2006] VCC 637	Melbourne, Victoria
Somsri **YOTCHOMCHIN**	Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184	Sydney, New South Wales
Sarisa **LEECH**	CDPP v Ho & Leech (Sentence) [2009] VSC 495	Melbourne, Victoria
Kanokporn **TANUCHIT**	R v McIvor and Tanuchit [2010] NSWDC 310	Sydney, New South Wales
Namthip **NETTHIP**	R v Netthip [2010] NSWDC 159	Sydney, New South Wales
Watcharaporn **NANTAHKHUM**	R v Watcharaporn Nantahkhum SCC149 of 2010	Canberra, Australian Capital Territory
Chee Mei **WONG**	R v Chee Mei Wong	Sydney, New South Wales
Lay Foon **KHOO**	The Queen v Lay Foon KHOO [2017] 2105 of 2016	Perth, Western Australia
Rungnapha **KANBUT**	R v Kanbut [2019] NSWDC 931	Sydney, New South Wales

The primary focus of this research is on the construction of the relationship between the victimisation and offending within the above ten cases to understand how women's agency is constructed within a patriarchal legal setting. This thesis aims to examine the ways in which during sentencing judges construct the victimisation and offending of women who have been identified as acting in offending roles within Australian cases of HTCSE. Four research questions guided this research:

1. How are narratives about women acting in offending roles in cases of HTCSE constructed by judges during sentencing?
2. How are the background structural constraints and the previous victimisation of these women dealt with by judges during sentencing?
3. How do Australian judges construct the relationship between victimisation and offending in HTCSE?
4. Do legal structures constrain judges' decisions on sentencing?

To undertake this analysis, publicly accessible sentencing remarks and appeal transcripts pertaining to each woman offender were examined. Both sources represent a form of narrative that has been constructed by the court and, for this reason, the term court-constructed narrative (CCN) was developed for the purpose of this research to describe those particular narratives. Sentencing remarks were expressly chosen as the principal form of CCN analysed as they were the primary documents in which the offenders' background was discussed. Importantly, CCNs cannot be considered wholly representative of the experiences of either victims or offenders; however, they do provide a lens through which to view how patriarchal systems, such as the law and the courts, structure women's experiences of victimisation and offending. This analysis was supplemented with pre-sentence and psychological/psychiatric reports where available, with interviews with six key judges, two of whom, provided access to the relevant pre-sentence and psychological/psychiatric reports, and with five anti-trafficking experts working in the space of HTCSE in Australia. The judges who were interviewed were involved in the identified cases primarily in the capacity of the sentencing judge and to a lesser degree, the appellate judge. As such, this thesis has triangulated a rich body of qualitative material pertaining to each Australian case of HTCSE that occurred between 2005 and 2019. Ethics approval was granted to undertake this research by the Social and Behavioural Research Ethics Committee (SBREC) and was assigned project number 7495.

The analyses of the various data sources, undertaken through a thematic content analysis, focus on the construction of women's involvement uniquely, as it is their offending as constructed by the sentencing judges which is examined rather than their victimisation alone. Within this examination, it is evident they too have significant histories of victimisation;

however, it is how this victimisation impacts their *offending*, and the way in which the relationship between victimisation and offending is constructed by judges, that are the key considerations within this thesis. Accordingly, the analyses seek to comment on the structures facing the identified offenders, with the intention of drawing awareness to, and facilitate an understanding of, the ways these women exercise agency. More specifically, focus is placed on the way the structures within which these women are situated help shape their agentic decisions and how these are viewed and constructed by judges during sentencing.

Four primary themes were identified from an analysis of the various data sources pertaining to the ten women acting in offending roles. These themes constitute four layers of constraint imposed on these women. They are: situational constraints in the women's lives; constraint imposed by judges; systemic-level constraints of the CJS; and additional constraint imposed by judges due to systemic constraints of the CJS. These themes formed the analytical component of this thesis. The remainder of this introduction provides an overview of each chapter and an outline of the thesis structure.

Thesis Overview

Chapter 2 provides a background on human trafficking in Australia, what is known, globally about women who act in offending roles in trafficking, the victim-offender cycle and dominant gendered human trafficking narratives. This chapter discusses the United Nations definition of human trafficking. Next, the chapter discusses the pertinent Australian Commonwealth legislation and explains the two offences, as they appear in the legislation, that the identified women were charged with: slavery and sexual servitude. The following section of this chapter examines the global trends of women acting in offending roles in human trafficking, considering the UNDOC *Global Report on Trafficking in Persons* data. Literature on women human trafficking offenders is discussed next, and the chapter explores what is known about women who act in offending roles in human trafficking.

Following this, literature exploring the victim-offender cycle is discussed. Research on criminal victimisation and offending demonstrates that there is often considerable overlap between victims and offenders (Jennings, Piquero & Reingle 2012; Lauristen & Laub 2007;

Sampson & Lauristen 1990; Tillyer & Wright 2014). One individual can be simultaneously a victim and an offender. This creates a cycle of victimisation and offending, which is understood as the victim-offender cycle. Finally, Chapter 2 explores the dominant gendered narratives of human trafficking. These narratives, which construct human trafficking as a phenomenon with distinct victims and offenders, dominate professional and public discourse regarding HTCSE and influence perceptions of victims and offenders. As a result of these narratives, the space for women traffickers to exist is rendered absent, which has resulted in women traffickers being largely ignored and seldom studied (Choi-Fitzpatrick 2016; Wijkman & Kleemans 2019).

Chapter 3 provides a theoretical framework that offers a structure/agency reflection encompassing the intersectionality of gender, race, sex work, the victim-offender cycle, and the law and court as a patriarchal and white domain. This chapter highlights the need to understand how patriarchal structures shape court narratives about women's lives. It discusses the patriarchal construction of the court and outlines the way the legal habitus (Bourdieu 1987) works to hold the law's knowledges above women's knowledges (Smart 1990), which ensures the full trajectory of the victim-offender cycle is not visible. Since these cases involve both offences that occurred within the sex industry and offenders who transgressed stereotypical gender roles, gendered morality is heavily interwoven into the CCN of these women. Inclusive of feminist debates concerning sex work and choice, this chapter, thus, discusses the link between gendered morality and sex work. Finally, the chapter ends with a discussion on Giddens' (1979) theory of structuration. His conceptualisation on the interrelatedness of structure and agency enriches the rest of the discussion in this chapter, and provides the means to acknowledge how these women exercise agency, despite being considerably constrained by structures. This chapter offers a theoretical framework that broadens the understanding of how narratives about women acting in offending roles in HTCSE are constructed by the court.

Chapter 4 discusses the research design and methodology used to undertake the analysis. The first section of the chapter discusses the qualitative research design that mapped out the relationship between the CCN and the victim-offender cycle present in the ten women identified as acting in offending roles in cases of HTCSE. While sentencing remarks are the

primary form of CCN analysed in this thesis, appeal transcripts, were also used as an additional form of CCN where applicable. To strengthen the scrutiny of the sentencing remarks, pre-sentence reports and psychological/psychiatric reports were analysed also. Semi-structured interviews were undertaken with carefully and specifically chosen judges, each of whom had a relationship to one of the identified cases. Selected Australian anti-trafficking experts were also interviewed as a source from which to gain further knowledge about the victim-offender cycle in HTCSE, in the Australian context. The following section of this chapter reviews the method used to analyse the data sources. A thematic content analysis was undertaken to analyse the primary themes (Joffe & Yardley 2004). Finally, the chapter discusses the gatekeepers of the research, the difficulties encountered in accessing court documents and the possible limitations of the research.

Chapter 5.1 offers a discussion of the victims and offenders related to six of the ten cases examined in this thesis: R v DS [2005] VSCA 99; R v Tang, Wei [2006] VCC 637; Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184; CDPP v Ho & Leech (Sentence) [2009] VSC 495; R v McIvor and Tanuchit [2010] NSWDC 310; and R v Netthip [2010] NSWDC 159. The chapter begins by discussing the facts related to the victims as acknowledged within the sentencing remarks. Within this, victims' demographics, journey to Australia and experience once in Australia are examined. Following the same template, the facts related to the offenders are then explored with two additional sections exploring the offender's role within the organisational structure and the sentence they received. A specific template is utilised throughout this and the following chapter to highlight the similarities that exist between the victims and offenders within each case. Importantly, this template allows trends and patterns in offending and victimisation within Australian HTCSE cases to emerge and highlight the overlap between victimisation and offending.

Chapter 5.2 serves as a continuation of Chapter 5.1's analysis and provides a discussion of the remaining four cases: R v Watcharaporn Nantahkhum SCC149 of 2010; R v Chee Mei Wong; The Queen v Lay Foon KHOO [2017] 2105 of 2016; and R v Kanbut [2019] NSWDC 931. The discussion of each case has been intentionally spread over two chapters due to the increase in the amount of information about the offender considered by the judge within the sentencing remarks. In this chapter, the four cases span from 2012 to 2019 while in the

previous chapter, the six cases occurred between 2005 and 2010. This chapter follows the same template utilised in Chapter 5.1 to provide a consistent and original discussion of the remaining four cases.

Chapter 6 addresses the first and second research questions and explores two of the four identified layers of constraint experienced by the offenders. It begins by examining the victimisation the offenders experienced, and the constraining structures in their lives, as constructed by the sentencing judges. These elements are individual level situational constraints and represent the first layer of constraint identified. The following section explores the constraint imposed by the judges through the practice applying moral judgement to these cases, which represents the second layer of constraint identified. Exploring the concepts of choice and agency, the chapter discusses how these are viewed by the judges through a moral positioning. Within a moral positioning, the judges frame their narratives as if the women made the free *choice* to exploit other women. This chapter argues that the framing of choice in this way disregards any impact of past/ongoing victimisation or constraining structures within the women's lives.

Chapter 7 addresses the third and fourth research questions and explores the remaining two layers of constraint experienced by the offenders. It begins by exploring the constraints imposed by the CJS, which represent the third layer of constraint identified. These construct women's narratives further, in a way that denies part of their experience. The section which follows addresses the fourth and final layer of constraint identified, which relates to that imposed by the judges and which is caused by the systemic constraints of the CJS. A consequence of this layer of constraint is the practice of judges constructing oversimplified narratives. The final section of Chapter 7 explores the existence of agency and choice within structure and constraint (Giddens 1979). This discussion serves to conclude the four chapters of analysis by speaking to the amount of choice that these women actually did have. It concludes by arguing that the level of choice these women really had appears marginal, at best, when their choices are considered in conjunction with the extensive constraint they experienced and the way this is constructed by the judges.

The eighth and final chapter presents the recommendations and concluding remarks drawn from the analysis. Two primary recommendations are made. Due to an identified knowledge gap, the first suggests that the United Nations conducts specific training for judges and other criminal justice actors on the complexities of the lives of women who have been identified as acting in offending roles in cases of HTCSE. The second recommendation is to adopt the term 'victim-offender' in cases where an individual is both victim and offender. Throughout this thesis, the identified women are referred to as offenders, to replicate the language used by judges. However, this term does not fully represent their lived experience. Therefore, adopting the term victim-offender would acknowledge their victimisation without detracting from the victims' own experiences. Finally, this chapter argues that the CJS's response to these victimised HTCSE offenders will continue to be ineffective if the judicial understanding of the victim-offender cycle remains deficient.

Chapter 2: Offending Women in Australian Cases of Human Trafficking for Commercial Sexual Exploitation

Introduction

The United Nations has reported on the unusually high number of cases of human trafficking where women were identified as acting in offending roles (UNODC 2016). Despite what dominant narratives suggest, therefore, global data reveals women are not only victims of human trafficking. The aim of this chapter is to provide background on human trafficking for commercial sexual exploitation (HTCSE), in the Australian context and to situate this within the broader global context of human trafficking based on the available literature.

To contextualise the discussion, this chapter begins by discussing human trafficking in Australia, the internationally accepted definition of human trafficking, and the relevant Australian legislation. The United Nations provides the sole internationally accepted definition of human trafficking, which Australia adopted in 2005 (Philips 2008). Slavery and sexual servitude are the two primary offences with which the ten women who were identified as acting in an offending role were charged. These offences are defined under Australian Commonwealth law, specifically the *Criminal Code Act 1995* (Cth). Next, this chapter discusses the global trends of women identified as acting in offending roles in human trafficking, as extrapolated from the United Nations Office on Drugs and Crime (UNDOC) *Global Report on Trafficking in Persons* (GLOTiP). Following this, characteristics of women identified as acting in offending roles in cases of human trafficking are explored with a focus on the existing available literature. Based on the existing literature, the understanding of women's roles in HTCSE remains limited (McCarthy 2020).

A notable recurring element in the lives of those women convicted as traffickers is prior experience as trafficked victims (Kienast, Lakner & Neulet 2014; UNODC 2020), which highlights the existence of the victim-offender cycle. The chapter then provides an overview of the literature on the victim-offender cycle, to explore the impact that prior victimisation has on offending. This chapter concludes by reviewing the existing dominant gendered narratives of human trafficking. These narratives reinforce Christie's (1986) conceptualisation

of the ideal victim and offender by perpetuating the notion of both the ideal trafficking victim and trafficker. This discussion is undertaken to highlight the way these narratives, which are used to inform frameworks employed to combat HTCSE, render the space for women traffickers virtually absent and result in an under-developed understanding of the victim-offender cycle being observed in HTCSE cases. This results further in a limited understanding of the ways in which women exercise agency while being structurally constrained and further, inhibits criminal justice responses to women who are both victims and HTCSE offenders. Based on the available literature, this chapter aims therefore to provide background on HTCSE in Australia, the characteristics of women identified as acting in offending roles in cases of HTCSE, and the victim-offender cycle.

Human Trafficking in Australia

Article 3(a) of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children (hereafter; The *Protocol*) provides the 'first internationally agreed-upon definition' (Goździak & Vogel 2019, p. 110) of human trafficking. It states:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs (UN.OHCHR 2000, p. 2).

Heavy lobbying from different groups, each with differing views on sex work, influenced the *Protocol* (Goździak & Vogel 2019; Goździak 2021). Religious, abolitionist and (some) feminist organisations, such as those aligning with radical feminism as discussed in Chapter 3, viewed all sex work as a violation of women's human rights (Doezema 2005). This positioning argued that sex work can never be voluntary as 'women's consent to [engage in] sex work is

meaningless because they do not realize the exploitation they will experience' (Goździak & Vogel 2019, p. 119). The opposing side of this argument, offered from human rights organisations, considered sex work a form of legitimate labour and argued women can freely choose to engage in sex work. Aligning more with liberal feminism, sex work as a form of labour can enable women to survive within the various structural constraints with which they are faced (Miriam 2005). Goździak (2021, p. 17) argued 'the definition of trafficking [in The *Protocol*] became a battleground between those who consider it possible for sex work to be a voluntary choice and those who consider prostitution to always be forced'. As a result, this definition makes understanding whether agency has been exercised within cases of HTCSE problematic.

There are a variety of elements that limit the available opportunities to traffic people into Australia, including Australia's strong migration controls and geographic isolation. Notwithstanding, Australia remains a destination country for human trafficking and slavery. In recent years the Australian Federal Police have noted a more diverse group of victims originating from countries including Sudan, Pakistan, and Afghanistan. However, Thailand and Malaysia are where many trafficked women identified by Australian authorities as exploited within the sex industry originate from (Interdepartmental Committee on Human Trafficking and Slavery 2020).

The first Australian case of human trafficking, involving Wei Tang, was prosecuted under Commonwealth legislation Australia in 2005, the same year in which Australia ratified The *Protocol* (Philips, 2008; United Nations Treaty Collection 2021). Since then, ten women have been convicted of human trafficking-related offences involving adult commercial sexual exploitation. This category of offences is outlined under Division 270 and 271 of the *Commonwealth Criminal Code Act 1995* (Cth); however, slavery and sexual servitude are the two most common offences under which these ten women were charged.

Slavery and Sexual Servitude Under Australian Law

Slavery and sexual servitude are defined under s270.1 and s270.4 (respectively) of the *Criminal Code Act 1995* (Cth). These definitions serve as a point of reference for judges and

are at times outlined within the sentencing remarks. More often, however, these terms are discussed within the appeal transcripts in cases involving an appeal. A discussion of these terms is important as interpretations of each feature within the CCN for these women and highlight how the Australian judiciary frame the offences of slavery and sexual servitude.

Slavery

Six offenders were charged with offences relating to slavery: Rungnapha Kanbut, Wei Tang, DS, Sarisa Leech, Watcharaporn Nantahkhum, and Kanokporn Tanuchit. Slavery is defined under s270.1 of the *Criminal Code Act 1995* (Cth) as:

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

In cases involving a slavery charge, such as those discussed in this thesis, judges have at times provided their interpretation of specific elements of this definition. These interpretations are provided to assist the jury during a trial, as well as to support a decision during an appeal.

Within these cases, there is often contention over the meaning of the word 'ownership' contained within this definition of slavery and over how the trial judge has directed the jury regarding it. This is often an issue raised within an appeal. For example, in response to one instance of this, Justice Buchanan and Justice Ashley suggested:

> Slavery as a legal status does not exist in Australia. Legal ownership of one person by another is impossible. Accordingly, the statutory definition is couched in terms of the manner in which the person said to be a slave is treated by the exercise of powers over that person by another. **The offence is treating another person as if that person were a slave.** There are a number of possible indicia of a slave, including being the subject of a slave and purchase; being used at another's behest without restriction; being exploited by receiving wholly inadequate remuneration for one's labour; being physically confined; being denied the choice between continued service and freedom, and being deprived of the means of returning to one's country of

> origin [emphasis added] (Kam Tin Ho v The Queen and Ho Kam Ho v The Queen, Kam Tin Ho v The Queen and Sarisa Leech v The Queen [2011] VSCA 344 [32]).

Additionally, Justice Lasry, upon completion of the trial of Sarisa Leech and Kam Tin Ho instructed the jury about the expression 'powers attaching to the right of ownership':

> … why cannot you just say, well, slavery is owning someone. It would be a lot simpler. Well, the answer is, you cannot legally own someone. That is why we do not say slavery is ownership because you cannot own someone. That is why we have the words "powers attaching to the right of ownership" […] If you then say what does ownership means, ownership includes dominion overall complete subjection of the worth of a person by another (cited in Kam Tin Ho v The Queen and Ho Kam Ho v The Queen, Kam Tin Ho v The Queen and Sarisa Leech v the queen [2011] VSCA 344 [26]).

As one person cannot legally own another person, as was the case in historical accounts of slavery, these judges suggest a slavery offence relates not to owning a person but more to the practice of treating someone as if they were a slave.

Campbell JA from R v Sieders; R v Somsri [2008] NSWCCA 187 [94] focused less on the element of ownership than the previous judges did, but more on the word 'including'. Citing Eames JA in R v Wei Tang [2007] 16 VR 454 at 464 [41], Campbell JA suggested that the word 'including', and those following from this in the above definition:

> [d]o not expand the definition but merely makes it clear that conduct that the victim agreed to, or contracted to undertake, whether to meet a debt or otherwise are included within this definition. *A volunteer slave, in other words, is no less a slave* [emphasis added].

In this case, the sentencing judge is speaking to the concept of consent. This judge suggested that even if a victim consents to come to Australia under a contract or debt, they can still be considered a slave under Australian Commonwealth law. This is important as this interpretation is often offered only when the victim is being discussed. Importantly, this

speaks to how judges construct the victimisation and offending in Australian HTCSE cases where women are identified as acting in offending roles.

Sexual Servitude

Three of the remaining offenders were charged with offences relating to sexual servitude: Namthip Netthip, Chee Mei Wong, and Somsri Yotchomchin. Servitude is defined in s270.4 of the *Criminal Code Act 1995* (Cth) as:

> … the condition of a person (the victim) who provides labour or services, if, because of the use of coercion, threat or deception [is not free] to cease providing the labour or services; or to leave the place or area where the victim provides the labour or services; and the victim is significantly deprived of personal freedom…

Sexual servitude, is thus defined as:

> … the condition of a person who provides sexual services and who, because of the use of force or threats: (a) Is not free to cease providing sexual services; or (b) Is not free to leave the place or area where the person provides the sexual services (R v Sieders & R v Yotchomchin [2006] NSWDC 101 [16]).

Sexual service is defined further within the dictionary of the *Criminal Code Act 1995* (Cth) as: '… the commercial use or display of the body of the person providing the service for the sexual gratification [of] others' (R v Sieders & R v Yotchomchin [2006] NSWDC 184 [18]). Nine of the ten women identified were charged with slavery and sexual servitude offences under the above definitions. The remaining offender, Lay Foon Khoo, was charged with offences related to s271.2: Trafficking in Persons. The offences pertaining to all ten of the offenders identified occurred within the sex industry. The following section of this chapter will consider the available literature on women acting in offending roles within human trafficking.

Global Trends of Women Human Trafficking 'Offenders'

With the exception of the first two reports in 2009 and 2012, the United Nations Office on Drugs and Crime (UNDOC) releases the *Global Report on Trafficking in Persons* (GLOTiP) biannually. These reports focus on victims, traffickers, and geographical trafficking flows, and trafficking trends are highlighted. The inaugural 2009 report was the first international discussion highlighting the prevalence of women acting in offending roles in cases of human trafficking on a global level. Since then, the gendered analysis of traffickers, or those who have been identified as such, has become more thorough. Table 2 outlines the global averages of women suspected, prosecuted, and convicted of human trafficking-related offences as highlighted within the 2009 – 2018 UNODC GLOTiP reports. From the available data within this table, the global average has rarely dropped below 30% for any of the three categories relating to traffickers: suspected, prosecuted, or convicted.

Table 2: UNODC Global averages of women suspected, prosecuted and convicted of trafficking in persons-related offences (UNODC 2009; 2012; 2014; 2016; 2018).

Percentages of Women Suspected, Prosecuted and Convicted of Trafficking in Persons[1]				
Date Range Included in Percentages	UNODC Report	Suspected/Investigated	Prosecuted	Convicted
2003 – 2006	2009	N/A	N/A	54%
2007 – 2010	2012	N/A	32%	33%
2010 – 2012	2014	38%	32%	28%
2012 – 2014	2016	40%	38%	35.5%
2014 – 2016	2018	31%	35%	38%

The 2009 GLOTiP highlighted that in 30% of the countries where gender of the offender was known, there were more women than men convicted. Further, in 28 countries, the percentage of women convicted ranged from 10% – 50%. These figures were more impressive when compared to other crimes where the percentage of women offenders ranged from 6% – 13% (UNODC 2009). Subsequent UNODC reports highlighted similar findings.

[1] As highlighted above, the gendered analysis of traffickers became more thorough with each new report. Therefore, some data from the 2009 and 2012 reports was not available as it was not analysed with as much detail as it was in later years.

The 2012 GLOTiP revealed between 2007 and 2010, 32% of those prosecuted and 33% of those convicted were women. In Australia, specifically, between 2007 and 2010, women comprised 70% of those persons prosecuted and 44% of those convicted. However, women only made up 20% of persons convicted for *all* crimes in Australia (UNODC 2012). Overall, the proportion of women convicted for trafficking offences in South Asia, East Asia, and the Pacific region, to which Australia belongs, was higher than that reported in other regions between 2007 and 2010. This suggests that the 'prominence of female offending rates related to trafficking in persons is a clear exception in the criminological taxonomy [as] few other crimes record this level of female participation' (UNODC 2012, p. 29).

Echoing the 2012 GLOTiP, the 2014 report suggested that the higher share of women being observed as holding offending roles was an anomaly in comparison to other types of crimes where the share of women convicted sat in the range of 10% – 15% (UNODC 2014). More recent GLOTiP reports again highlighted that women comprised a relatively large share of convicted offenders compared to most other crimes (UNODC 2016; UNODC 2018). Therefore, relatively high involvement of women acting in offending roles appears to be a consistent characteristic of human trafficking.

Characteristics of Women Acting in Offending Roles in Human Trafficking

Globally, United Nations data highlights the percentage of women holding offending roles in cases of human trafficking remains consistent (UNODC 2009; 2012; 2014; 2016; 2018). The UNODC suggests the high prevalence of women holding offending roles is 'remarkable as there are few crimes with such high levels of female participation' (UNODC 2016, p. 33; see also UNODC 2012, pp. 29-31). Furthermore, this data challenges the idea of who HTCSE victims and offenders are; women are not *solely* the victim of these crimes as dominant narratives of HTCSE would suggest.

Traditionally, women have been viewed as victims of trafficking, particularly, of sexual exploitation (Turner & Kelly 2009). As will be explored later in the chapter, many dominant narratives focus on the female victim/male perpetrator paradigm whereby a 'clear distinction

is made between perpetrators and victims: a victim can never be a perpetrator, and a woman, therefore, can never be involved as a perpetrator …' (Wijkman & Kleemans 2019, p. 56).
Thus, this has resulted in a limited understanding of the roles and experiences of women acting in offending roles in human trafficking (Choi-Fitzpatrick 2016; Wijkman & Kleemans 2019; McCarthy 2020). However, scholarly attention has begun to shift to focus on these women in the United Kingdom (UK), Europe and Australia.

Broad (2015, p. 11) examined women traffickers in the UK, arguing for a greater understanding of the ways in which women become involved, the roles they hold, and 'how the criminal justice system can effectively respond'. Wijkman and Kleemans (2019) examined the characteristics and prevalence of women traffickers in the Netherlands and McCarthy (2020) studied women traffickers in Russia. In Australia, the Australian Institute of Criminology acknowledged the overlap between victimisation and offending in trafficking offenders, citing the above-mentioned UNODC GLOTiP reports (Simmons et al. 2013). More recently, an in-depth study examining the victim-offender cycle in Australian HTCSE offenders was released (Baxter 2019). This study examined women charged as the trafficker in Australia, and found that judges held an idealistic expectation of behaviour by those women who were previously victimised and exploited. This was the first comprehensive study to examine women HTCSE offenders with histories of victimisation in Australia, to highlight the victim-offender cycle present.

Data suggests that previous victimisation is a recurring element in lives of women convicted as traffickers (Kienast, Lakner & Neulet 2014; UNODC 2020). Many women have been trafficked themselves, which may have taught them the necessary skills of the trade and provided them exposure to the level of profits potentially derived (Hughes & Denisova 2003; UNODC 2012). Additionally, prior involvement in sex work can also lead to their involvement in trafficking operations involving commercial sexual exploitation. Older women are often no longer desirable as sex workers and as such, must find other ways to earn an income. Many previously contracted women will remain in the sex industry and become the traffickers after their debt has been repaid as it may be the only form of employment they know (Kabance 2014).

Social and familial support influences victim's' options to exit the trafficking business. A lack of support can limit victim's' ability to reintegrate back into the non-offending part of society (Kienast, Lakner & Neulet 2014). A reliance on their traffickers, together with a lack of access to legitimate employment opportunities, often due to a lack of English-language skills, illegally being in the country and a lack of employment skills/qualifications, may lead these women to begin acting in offending roles, to progressively gain independence. When viewed as an expression of agency made amongst significant structural constraints, women may become the trafficker to improve their own situation. Studies suggest empathy and emotions are put aside when women shift their position from victim to offender. A 'better her than me' approach is adopted as an individual survival strategy (Kienast, Lakner & Neulet 2014, p. 9; Wijkman & Kleemans 2019).

The role of women in the trafficking process is often observed as one that requires frequent interaction with victims. This results in women often being the most visible actors in the trafficking organisation, as discussed in Chapter 5.2 and Chapter 6. Data suggests traffickers and their victims often come from the same geographical location and speak the same language or have the same ethnic background (Simmons et al. 2013; UNDOC 2016). There is a strong correlation between the citizenships of the victims and offenders; the nationality of the offender is linked closely to that of the victims they traffic. This helps women who hold offending roles recruit victims and gain their trust.

The UNODC acknowledged the high prevalence of women acting in offending roles throughout various GLOTiP reports. It was also acknowledged that there was a link between victimisation and offending. However, until recently, little consideration had been given to how victimisation and offending influenced each other. In addition, there was little understanding of how judges considered and understood those HTCSE cases which included a woman 'offender' who herself had previously been a victim of trafficking. For the first time since the UNODC's 2009 acknowledgment of the prevalence of women acting in offending roles and the victimisation/offending link, in 2020 the UNODC compiled a case law report analysing 53 cases from 16 jurisdictions, including Australia. This report provides the most comprehensive overview of women convicted of trafficking-related offences worldwide who had themselves been victims of HTCSE (UNODC 2020).

The UNODC (2020, p. 24) report found that the 'lack of understanding of the traumatic impacts of multiple and overlapping forms of victimisation […] impedes recognition of the connection between victimisation and the victim-defendant's criminal actions'. This study is important as it discovered the gender dimension within HTCSE cases, which had rarely been considered by the respective judges when they were faced with a woman offender. In many of the cases examined, judges did not consider the possibility that coercive control, which captures the 'multi-faceted forms of oppression' women experience (Stark 2013, p. 18), was employed as the means to obtain the women's' participation in the offending roles for which they had been charged (UNODC 2020). The report found also that victims' motives for offending typically related to the easing of their own exploitation. Economic gain was a further motive for some victims, especially those attempting to escape extreme poverty or those that had financial familial responsibilities (UNODC 2020). Both acts represent socio-economic constraints on women, as will be explored in Chapter 6. Importantly, this report found that during sentencing judges viewed the element of prior experience as a trafficked victim as both mitigating and aggravating (UNODC 2020).

Various studies worldwide have reported on the awareness some victims have of the nature of the work they will be undertaking and the contract under which they will work (Augustín 2006; Steinfatt 2003; Vocks & Nijboer 2000). Some women do not understand aspects of their contract, such as, the impact being tied to debt bondage will have on them. However, many are aware and have made conscious and deliberate decisions to relocate to work in the sex industry (Weitzer 2007). A study of Vietnamese women trafficked in Cambodia suggests that not all trafficked women under a debt contract are tricked or coerced into working in brothels (Steinfatt 2003). In Europe, Augustín (2006) similarly suggests that many migrant women are actively engaged in their migration journey. While these decisions are, again, often shaped by socio-economic structural constraints, women are aware of the nature of the work they will be engaging in once in the destination country. These women are not ignorant or passive, as many proponents of the anti-sex work rhetoric claim. Similarly, Vocks and Nijboer (2000) found that many victims from Central and Eastern Europe identified in the Netherlands had made the conscious decision to rely on traffickers for their migratory journeys. Again, however, this decision was born from socio-economic structural constraints under which they

had been subjected, primarily that of poverty. Nevertheless, as explored later in this chapter, the dominant human trafficking master narratives do not accurately reflect the experiences of many women who migrate for greater economic opportunities and, therefore, do not accurately represent the victim-offender cycle present in many cases of HTCSE.

Agency, Structure and the Victim-Offender Cycle: The Impact of Prior Victimisation on Offending

While recognition of the victim-offender cycle is relatively new in the trafficking space, criminological research has long shown the link between experiences of victimisation and consequent offending. This section explores literature that looks at the relationship between victimisation and offending and the overlap between each that can occur within the one individual. The aim of this section is to highlight how victimhood and agency are often incompatible, despite the documented overlap between victimisation and offending.

The Victim-Offender Cycle

A recurring criminological finding is the strong link between victimisation and offending (Averdijk et al. 2016; Muftić & Deljkić 2012; Pyrooz, Moule Jr & Decker 2014; Reid & Sullivan 2012; Tillyer & Wright 2014). Research on criminal victimisation and offending demonstrates that victims and offenders are not always distinct groups (Sampson & Lauristen 1990; Tillyer & Wright 2014), and that there is often considerable overlap between the two populations (Jennings, Piquero & Reingle 2012; Lauristen & Laub 2007). In this space, there exists a cycle of victimisation and offending, otherwise known as the victim-offender cycle. Similarities are shared often between victims and offenders, and as such, one person can often be simultaneously both a victim *and* an offender (Koo, Chitwood & Sánchez 2008). As such, it is often difficult to distinguish between the two (Reid & Sullivan 2012). Experiencing victimisation results in a higher likelihood of offending behaviours (Reid & Sullivan 2012) with many offenders suffering victimisation prior to their offending (Lauristen, Sampson & Laub 1991; Muftić & Deljkić 2012).

Being victimised once increases a person's likelihood of being victimised again (Farrell 1995). Victims who make changes to behaviours are better able to avoid being re-victimised (Turanovic, Pratt & Piquero 2016); however, not all victims are in a position to make socially accepted changes to their lives in order to avoid being re-victimised. One aspect that may prevent these meaningful changes are structural constraints. People who live in disadvantaged communities are often faced with significant hardship; they often receive below standard schooling and reside in rundown housing (McInerney & Smyth 2014). In addition to this, discrimination, hopelessness, and violence are often regular features of everyday life (Anderson 1999; Bolland 2003). Due to economic structural constraints, those living in disadvantaged communities face greater pressures to participate in risky behaviours (Turanovic, Pratt & Piquero 2016).

Structural constraints can shape daily life in certain ways, such as leading individuals to engage in deviant or criminal behaviours; however, they can also shape their responses to victimisation (Turanovic, Pratt & Piquero 2016). Individuals learn ways to adapt to their situation when impacted by structural constraints. Anthony Giddens (1984) suggests that social structures shape individuals while, simultaneously, individuals shape social structures. Furthermore, social structures not only act on people, but people act on social structures. This conceptualisation of structure and agency creates a space for individuals to exercise agency despite being considerably structurally constrained.

As many offenders are also victims, their offending behaviour is often profoundly related to their victimisation. Yet, the idea that a person is either one *or* the other, but never both, has impacted how the field is studied with many scholars focusing on either victimisation *or* offending (Muftić & Deljkić 2012). Additionally, the ability for one individual to be both a victim and an offender is problematic for the CJS to respond to. The offender is considered the antithesis of the crime victim; therefore, to the CJS, an individual must be either one or the other. As an offender, the individual is the polar opposite of a victim; however, it is not always possible to make a clear distinction between victims and offenders due to many offenders having been victimised (Heber 2014). As a result, it is rarely possible to fully understand victimisation and offending apart from one another, and thus, it is critical to understand the cause of the victim-offender cycle (Zimmerman, Farrell & Posick 2017).

Despite this knowledge, once an individual has committed an offence, the CJS deems them undeserving of the victim label. This individual becomes the offender and only the offender. They are afforded little-to-no recognition of their own victimisation, which results in little understanding of the effects of that victimisation on the offending.

Rumgay (2004, p. 10) suggests that the connection between victimisation and offending does 'not imply a direct causative relationship between the two'. If this were the case, the offender's culpability would be relieved if their actions were as a direct result of forces beyond their control. This could result in responses that are seen to inadequately recognise the experience of the victims. The rise of the victims' rights movement has contributed to a greater understanding of the victim experiences. This has created challenges for appreciating an offender's past or current victim status during sentencing. When considering this, the motives behind 'condemn a little more, understand a little less' become apparent (Rumgay 2005, p. 16).

The victim-offender cycle has been applied previously to crimes including sexual abuse and domestic and family violence (DFV). Sexual abuse and DFV are both well documented in the literature on the victim-offender cycle as a predicator of future offending (Jennings et al. 2014; Jennings & Meade 2017; Muftić & Deljkić 2012; Muftić, Finn & Marsh 2012; Plummer & Cossins 2018; Tillyer & Wright 2014). However, the cycle has yet to be applied to HTCSE. Noonan (1996) suggests that the cumulative effect of violence on a person has the subsequent ability to normalise it. In the same way, the cumulative effect of experiencing victimisation resulting from being a trafficked woman, could have a similar ability to normalise that type of behaviour.

Rumgay (2004, p. 7) suggests associations between histories of victimisation and criminal involvement indicate a 'complex adaptation to traumatic experiences'. Conflict, violence or abuse in adult relationships may increase stress, which further impairs the ability of women to make appropriate problem-solving choices. Such experiences may constrain women and lead these women to a willingness to consider unlawful solutions to an assortment of problems (Rumgay 2004). Oppressive structures under which women find themselves can, therefore, reshape and confine women's goals (Meyers 2014). To acknowledge and

understand the influence of prior victimisation on offenders' actions is not equivalent to excusing them of their offending, but rather a way to understand why it has occurred at all. Additionally, acknowledging the influence of victimisation on an individual's offending enables an understanding of the ways that constraining structures, in conjunction with victimisation, influence women's choices and their means of exercising agency.

The (In)compatibility of Agency and Victimhood in Human Trafficking

Victimhood and agency are often incompatible concepts: if victims exhibit agency, they are considered less of a victim. Laub (2006, p. 244) suggests that greater attention to understanding human agency is required as individuals 'make choices and are active participants in the construction of their lives'. Therefore, victimhood, at whatever stage, is required to be conceptualised in a way that does not deny the human capacity of choice and agency but rather understands this choice and agency within the context of the offending (Meyers 2016). Hopper (2004, p. 129) suggests many trafficked people are 'strangers in a strange land', and, as a result, there are many barriers between them and the rest of the society. Trafficked individuals often have had limited educational opportunities and English-language skills, and few financial resources in their country of origin. These all constitute socio-economic structural constraints in their lives which often continue, once in the destination country. Such structural constraints significantly limit the choices available to women. It is particularly important to consider the environment in which 'choices' are made, when examining women HTCSE offenders.

A desire to gain back a sense of agency and choice can be triggered by victimisation (Averdijk 2010). To regain this agency and control, actions can be taken against another, regardless of whether they had anything to do with an individual's initial victimisation. Becoming the offender may occur therefore to improve their own situation. This shift can be viewed as an example of agency made within constraint, as discussed earlier in this chapter. However, the social roles of the crime victim, arguably born from Christie's (1986) notion of the ideal victim, involves the victim doing everything possible to avoid being re-victimised (Miers 1990). Victims who make changes to behaviours are better able to avoid being re-victimised (Turanovic, Pratt & Piquero 2016). However, structural constraints, particularly socio-

economic constraints, limit the choices available to many victims to enact meaningful, socially accepted changes to their lives in order to avoid being re-victimised. The limited choices they do have available to them render them the offender in the eyes of the Australian CJS.

By adopting the use of a wider lens, and examining the pathways that lead into offending, the links between victimisation and offending can be viewed as opportunities within a given situation. As discussed earlier in this chapter, a significant number of women human trafficking offenders are former sex workers or victims of HTCSE (Kienast, Lakner & Neulet 2014). Therefore, the pathways that led to their victimisation initially, also contributed to their transition into offending. The pathways into this type of criminality, are 'important in understanding the nexus between the illegal movement of people across borders and the structures that control access to employment and income' (Broad 2015, p. 1072). However, Kienast, Lakner and Neulet (2014) suggest that the motives and means of women's involvement and roles in HTCSE organisations lacks substantial professional discourse. Furthermore, they advocate that gender stereotypes remain prevalent with women being inherently considered victims. These stereotypes render absent the space for women traffickers to exist and result in a severely limited understanding of women who act in offending roles in HTCSE.

Gendered Stereotypes and the Absence of Women's Agency

Stereotypes are often utilised when discussing HTCSE, which is viewed predominantly as a crime with distinct victims and offenders (Warren 2012). Chong (2014) suggests stereotypes are static attributes imposed by others and serve to allow a predictable outcome by creating permanent ideas to describe others. Popular narratives involving depictions of certain types of trafficking victims, and offenders, help to build and further perpetuate specific stereotypes of the 'typical' trafficking victim (Wilson & O'Brien 2016). Anti-trafficking media and activist groups, which inform global responses to human trafficking, have 'constructed a moral economy of gendered violence' (Warren 2012, p. 106). This construction positions young women under the control of ruthless men who exploit them in the sex industry (Spencer & Broad 2012). The reproduction of this theme results in minimal space for women traffickers to exist and discounts women's agency.

Stories of young girls who are trafficked for sexual exploitation, such as that involving Puangthong Simpalee and her enslavement as a prostitute from the age of 12 (Maltzahn 2008), are prominent in the media and political debates. These stories typically include young women, who are lured away from their homes with the deceptive promise they will earn substantial amounts of money by undertaking work in a bar or restaurant or as a nanny (O'Brien, Carpenter & Hayes 2013). Once they arrive, their passports are confiscated, and they are forced into sex work to repay costs associated with their travel. The dissemination of predominately archetypal stories in the public arena helps to shape a particular construction of trafficking that serves to prioritise specific types of victims, while ignoring those that do not readily fit this idea.

These constructions also hide the coercion, deceit and exploitation that can occur in situations where women *willingly* and *knowingly* travel to work abroad as sex workers (O'Brien, Carpenter & Hayes 2013). Many women trafficked for commercial sexual exploitation in Australia already work as sex workers and understand they will be working under a contractual arrangement in a brothel once they arrive in the country. Evidently, these women are not the traditional 'forced, innocent and naïve victims of the trafficking myth' (O'Brien, Carpenter & Hayes 2013, p. 408). Those women who do not fit the socially constructed mould of who a victim and offender of HTCSE is, as well as who a *woman* is, are assigned the label of the non-ideal victim or the offender. This practice is observable in the cases discussed herein, which demonstrate agency and victimisation are incompatible concepts for these women in the eyes of the judges. Despite oftentimes exercising agency amongst considerable structural constraints, it is precisely the exercising of agency that excludes them from being entitled to hold the status of victim. Consequently, when the young woman victim is revealed to be something other than the completely blameless and innocent trafficked woman, such as when she becomes an offender, she is no longer entitled to the label of 'victim'.

Much of the previous discourse on victimology reinforces Christie's (1986) ideal victim notion: that victims are weak, innocent, blameless and *women*. According to Christie (1986), victims are perceived to be more legitimate when they are weaker than the offender, are unknown

to the offender and, more importantly, are completely blameless for the harms *the women* experience. Conversely, offenders are depicted as deviant, big, bad *men*, who are unknown to the victim. At the opposite end of the spectrum sits the image of 'ideal offenders', who lack an education and are *male*, evil, poor, lacking education, a minority and unstable (Christie 1986; Madriz 1997).

Nils Christie's 'Ideal Victim'

The aim of Nils Christie's (1986) work on victimology was to determine what exactly characterises the ideal victim. Christie argued the ideal victim is weak – and the three groups of people most suited to this category are those who are old, sick, or young. While Christie does not explicitly state that the ideal victim is a woman, it is clear by his use of pronouns. However, when he begins his discussion on what constitutes the ideal victim, Christie states that he does not think of the person who most perceives themselves as a victim, nor does he think of those who may be in the greatest danger of being victimised, although both may and may not be included in this category.

Interestingly, what Christie (1986, p. 18) thinks of by the term ideal victim is 'a person or category of individuals who – when hit by a crime – most readily are given the complete and legitimate status of being a victim'. Some victims, suggest Cohen (2001), are seen as more deserving than others. This, arguably, is influenced by both Christie's own conceptualisation of the ideal victim discussed here, combined with the society in which the victim exists. Christie argues that in order to be considered an ideal victim, a person (usually a woman) must be strong enough to be listened to but, simultaneously, weak enough to not become a threat since being a threat to others would not create general and public sympathy that is associated with the status of being a victim. Like definitions of morality, whereby what is considered moral/immoral is defined by the society in which it exists those considered victims are defined also by the society in which they exist.

Contrastingly, Christie (1986) argues that the less-than-ideal victim consists of the following attributes: he was strong (rather than weak), he was not carrying out a respectable task, he could and should have protected himself (blame could be laid), he was as big as the offender,

and he was close to the offender. Again, the use of pronouns quite clearly defines the less-than-ideal victim as male in contrast to the ideal victim as female. Victims who become the offender represent 'bad' victims. The ideal offender, like the ideal victim, is gendered. As contrasting with the 'ideal victim', Christie (1986) suggests that the ideal offender is a male, who lacks an education and is evil, poor, a minority, and unstable (Christie 1986; Madriz 1997). Ideal victims and offenders are interdependent as they create each other; the more ideal the victim is, the more ideal the offender is and vice versa. Therefore, those that were more foreign and were seen to be less humane were considered more of an ideal offender. The more of these elements an offender possessed, the more 'ideal' they became.

Zaykowski, Kleinztuber and McDonough's (2014) study examining judicial narratives of ideal and deviant victims in judges' capital sentencing decisions revised Christie's (1986) work regarding the stereotypes of the ideal victim to determine whether the victims in their study were described as ideal or deviant. Like Christie's (1986) conceptualisation, results showed that those who came from a loving family and were considered innocent, were viewed as ideal victims whereas deviant victims were those whose own 'questionable characters led to their demise' (Zaykowski, Kleinztuber & McDonough 2014, p. 724). Importantly, a clear distinction was identified between deviant victims, who were noted as being disreputable, and ideal victims, who the respective judges felt were worthy of sympathy. This illustrates the ability of similar conceptualisations to seep into the judiciary and influence judges' judgements of those individuals who have been labelled the offender but have also experienced victimisation and therefore, do not fit the 'typical' victim mould.

Stemming from Christie's (1986) conceptualisation of the ideal victim, there exists a hierarchy of victimisation, in relation to HTCSE. At one end sits the 'good' victims who are kidnapped and coerced into prostitution and deemed worthy of protection; at the other, are the 'bad' victims who agreed to work in the sex industry and deserve the exploitation they are afforded (O'Brien, Carpenter & Hayes 2013). Supporting this, Jordan (2002) suggests there are two types of HTCSE victims: Madonnas, who are innocent, vulnerable, and forced into prostitution and whores who are tainted and need rehabilitation. It becomes evident how this construction is problematic for a person who is both a victim and an offender; once they become an offender, they lose the attributed blamelessness required to be the victim

described by Christie (1986). They are no longer viewed as weak, innocent, naïve, or vulnerable. When this occurs, any formal support for their victimisation becomes non-existent. Upon implementation of The *Protocol*, discussed earlier in this chapter, many countries focussed primarily on trafficking for sexual exploitation, and neglected other forms of trafficking. Sex trafficking victims, argued Goździak (2021), were prioritised because they matched the image of the ideal victim given their weakness, vulnerability, and femaleness. This narrative, established in gendered stereotypes, renders both trafficked *men* (Goździak 2021) and women traffickers invisible.

Dominant Gendered Narratives of Human Trafficking

Augustín (2020, p. 224) suggests that contemporary trafficking accounts follow the same narrative. They 'present a struggle between Good and Evil in which masculine men are the protagonists, and a women's auxiliary takes up the veil of rescue'. Ideologically motivated master narratives have dominated the professional and public discourse regarding HTCSE and influence perceptions of victims and offenders (Kienast, Lakner & Neulet 2014). These narratives involve dominant constructions of the problem of human trafficking as ones that view women as unable to take control of their own decisions and lives, and who are further mercilessly exploited by traffickers (Spencer & Broad 2012), removing any space for women's and victim's agency to exist. Existing trafficking narratives involve a plot that rarely varies. It typically begins with deception which is followed by coercion into prostitution. It then moves onto the tragedy of being forced into sexual slavery and ends with the victim being 'rescued' (Doezema 2010; Andrijasevic & Mai 2016).

Dominant narratives stereotypically portray the trafficked victim as a 'young, innocent, foreign woman tricked into prostitution abroad' (Andrijasevic & Mai 2016). As she is usually also battered and kept under constant surveillance, her only hope is police rescue. This rhetoric is one that is organised around the dichotomy of passive female victims and merciless male traffickers. Representations of prostitutes as typical victims and all traffickers as members of various Mafia groups position both the victims and offenders as not belonging to 'our' society and become an 'other'. Segrave, Pickering and Milivojevic (2009, p. 50) suggest, '[f]or women to be subjectively construed as victims, they [need] to be seen as the passive

prey of human traffickers'. This removes any space for women to exercise their personal agency, as this would raise doubts concerning the legitimacy of their victimisation.

Feminist political campaigns concerning the victimisation of women, argue Mason and Stubbs (2010), have had inadvertent consequences in that they further re-enforce further the association of the victim category with that of women. The visible gendered representation of both offenders and victims, in political campaigns or any form of media, feed into the already formed stereotypes and become *the* gendered representations. Within these representations, men are most likely to be the offenders and victimisers, which reinforces the dominance of male criminality. This further strengthens the belief that victims of crimes are always women (Davies 2011). As a result, only some victims are considered as deserving of concern and support, while others are viewed as complicit in their own victimisation and are, consequently, less deserving.

The depiction of 'offenders as 'prototypical deviants' who are unknown to [the victim]', strengthens the construction of victims as weak, naïve, and blameless (Wilson & O'Brien 2016, p. 37). In contrast to the typical trafficked victim, the image of the typical trafficker is a middle-aged man, who is unknown to the victim, deceives her, and trafficks her into prostitution (Simmons et al. 2013). Like Christie's (1986) conceptualisation of the 'ideal victim', traffickers are individuals frequently linked to masculine characteristics (Andrijasevic 2007). Traffickers are often portrayed as the personification of evil; viewed as predatory men who are rapists and kidnappers involved in organised crime (Weitzer 2007). Like those stereotypes discussed above regarding trafficking victims, the common portrayal of trafficking offenders, as surmised by Weitzer (2007), ignores those offenders who do not fit this construct. This skewed image is born from, and reinforced by, gendered binary constructions. Under this construction, women are viewed as relational, mothers, caregivers, good, and sensitive (Mackinnon 1982), whereas men are autonomous, but emotionally stunted, aggressive, and competitive. Subscribing to dualistic conceptualisations offered under a binary system, suggests Wolken (2006), ignores all trafficking victims (and offenders) whose experiences fall beyond these limited constructs.

Traditionally, therefore, trafficking 'has been constructed, marketed, and viewed as a heinous male perpetrated offense against women and girls' (Jones 2014, p. 144), thus rendering women traffickers practically invisible. Berman (2010, p. 85) argues that sensational images, such as 'a nefarious underworld populated by "dark", haunting criminals; hundreds of young, innocent, "white" girls kidnapped and violated', occupy almost every public representation of trafficking incidents which involve women victims and male offenders. This narrative, however, rejects the idea that these women may understand the work they will be undertaking and choose sex work as a means of empowerment to improve their livelihoods (Augustín 2020). Stereotypes such as those discussed in this section, suggest Dyer (1993) and Andrijasevic and Mai (2016), should be viewed, therefore, as a social construct that serves only to condense complex occurrences into static images and recurrent narratives.

The current figure of the trafficked victim conceals women's migratory agency and a false dichotomy between ideal and *real* victims is produced (Hoyle, Bosworth & Dempsey 2011). Women trafficked for commercial sexual exploitation are portrayed as either powerless victims or unworthy prostitutes (Jordan 2002). Framing women into these narrow and specific narratives reduces and oversimplifies migrants' lives and choices. Importantly, many of these narratives are deficient in considering and addressing the structural causes of human trafficking (Kienast, Lakner & Neulet 2014; Goździak 2016). Andrijasevic and Mai 2016 (p. 2) argue that '[s]implistic trafficking and slavery representations portraying all migrant sex workers as powerless victims are problematic because they conceal the agency of the migrants working in the sex industry'. The concept of agency needs to be viewed, therefore, 'according to migrants' priorities and needs, which emerge in the context of their increasingly precarious and marginalised lives' (Mai 2016, p. 3). Thus, it is necessary to move beyond the dichotomy between free and forced migration in the global sex industry to render visible the agency of women who migrate to work in the sex industry (Andrijasevic 2010). The gendered constructions of men as the traffickers and women as the trafficked need to be removed in order to challenge the simplistic understanding of agency and choice that currently exists (Mai 2012).

The rise of neo-abolitionist policies framing all sex work as sexual exploitation, resulted in 'harmful policies exacerbating the exploitability and deportability of marginalized migrant

groups' (Mai et al. 2021, p. 1608). Legislative approaches in the UK, the United States of America (USA), and Australia continue to disregard the agency of women to make choices in the often difficult and constrained circumstances with which they are faced (Spencer & Broad 2012). Victims within the annual USA Trafficking in Persons Reports are depicted as young, innocent women or girls who are tricked and coerced into sexual servitude – reinforcing further the construction of the ideal trafficking victim. This notion of ideal victimisation is, however, broadly inconsistent with the available knowledge regarding sex work, migration and personal agency, which demonstrate that many victims of trafficking have an awareness they will be working in the sex industry (Doezema 2000; Weitzer 2007; Wilson and O'Brien 2016). Therefore, the stereotypical trafficking victim holds little resemblance to *actual* women migrating for work in the sex industry (Doezema 2000). Goździak's (2016) work on trafficked children in the United States of America deconstructs dominant constructions of human trafficking to move beyond the oversimplified narratives within the trafficking discourse.

Progressing away from the idea that trafficking always involves abduction enables an understanding that victims may consent, or choose, to go with their traffickers (Kabance 2014). However, despite the acknowledgment that victims may not all fit the previously held master narrative of the young, innocent, blameless victim, many narratives still falsely depict women who migrate to other countries, including Australia, as seeking 'legitimate' financial opportunities. This narrative enables the availability of the 'blameless' label to be applied and to strengthen the preferred discourse. However, these narratives ignore the large number of victims who seek to achieve socio-economic advancement through consensual employment within the commercial sex industry (Wilson & O'Brien 2016). There remains little awareness that this 'choice' is bound significantly by socio-economic structural constraints faced by victims. As will be discussed in Chapters 5.1 and 5.2, the same structural constraints that impact the victims, can also impact offenders and choices they make which may render them offenders in the court's eyes. These narratives do little more than reinforce an unrealistic and idealised conception of victimisation.

When criminal justice actors are faced with instances of offending women, particularly in cases where women are viewed as transgressing gendered norms, moral judgement is often

applied. Broad's (2015) research into human trafficking offenders in the UK discovered a moral element to the comments received from criminal justice members, which indicated the unnatural presence of women in this type of offence. In relation to the women offenders in Broad's study, the fact they were women and were involved in a sexually exploitative offence amplified the judgment of deviance they received. During interviews Broad (2015) conducted, the deviance in those cases was explained as a response to previous victimisation. However, this was not outwardly considered within the narrative contained within the sentencing remarks. Becoming involved as a perpetrator appeared to negate or dismiss any experiences of victimisation, despite research suggesting previous victimisation was a significant factor for women and their pathways into offending. The conclusion from Broad's research indicates that the offences have become about the sex and not about the victimisation.

The language of slavery that was employed, together with dominant gendered narratives of HTCSE, often set up a false dichotomy between ideal victims who are viewed as exercising no agency, and *real* victims whose experiences are typically more nuanced and complicated (Hoyle, Bosworth & Dempsey 2011). The false dichotomy between ideal and *real* victims, discussed in this chapter, can be observed in relation to women offenders who are victims also. Victims are not equal, and neither are offenders. Employing a framework based on the presumption about the ideal victim, and further, the ideal offender, coupled with conceptions about trafficking that rely on the language and images of slavery, can have adverse consequences for those who do not readily fit the constructed ideas informing that framework (O'Brien, Carpenter & Hayes 2013).

Conclusion

Traditionally, women are viewed as victims of trafficking, particularly sexual exploitation (Turner & Kelly 2009), which render the traffickers, men. However, the UNODC (2009; 2012; 2014; 2016; 2018) has consistently reported the high rate of women acting in offending roles in cases of human trafficking. Global data thus reveals, women are not *solely* the victim of these crimes. However, many dominant gendered human trafficking narratives focus on the female victim/male perpetrator paradigm, which results in an under-developed understanding of women who act in offending roles in HTCSE (Choi-Fitzpatrick 2016; Wijkman

& Kleemans 2019). Frameworks based on presumptions of the trafficked victim as a young, weak, naïve woman coerced into sex work (Andrijasevic & Mai 2016), and traffickers as middle-aged men, who deceive young women and force them into prostitution (Simmons et al. 2013) can adversely influence judge's constructions of women's narratives within a patriarchal legal setting. The use of such restricted narratives fails to adequately depict the complexity of the trafficking experience, as well as the presence of the victim-offender cycle, which creates barriers within the CJS when responding to women who are both victims and HTCSE offenders. While 'offender' and 'victim' remain mutually exclusive and oversimplified categories, judicial recognition of the relationship between agency and structures in women lives, is not possible.

Chapter 3: A Critique of Court-Constructed Narratives: The Intersectionality of Gender, Race, Morality, Structure/Agency and the Victim-Offender Cycle

Introduction

A critique of court-constructed narratives (CCN) can highlight the ways in which the intersectional elements that are present in court cases involving women charged with acting in offending roles relating to human trafficking for commercial sexual exploitation (HTCSE) are constructed within the patriarchal environment of the court. This chapter argues that theorising court narratives in reference to women trafficking offenders requires a consideration of structure/agency that encompasses the intersectionality of multiple elements, such as gender, race, sex work, the victim-offender cycle, and the law and court as a patriarchal and white domain. Therefore, this chapter provides the theoretical framework for a critical and alternative discussion on pre-existing legal and procedural debates surrounding HTCSE, gender, sex work, and victimisation.

This chapter begins with an introductory discussion on court narratives in the form of judge's sentencing remarks. The following section discusses the patriarchal construction of the court. This section outlines the way the legal habitus (Bourdieu 1987) works to hold the law's knowledges above women's knowledges (Smart 1990), which render absent the full trajectory of the victim-offender cycle. Further, this chapter highlights the importance of understanding how the stereotypes discussed in Chapter 2 feed into the patriarchal construction of women's lives. This chapter considers how patriarchal structures shape court narratives about women's lives to contribute towards an evolving dialogue on feminist uses of, and challenges to, the concepts of choice and agency (FitzGerald & Munro 2012).

Gendered morality is heavily interwoven into the CCN of these women because the selected cases involve offences that occurred within the sex industry and by offenders who transgressed stereotypical gender roles. This chapter then discusses the link between gendered morality and sex work, inclusive of the feminist debates concerning sex work and choice, and explores the need to conceptualise agency as a form of resilience that is exercised

when women are faced with significant structural constraints. Finally, the chapter ends with a discussion on Giddens' (1979) theory of structuration, as his conceptualisation of the interrelatedness of structure and agency enriches the subsequent discussion by providing a way to acknowledge the ways these women exercise agency, despite being considerably constrained by structures.

This chapter builds on Giddens' notion of structure and agency with the addition of Bourdieu's (1987) construct of structure/agency in the legal field, combined with a multidimensional feminist lens. It enables a theoretical framework that furthers an understanding of the ways HTCSE women offender narratives are constructed by the court and imposed on women. Additionally, the framework provides a way to view their offending as a form of agency while being significantly structurally constrained. The chapter uses liberal feminist theory to assign agency and subjectivity to women, which is often denied by radical feminist theory. Using liberal feminist theory acknowledges the duality of agency and structure and demonstrates the ability of women to exercise agency within structural constraints. Critical feminist theory and critical legal theory are used to highlight how the patriarchal environment of the court constructs the intersectional elements that are present in cases involving women charged with acting in offending roles relating to HTCSE.

Sentencing Remarks as Court-Constructed Narratives

Court-constructed narratives are those narratives which are written by the court to summarise the trial and explain the judge's decision (Burn 2017). The sentencing remarks analysed within this thesis, which are produced by a judge during sentencing, are one form of CCN. CCN contain the re-construction of past event/s relevant to a specific case. The act of narrating them, which varies in degree depending on the part of the case in which it occurs, is central to the legal system (Olson 2014). However, such narration is regimented and not all voices are equally represented. In fact, it is quite the opposite. As Burn (2017, p. 2) suggests, 'courts provide a unique setting for the creation and expression of narratives … [They] create a highly structured environment, which can restrict expression in some circumstances …'.

The rise of the victims' rights movement in Australia in the 1970's (O'Connell 2015) and the resulting introduction of victim impact statements (VIS) in the Australian CJS, signalled a shift in realising the importance of narratives within the legal context (Burn 2017; Erez 1991). Nevertheless, as explored in Chapter 7, this shift placed the focus of the narrative on those individuals identified by the court as the victims. While VIS focus on the ways in which a specific crime has affected a person (victim) or their family, sentencing remarks are the only form of CCN that discusses the offender's victimisation, life history, and pathway into offending. Olson (2014, p. 2) argues that 'uncovering the narrative qualities of legal […] judgements, including their sequencing and causal presentation of events as well as their investments in prescriptive assumptions about correct behaviour, is […] vital to understanding how law operates', as these narratives are highly structured by the environment in which they are produced (Burn 2017).

Critical legal studies, including feminist jurisprudence, challenged the law's power and focussed attention on the narrative qualities of the law to highlight the law's service to the entitled and the need to acknowledge underrepresented groups in society (Olson 2014). These groups featured marginalised, and minority groups, and women. The stronger analyses of CCN involving women pay close attention to the importance of social structure within their lives (Fleetwood 2016). Social structure as a whole, depicts the varying social forces that have the ability to elicit a powerful influence on individuals (Cheal 2005; Parker 2000).

Life experiences are a critical element drawn upon in the creation of CCN. That being said, it is the judge who decides what is important/unimportant to the construction of each narrative. Analyses of narratives of women's lawbreaking are important to understand how the patriarchal legal setting produces gaps in these narratives, and replicates them, at times portraying previous tough experiences as negative for the offender herself. When these narratives are replicated in future court cases, they act as precedent judgements (Olson 2014), and can influence subsequent similar cases. Chapter 7 explores this construction through an analysis of a judge's remarks on appeal. It uses one case to exemplify the process of judges replicating court narratives, and highlights the potential for past cases to influence and steer future, similar cases. Narratives about women's lawbreaking can underscore social structures and individual agency, bridging the gap between the ways agency is exercised

within differing social structures (Fleetwood 2015). Furthermore, analyses of the ways narratives about women are constructed demonstrate how social structures are intricately bound up within different discourses. This chapter sets the scene for this analysis by exploring the theoretical points of critical legal feminist theory, the legal habitus and the juridical field, gendered morality, and Anthony Giddens' theory of structuration (1979) to better understand how CCNs develop.

A focus on court narratives draws attention to the way different stories come to be told and heard and which resources can be drawn upon by those constructing the narrative (Gubrium & Holstein 1998). CCN are constructed by the judge *about* the offender, using various sources available. The information gleamed from these sources offers insight into the reasons behind the lawbreaking but are structured through the male gaze of a fundamentally patriarchal legal system. Deconstructing legal narratives about women's lawbreaking allows a consideration of 'how women's experiences are structured by discourse' (Fleetwood 2015, p. 371). It enables a focus on those discourses produced by the court which, as will be discussed below, Smart (1992) argues are both male and sexist.

Sentencing remarks are highly structured CCNs produced within an inherently patriarchal system and 'shaped by jurisdictional legal contexts' (Burn 2017, p. 7). Within this framework, these narratives reflect the way individual agency and constraining structures are viewed by judges. Specifically, these narratives highlight the way agency and structure are viewed differently depending on whether the victims or offenders are being discussed. Chapter 5.1 and Chapter 7 explore the way the same structures can be used in support of the 'current' victim's situation and, simultaneously, to intensify the offender's lawbreaking. The following section of this chapter explores the power of the court environment to structure women's experiences. Through a discussion of Bourdieu's (1987) legal habitus within the juridical field and the practice of the law imposing its own knowledges on to women with little consideration of the knowledges they possess (Smart 1990), the following section demonstrates the way the court builds an artificial but powerful binary which produces and reinforces dual constructions of gender.

The Power of Legal Discourse to Structure Women's Experiences

Law is a powerful discourse due to its supposed claim for truth (Smart 1990). Finkelstein (2011, p. 136) argues, however, that the adversarial system which Australia adopts is not well-adapted at uncovering the truth as 'the judge must make do with the evidence presented and hope that the parties know what they are doing'. This acts as a constraint on judges which subsequently serves as a further constraint on women who pass through the court environment. Within the adversarial system, a greater importance is assigned to destroying the opposition's case (Strier 1994), in contrast with the inquisitorial system in which truth-seeking is prioritised over proof-making (Freiberg 2011).

The law often silences women who encounter it and feminists who seek to challenge it (Smart 1990). Generally, feminist legal scholars are critical of the ways in which the law acts as a tool that continues to contribute to and reinforce women's social oppression (Hunter 2019). As such, the law is complicit in the continuation of this. Within the law, gender identities and norms are created in often conservative ways that ignore the nuances of gender, actions/agency, and contexts/structures (Buss 2009). Social norms, laws, and institutions advantage particular groups and people in society such as men, and disadvantages others like women (Weldon 2006). The law is sexist as it actively disadvantages women by failing to recognise the specific harms done to women due to the fact that these harms advantage men (Smart 1992).

Anthony Giddens (1979) talks extensively about structure and agency, which is useful to understand their co-existence. Still, a limitation of Giddens' work is that it pays only marginal attention to the law, specifically. The following section will explore the ways Bourdieu's (1987) conceptualisation of habitus and Smart's feminist exploration of the law can supplement Giddens' (1979; 1984) work and enrich the development of a framework inclusive of agency and structure within the legal field.

The Legal Habitus and the Juridical Field

Bourdieu (1987) views the law, situated within the juridical field, as a constitutive force within modern liberal societies. By its very nature, the law is not independent of other social practices or ideologies but is closely tied to these. A field relates to an 'area of structured, socially patterned activity or "practice"' (Bourdieu 1987, p. 805). A juridical field, therefore, is 'organized around a body of internal protocols and assumptions, characteristic behaviours and self-sustaining value' (Bourdieu 1987, p. 806), and is a field which exerts a force upon all who enter within its range. This type of social field is one representing a site of struggle and those who are situated within this field define what is to be controlled.

Patterned by tradition, daily experience, and education, practices within the legal universe operate as 'learned yet deep structures of behaviour within the juridical field' (Bourdieu 1987, p. 807), otherwise known as habitus. Habitus relates to 'the habitual, patterned ways of understanding, judging, and acting which arise from our particular position as members of one of several social "fields," and from our particular trajectory in the social structure' (Bourdieu 1987, p. 811). Acquired through different experiences, the habitus is the product of an individual's social environment (Bourdieu 1990). Bourdieu's habitus, long used in sociological and criminological studies of crime (Sandberg & Fleetwood 2016; Moyle & Coomber 2017), is a tool for studying the ways that social fields (structures) and individual practices (agency) are mutually connected.

Structures within one's individual social environment are capable of both guiding and constraining an agent's behaviour or actions (Bourdieu 1987); individual actions are shaped by objective structures (Bourdieu 1990). Thus Bourdieu, like Giddens (1979; 1984), views agency as intricately connected to structure. In order to completely capture the full complexities of the agentic dimension of social action, agency is required to be situated within the flow of time. Bourdieu (1990) argues that a person's social field is internalised through their experiences, thus, creating individual practices. Like Giddens (1979; 1984), Bourdieu emphasises the importance of viewing structure and agency in space and time. By operating through space and time, Bourdieu's (2000) habitus creates a dynamic, rather than static, account of agency.

Different conditions of existence relating to educational background, social status, and life experience all give rise to distinct forms of habitus. The legal habitus reflects the deep structures of legal perception, judgement, and behaviours, which have a specific power and influence of their own (Bourdieu 1987). In the cases selected in this thesis, the habitus in which the women discussed in the CCN are situated is reflective of the social inequalities faced by each, which are reproduced through their actions (Bourdieu 1990). An individual's habitus, therefore, structures the way each person experiences and interprets their own social world (McNay 2004). The legal habitus, in which the judges are situated, is inherently different to the habitus shared by the women in the analysed CCN; however, both can shape and constrain their actions (women identified) and judgements (judges). The respective habitus of the judges and the women whom they sentence, structure their knowledges, and subsequently, their experiences.

The Hierarchy of Knowledges in a Patriarchal System

The law associates the knowledges produced by women as holding less value than the law's own knowledges. This is despite women's knowledges presenting a powerful tool to understand women's experiences. Law is positioned high on the hierarchy of knowledges in a patriarchal society (Smart 1990). As the law associates itself with the qualities of rationality, coherence, and objectivity, it asserts a high value on its own knowledges compared to other knowledges. By contrast, the law associates the knowledges produced by women with the opposite term within these binaries: irrational, incoherent, and subjective, significantly devaluing these knowledges (Hunter 2019). Thus, the law can disqualify other subordinate knowledges – those deemed less worthy by those who determine what is valued or devalued in society. As Bourdieu (1987) suggests, those situated within the juridical field define what is to be controlled, what is legitimate/illegitimate, and what is valued/devalued.

The judiciary, situated within the juridical field (Bourdieu 1987), employs a powerful discourse. The judiciary and the law have historically been a predominantly male group; as Smart (1992, p. 32) states, the 'law is male'. Recently, the number of female judicial officers

has been increasing; [2] however, male judicial officers still outnumber the women in every Australian state and territory (Opeskin 2020). As the juridical field remains a patriarchal system, what passes as knowledge reflects the interests of men, even when women are the central element in the narrative. Smart (1990, p. 195), therefore, suggests, the 'law is a reflection of male interests or values [and] […] is part of the patriarchal state'. The law is sexist by the way men continue to be 'retained as the standard by which women must be judged' (Smart 1992, p. 31). Law and legal knowledge are not only about the legislation; however, they do involve legal reasoning, concepts of justice, objectivity and maleness (Smart 1999).

Aligning with a more radical feminist viewpoint, Mackinnon (1983) argues that the law is purely the reflection of male power; the power of men to both objectify the world and the women within it. However, Smart (1999) suggests that the problem with the law is more to do with the *structures* of patriarchy within it, rather than men as biological agents as Mackinnon (1983) argues. By the way these women's choices have been structured and viewed by the court, it is evident they both shape each other. Since the law involves structures of patriarchy, the law is therefore a reflection of male power. The male gaze of the court is what decides that which is good/bad, valued/devalued, and worthy/worthless within a patriarchal society. As a result, the patriarchal structure of the court is also what decides where in the hierarchy of knowledges women's knowledges are positioned.

Within critical legal feminism, a 'postmodern turn' has occurred in which the starting point of analysis has been moved from '"women's experiences" to the discursive processes by which gender and women's experience are constructed', particularly within the legal and juridical field (Hunter 2019, p. 54). Postmodern feminism rejects the notion of 'one reality' and is an important addition to the theoretical understanding of CCNs, as many judges try to impose 'their' reality onto the lives of the women they sentence. Postmodernism suggests Smart (1999), 'refers to a mode of thinking which threatens to overturn the basic premises of modernism…' (p. 36), which refers to 'the intellectual mode of western thought which has been identified as male […] and as white …' (p. 37). A feature of modernism is the ability of

[2] In this thesis, the term judicial officers refer to both Judges and Magistrates.

different knowledges, claiming to be true, to hold a high place in the hierarchy of knowledges. It is this claim to truth that assigns claim to power (Smart 1990).

The core element of postmodernism is interested in subjugated knowledges which tell different stories (Smart 1999). As discussed, the law asserts a high value on its own knowledges compared to other knowledges, including those belonging to women. The relationship between power and knowledge is central to Foucault's analysis of power, whereby the ability of different discourses to exercise power through their claim of truth is examined, suggesting 'power is productive of knowledge' (Smart 1990, p. 196). However, the law can disqualify other subordinate knowledges – those deemed less worthy by individuals who determine what is valued or devalued in society. Revealing the law's vision of women and their lives as completely distorted, Dahl (1987) suggests that the only way law can begin to be less oppressive to women is by understanding and capturing the reality of their lives. CCN can be used to understand the way in which the patriarchal system of the court upholds certain binary views, frames the impact of structures on their actions and, further, highlights what passes as knowledge actually reflects the interests of men, even when women are the central element in the narrative.

Binary Constructions Within the Court

Law's knowledges versus women's knowledges builds an artificial but powerful binary whereby the law produces and reinforces binary constructions, such as masculine/feminine, good/bad, rational/emotional. Working in a context that holds a view of women as being equivalent, the judiciary subsequently assigns stereotypical behaviours and qualities to women (Potts & Weare 2018; Smart 1999). These qualities are those that often appear in a dichotomous form between female and male characteristics. The experience of entering a patriarchal system, such as the court, structures women's experience of that area due to the stereotypical expectations of women's behaviour. What constitutes appropriate behaviour displayed by a woman who is feminine can influence the judgements made about the women who enter this area (Walklate 2001), particularly those who enter as offenders, rather than victims. Women become closely associated with their bodies and the manner in which women use them comes to determine how they are viewed by the court (Smart 1992). The

use of women's bodies, even by the women themselves, has caused a divide within feminist theorising of choice and sex work which will be explored later in this chapter.

Gender – woman/man – is a socially constructed concept. This social construction expresses a feminine stereotype of a woman whereby she is 'docile, soft, passive, nurturant, vulnerable, weak, […] and domestic, made for child care, home care, and husband care' (Mackinnon 1982, p. 530). As highlighted in Chapter 7, women who transgress this stereotype, those who resist or fail, or do not fit the socially constructed mould of who and what a woman should be, are considered less female or a lesser woman. What constitutes appropriate behaviour to be displayed by a woman, has the power to influence the judgements made about the women who enter the juridical field (Walklate 2001). In particular, those who enter as offenders, rather than victims.

Those women who do not adhere to the patriarchal construction of gender roles are often treated more severely (Chesney-Lind 1987). Offending women are viewed often as doubly deviant: deviant because they have broken the law, doubly deviant because their actions transgressed accepted gender roles (Herzog & Oreg 2008). Women who offend are viewed as both more culpable and blameworthy for their actions (Tillyer, Hartley & Ward 2015). Smart (1992) suggests that an unmarried woman, for example, is a type of woman who operates within the discourse to invoke the correct place of 'Man'. As she does not have a man in her life, she is the problem. Therefore, Man is the solution to this problem as 'he signifies the stability, legitimacy and mastery' absent in her world (Smart 1992, p. 39). However, when a woman transgresses societal reasonings of what makes a woman, Woman, by participating in acts generally thought of as being conducted by men she *becomes* the stability, legitimacy, and mastery of her own life without needing Man and, therefore, renders irrelevant the place of Man.

This narrative, however, does not fit within the construction of the ideal or accepted woman – despite often being far removed from the real woman – within a patriarchal system. This is arguably influenced by the fact the women in the CCN are using their bodies in a way that is deemed unacceptable by both society and the judiciary. This element is central to the CCN of these women. Thus, this becomes not only about the woman but about the sex; and the

intersection between sex work, gender, structure, and agency becomes clear. These gendered stereotypes and expectations, and the results of a woman transgressing these, are discussed in Chapter 7. The following section explores the ways which the victim-offender cycle is often absent within the CCN due to the construction of narratives of women's experiences within a patriarchal legal system.

The Absence of the Full Trajectory of the Victim-Offender Cycle Within Court-Constructed Narratives

CCN are constructed within a patriarchal system, which determines what is relevant/irrelevant for the construction of each narrative. Parts of a story that do not fit this narrative are cast aside, deemed irrelevant and immaterial. In this case, alternative accounts of a particular event are disqualified and 'the legal version becomes the only valid one' (Smart 1990, p. 198). To the court, an offender's life narrative therefore appears somewhat insignificant. While the court does acknowledge an offender's history, the court also reconstructs the narrative using what is and is not presented by the different actors involved in the trial. As a result, the full trajectory of the victim-offender cycle is often absent.

In the absence of the whole cycle, the intersection between sex work, gender, structure, and agency can never be understood. The suggestion that the courts are only interested in finding the truth, which fits the *current* victim(s), is based on the argument that the court is only interested in upholding the rights of the *current* victim(s) and punishing the offender, rather than providing support for *all* victims. These rights, argues Smart (1999), reflect the power and experiences of men combined with a moral base, which stems from men's experience of the world, or their ability to define it. Their ability, in this case, subsequently results from their habitus and patterned way of understanding, which has arisen from their position in the social structure (Bourdieu 1987). Furthermore, as the law is not independent of other social practices or ideologies but rather closely tied to these, morality is largely intertwined within legal narratives. The following section explores the presence of gendered morality within the criminal justice system (CJS) and the ways this influences the court's construction of women's narratives.

Gendered Morality and the Criminal Justice System

Giddens' Morality

Morality is a concept present in everyday life, including the law. Laws are the most strongly sanctioned type of social rules and are formally prescribed levels of penalty throughout different societies (Giddens 1984). However, laws and criminal justice institutions, continue to be predominately male-dominated institutions (Spader 2002). What is deemed moral/immoral, for example, education equals good/moral and sex work equals bad/immoral, is a product of a patriarchal society. Legal theory presupposes that even though someone may not have understood that an act they committed contravened a law, they may still be held responsible (Giddens 1976). This culpability is assessed based on whether they *should have known* what they did was illegal, or arguably, immoral. However, Giddens also notes the ambiguities and blurring often present within the conduct for which agents are to be deemed responsible.

Citizens follow a certain equation regarding morality in their everyday life: agency equals moral responsibility, which equals the context of moral justification (Giddens 1976). Transgressions of amoral claims are followed by sanctions, which involve the reactions of others (Giddens 1976). The transgression, however, can be potentially negotiated, as it is, rather, the way the transgression is viewed or identified that affects any sanctions it may be subjected to. The interdependence of morality and power has two main aspects: the possibility for different world views to clash, and the possibility of clashes between the understanding of what constitutes common norms (Giddens 1976). Within a patriarchal system, this clash occurs between those who create the norms – men and those about whom the norms are created – women. As discussed in Chapter 2, Christie (1986) gendered the 'ideal victim' as a woman. Similarly, Giddens has gendered the person to whom morality applies in the context of moral responsibility within the law, as a man. Those to whom the concept of morality is being applied quite strongly within these CCN are, however, women. Thus, morality is being applied through a gendered lens.

Gendered Morality

Gilligan (1982) aimed to challenge the traditional concepts of morality. In her work, Gilligan (1995) aimed to uncover whether there was an association between gender and whether individuals adopt a morality of justice (often aligned with men) or a morality of care (often aligned with women). Results from one study suggest that most men focused on a morality of justice, while women were more divided 'with roughly one third focusing on justice and one third on care' (Gilligan 1995, p. 25). This suggested men tended towards a focus on justice over care whereas women (albeit not all) tended to focus on care over justice. While aware of both options, each would generally focus on one or the other: 'although people are aware of both perspectives, they tend to adopt one or the other in defining and resolving moral conflict' (Gilligan 1995, p. 20).

This reinforces existing gender stereotypes including that men are logical and women are nurturers and care givers, which subsequently creates problems for offending women who transgress these stereotypes. Despite the important awareness of male-dominated areas involving patriarchal structures and the way these arenas serve to silence women's experience, as explored earlier in this chapter, a focus on morality in this way continues to be damaging to those women who transgress gender stereotypes (Smart 1992). The expectation of women to fit gender norms and therefore align with a morality of care, serves to strengthen the immorality of their actions within a patriarchal legal system. Women who act in offending roles in HTCSE are consequently deemed immoral by the CJS as their actions transgress gender stereotypes and do not align with a morality of care.

Spader (2002) criticises this view, suggesting it justifies the differential and unequal treatment of women. As the concept of care generally relates to closer relationships between people, including those evident between friends and family, the distinction between men aligning with a morality of justice and women aligning with a morality of care 'reinforces the stereotype that women are best suited for the private, caring domains of the family…' (Spader 2002, p. 71). The morality of care renders a belief of women whereby they are expected to care for the whole of humanity in the same way they care for their family and friends (Manning 1992).

Gilligan (1982) further examined the idea of differential moral development of men and women, and suggested men and women develop different moral codes as children. Men favour logic and neutrality whereas women orientate towards an interpersonal morality. Another gendered construction of morality, that of interpersonal relations, also reinforces pre-existing gender roles. Actions that transgress specific gender stereotypes such as women as mothers, homemakers, child bearers, as caring, and loving are deemed to be immoral. As a patriarchal system, the legal field is based on a moral code that favours logic and, therefore, favours masculine views of morality.

The importance of studying gender is observed in the examination of 'how our institutions and social practices privilege or value forms of behaviour associated with privileged groups of men over forms of behaviour associated with women, or people of color, or the poor' (Weldon 2006, p. 237). Much of the anti-prostitution rhetoric that exists 'labels prostitution as moral decay [and] the prostitute as a demonized individual' (Kesler 2002, p. 229). As explored in the following section, sex work is thus defined as immoral, as an illegitimate form of work and an unacceptable way for a woman to use her body.

The Relationship between Sex Work and Gendered Morality

HTCSE occurs within the sex industry. The women in the identified cases worked initially as sex workers and then as women who managed other sex workers. Kessler (2002) suggests sex workers are viewed as women who have strayed too far from the gendered sexual norms which are constructed by a patriarchal system. These women are labelled as sexual deviants and considered hyper-sexualised, and this good girl/bad girl dichotomy that exists in relation to sex work is not helped by images portraying feminists as Madonnas and sex workers as whores (Kesler 2002). Images reinforcing sex workers as whores also encourage the application of morality to cases involving sex work. A focus on the good sex/bad sex binary renders HTCSE more morally culpable than other forms of human trafficking. This emphasis on good sex/bad sex affects the identification of those involved in HTCSE, since those who have been trained to identify and respond to these cases often subscribe to the idea that sex work is a serious *moral* and criminal act (Wolken 2006). These identifiers and responders

already have a heavily ingrained presumption of guilt against a woman who has been identified as the offender, despite originally being a victim. When this happens, she is deemed even more morally culpable. This moral culpability is evident within the CCN of these women and will be explored further in Chapter 6.

Consequently, HTCSE has been socially constructed as morally reprehensible. Deemed as a type of unqualified evil, proponents of the anti-sex work rhetoric launched a moral crusade on this form of human trafficking, generating widespread concern.[3] Larissa Sandy's (2014, p. 88) work on Cambodian sex workers, for example, demonstrates 'the stereotypical image of Cambodian sex workers as "helpless victims" waiting to be saved' is one that elicits public sympathy. Attention is subsequently placed on dramatic, highly traumatised victim-centred narratives, to justify the intensified punishment of offenders of these crimes; anecdotal horror stories are offered to establish the severity of the evil being targeted (Weitzer 2007). This perspective frames situations as black and white: *all* voluntary and forced sex work is an objectified and oppressive form of male domination over women which refuses to acknowledge any grey areas. This narrow perspective leaves little room for women's empowerment and fails to challenge the structural factors in women's lives (Andrijasevic & Mai 2016). This moral crusade positions a small number of cases as the norm by significantly dramatising a select few examples of human suffering with the aim of causing alarm and outrage.

This dramatisation has dominated the debate on sex work and HTCSE, influencing many policy and intervention responses (Weitzer 2007). There is a grey area which is ignored by this perspective ignores, however, and it exists in women's ability to exercise agency and power, despite being constrained by structures. While both liberal and radical feminists agree that women's lives and experiences are structured within a patriarchal system, each hold opposing views on sex work and the degrees to which women's lives are impacted by these structures. Each perspective was influential in the construction of the United Nations definition of human trafficking (Goździak & Vogel 2019; Goździak 2021) outlined in Chapter 2. The following

[3] See Wolken (2006) for a discussion regarding the focus that has been placed on trafficking for sexual exploitation at the cost of neglecting all other forms of human trafficking.

section of this chapter explores the opposing views within liberal and radical feminist theory regarding sex work, choice, agency, and structure.

Liberalism, Sex work, and Choice: Agency and subjectivity

Liberal feminist theory focuses on agency and choice within constraining structures. Despite operating within patriarchal societies, liberalism values the autonomy and rationality of individuals and is centrally concerned with the concept of agency and choice, framing choice as the exercise of an individual's autonomy (Miriam 2005). Feminists aligning with a liberal view push to distinguish between forced and voluntary sex work, arguing for a definition of sex work as a form of labour to restore dignity to the decisions made by women that enable them to survive within the structural constraints they are faced (Miriam 2005). Cambodian sex worker narratives demonstrate some women view sex work to be the best choice for them to care for their family within a restricted range of options (Sandy 2014). Women's equality and freedom are best achieved by destigmatising sex work and improving the conditions of employment for those women who engage in sex work, including those who may have been trafficked and wish to stay in the sex industry (Meyers 2014). Contrastingly, radical feminist theory, condemning all forms of sex work, often argues both voluntary and forced sex work is a male-dominated form of oppression over women, whereby women are objectified (Weitzer 2007).

Radical Feminism, Sex work and Structure: Reinforcing male dominance

Activists who adopt an extreme version of radical feminist theory argue for a closure of the sex industry and maintain that all women who are in the sex industry, either through being involuntarily trafficked or by 'choice', need to be rescued (Meyers 2014). These activists have undertaken much of the research into HTCSE and their views, therefore, inform our understanding of HTCSE, as well as policy responses (Goździak 2016). Established in an understanding of structure and social organisation as inherently patriarchal (Gerassi 2015), radical feminist theory, in contrast with liberalism, argues that sex work is defined by the intersection of patriarchy and capitalism: an intersection structured by male supremacy,

serving to reinforce men's dominance (Overall 1992; Pateman 1988). All sex work, thus, is a violation of women's human rights (Doezema 2005).

One of the primary objections proposed about sex work generally is that those who engage in it do not choose, wholly and freely, to do that type of work. It is only a job that women, particularly those who are structurally disadvantaged by poverty or other economic or non-economic factors including abuse (Satz 1995), engage in when there appears to be no other option for them (Overall 1992). This research into the legal-juridical setting reveals quite the opposite: that the judicial participants view women, who are framed as offenders of HTCSE, as committed to a choice. This reveals that the CJS rejects the radical feminist view, albeit to advance another narrative, these women should have known better than to act the way they did. Therein exists the need to acknowledge the lack of nuance in denying agency.

Radical feminists often argue that sex work rests on the structural inequalities faced by women in a patriarchal society and that women would not be 'forced' to sell their bodies in the form of sexual services, had they the same opportunities as men. However, focusing on individual actors ignores the global socioeconomic forces that push people to migrate (Weitzer 2012). 'Choice', therefore, is a debated concept with many radical feminists as they would argue that the 'choosing' to undertake sex work is driven by a lack of other options and, as a result, the 'choice' to undertake sex work can never wholly be described as a choice (Gerassi 2015). Yet, between these two viewpoints there exists a space for women to exercise agency despite being constrained by patriarchal structures, whereby agency is viewed as resilience. This is explored in the following section.

Reassigning Agency within Patriarchal Structures

Satz (1995) suggests that critics of sex work have taken one element of the situation and portrayed it as the *only* situation. Many radical feminists have fought to remove women's agency and subjectivity by assigning the label of victim to every woman in the sex industry, whether they be voluntarily trafficked or not. This viewpoint does not consider the possibility of empowerment through sex work, observed in terms of autonomy and economic stability or independence (Kesler 2002). Narratives that situate all sex workers as victims, are

inadequate and unhelpful for informing realistic understandings of sex work (Sandy 2014). Framing all sex work as exploitation produces polices that exacerbate the exploitability of migrant women (Mai et al. 2021). Categorising all individuals in sex work as victims of sex trafficking, or not, creates an unhelpful dichotomy leading to a focus on victims who are always under a form of force (FitzGerald & Munro 2012; Snyder-Hall 2010).

Those who align with a more liberal view of sex work argue that viewing all women in the sex industry as victims is a distorting ideology (Miriam 2005). The liberal perspective views women trafficked for sex work as exercising a degree of autonomy within their constrained social context that otherwise offers few options. There is a need therefore, not to question whether sex workers *have* agency, but to question the socio-legal meaning of that agency/empowerment. Despite the rescue narrative offered often by radical feminists, the choices women make within a constrained environment are important to be recognised in order to develop a more nuanced understanding of sex work (Sandy 2014). When the meaning of empowerment is interrogated within a social order structured by patriarchy, there exists the ability to conceive power as power to act (Miriam 2005). An account of agency and empowerment that acknowledges the compatibility between agency and victimisation (Meyers 2014; Miriam 2005), and views agency as resilience, is therefore necessary.

Agency as Resilience

Despite being interpreted in different ways, agency can be understood as resilience as well as, 'self-hood, motivation, will, purposiveness, intentionality, choice, initiative, freedom, and creativity' (Emirbayer & Mische 1998, p. 962). Representing an active rather than submissive stance, agency refers 'to the capacity of individuals to […] shape their life circumstances' (Haffejee & Theron 2019, p. 686). As a result, agency often represents resilience and vice versa (Sano 2012). Goździak's (2016) work highlights the presence of agency and resilience in child survivors of human trafficking. When considering resilience, however, it must be done with a focus on social actors and their agency. When considered this way, resilience is viewed as human agency (Bohle, Etzold & Keck 2009, p. 9), and social actors and their capabilities are prioritised.

The failure to recognise agency as having distinct theoretical dimensions and variable social manifestations, argue Emirbayer and Mische (1998), has rendered agency to remain tightly bound to structure to the extent that the ways in which agency has the power to shape structure, has been lost entirely. Many seeking to theorise agency have proffered one-sided points of view. To overcome this, Emirbayer and Mische (1998, p. 963) sought to reconceptualise human agency as a

> temporally embedded process of social engagement, informed by the past (in its habitual aspect), but also orientated toward the future (as a capacity to imagine alternative possibilities) and toward the present (as a capacity to contextualize past habits and future projects with the contingencies of the moment).

Here, highlighting links to Bourdieu's (1987) habitus, human agency is reconsidered in a way that acknowledges the ability for agency to shape structure. In relation to human trafficking, Mai (2016) suggests that agency needs to be considered within the context of migrants' marginalised lives and according to their specific priorities and needs. Thus, as discussed in the following section, an intersectional lens is an important addition to this framework to enable the consideration of the ways different structural constraints intersect in the lives of the women and the courts.

Intersectionality: Gender, Race, Agency, and Structure

A focus on gender alone has led to criticisms which state that to focus only on gender results in the neglect of other lived realties (Heidensohn & Silvestri 2012). An intersectional lens allows for multiple lived realties to be considered. Intersectionality looks explicitly at the interlocking systems of oppression (Anthias 2014). The process of disadvantage originating from the combination of multiple different categorisations, including gender, class, poverty, and social disadvantage, is examined by using an intersectional viewpoint. Importantly, the significance of an intersectional viewpoint is its ability to create newer and more hybrid forms of social disadvantage and, further, acknowledge the sensitivities required for addressing the intricacy of social relations (Anthias 2014).

An intersectionality lens enables the invisible to be rendered visible (Anthias 2014), highlighting existing inequalities and divisions within society (Mai et al. 2021). It allows for the acknowledgment of the way that different structural constraints intersect in the lives of both women and the courts. As explored earlier in this chapter, the adversarial legal system creates constraints for judges operating within that system. This creates further constraint for the women whom judges sentence. These constraints can influence the construction of women's narratives, rendering often important parts of their narrative absent from the CCN. In order to account for the relationship between social inequalities and offending behaviour, consideration must be given to social structures that shape behaviours.

As discussed earlier in this chapter, Bourdieu's (1987) conceptualisation of the legal habitus demonstrates the ways judge's actions are shaped within the juridical field, which, in contrast, is vastly different to the habitus in which offending women often exist. While both are subjected to social structures which can pose limitations on behaviour, each group of individuals faces different structures within their lives. Feminist jurisprudence was developed to address the ways in which the legal system works to the detriment of women.

Gender and race are socially constructed concepts. Race, as a social construct, enables an understanding of the way racism works to dominate and oppress different groups (Belknap 2007) by producing inferior and superior groups within society (Zuberi 2001). This social construction is reinforced within the judiciary (Lopez 1996), and individuals are subjected to racial stereotypes due to the way they look, for example, Asian. Racial stereotypes also play a role in the social inequalities faced by certain groups within society. Due to the predominant maleness and whiteness of the law and the court, racial and gender stereotypes are reinforced within the legal setting. Within the patriarchal domain of the law and the courts, these offenders are the 'others'. These women are not white and often have limited English-language skills. They also have little formal and informal support networks around them, which makes it appears as though they do not belong to mainstream society. Within HTCSE, sexualised and racialised stereotypical images possessed by those in Australian society regarding predominately Asian women play a role in the construction of narratives within the sex industry (Chong 2014). These stereotypes will be discussed in the following section exploring the structural components of HTCSE.

An account of structure and agency is needed that highlights the interconnectedness between individual subjectivity and social structures, and emphasises them as being in a relationship, not opposing one another (Fleetwood 2016). Giddens (1979) theory of structuration extensively discusses the interrelated nature of structure and agency. It is used to enrich this framework that aims to resituate the idea of choice as held by the judges, expressed through the CCN, to agency within structural constraints. By employing an intersectional lens, the link between structure, agency, and gender can be understood. The following section explores the structural components of human trafficking and the ability of these to shape women's choices.

Structural Components of Human Trafficking

Poverty, gender, ethnicity, and race are all underlying structural components in human trafficking (Chong 2014) and influence the ways in which agency can be exercised. As discussed in Chapter 2, Hindelang, Gottredson and Garofalo (1978, p. 242) suggest:

> constraint originating from [the social structure] can be defined as limitations on behavior […] economic factors pose stringent limitations on the range of choices that individuals have with respect to such fundamentals as area of residence […] and access to education.

Structural constraints can shape daily life in certain ways, such as leading individuals to engage in deviant or criminal behaviours. However, they can also shape an individual's response to victimisation (Turanovic, Pratt & Piquero 2016).

Women are more at risk of being trafficked due to the structural poverty and marginalisation they face in their domestic and social realms. As will be explored in Chapter 6, the sexualised and racialised stereotypical images that Australian society possess play an important role in HTCSE (Chong 2014), as they create gendered dominant narratives. Furthermore, they create narratives within the sex industry, particularly in relation to those who operate as sex workers and within those responding to HTCSE. Chong (2014, p. 198) further suggests that 'racist and sexual stereotypes of women are exploited in the sex industry'; patriarchy has set up the

female stereotype of passivity and submissiveness and 'racialised and ethnicised peoples are prone to experience violence […] [including] sexual exploitation' (p. 198). Furthermore, there exist sexual ideologies which contain similar racialised stereotypes including, '…the sexual submissiveness of Asian wom[e]n' (Nagel 2003, p. 56). Demand correlates with these sexist and racist stereotypes (Chong 2014).

In view of HTCSE, women who are poor and have few options for survival may fall victims to traffickers or may prostitute themselves when they seemingly have few other choices (Anthias 2014). A combination of little formal education and a lack of viable economic opportunities resulting in a lack of financial security fuels the migration of women from their rural villages in search of better work opportunities. This process, together with societal and cultural norms, which acts to reinforce gender inequalities, renders them vulnerable to the trafficking process (Konstantopoulos et al. 2013). Migrant women who have little social or cultural capital struggle against the various oppressions they face, including, social, sexual, and economic subjugations (Anthias 2014). Within this struggle, some may seize one of the only options they feel is available to them. Despite this inherent battle due to various structural constraints present in oppressive contexts, the ability still exists to exercise autonomous choices (Meyers 2014). These choices are, however, often considered immoral by those situated within the juridical field, who are not under similar oppressive structures. The construction of these women's actions as immoral is used to further intensity the severity of their 'choices'.

Oppressive structures under which women find themselves can reshape and confine women's goals within their self-understanding (Meyers 2014). Postmodern feminism, as discussed earlier in this chapter, seeks to reject the notion of the 'one reality' many of the judges impose when they try to impose 'their' reality onto the lives of the women they sentence, despite not being under the same oppressive structures. Adaptive preferences refer to the 'reduced expectations and cramped desires that are developed in a structurally unjust socioeconomic context […] because they can be satisfied within the parameters set by that context' (Meyers 2014, p. 435). Despite this, these women still exercise agency to cope with the obstacles these contexts present whilst taking advantage of opportunities presented to them within these constrained contexts. While their agency is strong and these women are equipped to

prioritise their interests despite significant adversity, they are still victims of the structures that constrain them.

Miriam (2005) argues autonomous agency will never be available to women under patriarchal systems. Small acts are possible, but 'truly free agency must await a post patriarchal society' (Meyers 2014, p. 433). A very bleak position to hold, this viewpoint suggests an extensive period before women can ever (if ever) possess the ability to exercise their own agency. Narayan (2001), on the other hand, suggests rational choice, in the absence of direct force or threats, is sufficient to represent autonomous agency. Insisting patriarchy imposes significant constraints on women, Narayan's account of agency recognises that even those living under constrained conditions hold the capacity for choice and action. What neither account of agency/autonomy recognises, suggests Meyers (2014), is that autonomy is fluid and can be present in varying degrees at different stages. An account that recognises the fluidity of autonomy is required to conceptualise the different ways women can exercise agency throughout their lives, depending on the different structures within which they are situated.

The Intersection of Feminism and Anthony Giddens' Theory of Structuration

The Canadian Advisory Council on the Status of Women (1984) questioned whether a woman who possesses only a minimal education and lacks financial well-being could ever completely 'choose' a life that is (and continues to be) stigmatised by a large portion of society (cited in Overall 1992). This represents the intersection between agency and structure. At this intersection, there is the ability to acknowledge that women's agency and therefore, choice, is restricted and bounded by structures within their lives; however, the ability for women to exercise agency within constraint is also acknowledged. The capacity for agency and victimisation to exist in conjunction with one another, rather than opposed to each other, can also be acknowledged. This is where Giddens' (1979) theory of structuration intersects with feminism.

An account of agency is required that does not neutralise women's agency in oppressive contexts but rather acknowledges the compatibility of both agency and victimisation, further explicating women's empowerment (Meyers 2014). It is too simplistic to view those women

living under oppressive regimes in a dichotomous light. Polarised conceptualisations such as women living under oppressive circumstances as either free agents *or* passive victims are anchored in a flawed and inaccurate understanding of women's autonomy (Meyers 2014). As such, there is a need for agency to be viewed in conjunction with structure. Despite Giddens' theory of structuration lacking a gendered lens and being argued to possess an elitist view (Mulinari & Sandell 2009), his theorisation on the interrelatedness of structure and agency, when combined with liberal and critical legal feminist theory, enhances the understanding of the ways the women in the CCN have exercised agency, despite being considerably constrained by structures.

Anthony Giddens' Duality of Structure

Earlier theories (see Table 3 for an overview) conceptualised structure and agency as existing separate from one another, often appearing as mutually incompatible concepts (Giddens 1979). Structuralist theories gave priority to the 'object over the subject […] to structure over action' (Giddens 1979, p. 50). Within these theoretical conceptualisations, the constraining qualities of structures are strongly emphasised over human agency. Contrastingly, voluntarist theories gave superiority to agency in the explanation of human conduct affording little attention to constraint posed by structures (Giddens 1984).

Table 3: Different conceptualisations of structure and agents/agency (Bryant & Jary 2001).

	Structuration Theory	**Voluntarist Theories**	**Structuralist Theories**
Structure	Structure both creates and constrains action and is created by action.	Structures are products of agents.	Structures heavily constrain choices.
Agents/Agency	Actors are knowledgeable and competent with the ability to reflexively monitor their actions.	Agents determine their choices and actions.	Agents are merely the victims of their circumstances. Own choices are marginal and often non-existent.

A similar dichotomous thought configuration which is found within the court's view of women, and offenders, can also be observed within these conceptualisations; that is, the

need for an individual or a situation to be one of either/or, instead of one existing of multiple elements. Individuals, therefore, either had agency *or* were constrained by structure, rather than possessing the ability to exhibit both agency *and* structure, or agency within structure. Dichotomies such as this do not completely conceptualise an individual's experience. Approaches that place emphasis on either structure *or* agency, such as in functionalist and voluntarist theories, have been viewed as less adequate than those perspectives which seek to incorporate both agency *and* structure in the analysis, such as Giddens' theory of structuration (1976; 1979; 1984), and feminist theory (Wharton 1991).

Giddens' theory of structuration sought to connect human action and structural explanation within social analysis (Giddens 1979). Thus, structuration theory - the notion that structures can both make action possible and restrict it - was formed (Joas 1987). As a theory, it demonstrates how social structures are constituted by human agency while also being the mediums of this constitution (Giddens 1976). Furthermore, it reconceptualised structures as constructs which enabled human agency, rather than constraining it. Structures are therefore formed through action and, simultaneously, action is formed through structures (Giddens 1976). This is what Giddens' termed the duality of structure and is the central concept of his theory of structuration. Giddens' theory of structuration is valuable to this discussion as it offers the ability for structure and agency to influence each other and demonstrates how agency can be exercised despite the presence of structures. While some scholars have criticised Gidden's theory, it highlights how the offending exhibited by victimised women identified as the traffickers can be framed as agency within constraint.

Critics of Giddens' Sociological Theorising

Critics of Giddens' theory of structuration have doubted whether it has offered much to empirical social researchers (Bryant & Jary 2001). They suggested it was too focused on the philosophic, abstract realm, lacked links to practical circumstances and required further conceptualisation and refinement (Stones 2005). Furthermore, a specific criticism of Giddens' original theory of structuration was that, depending on where the emphasis was placed on either structure or agency at any given time, either could be presented as overly voluntaristic or overly deterministic. This is what Giddens' theory sought to avoid. Stones (2005) has since

refined Giddens' structuration theory, terming the redeveloped theory strong structuration theory, to overcome some of these criticisms.

Feminist critics argue that Giddens' view of gender is elitist and only 'narrowed to [fit] a privileged few' (Mulinari & Sandell 2009, p. 494). Within Giddens' work, there exists a distinct lack of understanding of the gendered division of labour and the manner in which women's conditions within various labour markets are structured. In particular, this is indicative of the fact that women often have to migrate to other countries in search of low-paid work due to the lack of economic opportunities in their home countries. As a result, Giddens' narrow understanding of gender, 'obscures the interactions between labour regimes and the production of specific (racialized) femininities' (Mulinari & Sandell 2009, p. 500). For example, Asian women's position in the labour market differs significantly from white women's as they are more often forced to accept low paid, unskilled work (Brah 1996).

Despite these criticisms, Giddens' theory of structuration, in particular the emphasis that is placed on both structure *and* agency, remains pivotal and applicable (Stones 2005). Within his theory, Giddens discusses the duality of structure, where the mutual dependence of agency and structure is exhibited. What Giddens has added to previous conceptualisations of structure and agency is another dimension where each are interrelated and can co-exist. This chapter will now explore the important concept of systems, which help illustrate how agency and structure are interrelated.

Systems

For the women analysed within the CCN, the systems of social interaction illustrate how agency can be exercised within structures by demonstrating the ways that individuals can produce controlled, directional change in their life, despite the constraining force of structures. This is achieved through the process known as self-regulation through feedback. Giddens suggests there are three types of constraint on an individual and on their ability to make a choice: material constraints deriving from the body's limited physical capacity; constraints derived from sanctions related to power; and structural constraints (Loyal 2003). Structural constraints, the most important form of constraint identified within the analysed

CCN, refer to both those present in the lives of the analysed women, as well as the way in which the law is structured to support a patriarchal view of these women (Smart 1990; 1992). Giddens suggests structural constraints only make sense when considered in combination with an individual's pre-structured options, which limit an individual's possibility for action.

Systems of social interaction are constituted through the interdependence of groups and reproduced through the duality of structure (Giddens 1979). Actors are dependent on one another, as agency is dependent on structure to both enable and constrain action. Social interaction is made up of two 'systems': social and system integration. Social integration relates to the level of face-to-face interaction (Giddens 1979; 1984), while system integration refers to 'the level of relations between social systems or collectives' (Giddens 1979, p. 77). Within system integration, the concept of system can be conceived as the interdependence of action, which can be observed in three different ways: homeostasis causal loops, self-regulation through feed-back or reflexive self-regulation. As will be explored in Chapter 7, homeostasis causal loops and self-regulation through feedback, are most applicable to this research as they demonstrate two different scenarios both of which are applicable to cases of HTCSE.

Homeostasis casual loops refer to the pattern of causal loops, or circular causal relations, whereby a change in one event can be seen to initiate a sequence of events that affects the following events. For it to be a causal loop, the events must return to the initial event that began the loop (Giddens 1979; 1984). Self-regulation through feedback operates through a process of selective information filtering. This allows more directional and controlled change and enables a further exercising of agency, which homeostasis causal loops cannot (Giddens 1979). The interdependence of action as illustrated by the processes of homeostasis causal loops and self-regulation through feedback will be explored further in Chapter 7.

Agency

Giddens (1976, p. 75) defines agency as 'the stream of actual or contemplated causal interventions of corporeal beings in the ongoing process of events-in-the-world'. The concept of Praxis, directly relates to the notion of agency. Praxis refers to the ability of repeated acts

by individual agents to either reproduce or disrupt the social structure. Giddens (1979) refers to action as agency and suggests it is not a combination of discrete acts but rather a continuous flow of conduct, or 'lived-through experience' (Giddens 1976, p. 74). Integral to Giddens' (1976) concept of action is the idea that at any given time, a person (agent) could have acted differently. Choices are, therefore, made by agents.

People are knowledgeable agents with the ability to monitor their actions reflexively. Human agents always know what they are doing on a certain level, suggests Giddens (1984); however, they may know little of the ramified consequences of the activities they engage in. Furthermore, individuals operate under both the threat and the promise of the circumstances in which they find themselves. The flow of action, therefore, can produce unplanned consequences that may further form unrecognised conditions of action.

Agency and Power

Giddens' conceptualisation of agency highlights the close connection between agency and power. Agency refers to a person's *capability*, rather than their *intention*, to act; therefore, *agency infers power* (Giddens 1979). Power represents the ability to act otherwise and, further, can either intervene or refrain from intervention. In this light, agency is contingent on an individual's capability to make a difference to a pre-existing situation (Giddens 1984). Giddens (1976, p. 110) suggests agency, 'intrinsically involves the application of "means" to achieve outcomes, brought about through the direct intervention of an actor in a course of events'. Power, however, 'represents the capacity of the agent to mobilize resources to constitute those "means"' (Giddens 1976, p. 110). Agency is, therefore, closely tied to the concept of power.

Dowding (2008) argues power is also closely aligned to cause and, therefore, to agency. As explored earlier in this chapter, liberal feminist perspectives place the power in the individual, whereas radical perspectives place the power in the structure. As agency is aligned to agents in Giddens and Dowding's conceptualisation, the term power is more naturally centred around the agent rather than structure. Thus, agents hold the power, not the structure. However, power and the ability to act, are also closely tied to structure.

Structure

Structures, to Giddens (1979; 1984), are not solid, tangible organisations. Rather, structure refers to the idea that social systems are reproduced social practices constructed by Praxis as introduced in the previous section on agency. Structures can be viewed as an organised set of rules and resources, and the latter provide the means through which power can be exercised (Giddens 1984). Structure is viewed as a set of rules and resources that govern different social actions. Actors draw on these rules and resources in the production of interaction (Mingers 2004) and are implicated in the reproduction of social systems (Giddens 1979; 1984). This is what Giddens termed the duality of structure. Giddens (1984) suggests viewing structure in this way implies the recognition of an existence of a social actor's knowledge or memory trace of how things are supposed to be done combined with the organisation of social practices through the mobilisation of that knowledge. Structure, therefore, is something existing within the memory of human agents and represented in human action (Bryant & Jary 2001). This suggests human beings carry the potential to change their surrounding structure.

Every action is a production of something new; however, simultaneously, 'all action exists in continuity with the past …' (Giddens 1979, p. 70). Giddens does not conceptualise structure as a *barrier* to action rather he conceptualises structure as fundamentally *involved* in its production. Structure is something that enables action. What is important about this conceptualisation is the inherent acknowledgement that every individual can exercise choice; however, this choice is fundamentally shaped by structure. Dowding (2008) supports the conceptualisation that structure and agency are deeply interwoven suggesting agents react to their environment and their actions can either reinforce existing structures or lead to changes in them.

Duality of Structure

Giddens' (1979) concept of structuration refers to the duality of structure, which relates to the mutual dependence between structure and agency. A key element of the duality of

structure is the ability for structures to enable human agency, rather than only constrain it, without minimising the significance of the constraining aspects of structure (Giddens 1984). Structure, therefore, both enables and constrains agency. What is important for this framework of agency and structure within a critique of the CCN is that agency is often exercised within considerably constraining structures, even though structure enables agency. This demonstrates an individual's ability to exercise agency *despite* being significantly constrained or 'structured'. However, as was explored in the previous section on morality, agentic decisions are given moral weight within patriarchal structures because the male centric ideal that forms the patriarchal narrative inbuilt in the CCN does not consider agency as an acceptable pathway into offending.

Giddens developed the theory of structuration to overcome the theoretical dualities that prevent ascertaining a deeper understanding of the social world. One of these dualisms includes structure/agency. His theory offered a rethinking of sociological concepts including agency, structure, meaning, and power (Tucker 1998). Giddens' theory of structuration provided a space where structure can both create and constrain choice. This conceptualisation views structure as involved in the production of action while enabling actors to be knowledgeable competent agents. By combining Giddens theory of structuration with liberal and critical legal feminist theory, the intersectionality between sex work and gender, and structure and agency can be understood.

Conclusion

An account of agency that does not neutralise women's agency in oppressive contexts but rather acknowledges the compatibility of both agency and victimisation, further explicating women's empowerment (Meyers 2014), is offered within this framework. It is too one-dimensional to view those women living under oppressive systems in a dichotomous manner. Polarised conceptualisations (such as those which stipulate women living under oppressive conditions are either completely free agents *or* passive victims) are cemented in an inaccurate understanding of women's autonomy. A framework incorporating critical legal feminist theory, Smart's exploration of the law, and Bourdieu's (1987) legal habitus as situated within the juridical field, accounts for the gender differences that exist within society and the ways

these are replicated and understood within the courts. This conceptualisation allows for an understanding of the ways the choices made by women are framed as legitimate/illegitimate by a patriarchal legal system within the analysed CCN. With this lens, the acknowledgement of the intersectional nature of different interlocking systems of oppression is highlighted. The final addition of Giddens' (1979) conceptualisation of structure and agency to this gendered legal lens, acknowledges the ability for women to exercise agency amidst the various constraining structures within which they are situated.

Chapter 4: Methodology

Introduction

A qualitative research design mapped out the relationship between the court-constructed narratives (CCN) and the victim-offender cycle present in the ten women identified as acting in offending roles in HTCSE, as outlined in Chapter 1. The first section of this chapter provides an overview of the ten cases analysed within this thesis. Following this, the various data sources used within this research are summarised. Sentencing remarks are the primary form of CCN analysed within this thesis; however, appeal transcripts are also used where applicable. Pre-sentence reports (PSR) and psychological/psychiatric reports (PR) are used additionally, where available, to strengthen the analysis of the sentencing remarks. Interviews were undertaken with carefully and purposively identified judges, to shed light on how judges constructed the narratives within the sentencing remarks. Australian anti-trafficking experts were also interviewed as a source from which to gain further knowledge about the victim-offender cycle in the Australian context.

The following section of the chapter discusses the analytical framework used within this thesis. A thematic content analysis (TCA) was undertaken to analyse the primary themes identified from an examination of the various data sources used. Multiple sources of data were used to enable the data to be triangulated, which is used to enhance the quality and strength of the data (Mason 2002). The final section of this chapter discusses issues related to gatekeepers, access, and limitations. Gatekeepers are individuals who provide access and allow or permit research to be undertaken (Cresswell 2014, p. 188). Throughout this research, the Commonwealth Department of Public Prosecutions (CDPP), court registrars, and judicial associates all acted as gatekeepers to research into Australian legal processes. Access issues were faced when attempting to access the CDPP, the offenders' legal representation and the trial transcripts, which enhanced the hidden nature of HTCSE in Australia. Lastly, three limitations to the research are discussed including the absence of the women's voices, researcher bias, and participant memory.

This thesis aims to examine the way judges' construct the victimisation and offending of women who have been identified as acting in offending roles within Australian cases of HTCSE. To undertake this examination, the thesis analyses those narratives constructed by the court. For the purpose of this research, these narratives are termed court-constructed narratives (CCN). The aim of this chapter is to outline the methodology used within this thesis.

Research Justification and Overview

This research focuses on the judicial construction of victimisation and offending within the ten cases of HTCSE where women were identified as acting in offending roles. The key consideration within this thesis is the way the relationship between the victimisation and offending within these ten cases is constructed by judges within a patriarchal legal setting. The analyses within this thesis seek, therefore, to comment on the structures facing the identified offenders, as constructed within the CCN, with the intention of drawing awareness to, and facilitating an understanding of, the ways these women exercise agency. More specifically, however, a focus is placed on the way the structures within which these women are situated help *shape* their agentic decisions, as explored in Chapters 5.1 and 5.2, and how these are viewed and constructed by judges, as examined in Chapter 6.

Overview of the Ten Cases Analysed

All the women identified in this thesis were charged with offences under s270 and s271 of the *Criminal Code Act 1995* (Cth). The primary charge in each of the ten identified cases related to slavery and/or sexual servitude. Four women were also charged with further offences, the majority of which were contrary to the *Migration Act 1958* (Cth). Tables 4 and 5 provide an overview of the offences each offender was charged with and sentenced for, the initial sentence received, and the altered sentence in cases involving an appeal. Table 4 contains those women who were themselves victims of trafficking prior to the commencement of their offending. Table 5 contains the remaining five offenders who were not victims of trafficking but did have histories of victimisation acknowledged by the judges. The information within these tables has been collated from the sentencing remarks, and appeal transcripts, where applicable, relevant to each offender.

Table 4: Women identified as acting in offending roles whom the sentencing judges acknowledged to be a victim of trafficking: F = female, M = male.

Offender and Gender	Sentencing Citation	Charged Offences related to Slavery, Servitude and/or Sexual Servitude	Legislation	Decision at Sentencing		Appeal Citation	Final Sentence After Appeal	
				Total Sentence Imposed	Non-Parole Period		Total Sentence Imposed	Non-Parole Period
DS (F)	The Queen v DS [2005] VCC (NB: judgement not available)[4]	3 counts of possessing a slave; and 2 counts of engaging in slave trading	s270.3(1)(a) & s270.3 (1)(b) (respectively) of the *Criminal Code Act 1995* (Cth)	9 years	3 years	R v DS [2005] VSCA 99	6 years	2 years 6 months
Lay Foon KHOO (F)	The Queen v Lay Foon KHOO [2017] 2105 of 2016	1 count of organising or facilitating the entry of another person into Australia, including the deception about the fact their entry into Australia would involve the provision of sexual services for exploitation or the confiscation of their passport.	s271.2(1) of the *Criminal Code Act 1995* (Cth)	4 years	18 months	N/A[5]	-	-
Sarisa LEECH (F)	DPP (Cth) v Ho & **Leech** [2009] VSC 495	1 count of intentionally using a slave; and 1 count of intentionally possessing a slave	s270.3(1)(a) of the *Criminal Code Act 1995* (Cth)	6 years	3 years 6 months	Kam Tin Ho v The Queen and Ho Kam Ho v The Queen, Kam Tin Ho v The Queen and Sarisa Leech v The Queen [2011] VSCA 344[6]	5 years 6 months	3 years
Kam Tin HO (M)	DPP (Cth) v **Ho** & Leech [2009] VSC 495	1 count of intentionally using a slave	s270.3(1)(a) of the *Criminal Code Act 1995* (Cth).	14 years	11 years	*As Above*	4 years 6 months	Unknown
Watcharaporn NANTAHKHUM (F)	R v Watcharaporn Nantahkhum SCC149 of 2010	1 count of intentionally possessing a slave[7]	s270.3(1)(a) of the *Criminal Code Act 1995* (Cth)	8 years 10 months	4 years 9 months	Watcharaporn Nantahkhum v The Queen [2013] ACTCA 40	6 years 10 months	3 years 6 months
Kanokporn TANUCHIT (F)	R v McIvor and **Tanuchit** [2010] NSWDC 310[8]	5 Counts of intentionally possessing a slave; and 5 Counts of intentionally exercising over a slave, the power attaching to the right of ownership namely the power to use	s270.3(1)(a) of the *Criminal Code Act 1995* (Cth)	12 years	7 years	N/A	-	-
Trevor MCIVOR (M)	R v **McIvor** and Tanuchit [2010] NSWDC 310	Tanuchit and McIvor were found guilty of the same offences as detailed above.	*As Above*	12 years	7 years 6 months	N/A	-	-

[4] DS pleaded guilty to all 5 counts and was sentenced. This sentence was appealed, and her sentence was reduced.

[5] Similarly, as this case was only sentenced in 2017, at the writing of this thesis there had been no appeal lodged by Khoo.

[6] This appeal contained the appeal for two separate cases: Kam Tin Ho and Ho Kam HO v The Queen and Kam Tin HO and Sarisa LEECH v The Queen.

[7] Nantahkhum was further found guilty of 2 counts of allowing the victims to work in breach of their visa conditions knowing they were a non-citizen who held a visa that was subject to a condition restricting the work they could do in Australia, knowing they were being exploited pursuant to s245AC of the *Migration Act 1958* (Cth); 2 counts of allowing the victims to work, knowing they were non-citizens and further knowing both victims were being exploited under s245AB of the *Migration Act 1958* (Cth); and 1 count of attempting to pervert the course of justice in relation to the judicial power of the Commonwealth pursuant to s43 of the *Crimes Act 1914* (Cth).

[8] The initial trial - R v McIvor and Tanuchit [2008] NSWDC 185 (NB: judgment not available) was appealed – McIvor v R, Tanuchit v R [2009] NSWCCA 264 and a new trial was ordered. This is the second trial with sentence.

Table 5: Women identified as acting in offending roles who were not acknowledged to be a victim of trafficking but did exhibit histories including victimisation: F = female, M = male.

Offender and Gender	Sentencing Citation	Charged Offences related to Slavery, Servitude and/or Sexual Servitude	Legislation	Decision at Sentencing		Appeal Citation	Final Sentence After Appeal	
				Total Sentence Imposed	Non-Parole Period		Total Sentence Imposed	Non-Parole Period
Rungnapha KANBUT (F)	R v Kanbut [2019] NSWDC 931	2 counts of intentionally possessing a slave; and 2 counts of exercise over a slave, any powers attaching to the right of ownership namely the power to use[9]	s270.3(1)(a) of the *Criminal Code Act 1995* (Cth)	8 years 2 months 30 days	5 years 2 months 30 days	N/A[10]	-	-
Namthip NETTHIP (F)	R v Netthip [2010] NSWDC 159	Conducting a business that involved the sexual servitude of 11 other persons, knowing about that sexual servitude[11]	S270.6(2) of the *Criminal Code Act 1995* (Cth)	2 years 3 months	1 year 1 month	N/A[12]	-	-
Wei TANG (F)	R v Tang, Wei [2006] VCC 637[13]	5 counts possessing a slave; and 5 counts of exercising a power of ownership over a slave, being the power to use.	s270.3(1)(a) of the *Criminal Code Act 1995* (Cth)	10 years	6 years	The Queen v Wei Tang [2009] VSCA 182[14]	9 years	5 years
Chee Mei WONG (F)	R v Chee Mei Wong	1 count of conducting a business that involved the sexual servitude of others[15]	s270.6(2) of the *Criminal Code Act 1995* (Cth)	6 years	3 years	N/A	-	-
Somsri YOTCHOMCHIN (F)	R v Sieders & R v **Yotchomchin** [2006] NSWDC 184[16]	1 count of conducting a business that involved the sexual servitude of other persons	s270.6(2) of the *Criminal Code Act 1995* (Cth)	5 years	2 years 6 months	SIEDERS, Johan v R; SOMSRI, Yotchomchin v R [2008] NSWCCA 187[17]	-	-
Johan SIEDERS (M)	R v **Sieders** & R v Yotchomchin [2006] NSWDC 184	Yotchomchin and Sieders were separately represented but tried together and both found guilty of the same offences as detailed above.	*As Above*	4 years	2 years	*As Above*	-	-

[9] Kanbut was found further guilty of one count of dealing with money or other property that was, and that she believed to be, proceeds of crime the value of money $10,000 or more contrary to s400.6(1) of the *Criminal Code Act 1995*.
[10] As this case was only sentenced in 2019, at the writing of this thesis there had been no appeal lodged by Kanbut.
[11] Netthip was further found guilty of counselling and procuring the commission of an offence through making false statements to an immigration official in connection with an application for a further visa, being a protection visa that would permit the victim, as a non-citizen, to remain in Australia pursuant to s234(1)(b) of the *Migration Act 1958* (Cth) and s 11.2 of the *Criminal Code Act 1995* (Cth) and 10 offences of causing a document containing a false statement to be delivered to a Department of Immigration and Citizenship (DIAC) officer pursuant to s 234 (1)(c) of the *Migration Act 1958* (Cth).
[12] Netthip plead guilty and was sentenced. She did not appeal her sentence.
[13] Tang was initially charged in 2005 with two co-accused: DS and her husband, Paul Pick. DS pleaded guilty. Pick was, however, acquitted on eight of the ten charges, with the jury being unable to determine guilt on the remaining two. The jury was discharged without verdict. Tang was then re-tried separately. The citation for that trial is listed in this table.
[14] After Tang was sentenced upon completion of the second trial, three appeals were held. Neither the first, *The Queen v Wei Tang [2007] VSCA 134* nor the second, *The Queen v Tang [2008] HCA 39*, resulted in changes to her sentence. During her third appeal, that listed in this table, her sentenced was reduced.
[15] Wong was further found guilty of four counts of allowing a person to work in breach of their visa conditions, further knowing they were being exploited contrary to s245AC(2) of the *Migration Act 1958* (Cth); and 2 counts of allowing a person to work in breach of their visa conditions contrary to s245AC(1) of the *Migration Act 1958* (Cth).
[16] Yotchomchin and Sieders were not charged as participants of the same offence. They were charged with separate offences; however, the conduct was of the same nature, involving persons connected with both of their establishments. There was some overlap in offending, and the Court suggested Yotchomchin cooperated with Sieders to a degree. There were effectively two trials heard concurrently (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [14]).
[17] Both Yotchomchin and Sieders' appeal against their conviction and sentence was dismissed by the appellate judges.

Case Selection

Despite the acknowledgement by the United Nations Office on Drugs and Crime (UNODC) regarding the high prevalence of women offenders in cases of human trafficking, as discussed in Chapter 2, there remains little research examining this phenomenon in the Australian context. As such, a purposive decision was made to focus on those cases involving adult women identified as the offender in human trafficking cases. Further, the UNODC (2012; 2016; 2020) notes the link between previous involvement in the sex industry and future involvement in trafficking networks. Therefore, those cases inclusive of offences in the sex industry – those related to commercial sexual exploitation – were chosen as the focus of this research.

Publicly available, Commonwealth prosecuted cases were analysed in this thesis as human trafficking generally involves hidden populations (Tyldum & Brunovskis 2005), due to the concealed nature of the crime. To locate these cases, a search was undertaken on the Commonwealth Department of Public Prosecutions (CDPP) website, as the CDPP act as the prosecutorial body on all Australian Commonwealth cases. This search provided a list and short summary of all Commonwealth human trafficking and slavery cases. From this list, those cases which fit the parameters of this research were able to be extracted. The identified cases occurred across a 14-year-period, ranging from 2005-2019, and are discussed in detail throughout Chapters 5.1 and 5.2. See Table 6 for a condensed overview of the identified cases.[18] The following section of this chapter discusses the various data sources analysed within this thesis.

[18] Three of the identified cases included both a male and female defendant who were charged together. In these cases, the name of the female has been highlighted in bold to differentiate her from the male defendant.

Table 6: An overview of the cases selected and analysed within this thesis.

State	Offender Name	Case Citation
ACT	Watcharaporn NANTAHKHUM	The Queen and Watcharaporn Nantahkhum [2012] ACTSC
NSW	Rungnapha KANBUT	R v Kanbut [2019] NSWDC 931
NSW	Namthip NETTHIP	R v XW082 [2010] NSWDC
NSW	Kanokporn TANUCHIT	R v McIvor & Tanuchit [2010] NSWDC
NSW	Chee Mei WONG	2010/00268031 R v Chee Mei Wong [2013] NSWDC
NSW	Somsri YOTCHOMCHIN	R v Sieders, R v Yotchomchin [2007] NSWDC
VIC	Wei TANG	R v Wei Tang [2006] VCC
VIC	DS	The Queen v D.S. [2005] VSCA 99
VIC	Sarisa LEECH	DPP/R v Kam Tin Ho & Sarisa Leech [2009] VSC
WA	Lay Foon KHOO	The Queen v Lay Foon Khoo [2017] WADC

Data Collection

The Study Design: Triangulation of a Rich Body of Qualitative Material

Multiple data sources were analysed in this research in order to acquire the most in depth understanding of how judges construct women's narratives in a patriarchal legal setting and to enable the triangulation of a rich body of available material. The sources analysed included sentencing remarks, appeal transcripts, PSR, PR, and transcripts from semi-structured qualitative interviews. The use of different data sources within this research provides the opportunity to analyse the identified cases in much greater depth than would be possible with the analysis of only one data source. All data sources were analysed using thematic content analyses undertaken to identify emerging themes.

Sentencing remarks and appeal transcripts, as two of the publicly available sources, were analysed prior to the interviews taking place. This was done purposefully, as the effective generation of data from the interviews was dependent on the prior analysis of the sentencing remarks and appeal transcripts, specifically (Mason 2002). Qualitative semi-structured interviews were then conducted with each respective sentencing judge who was willing to participate in this study. Judges were the primary type of participant selected to be interviewed in this research as the aim of this thesis was to examine how judges' construct the victimisation and offending of women who have been identified as acting in offending roles within Australian cases of HTCSE. The judges who were approached for this research were those who were personally involved with the identified cases. However, selected

Australian anti-trafficking experts were also interviewed to gain further knowledge about Australian cases of HTCSE. Ethics approval was obtained from the SBREC and project number 7495 was assigned. After the interviews had been undertaken, the PSR and PR were obtained, where available, and analysed. The analyses of these sources occurred post-interview as in two cases, these documents were provided by the judges interviewed. Through the analyses of multiple different data sources, the overall analysis was strengthened. See Figure 1 for a condensed overview of this process.

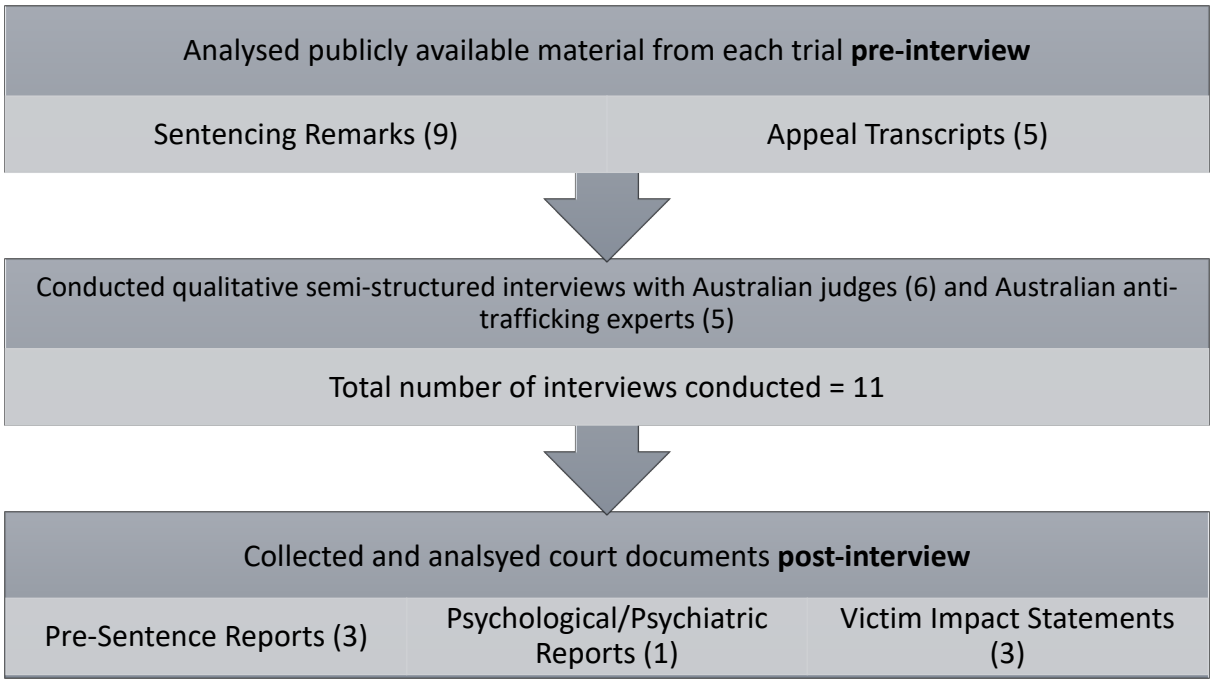

Figure 1: The staged process of data collection and analysis.

Textual Data Sources: Pre-Interview

Many different facets of social life are mediated by written texts (Smith 1974); as such, they can provide an abundance of material. Laws and juridical texts are an important part of the legal system (Peräkylä & Ruusuvuori 2011), and can therefore provide an important lens through which to view various legal processes. The use of existing sources can complement other methods, such as interviews, and, thus, provide stronger analyses (Peräkylä & Ruusuvuori 2011).

Sources in the form of documents can actively be used during interviews, as well as prior to, or after (Mason 2002). This technique was utilised within the qualitative semi-structured interviews when referring to a specific section of text from the sentencing remarks. It was done purposefully as a way for the researcher to elicit a greater level of understanding of the remarks made upon sentencing for each identified offender, as well as to act as a prompt for the interviewee.

Sentencing Remarks

From a review of publicly available text sources related to each trial, sentencing remarks were considered the primary site to locate information regarding the identified women; in particular, information about their lives prior to the commencement of the offending behaviour. Sentencing remarks were analysed in order to answer two of the four guiding research questions: How are narratives about women acting in offending roles in cases of HTCSE constructed by judges during sentencing? How are the background structural constraints and the previous victimisation of these women dealt with by judges during sentencing? Sentencing remarks are free of charge and are generally publicly accessible (Bright, Hughes & Chalmers 2011) without the need for ethics clearance (National Health and Medical Research Council 2018).[19] These documents offer a more accessible, condensed alternative to the trial transcripts. Additionally, as suggested by Judge Two, sentencing remarks are the only place where an offender's background, including previous victimisation, is considered and can be explored. Analysing publicly available sentencing remarks, enables this research to examine 'those remarks that potentially have the most impact outside of the courtroom' (Potts & Weare 2018, p. 25).

Judges' sentencing remarks are different from transcripts from the trial. Both arise from the court proceedings; however, trial transcripts are a document of the entire trial proceedings, while sentencing remarks are primarily only the comments made by the judge during sentencing (Bright, Hughes & Chalmers 2011). Sentencing remarks contain the 'language of

[19] One jurisdiction, Western Australia, required permission to be granted by the court registrar. As a result, the sentencing remarks were not easily publicly available, as the researcher needed to pass through a gatekeeper in order to view them.

relatively powerful actors (judges) as they discursively construct the identities of relatively powerless social actors…' (Potts & Weare 2018, p. 22). In other words, these documents are constructed by the judge. They surmise what transpired within the trial, outlining the primary facts related to each victim, prior to discussing any features relating to the offender, specifically. Almog (2001, p. 501) suggests '[j]udges are, in a way the most "official" storytellers in contemporary human existence'.

In relation to information about the offenders, the sentencing remarks can only be produced based on the information with which the judge has been provided through different mediums. These can include testimony from the offender herself (although this, as will be discussed in Chapter 7, rarely occurred), their legal representation, and that which is included in either a PSR or PR tendered during sentencing at the judge's request. The construction of information provided from these various sources, including what is both included and left out, is up to the judge during sentencing. Therefore, the narratives contained within the sentencing remarks are highly constructed narratives, which have the power to significantly shape the way which the relationship between victimisation and offending, and structures and agency, are viewed and constructed by judges in subsequent cases. This will be explored in Chapter 6.

Appeal Transcripts

Appeal transcripts, like the sentencing remarks, were also publicly accessible. The majority of what is known about an offender is discussed during sentencing and is included in the judge's sentencing remarks. The appeal transcripts do, however, at times include additional information about the offender. Importantly, throughout this research it was discovered these transcripts contained parts regarding the offender's victimisation experiences, particularly when she was herself trafficked to Australia. Some offender's legal representation would include this as a reason for the appeal so, it was important to examine how the appellate judges considered it. Specifically, it was necessary to explore whether the appellate judges supported the sentencing judge's views in relation to the link between prior victimisation and offending. Consequently, the transcripts related to the appeal were useful

and publicly available documents to analyse and to further develop an understanding of the way the offender's narrative is constructed by judges.

Qualitative Semi-Structured Interviews

Qualitative semi-structured interviews were utilised with the aim of *generating* data, rather than simply collecting data (Mason 2002, p. 68). Interviews consist of accounts related to specific issues of interest to the researcher (Peräkylä & Ruusuvuori 2011), and were undertaken in order to answer the remaining two guiding research questions: How do Australian judges understand the relationship between victimisation and offending in HTCSE? Do legal structures constrain judges' decisions on sentencing? During interviews, researchers can access specific areas of reality, such as an individuals' subjective experiences, attitudes, or beliefs, that would be otherwise inaccessible. Qualitative interviews often, therefore, adopt a thematic, topic-centred or narrative approach, particularly when the research has specific topics, issues or themes they wish to cover (Mason 2002).

Within qualitative research, participants are selected based on their ability to provide information sought for the research (Kumar 2019). The judges were selected based on their knowledge of a specific Australian case of HTCSE, whereas the anti-trafficking experts selected based on their broad knowledge of HTCSE in the Australian context. Qualitative interviews are often utilised when emphasis is placed upon the depth, nuance, and complexity of data, as these are aspects which broader research methods such as surveys, cannot provide. To answer the questions, outlined earlier, which guide this research, it was important to adopt an approach that would enable the understanding of the complexity and depth embedded in the contextual accounts and experiences of each participant (Mason 2002). As such, open-ended questions were utilised in each interview, with the primary goal being to attempt to elicit the most in-depth information from each participant on specific issues relevant to each (Kumar 2019). Further, they were used to limit any researcher bias, which can present during the formulation of closed-ended questions when the researcher selects only the responses, they are interested in (Kumar 2019). Researcher bias, as a potential limitation, will be discussed briefly at the end of this chapter.

A degree of flexibility was retained in each interview to maximise its ability of each interview to produce rich, situated knowledge. In this approach, cues can be acted upon and questions constructed and tailored to follow up specific, individual responses. Allowing interviews to evolve organically is particularly beneficial in response to points that could not have been anticipated prior to the interview taking place (Mason 2002).

Participant Coding

The name of each interview participant was de-identified and systematically coded numerically. As was communicated to each participant prior to the commencement of the interview, complete anonymity could not be guaranteed due to the relatively small pool of interview participants. However, de-identifying the names of each participant was a method adopted by the researcher to limit the chance of participants being identified. Furthermore, while the gender of each interview participant could have added a further layer to the analysis, a purposive decision was made to omit the gender of each participant, as gender could be used as an identifier. Table 7 provides an overview of all participants interviewed.

Table 7: List of interview participants.

Australian State	**Participant Name (coded)**	**Judge or Anti-Trafficking Expert**
NSW	Judge One	Judge
NSW	Judge Two	Judge
VIC	Judge Three	Judge
VIC	Judge Four	Judge
NSW	Judge Five	Judge
ACT	Judge Six	Judge
NSW	Participant One	Anti-Trafficking Expert
SA	Participant Two	Anti-Trafficking Expert
VIC	Participant Three	Anti-Trafficking Expert
VIC	Participant Four	Anti-Trafficking Expert
VIC	Participant Five	Anti-Trafficking Expert

Interview Participants

Ethics

As part of the study design involved conducting face-to-face, qualitative semi-structured interviews with selected participants, ethics approval was required in order to conduct this portion of the research. The study participants, who were Australian judges and anti-trafficking experts, were considered low risk by the researcher. As such, two ethics applications were made: one primary application for the overall research, and one involving a low or negligible risk assessment. Both applications were approved and assigned the SBREC project number 7495.

Judges

Six judges were interviewed for this research. Each judge was carefully selected based on their relation to, and knowledge of, an identified case. All the judges who participated in this research were involved in at least one of the identified cases. The sampling design was purposive in so far as judgement was exercised by the researcher as to who could provide the most accurate information on each identified case (Kumar 2019). Also utilised was expert sampling, where respondents to be selected, had to be regarded as experts in a particular field of interest to the research (Kumar 2019). As an analysis of the sentencing remarks as a form of CCN was being undertaken, with a focus on the offender's actions and victimisation experiences and the way the relationship between these was constructed by each judge during sentencing, sentencing judges were considered experts in these cases. Most judges interviewed were identified through the publicly available sentencing remarks from each case. To a lesser degree, judicial participants (appellate judges) were also identified from the appeal transcripts when a sentencing judge was not able to participate in the research.

In relation to two participants, Judge Five and Participant One (discussed shortly), a different sampling technique was utilised. Although this was unintentional, snowball sampling was used to recruit two of the interview participants. Snowball sampling is the process of first selecting a few individuals of interest to the research and collecting the required information from them. Then, these individuals are asked to identify others who may also be useful to the

research (Kumar 2019). In these two instances, using this technique was accidental to the extent that the researcher did not ask the relevant participants to identify other potential participants; instead, these were volunteered by a purposively selected judge to further enhance the research.

Anti-Trafficking Experts

Five anti-trafficking experts were interviewed for this research. In this thesis, anti-trafficking experts are individuals who possess significant knowledge of HTCSE in Australia. These individuals were involved with the cases discussed throughout this thesis from either a legal or a non-government organisational perspective. Similarly, when selecting the judicial participants, techniques of purposive and expert sampling (Kumar 2019) were used to select these four of the five individuals. Those selected to participate in this research were deemed by the researcher to be experts in the field of HTCSE in an Australian context and, therefore, those best placed to be able to comment on any cases involving the victim-offender cycle which had not progressed through the CJS.

Interview Transcription

Each interview was recorded after formal consent to do so was requested and obtained. Knowing the interview was being recorded allowed the researcher to actively listen to what each participant had to say. This further allowed the reflexive formulation of questions, ones that could not have been predicted or pre-determined prior to the interview, based on what the participant had said (Mason 2002). This, as discussed earlier in this chapter, is an important component of qualitative interviewing.

As a thematic content analysis (TCA) of the interview transcripts was to be undertaken, the transcription of the data needed to consist of a thorough and rigorous verbatim account off all verbal expressions (Braun & Clarke 2006). It is vital that the transcript retain the original phrasing and utterances; therefore, it is important to not only pay attention to the words, but also to the punctuation, as these can alter the meaning of some statements. Riessman (1993) suggests the process of transcription is an excellent way for the researcher to familiarise

themselves with the interview data prior to beginning the analysis. Each interview was transcribed by the researcher at the cessation of the interview. While complete anonymity could not be guaranteed, transcription by the researcher was a step implemented to limit the number of people who had access to the raw data. Upon completion of the transcription of each interview, it was sent to the relevant participant to review.

Informed Consent

After initial agreement to participate was received, and prior to each interview being conducted, informed consent was individually sought from each participant to both conduct and record the interview. Informed consent is an important part of conducting research with human participants. It is required to ensure participants are made clearly aware of the information sought from them, why that information is being sought, how that information will be used, expectations of participants in terms of what they will be required to do, and whether the research will directly or indirectly impact them (Kumar 2019). Furthermore, conducting researching without first seeking and receiving informed consent from participants is considered unethical.

After each interview was conducted and transcribed, consent from every participant was sought to use the transcript that had been produced. As discussed above, each participant had the right to read the transcript and either consent or withdraw consent for the transcript to be used in the research. Within this step, participants also had the opportunity to change or redact any part of their transcript. Consent to use the transcript was granted by every participant.

Textual Data Sources: Post-Interview

Pre-Sentence and Psychological Reports

Pre-Sentence reports and psychological reports are two documents specifically concerning the offender that can be tendered to the court. Both reports are an excellent place to locate information about the offender and the offending behaviour, which may not have been included within the sentencing remarks. A PSR is compiled by a parole and probation officer

assigned to the offender from the relevant Department of Corrections, or Corrective Services. If an offender themself does not give evidence in a trial, which according to Judge Two is often the case, then the PSR may be the only information a judge has regarding the offender's background or subjective circumstances, particularly including any history of victimisation. A PR, on the other hand, is written by a psychologist or a psychiatrist and, like a PSR, can also provide information regarding the offender's life history.

Three PSR were obtained for this research. Two of these were provided by two of the judges interviewed, who were related to each case. Upon application to the relevant court registrar, the third PSR was provided. Copies of the PSR for the remaining seven cases were applied for to the relevant registrar; however, all were denied by the registrar for various reasons. In these cases, the registrars acted as gatekeepers, which will be discussed in more detail later in this chapter. Only one PR was obtained, which was provided by one of the interviewed judges. This type of report was requested in the other cases; however, one was either not tendered for that specific offender, or the court no longer had the report on file. This was found to be the case in the lower courts.

Victim-Impact Statements

Victim impact statements (VIS), while not directly sourced, were obtained in one case. This thesis is not focussed on those identified as the victims within the respective cases primarily because, as discussed in Chapter 1, a large amount of existing human trafficking research is focused on the victim. Rather, this thesis is focused on the victimisation experiences of those women identified as acting in an offending role. The six VIS were provided by one of the judges interviewed.

The VIS obtained were not used in the discussion for two reasons. Firstly, this thesis is focused on the victimisation experiences of the offender. Therefore, VIS from the point of view of the *current* victim/s were not a source sought out and utilised in this research. As they were not identified as appropriate sources, only one was opportunistically obtained. Secondly, due to the sensitive nature of cases involving HTCSE, there are often non-publication orders attached. These orders prohibit the publication of data that either discloses a victim's identity

or could be used, indirectly, to identify any of the victims. This is often the case when victim/s names have been de-identified within a transcript and synonyms have been applied, as can be observed to have occurred in Chapters 5.1 and 5.2.

As a form of background research, however, these VIS were valuable. They provided a deeper lens through which to view the similarities and differences between the experiences of the different participants, including the *current* victim/s and the offender (*former* victim in the eyes of the court), within this case. As VIS contain personal and sensitive information, reading them provided the researcher a window into what each *current* victim in this case experienced and the impact this had on them, both during the period of contract (or exploitation) and post-contract. It was a reminder of why victims are often the focus of research on human trafficking, and further supported the researcher's standpoint that a holistic approach is required, one where the offenders are required to be just as well understood as the victims.

The provision of these VIS, PSR, and PR pertaining to the respective cases, was demonstrative of the level of support this research had from the interview participants. Ultimately, by providing these documents, these judges demonstrated their support for the research and highlighted each participant's belief in the importance of a transparent justice system. Interestingly, despite the actions of these select few judges and their strongly held belief that the CJS should be transparent, it is clear from the many obstacles faced in obtaining similar documents in relation to other cases that the CJS is not as transparent as it professes to be (Reeves 2010). These obstacles will be discussed further in the section exploring gatekeepers and limitations within the CJS. The framework adopted to analyse the primary themes identified from these data sources will be explored in following section of this chapter.

Analytical Framework: A Thematic Content Analysis

Thematic Categorisation of Data

Due to the number of diverse sources used within this thesis, the indexing and retrieval of themes throughout the different texts was done so using computer-assisted qualitative data

analysis software (CAQDAS) (Mason 2002); specifically, QSR NVivo. This approach was undertaken, over a manual approach (Anderson 2007), as CAQDAS provides a platform which both facilitates and enhances the indexing and categorising process. Importantly, this platform allows the researcher to thematically identify and index many categories found within text-based documents (Mason 2002). Four primary themes, representing four distinct layers of constraint present in the ten cases, were identified from the various data sources. The first two themes: situational constraints in the women's lives and constraint imposed by judges, are explored in Chapter 6. The remaining two themes: systemic-level constraints and additional constraint imposed by judges due to systemic constraints, are explored in Chapter 7.

As noted previously, the sentencing remarks formed the beginning of the analysis, as they were the starting point which led to other parts of the data set, including the appeal transcripts. Appeal transcripts were, however, only available for the five cases that went to appeal, as outlined earlier in this chapter in Tables 4 and 5. These transcripts were analysed to see whether the responses to the identified themes found within the sentencing remarks varied or remained consistent. In other words, the researcher was interested to see whether the appellate judges held the same views of the sentencing judges in relation to these themes, or whether they deviated and held different views. All the sources analysed within this thesis - the sentencing remarks, appeal transcripts, interview transcripts, PSR and PR - are linked. Extracting and indexing the relevant themes from all the sources together in the way in which they have been considered, helped to identify how the court constructed the narrative about each offender. Once all the themes had been extracted and categorised, a TCA was undertaken.

Thematic Content Analysis

Qualitative content analyses are a particularly useful method of analysing narratives (Chase 2011), as they can provide a broader context to a situation or event as discussed in a narrative. Content analysis is a method of examining different categories evident throughout different texts and quantifying the number of times they occur. In this method, the *frequency* at which different themes or categories occur is identified. While similar to content analyses, thematic

analyses pay greater attention to the qualitative aspects of these texts. This method adds to that of content analyses as it enables the ability to analyse the frequency of each theme, as well as an *analysis of their meaning*. It is this characteristic that adds the 'subtlety and complexity of a truly qualitative analysis' (Joffe & Yardley 2004, p. 3) and is why a TCA was adopted in this thesis.

Thematic content analysis is a foundational method of qualitative analytic procedures (Anderson 2007; Braun & Clarke 2006), which provides the ability to interpret various aspects of the research (Boyatzis 1998). A primary advantage of a TCA is it offers an approach to analysing qualitative data that is theoretically flexible (Braun & Clarke 2006). Due to the flexibility inherent in a TCA, it holds the ability to produce rich, detailed, and complex accounts of data. Although limited to textual data, TCA is primarily a descriptive way to present data, and, as such, it has been suggested that it cannot serve as a complete analysis (Anderson 2007). Despite this limitation, TCA can present content from a variety of textual sources thematically through an identification of the common themes (Kumar 2019).

When undertaking a TCA, a theme represents a patterned response within a particular data set (Braun & Clarke 2006). Rather than themes passively emerging from the various textual sources, themes were actively identified by the researcher and then the *meaning* of these themes analysed using a TCA. The flexibility characteristic inherent in TCA influences what constitutes a theme. Once these themes were identified, they could have been used in a variety of ways. For this research, however, verbatim responses from each participant were used and integrated throughout Chapters 5.1, 5.2, 6, and 7. Instead of counting how many times a theme emerged, which is one potential use, verbatim responses were integrated to retain and exemplify the views and beliefs of each respondent and to retain the authentic feel of their voice (Kumar 2019). However, access to information was largely subject to the approval of different individuals within separate institutions who acted as gatekeepers, which will be explored in the final section of this chapter.

Gatekeepers, Access and Limitations: A (non)Transparent System?

This section showcases how gatekeepers within the CJS, including the CDPP, court registrars, and judicial associates serve to enhance the hidden nature of HTCSE in Australia through creating additional layers of invisibility. Issues encountered relating to gatekeepers are explored to this extent because it is an original contribution to knowledge that highlights the number of layers preventing access to information about these women's lived experiences. Furthermore, this section highlights how the information presented to the judge is controlled by different parties, which contributes to the way in which women's narratives are constructed within a patriarchal legal setting. The difficulties faced in this area speaks to why HTCSE is a hidden crime and why these women's' stories are hidden.

Gatekeepers within the Criminal Justice System

The difficulties encountered in relation to accessing different documents demonstrates the hidden (not transparent) nature of the CJS and the role of gatekeepers. The cloak of secrecy and the barrier enforced by the various gatekeepers, afford more weight to judicial voices and the judge's legal narrative. This speaks directly to the theoretical discussion of the impact of structures, as discussed in Chapter 3. Individuals who do not have judicial knowledge often have difficulty accessing the system.

Gatekeepers are individuals who provide access and allow or permit research to be undertaken (Cresswell 2014, p. 188). These legal and institutional barriers, in the form of gatekeepers, have the power to not only approve, but also block researcher access (Horan & Israel 2016). People who serve as gatekeepers have the power to 'help or hinder research depending upon their personal thoughts on the validity of the research and its value …' (Reeves 2010, p. 317). The complex relationship between gatekeepers and the researchers can influence research regarding how data is collected and from whom, as well as, arguably more importantly, what research enters the public domain and with what effect (Jupp & Jupp 1989). Gatekeepers, therefore, can be both a help and a hindrance during data collection phases (Reeves 2010). When they are a help, they provide access to information which would otherwise be unobtainable by the researcher. Conversely, when they act as a hindrance and

block access to information, however, it can lead to the researcher not having all the information, or not asking the important questions (Chesney-Lind in Belknap, 2004). There may be several reasons why Commonwealth agencies, such as the CDPP may decline researcher access to either data or people including: limited available resources; possible disruptions to staff; or organisational processes or even the wish to avoid any scrutiny (Walters 2003).

Commonwealth Department of Public Prosecutions

In this research, there was an observable difference between the responses of the majority of selected judges and their respective judicial associates, that were approached, as discussed shortly, and those of the CDPP. This has previously been the case, as can be evidenced in the work of Gregory and Lees (1994). In their research in the United Kingdom, there was a noticeable difference between the response from the police and the Crown Prosecution Service (CPS). In that case, the CPS maintained a defensive stance and blocked the researchers' access to those lawyers with the most experience in sexual assault and rape cases. A similar situation was experienced when arranging access to those with the most experience with the identified HTCSE cases in Australia; in this case, the CDPP case officers.

In the many situations where there are layers of gatekeepers, as opposed to one single body, the gatekeepers themselves are in their own hierarchal relationship with differing levels of power between them (Jupp & Jupp 1989). This hierarchy can be observed within the CDPP. Initially, the researcher was provided access to the relevant individuals. This was done when the request to contact them was forwarded onto each case officer by the CDPP employee to whom the initial request was sent. This process allowed them to contact the researcher should they wish to participate, which all the relevant individuals did. After some time, this access was revoked by an individual holding a higher position in the hierarchy within the CDPP. Both acted as gatekeepers, however, the former was helpful insofar as they granted the researcher access, whereas the latter was a hindrance by revoking it.

It is also evident that this is not the first time an Australian prosecutorial entity has acted as a gatekeeper. Another example can be observed within research undertaken by the

Australian Institute of Criminology, which aimed to examine the experiences of child complaints of sexual abuse in the CJS. In this case, it was the Office of the Director of Public Prosecutions in Queensland that acted as a gatekeeper (Eastwood 2003). While the CDPP acted as a gatekeeper to individuals with experience and knowledge, court registrars act as gatekeepers to documents held at the court.

Court Registrars

Court registrars act as gatekeepers to documents submitted during sentencing and to transcripts still held at the court. A registrar is the manager or the administrator of the court (Court Services Victoria 2017). Any person wishing to apply for a file from proceedings, must do so through the registrar. Files can range from different transcripts, submitted evidence or any other documents such as PSR and PR; permission to view these must be granted by the relevant Registrar.

Like other gatekeepers, court registrars hold significant power in terms of their ability to either help or hinder the data collection within research as they can either approve or deny access to documents which are not publicly available via an internet search. In relation to this research specifically, the documents needing to be accessed through the registrar were important as they detailed the offender's life prior to the offending behaviour commencing. An analysis of these documents was a vital addition to understanding how the court constructed the narrative about each identified offender. As outlined earlier in this chapter, one court registrar was helpful insofar as they provided access to these documents. Others, however, upheld their role as gatekeepers and denied the researcher access to these documents. In Australia, each state and territory have their own judicial system even when the offence/s being heard are federal. Judges often do not open a dialogue about similar cases occurring within different jurisdictions (Marmo 2005). Therefore, researching in a country with multiple jurisdictions represented one of the challenges encountered with this research.

One of the Registrars informed the researcher that the requested documents were produced on a private and confidential basis only to assist the judicial officer in sentencing. This response was particularly interesting to the researcher as Judge Two stated documents

tendered as evidence during sentencing, such as a PSR, are a matter of public record and should be accessible. This provided an excellent example of the way in which court registrars act as gatekeepers to information produced at, and held by, the court. Similarly, to those at the CDPP who acted as gatekeepers to select individuals, judicial associates act as gatekeepers between the researcher and a judge.

Judicial Associates

Judicial associates assist the judge by performing numerous administrative and court duties including: 'completing paperwork, liaising with parties and keeping a record of court proceedings' (Court Services Victoria 2017). They are also able to act as gatekeepers between the researcher and judge. To speak to a judge, access must be requested through the respective judicial associate; thus, rendering these associates as gatekeepers. Fortunately for this research, all judicial associates were helpful, rather than a hindrance. However, it is important to identify the power they hold acting as a conduit for information between outside parties and judges.

Access Challenges

Commonwealth Department of Public Prosecutions case officers, the offender's legal representation and trial transcripts would have all added a further layer of analysis to how judges construct the victimisation and offending of women identified as acting in offending roles in HTCSE cases. However, researcher access to these three important elements of a criminal trial was challenging. The difficulty faced in accessing each contributes to the hidden nature of HTCSE in Australia.

Commonwealth Department of Public Prosecutions: Case Officers

Access was initially granted to interview the relevant case officers involved in each identified case. However, one week prior to conducting the first interview, permission to do so was revoked. This effectively banned all former and current employees from participating in the research. The employee who revoked access to all CDPP employees acted as a gatekeeper, as discussed above, by preventing the researcher from accessing a key actor within each of the

identified cases. Access issues were also faced in relation to the offender's legal representation.

Offender's Legal Representation: Barristers

The legal representative for each identified offender was listed in the sentencing remarks. Therefore, it was known which legal firm and which specific barrister represented each offender during her trial, sentencing and subsequent appeal, if there was one. Despite this, one firm suggested they had no knowledge of a particular defendant and many never responded to enquires made. Only one barrister responded positively to the researcher's initial enquiry; however, no further communication was had. Trial transcripts were another data source for which the researcher faced a significant barrier when attempting to access.

Trial Transcripts

As someone not related to the identified cases, transcripts from the trial were very expensive to access ranging from AUD$655 to AUD$34,256. This was the case even when an exemption was requested for research purposes. Based on this and supported by the knowledge provided by Judge Two that particulars pertaining to the offender were only discussed during sentencing, rather than during the trial, the decision to primarily only analyse the sentencing remarks and appeal transcripts, was made. Again, however, this demonstrates the non-transparent nature of the CJS.

Each of these aspects create barriers to accessing information about court processes and further contributes to the hidden nature of HTCSE in Australia. As was explored in Chapter 3, the law is positioned at the peak of the hierarchy of knowledges in a patriarchal society (Smart 1990). Those situated within the juridical field define what is to be controlled (Bourdieu 1987). The difficulty in accessing certain elements, such as the PSR or insights into the prosecution of women charged as offenders in HTCSE, enables the law to maintain a level of privilege in the hierarchy of knowledges. Lastly, there were three potential limitations of this research: the absence of the women's voices, researcher bias, and participant memory, which will be discussed in the following section.

Limitations of the Research

Absence of the Women's Voices

The inclusion of women's lived experiences, in their own voices, is vitally important to this field. One limitation of this research, therefore, is the absence of the women's voices and their own conceptualisation of the victim-offender identity about which this thesis discusses. Offenders' own experience was elected out of the methodology primarily due to accessibility challenges, which created a barrier to these women. In the Australian system, non-citizens in prison are deported back to their country of origin after serving their sentence. As many of the women identified had completed their prison sentence and were not Australian citizens, they had been deported back to their country of origin when this research commenced. Locating these women would have been challenging and time consuming. Additionally, as will be discussed in Chapter 6, many of those women identified had limited English-language skills. Therefore, language posed an additional barrier to these women as the researcher would have needed to employ an interpreter in order to translate the interviews with each woman who agreed to participate. Unfortunately, a thesis does not have the financial resources nor the time to undergo such extensive research.

The women's voices were not critical for this project as the primary aim of this research was to explore the judge's construction of their victimisation and their offending, rather than the women themselves. The researcher identifies the importance of juxtaposing the judges' views on the victim-offender identity with the women's views of themselves. However, for this specific project, the focus was on the judges who dealt with the ten cases analysed throughout this thesis to understand how judicial actors construct the impact of victimisation on offending within Australian HTCSE cases. This is particularly important in the Australian context due the relatively high number of women being identified as the offender in cases of HTCSE.

Researcher Bias

Researcher bias is possible within qualitative research. This was attempted to be mitigated by using semi-structured, open-ended questions during the interviews, rather than closed questions (Kumar 2019). However, the researcher's own construction of the offender narratives is also a construction coming from *outside* the offender, as is the case with the judge's construction within the analysed CCN. Finally, as some of the CCN were constructed by each judge up to 14 years ago, the accuracy of the memory of each participant also potentially posed a limitation.

Participant Memory

The cases analysed within this thesis occurred over a 14-year-period, from 2005 to 2019. Due to the two most recent cases occurring in 2017 and 2019, neither sentencing judge agreed to participate in this research. As a result, the judges who did participate were being asked to remember views they held, and decisions they made, up to 14 years ago. The data gained from each judge interviewed, therefore, relied on their memory of each case. The information obtained throughout each interview was checked against the sentencing transcripts produced at the time of sentencing. From this process, it became evident that the memory of each participant was accurate, regardless of the length of time that had elapsed between the case and the interview. Despite the similarities between that which was discussed in the interview and that stated in the sentencing remarks, the possibility of the participants' recollection of events to change or falter needed to be identified as a potential limitation.

Conclusion

This chapter discussed the methodology used within the thesis. Despite the gatekeeping, a qualitative research design mapped out the relationship between the CCN, those narratives created by the court, and the victim-offender cycle present in the ten cases of HTCSE where women were identified as acting in offending roles. Sentencing remarks are the primary form of CCN analysed within this thesis; however, appeal transcripts were analysed also in the five cases that went to appeal. Additionally, available PSRs and a PR have been analysed also to

strengthen the analysis of the CCN. Interviews were undertaken with carefully and purposively identified Australian judges who were each connected to one of the identified cases. Selected Australian anti-trafficking experts were interviewed. These experts were selected to increase the knowledge about the victim-offender cycle in the Australian context. Themes were identified from the various sources utilised and a TCA was then undertaken to analyse those themes and their meaning (Joffe & Yardley 2004). Through this research design, this research aims to examine how judges' construct the victimisation and offending of women who have been identified as acting in offending roles within Australian cases of HTCSE.

Chapter 5.1: The Court's Construction of Women's Victimisation and Offending: 2005 to 2010

Introduction

This chapter, and Chapter 5.2, analyses the ten Australian cases of human trafficking for commercial sexual exploitation (HTCSE) in an original way as this information, in this format, is not available in any other source. The aim of these two chapters is to bring together a vast amount of information to construct a cohesive account of what the court constructed narratives (CCN) say about each woman identified as acting in offending roles in Australian cases of HTCSE. This chapter provides a unique analysis of the victims and offenders related to six of the cases examined in this thesis, which occurred over a six-year period between 2005 and 2010: R v DS [2005] VSCA 99; R v Tang, Wei [2006] VCC 637; Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184; CDPP v Ho & Leech (Sentence) [2009] VSC 495; R v McIvor and Tanuchit [2010] NSWDC 310; and R v Netthip [2010] NSWDC 159. The remaining four cases, which occurred between 2012 and 2019, will be analysed in the following chapter. The discussion of each case has been separated over two chapters intentionally to highlight how judges in those cases that occurred between 2012 and 2019 discussed the offender's circumstances in greater detail than those judges in the cases that occurred between 2005 and 2010.

This chapter uses a consistent template to examine each case as it is constructed within the CCN. Firstly, the facts related to the victims are explored. Within this discussion their demographics are examined, including any structural constraints they experienced. Next, their journey to Australia and their experience once in Australia is examined. Following the analysis of the victims, the facts related to the women acting in offending roles are explored. This analysis follows the same template used when exploring the victims, with two additional sections exploring the offender's role within the organisational structure and the sentence they received.

As identified in Chapter 4, sentencing remarks were purposively chosen as the primary form of CCN analysed for this research as they were the primary place the offenders' background

was discussed. Most sentencing remarks follow a similar layout whereby the victim and their victimisation (the offending) are discussed first, followed by a discussion of the offender before outlining the sentence the offender receives. For this reason, the template and subsequent analysis within this chapter and Chapter 5.2 has been constructed purposefully to follow a comparable layout. Additional information was further obtained from available appeal transcripts, pre-sentence reports (PSR), and psychologist reports (PR), where applicable. Extracts from the interviews were interwoven to supplement information contained within the CCN analysed, where relevant.

The template utilised provides an original analysis of the key facts related to each case, allowing comparisons between the victims and the offenders. This comparison highlights the similarities between the victims and offenders within each case; specifically, the structural constraints and victimisation both experienced. Additionally, in those cases where the offender was a trafficked victim herself, this comparison showcases the replication of the offender's victimisation within the victimisation experienced by the victim/s. This template allows trends and patterns in offending and victimisation of trafficking victims in Australia to become clear, highlighting the overlap between the victimisation and the offending.

R v DS [2005] VSCA 99

The Victims: MK, SJ, AT, JR, and SB

Victim demographics: Who are they?

DS was charged in relation to five separate victims: MK, SJ, AT, JR, and SB.[20] All five victims were adult Thai women whom the court suggested were impoverished and already working in the sex industry in Thailand. The victims in this case had each been promised the ability to earn money in Australia after they had paid their 'debt' to those who brought them out to Australia, which included subsequent costs related to their accommodation and food. Each victim was aware they would incur a debt in the vicinity of AUD40,000 and AUD45,000, and

[20] There is a non-publication order in place for the victims in every case discussed in this thesis. Therefore, the victims will only be referred to by the acronyms or synonyms they are referred to in the publicly available CCN, even when their real names are known by the researcher. The way they appear in this chapter and Chapter 5.2 are how they are written in the CCN.

they were aware they would be undertaking sex work once in Australia in order to pay off this debt (R v DS [2005] VSCA 99 [6]).

Victims' journey to Australia

This case was referred to as an international scheme as it involved the cooperation of organisers in both Thailand and Australia. Each of the five victims was brought to Australia throughout 2002 and 2003 in a similar way. While the victims were in Thailand, organisers in Australia would arrange for a tourist visa to be issued to the victim (R v Wei Tang [2007] VSCA 134 [6]). Often, the success of this application depended on the victim having a specific amount of money, and one of the organisers would temporarily deposit money into a bank account in the victim's name. Once visas were arranged, the victims were flown from Bangkok to either Melbourne or Sydney. During this flight they were escorted, usually by an elderly couple (R v DS [2005] VSCA 99 [6]). This tactic was employed to detract attention from the victim.

Victims' experience in Australia

Once in Australia, the victims were met at the airport by a representative of the victims' Australian 'owner', 'Sam'. DS was 'Sam's' representative, acting further as an intermediary assisting in the arrangements for the victims to come to Australia. At the airport, DS paid off those who escorted the victims and would then take the victims to temporary accommodation while it was decided at which brothel they would work (R v DS [2005] VSCA 99 [6]).

Once at the brothel, the victims experienced little freedom and were required to work six nights a week without payment. They were given one free day a week; however, could keep their earnings if they chose to work on this day. During the period they spent repaying their contractual debt, they were not permitted to have a key to the apartment where they lived, nor were they allowed to leave the apartment freely. While at the brothel, the victims could not leave unless supervised by an escort who drove them to and from the brothel each day

(R v DS [2005] VSCA 99 [6]). DS's role in the organisation and relating to each victim will be outlined below.

The Offender: DS

Offender demographics: Who is she?

DS was 38 years old at the time of sentencing in 2005. Like the five victims, she was a Thai national (R v DS [2005] VSCA 99 [2]). As explored in Chapter 2, the role of women in the trafficking process is often observed as one that requires frequent interaction with the victims (Simmons et al. 2013). Sharing a geographical connection with both the victims and the international organisers would have assisted DS during her negotiations on behalf of 'Sam', as well as her day-to-day duties of looking after the victims after their arrival in Australia.

Like the five victims, DS had experience in the sex industry. Prior to entering into the agreement to come to Australia, DS had been working as a sex worker in Hong Kong 'pursuant to a like arrangement into which she entered with the organisers [to come to Australia]' (R v DS [2005] VSCA 99 [7]). Therefore, the contract under which she worked in Australia was likely the second contract she was subjected to while working in the sex industry. Consequently, DS had experience of working within the confines of the condition of debt bondage, or under contract. The sentencing remarks, however, contained very little discussion about this element of DS's background. Apart from her experience as a sex worker in Hong Kong and her journey to Australia, the sentencing remarks contained minimal information about her background compared to other offenders including Watcharaporn Nantahkhum, Lay Foon Khoo, and Rungnapha Kanbut, discussed in Chapter 5.2.

Offenders' journey to Australia

DS's journey to Australia was very similar to that of the five victims. She arrived in Australia in 2000, from Thailand, accompanied by an elderly couple. Her journey to Australia, her visa, and return air ticket were all arranged for her by a Thai organiser. In order to repay the costs associated with this arrangement once in Australia, DS worked as a sex worker being required to service 700 clients (R v DS [2005] VSCA 99 [7]). Two years after DS arrived in Australia under

contract, she became involved in the international trafficking operation for which she was charged in this case.

Offenders' own victimisation

During DS's period under contract after arriving in Australia, she was 'owned' by a man referred to as 'Sam' and worked in the brothel owned by Wei Tang.[21] Once DS repaid her own debt, she continued to work as a sex worker in Sydney. In late 2001, DS began working for 'Sam', the man who had 'owned' her upon her arrival in Australia and who later 'owned' the five victims for which DS had been charged (R v DS [2005] VSCA 99 [7]).

There is limited information available about DS's period under contract, including the conditions under which she was forced to work, the level of freedom she had or the length of time she spent under contract. Therefore, few comparisons can be made between DS and the five victims in this case. However, from the limited details acknowledged in the sentencing remarks, the circumstances under which the five victims in this case arrived in Australia were similar to those under which DS arrived. DS and the five victims were all from Thailand, were accompanied by an elderly couple, had their travel arrangements made for them prior to coming to Australia, and were all required to service clients in the sex industry to repay the costs associated with their travel arrangements. Despite this, these similarities were viewed differently: they simultaneously enhanced the victim's victimisation and the offender's culpability.

Offenders' role

DS was not the victims' 'owner' while they were in a condition of debt bondage, as stated above. She was, however, tasked with the day-to-day duties related to the victims' arrival and work in Australia. Prior to their arrival, DS was tasked with negotiating with the Thai organisers on behalf of the man known as 'Sam' (R v DS [2005] VSCA 99 [7]). Once in Australia, DS acted as the representative of 'Sam'; however, 'Sam's' identity was unclear in the sentencing remarks. DS met the victims upon their arrival, explained the working

[21] See reference to 'F' in R v Tang, Wei [2006] VCC 637.

arrangements to them, arranged which brothel they were to work in and, at times, took possession of their passports and return air tickets (R v DS [2005] VSCA 99 [8-10]). Additionally, the sentencing remarks suggested that DS would take the victims to meet Wei Tang, the owner of the brothel, and Paul Pick, the manager of the brothel where the victims would work (R v Wei Tang [2007] VSCA 134 [8]).

DS and the offending in this case was closely related to another case: R v Tang, Wei [2006] VCC 637 [10], which will be the next case discussed in this chapter. The CCN produced by the High Court of Australia during the second appeal lodged by Wei Tang described evidence provided by DS, in which she maintained she would collect the victim after receiving a call from someone referred to as the 'boss'. Once DS had collected the victim, she then called Tang 'who agreed to accept the [victim] as a contract worker in her brothel', agreeing further to 'take up a 70% interest in a syndicate which would "purchase" the woman' (The Queen v Tang [2008] HCA 39 [8]). DS and her associates, which likely consisted of 'Sam', comprised the remaining 30% of the syndicate. The full syndicate agreed to pay the 'boss' AUD20,000, which DS gave evidence was, '"the money for purchasing women from Thailand to come here"' (The Queen v Tang [2008] HCA 39 [8]). The 'boss's' identity is unknown, but they were likely the head of the international operation. This would mean DS was positioned at least five levels from the top of the hierarchy, as demonstrated in Figure 2. However, this information was not contained within the sentencing remarks for DS.

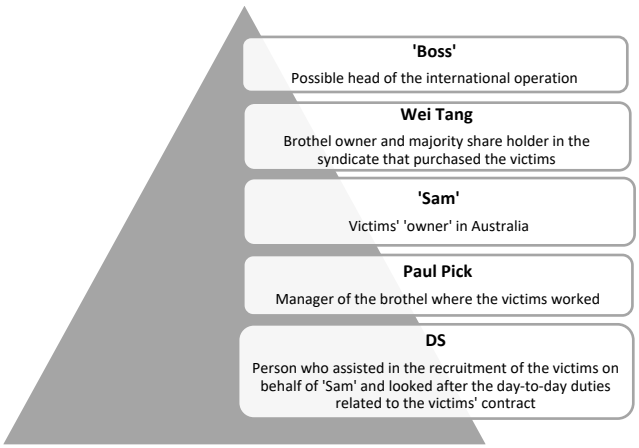

Figure 2: Position of the five key actors in the international operation DS was part of.

In 2003, officials from the Department of Immigration, Multicultural and Indigenous Affairs (now known as the Australian Department of Home Affairs), along with officials from the Australian Taxation Office, executed a search of the brothel where the victims worked. During this search, they obtained three of the victims' passports from Tang's original second co-accused, PP,[22] who managed the brothel (R v DS [2005] VSCA 99 [11]). As discussed above, DS was the intermediary between 'Sam' and the Thai organisers. Since the victims' passports were not found to be in the possession of DS, this too supports the supposition that DS was the intermediary: the person who removed the victim's passports and return air tickets on instruction from another participant in the operation.

Generally, DS supervised the victims at the brothel, ensuring they were working at an acceptable rate, acted as an interpreter when required and, at times, acted as their escort. DS instructed the victims on how to deal with police or immigration officials to avoid being detected as contracted sex workers and assisted the victims in making fraudulent applications for visa extensions. DS also collected money earned by the victims from the owner of the brothel, Wei Tang, and delivered it to 'Sam' (R v DS [2005] VSCA 99 [7]).

Sentence received

DS was initially charged as a co-offender of Wei Tang (discussed next). After her arrest, DS was involved in many lengthy interviews with the Australian Federal Police. Her co-operation was described as unique because she provided valuable insight into the scheme's operations both in Australia and Thailand. She furnished information regarding the finances of the operation, as well as the work of the contract 'owners', such as 'Sam', the man she had been sold to and later worked for. DS gave valuable information about other investigations, details of which are unknown publicly, and had agreed to give evidence against her co-accused (Wei Tang), as well as for the prosecution of others in relation to similar operations (R v DS [2005] VSCA 99 [12]). From the available information contained within DS's sentence on appeal, 'Sam' was not charged with any offences related to these victims.

[22] From that which has been contained in the CCN related to Wei Tang, PP is Paul Pick (R v Tang, Wei [2006] VCC 637 [8.2]).

DS's background as a contracted sex worker was mentioned during her appeal.[23] However, this information was used only to provide background information on DS, rather than as grounds for her appeal. The judge considered that the primary mitigating circumstance for DS was the considerable assistance she had provided, and continued to provide, to authorities. It was this and not the fact she was also a contracted sex worker, who came to Australian under a condition of debt bondage, which resulted in a 50% reduction to her sentence. DS was re-sentenced to a total period of imprisonment of six years, as outlined in Table 8. Had DS not co-operated with authorities to the extent that she did, she would have received a total sentence of 12 years imprisonment (R v DS [2005] VSCA 99 [21-23]).

Table 8: Sentencing overview for DS.

Offender	Location of Offending	Offences Charged	Plead Guilty Y/N	Gave Evidence Y/N	Original Sentence Imposed		Sentence after Appeal	
					Total	Non-Parole Period	Total	Non-Parole Period
DS	Melbourne, Victoria	3 counts of possessing a slave; and 2 counts of engaging in slave trading	Y	Y	9 years	3 years	6 years	2 years 6 months

R v Tang, Wei [2006] VCC 637

The Victims: 'A', 'B', 'C', 'D', 'E'

Victim demographics: Who are they?

The five victims in this case were the same as those discussed previously, since DS and Wei Tang were charged as participating in the same international operation. However, the sentencing judge in R v Wei Tang [2007] VSCA 134 instead referred to them as: 'A', 'B', 'C', 'D', 'E'. All five victims were Thai, had worked previously in the sex industry, and knew they would be working in the sex industry once they arrived in Australia. The CCN available for Tang provided further detail of the victims and the constraints they faced in their lives prior to consenting to come to Australia in a debt bondage arrangement.

[23] DS's original sentencing remarks were not accessible to the researcher.

'E' came from a poor family and was subjected to the burden of providing for her family financially. 'C' came to Australia for a better life than she had as a sex worker in Thailand, as did K.W. in CDPP v Ho & Leech (Sentence) [2009] VSC 495 (examined below). The sentencing judge agreed the victims' motive for coming to Australia was financial; they saw the potential income derived by each of them after their debt had been repaid and their 'contract' terminated. All the victims, however, had limited education and 'were financially deprived and vulnerable' when they arrived here (R v Tang, Wei [2006] VCC 637 [8.10]), which the judge suggested was the reason they were compelled to come to Australia under such arrangements (R v Tang, Wei [2006] VCC 637 [10]).

Victims' journey to Australia

As noted previously, DS and Tang were part of the same international operation; therefore, the five victims discussed in previously are the same five victims Tang was charged in relation to. Consequently, the victims' journey to Australia was discussed in the section exploring DS's circumstances.

Victims' experience in Australia

In addition to the details discussed above regarding the five victims experience in Australia under contract, the CCN related to Tang provided additional details about the conditions under which they worked. Each victim needed to service up to 900 customers over a four-to-six-month period in order to repay the debt incurred and worked from approximately 6pm to 2am each day (R v Tang, Wei [2006] VCC 637 [4]). When DS was sentenced, the sentencing judge maintained the victims were kept under lock and key in their apartments. This element intensified the seriousness of DS's offending (R v DS [2005] VSCA 99 [6]) and was based upon her testimony to authorities (R v Tang, Wei [2006] VCC 637 [8.2]). However, throughout Tang's sentence, the sentencing judge maintained there was no evidence this was the case, with which the Director of Public Prosecutions also concurred. Nonetheless, use of control was exercised by a fear of detection by police or immigration authorities (R v Tang, Wei [2006] VCC 637 [8]), and the victims were 'restrained by the insidious nature of their contract' (R v Tang, Wei [2006] VCC 637 [8.6]).

'E' and 'D' resided at Tang's apartment; however, the remaining three victims, 'A', 'B', and 'C' lived at the residence of a woman named Gaik Kim Ong, who was another manager of the brothel where the victims worked (R v Wei Tang [2007] VSCA 134 [11]). Ong's apartment was referred to as 'Mummies'. To distinguish the five victims from the other sex workers in the brothel, Tang referred to the victims as contract girls (R v Wei Tang [2007] VSCA 134 [7]). At the beginning of their contract, the victims were allowed out only while supervised by 'trusted non-contract girls' (R v Tang, Wei [2006] VCC 637 [8.2]). As their contract progressed and the victims proved they could be trusted, the control over each relaxed. Near the end of their contracts, the victims could go out whenever they wished, although they still needed to get permission from Mummy (Ong) (R v Tang, Wei [2006] VCC 637 [8.2]). The victims were well cared for by Tang and were provided with food and other necessities in order to work at the brothel (R v Tang, Wei [2006] VCC 637 [25]).

Two of the five victims, MK and JR (R v DS [2005] VSCA 99 [8-10]) repaid their debt in full. When this occurred, all restrictions placed on them were lifted and they regained possession of their passport. They were then free to choose when they worked, where they lived, and they received payment for their services (R v Wei Tang [2007] VSCA 134 [14]).

The Offender: Wei Tang

Offender demographics: Who is she?

Wei Tang was 44 years old at the time of sentencing in 2006 (R v Tang, Wei [2006] VCC 637 [15]) and spent the first 30 years of her life in China. Like DS, discussed above and Sarisa Leech, discussed below, the available CCN[24] contained limited information about Tang's background prior to her arrival in Australia. The highlights the way which offending women's narratives are structured by the quality of the offenders' legal representation, as explored in Chapter 7. However, the sentencing judge accepted Tang endured a 'harsh background both socially, politically and economically' while in China (R v Tang, Wei [2006] VCC 637 [26]).

[24] Tang was the only offender whose case progressed all the way to the High Court of Australia. Therefore, there are multiple publicly available CCN discussing this case; however, none explore her life prior to the offending.

Offenders' own victimisation

From the information available in the CCN, Tang was not a trafficked victim prior to her involvement in the international scheme, nor did she have any experience in the sex industry. Despite this, during an interview, Judge Three thought Tang could have been a victim prior to the commencement of her offending behaviour: '*there's nothing that says [she was a victim], but she certainly would have worked in a brothel*'. While it was never suggested Tang was a victim of trafficking during the trial or sentencing, Judge Three suggested during the interview: '*it really wouldn't surprise me if Wei Tang was [a trafficked victim]*' before she became a madam.

Not investigating Tang's history in the sex industry or considering her background important is problematic when attempting to understand why women exploit other women in the sex industry. Identification of whether Tang was a sex worker or a victim of HTCSE could help explain her introduction and involvement in the overall trafficking organisation within which the offending occurred. However, not knowing this element is indictive of the time this case occurred, as it was the first Commonwealth case[25] of this nature and is further indicative of the lack of understanding of these cases; particularly, the high prevalence of women victims who progress into offending roles (UNODC 2012; UNODC 2014; UNODC 2016; UNODC 2018).

Offender's role

Wei Tang owned and was involved in managing the brothel, along with two other people, where the five victims worked while under contract; however, Tang was not involved in recruiting and transporting the victims to Australia. As discussed above, one of DS's primary roles was facilitating the entry of the women into Australia and placing them in the brothels where they worked. DS, therefore, assisted in the recruitment of the five victims and placed them in Tang's brothel to pay off their debts (R v Tang, Wei [2006] VCC 637 [4.4]); R v DS

[25] DS was sentenced before Wei Tang, which is why she has been discussed first in this chapter; however, Wei Tang and DS were originally co-accused in relation to the original charges.

[2005] VSCA 99 [6]). Tang did, however, hold a majority share of the syndicate which purchased the women (The Queen v Tang [2008] HCA 39 [8]).

Sentence received

Tang's legal representation suggested during her sentencing that the business at her brothel was not as successful as it once was due to competition from other brothels in the area. It was this that reportedly prompted Tang to look for women overseas. The sentencing judge argued, while this could possibly explain her motive, it could not be used as an excuse for the offending (R v Tang, Wei [2006] VCC 637 [17]). It could, however, be used to explain her initial involvement in the organisation. The sentencing judge argued further, the mitigating factors available to DS, including the guilty plea, showing remorse and providing co-operation to authorities were not available to Tang (R v Tang, Wei [2006] VCC 637 [18]). See Table 9 for an overview of the sentences Tang received.

Like Tang, Watcharaporn Nantahkhum reached out to an agency, albeit for different reasons, as will be explored in Chapter 5.2, which possibly led to the commencement of her involvement in the offending for which she had been found guilty. Tang's motives were seemingly more business orientated than Nantahkhum's. However, both examples serve to highlight the ways these women potentially became enmeshed in the trafficking organisations.

Table 9: Sentencing overview for Wei Tang.

Offender	Location of Offending	Offences Charged	Plead Guilty Y/N	Gave Evidence Y/N	Original Sentence Imposed		Sentence after Appeal	
					Total	Non-Parole Period	Total	Non-Parole Period
Wei Tang	Melbourne, Victoria	5 counts possessing a slave; and 5 counts of exercising a power of ownership over a slave, being the power to use.	N	N	10 years	6 years	9 years	5 years

R v Sieders & R v Yotchomchin [2006] NSWDC 184

The Victims: L.K., W.S., W.P., and P.N.

Victim demographics: Who are they?

Johan Sieders and Somsri Yotchomchin were charged in relation to four victims: L.K., W.S., W.P., and P.N. (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [30, 35]). The victims knew they were coming to undertake sex work and would incur a debt of approximately AUD45,000 (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [17-20]). However, only W.P. had previous experience in the sex industry (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [44-66]). Different family members knew of this arrangement. In one case, the victim's brother acted as a guarantor for the agreed debt of AUD45,000. In another case, the victim's husband refused to do this; however, he clearly knew about the arrangement.

The four victims in this case came to Australia for reasons like those observed in other cases. As with K.W. in CDPP v Ho & Leech (Sentence) [2009] VSC 495 and 'C' in R v Tang, Wei [2006] VCC 637, W.S., P.N., and W.P. wanted the opportunity to earn more money than they could in Thailand and improve their economic situation. However, like 'E' in R v Tang, Wei [2006] VCC 637, L.K. had a financial responsibility to her family (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [44-66]).

Victims' journey to Australia

All the women arrived in Australian between late-2003 and early-2004 under a similar arrangement, with the purpose of making large amounts of money (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [44-66]). Pat,[26] a woman in Thailand, organised the visas which enabled each victim to enter the country legally. Once this was arranged, money was deposited into an account in the victim's name as evidence that she had sufficient money with which to travel. Then, a man would accompany the victim on their journey to Australia. After arriving in Australia, the victims were taken to meet Yotchomchin and 'delivered into her care' (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [20]). The money

[26] Pat's real name is Montha Phuncharaen (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [18]).

the victims had been given prior to leaving Thailand was removed from their account and the man who escorted the victims to Australia returned to Thailand (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [18-20]).

This case demonstrates the complexity involved in HTCSE cases and further, showcases the significant effect structural constraints have on women and the choices available to them. One of the victims, L.K., had a cousin who had previously come to Australia to work as sex worker due to the financial burden she faced when her family risked losing their home. Prior to the involvement of Yotchomchin, L.K. had been dealing with Sie Thoy who had attempted to arrange her travel to Australia. When this was not successful, L.K. met Pat, the woman who made travel arrangements for the four victims who Yotchomchin brought to Australia. L.K.'s cousin instigated this arrangement, through Yotchomchin (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [44-45]). After L.K arrived in Australia and met Yotchomchin, she was taken to the brothel where she worked. L.K met her cousin at the brothel (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [45-47]), where her cousin was potentially still working as a contracted sex worker. However, from the publicly available material, L.K.'s cousin did not appear to be one of the victims in this case.

Victims' experience in Australia

Like R v Chee Mei WONG and R v McIvor & Tanuchit [2010] NSWDC 310, the sentencing judge suggested that during the contractual period there were either implied or actual threats made against the victims to ensure they did not try to leave before their debt had been repaid. However, it was not clear which offender made these threats (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [38]). Nonetheless, their movements were not under the complete control of either offender, nor were they locked or confined in the apartment or brothel (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [118]).

Upon completion of their contracts, the women were able to continue working in the sex industry and retained the profits from this work, which W.P., P.N., and W.S. did. Yotchomchin's defence argued that when their contracts were fulfilled, P.N. and W.S had been able to send money, which was tax-free, to their families (Regina v Johan Sieders &

Somsri Yotchomchin [2006] NSWDC 184 [44-66]). However, the sentencing judge maintained even though this may be true, the women were still required to live and work in 'something of an underground community' due to their status in Australia (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [27]).

The Offender: Somsri Yotchomchin

Offender demographics: Who is she?

Yotchomchin was 43 years old at the time of sentencing in 2006 and is a Thai national, like her victims. She is the eldest of three children born to her parents, who separated when she was five. As a result of her parents' separation, she became part of a blended family of 13 children. She stated her upbringing was unhappy due to being subjected to poverty in Thailand combined with her parents' separation (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [74-79]).

Yotchomchin's education concluded when she was ten years old, primarily due to her family's impoverished circumstances and the need for her to assist her mother with both home duties and contributing to the household finances (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [84]). As a result, Yotchomchin had limited English-language skills. At the time of sentencing, she still had limited English (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [146]). When Yotchomchin was 15 years old, she left her son in the care of her mother (see offenders' own victimisation below), enabling her to move to obtain work to support her family (SIEDERS, Johan v R; SOMSRI, Yotchomchin v R [2008] NSWCCA 187 [233]). Yotchomchin displayed similarities to the victims in this case as both she and the victims were subjected to financial burdens from their families. At the time of sentencing, Yotchomchin still financially supported her brother's three children (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [90]) and her son, who had a disability resulting from a motor vehicle accident (SIEDERS, Johan v R; SOMSRI, Yotchomchin v R [2008] NSWCCA 187 [234]).

Offenders' journey to Australia

When Yotchomchin immigrated to Australia in 1997, she lived with her husband, whom she met through her sister. They divorced after only two years due to her husband's infidelity and, in 1999, she became an Australian citizen (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [82]). When Yotchomchin separated from her first husband, she began working as a sex worker (SIEDERS, Johan v R; SOMSRI, Yotchomchin v R [2008] NSWCCA 187 [234]). The sentencing judge argued Yotchomchin had prospered in the sex industry. So much so that she was able to develop her own business and, instead of working herself, had others working for her. However, unlike any other offender discussed within this thesis, from the information contained within the CCN, it appears Yotchomchin continued working in the sex industry despite managing other women (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [86-87]).

Offenders' own victimisation

Yotchomchin was the only offender with acknowledged domestic and family violence (DFV) perpetrated by a parent. After her parents' separation, she lived with her father, and two years, she moved in with her mother who had a new partner. Yotchomchin stated both her father and stepfather were emotionally and physically abusive towards her (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [74-79]). In conjunction with suffering DFV as a child, Yotchomchin was raped and held captive for three days when she was 13 years old (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [96]). As a result of this rape, she became pregnant (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [79]) and subsequently, both she and her family were ostracised from their village (SIEDERS, Johan v R; SOMSRI, Yotchomchin v R [2008] NSWCCA 187 [233]). The available CCN did not detail who raped her and held her captive for these three days; however, if it was a family member, this again is an extension of DFV.

Offender's role

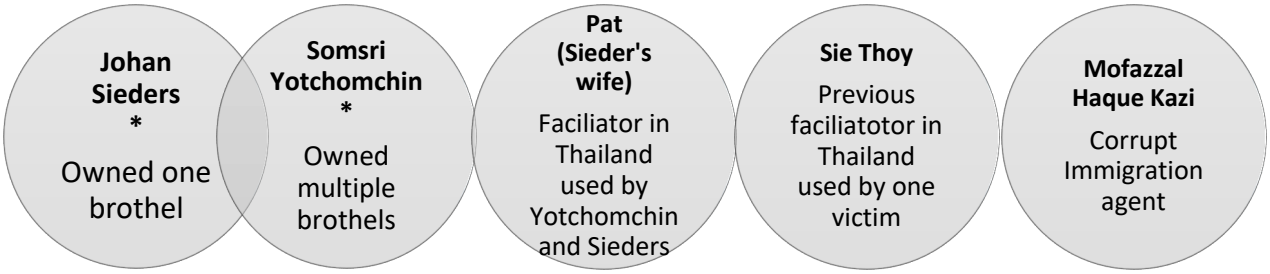

Figure 3: Key actors involved in the operation, including Yotchomchin, all situated on the same level.[27]

There were multiple people involved in this operation, like that involving DS and Tang discussed previously. However, there appeared to be less of a hierarchal structure within this case. All actors, despite holding different roles, were situated on the same level, as illustrated in Figure 3; however, Sieders and Yotchomchin's roles overlapped.

This case involved a man and woman co-offender, like the case R v McIvor & Tanuchit [2010] NSWDC 310. However, this case was different from others examined within this thesis. From that contained within the sentencing remarks, Yotchomchin was not married, nor in a personal relationship with Sieders, as Kanokporn Tanuchit was with Trevor McIvor. The way each co-offender appeared in this case is unique as they participated in the trial together due to the identical nature of the offending. The offending involved the same victims who worked at both of their brothels but the co-offenders were charged with separate offences. During sentencing, the judge explained:

> The accused were not charged as participants in the same offence, but rather were charged with separate offences, albeit engaged upon conduct of an identical nature and involving persons who were connected with both of their enterprises … (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [14]).

[27] From the publicly available information, those with an asterix were the only individuals charged with offences related to these victims.

The primary difference was Sieders managed one brothel, whereas Yotchomchin owned and managed several brothels. Throughout these brothels, Yotchomchin employed Thai women who were in a state of sexual servitude. Yotchomchin was referred to as one of two 'mothers of contract', like Kanbut who was referred to as 'mothertac', as explored in Chapter 5.2. Both terms described the person who looked after and exercised control over the women under contract, until the debt had been repaid in full (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [54]).

Like Trevor McIvor, Sieders was likely using his wife's background and connections in Thailand to secure women to work in his brothel. Sieders was married to another woman, Pat, with whom he ran one of the brothels where the victims worked. Pat, as can be seen in Figure 3, was the facilitator in Thailand who arranged the victims' travel documents. Interestingly, Sieders suggested it was his wife who introduced him to owning a business in the sex industry employing contracted women after she had been involved in a similar venture in Thailand (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [106]). However, the sentencing remarks did not detail what this venture was and whether Pat was again the facilitator or whether she was one of the contracted women. During Yotchomchin and Sieders' sentencing, the judge stated Pat was under arrest in Thailand, charged with procuring Thai nationals to travel to Australia for sex work (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [104]).

The relationship between Sieders and Yotchomchin, from what was detailed within the sentencing remarks, was therefore a business relationship whereby Yotchomchin, Sieders and Sieders' wife, Pat, cooperated to bring Thai sex workers to Australia. This cooperation included payment to Pat for arranging the entry of the Thai women into Australia and sharing the services of these women between the brothels which Sieders and Yotchomchin owned (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [33]). How Yotchomchin became involved with Sieders and Pat was not detailed within the CCN.

Additionally, payment was also made to Mofazzal Haque Kazi, a corrupt Australian immigration agent. Kazi was engaged for the purpose of making fraudulent visa applications for the women that would enable them to remain in Australia (Regina v Johan Sieders &

Somsri Yotchomchin [2006] NSWDC 184 [21-22]). As there was little differentiation between Sieders and Yotchomchin during sentencing, exactly who made the payments to Kazi was not detailed.

Sentence received

Neither offender pleaded guilty nor assisted authorities, as did DS. The sentencing judge suggested there were few notable differences between the offending of each offender; however, agreed that Seiders' role was 'marginally less than that of Yotchomchin' (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [70]). Additionally, Yotchomchin reportedly had more contact with Pat, the facilitator in Thailand, than Sieders (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [138, 141]). This is particularly noteworthy as Pat was Sieders' wife. However, this seems to be the primary reason for Yotchomchin receiving a longer sentence than Sieders, as outlined in Table 10.

Table 10: Sentencing overview for Somsri Yotchomchin and Johan Sieders.

Offender	Location of Offending	Offences Charged	Plead Guilty Y/N	Gave Evidence Y/N	Sentence Imposed	
					Total	Non-Parole Period
Somsri Yotchomchin	Sydney, New South Wales	1 count of conducting a business that involved the sexual servitude of other persons	N	N	5 years	2 years 6 months
Johan Sieders	As Above	As Above	N	N	4 years	2 years

DPP (Cth) v Ho & Leech [2009] VSC 495

The Victim: KW

Victim demographics: Who is she?

Unlike the previous case, which involved four victims, this case involved only one victim. KW, a Thai citizen, received only a primary school education. When she was 14 years old, she began working as a sex worker and worked in both Bangkok and Malaysia. When she was 30 years old, she became aware of the chance to come to Australia as a sex worker, where the potential financial benefits were greater than she was experiencing in Thailand (CDPP v Ho &

Leech (Sentence) [2009] VSC 495 [3-4]). KW met the offender, Sarisa Leech, in Bangkok; however, it was not clear whether it was Leech who introduced KW to this arrangement initially or whether an intermediary existed between Leech and KW.

Victims' journey to Australia

KW arrived in Melbourne, Australia in 2003, on a short stay visa under the pretence of attending a team building seminar. KW did not appear to be escorted to Australia as was observed to have occurred in the previous three cases; however, KW was aware her air ticket, accommodation, and visa had been arranged for her (CDPP v Ho & Leech (Sentence) [2009] VSC 495 [3-4]). Moreover, she was aware this arrangement created a debt, which she had to repay by 'providing sexual services to 650 men in particular Melbourne brothels' (CDPP v Ho & Leech (Sentence) [2009] VSC 495 [5]). It was not clear when she was informed of this (either prior to or after arriving in Australia) or whether she was aware of the amount of the debt. To extend KW's stay in Australia, Leech assisted her in applying for a protection visa using a false story. The application was rejected, and an appeal was lodged. During this time, KW was placed on a bridging visa and was allowed to work. Once this occurred, KW commenced work in a brothel (CDPP v Ho & Leech (Sentence) [2009] VSC 495 [9-10]).

Victims' experience in Australia

KW worked between 11am and 2am each day and was required to service up to 16 clients each day. While she was working in the brothel, the premises were locked, and she was not permitted to leave. She was, therefore, supervised closely. Initially, KW was not permitted to keep possession of her passport; however, after some time, Leech returned it to her (CDPP v Ho & Leech (Sentence) [2009] VSC 495 [36]). Once the debt had been repaid in full, KW had greater freedom of movement and was provided a key to the apartment where she lived. However, despite requesting to work shorter hours, KW was still forced by Leech and her co-offender, Kam Tin Ho, to continue working as she was the only sex worker at the brothel (CDPP v Ho & Leech (Sentence) [2009] VSC 495 [14-15]).

The relationship between KW and Leech was reportedly friendly, with Leech assisting her with learning English and how to use public transport. Despite this, during sentencing, the judge described the arrangement as highly exploitative due primarily to the fact she had no money, was unable to speak English, was entirely dependent on Leech, and had strict control exercised over aspects of her life (CDPP v Ho & Leech (Sentence) [2009] VSC 495 [36]). After the debt had been repaid, Leech considered establishing a brothel in Sydney. Leech and KW moved there with this intention; however, due to the inadequate number of customers, KW returned to Melbourne (CDPP v Ho & Leech (Sentence) [2009] VSC 495 [17]).

The Offender: Sarisa Leech

Offender demographics: Who is she?

Sarisa Leech, a Thai national like KW, was 37 years old at the time of sentencing in 2009. Within the CCN, there was very little detailed about Leech's background. Due to the pension her mother received after her father died while fighting in the Thai army, Leech was able to receive government-funded schooling up to year 11. After she left school, Leech commenced work as a waitress and later obtained work in what the sentencing judge described as a 'high-class cocktail lounge', undertaking sex work (CDPP v Ho & Leech (Sentence) [2009] VSC 495 [28]).

Offenders' journey to Australia

Like DS and Wei Tang, very little is known also about Leech's migration to Australia. As will be discussed in the following section, Leech came to Australia in a very similar way to KW. However, there was no information available publicly regarding who her traffickers were, how she was introduced to the prospect of coming to Australia in this way, the amount of debt she needed to repay, or anything regarding the process for proposed migration, including whether she was escorted by someone and how her travel arrangements were made. The sentencing judge did, however, state Leech came to Australia in 1997 as a contracted sex worker. The sentencing judge acknowledged further that during this time, she was under a very similar contract to that which KW was under (CDPP v Ho & Leech (Sentence) [2009] VSC 495 [29]).

Offenders' own victimisation

Six years prior to the first known victim (KW) arriving in Australia, Leech was a contracted sex worker herself. However, again like DS and Wei Tang, there appeared to be little attention allocated to considering Leech's background and any victimisation she experienced either prior to or during her time as a contracted sex worker. The sentencing judge did nonetheless state the arrangement under which Leech came to Australia required her to service 650 men to repay a debt (CDPP v Ho & Leech (Sentence) [2009] VSC 495 [29]), as did KW. Therefore, the contracts under which both Leech and KW worked were distinctly similar in terms of the number of clients needing to be serviced. This could indicate the debts, as well as the exploitative conditions, were also similar.

Despite the likely similarities between Leech and KW's victimisation experiences, Leech's experiences when she was a contracted sex worker prior to the commencement of the offending were not considered in the same light as they were for KW; nor did they elicit the same responses from the court throughout the CCN. The Commonwealth Department of Public Prosecutions argued that, when KW arrived in Australia, she was vulnerable for a variety of reasons which created a dependence through which Leech 'disempowered them, controlled them, removed their power and reduced them to slavery' (Ho v The Queen; Leech v The Queen [2011] VSCA 344 [39]). KW was particularly vulnerable, the sentencing judge argued, because she knew minimal English, had no friends or family in Australia, and had no knowledge of the system or laws in this country. It is reasonable to assume that Leech was also was vulnerable for these same reasons when she arrived in Australia.

Throughout the sentencing remarks, there were few connections made between the circumstances under which Leech feasibly was held while under contract and those under which KW was held. The sentencing judge maintained:

> There could be no doubt that this arrangement under which KW performed the services that she did was highly exploitative. KW was in Melbourne and unable to speak English. She had no money and was entirely dependent. The so-called 'debt' seems particularly exploitative. There was strict control over

> significant aspects of KW's life and particularly onerous for her in a foreign country, unable to speak the language, was that she was not permitted to keep possession of her passport […] In the early stage, she was not permitted to have a key to the premises and was supervised in almost every aspect of her daily life (CDPP v Ho & Leech (Sentence) [2009] VSC 495 [36]

However, from that contained within the CCN, the same view was not held when considering Leech's period under contract. Thus, the judge constructed Leech's experiences differently to how they constructed the victim's experiences. One possibility for this could relate to an underdeveloped awareness of the victim-offender cycle in cases of HTCSE and the impact prior victimisation has on future offending. Additionally, due to the victims' rights movement, a greater focus is now placed on understanding the victim's suffering, as opposed to the offender's suffering. This occurs, suggests Judge Six, as adequately recognising the harms done to the offender is often perceived to result in penalties that do not adequately recognise harms the victim has suffered. This is explored in Chapter 7.

Offenders' role

It is unclear whether there was a hierarchal structure present within this case. Leech held similar roles in relation to managing the victim as did DS, yet, in terms of organisational structure, compared to DS, this case seemed to be structured less like a hierarchy. The information contained within the sentencing remarks pertaining to Leech, specifically, suggest that the three primary actors in this case acted relatively equally, as demonstrated in Figure 4, despite holding different roles, which at times overlapped. Furthermore, the sentencing judge mentioned another two actors in addition to Leech's co-accused, Ho, who participated in the operation. These were a man named Lo Den, whose role was unknown, and a woman who came with Ho to examine KW after she arrived in Australia, whose name was unknown.

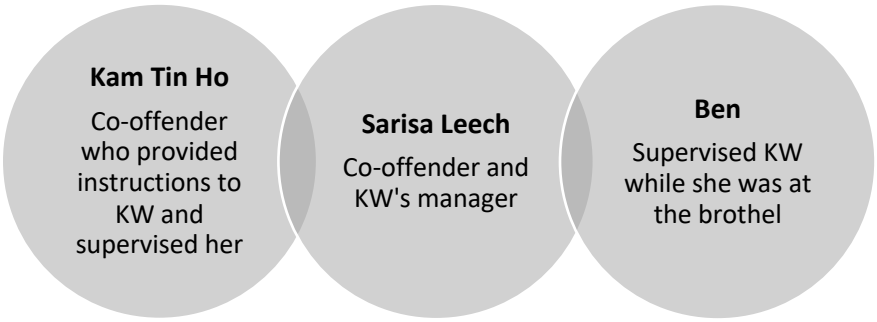

Figure 4: The relationship between the three primary actors: Kam Tin Ho, Sarisa Leech, and 'Ben'.

Considering Leech, like DS, was previously a contracted sex worker, it is possible there was a greater level of coercion involved than acknowledged within the sentencing remarks. Specifically, there could have been elements of coercive control present, as discussed in Chapter 2. Additionally, Kam Tin Ho, Leech's co-accused, was charged with his brother and co-offender, Ho Kam Ho, in a separate case: DPP v Ho & anor [2009] VSC 437. In this case, the sentencing judge considered Ho the 'Melbourne principal for a sophisticated, well-planned and well-executed scheme' (CDPP v Ho & Leech (Sentence) [2009] VSC 495 [45]). Therefore, it is plausible that there is more of a hierarchal element than is understood within the sentencing remarks. In the case of a hierarchy, Kam Tin Ho would sit at a higher level than Sarisa Leech, as outlined in Figure 5.

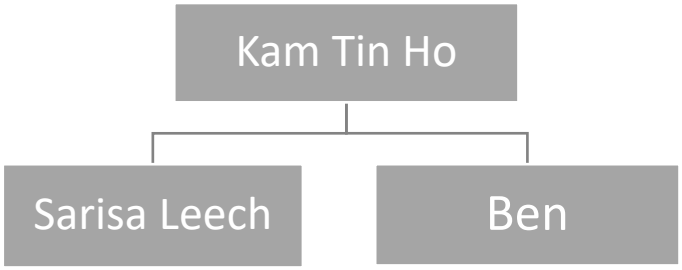

Figure 5: Proposed hierarchical structure of the operation in which Sarisa Leech participated.

Ultimately, Leech was involved in the arrangements to bring KW to Australia, as well as managing her once she arrived. These arrangements included organising her travel arrangements, obtaining her visa, and all future applications for a protection visa (CDPP v Ho & Leech (Sentence) [2009] VSC 495 [41]). As mentioned above, it was unclear whether there was an intermediary in Thailand, as there was with the previously discussed cases in this chapter. While in Australia, Leech informed KW of the hours she was to work, the number of

clients she would need to see each day, the arrangement of the sexual services she was to perform, and the percentage of income that would go towards repaying her debt. Further, Leech informed KW that her passport was to always be kept in the same locked box where her earnings would go, and she was to be supervised by Leech's co-accused: Ho and the man named Ben (CDPP v Ho & Leech (Sentence) [2009] VSC 495 [11]).

Sentence received

As in the case of Yotchomchin, neither Leech nor Ho pleaded guilty or provided assistance to authorities. Ho was originally sentenced to a much greater term of imprisonment than Leech. However, upon appeal, Ho's sentence was reduced significantly and ended up being less than Leech's sentence, as detailed in Table 11.

Table 11: Sentencing overview for Sarisa Leech and Kam Tin Ho.

Offender	Location of Offending	Offences Charged	Plead Guilty Y/N	Gave Evidence Y/N	Original Sentence Imposed		Sentence after Appeal	
					Total	Non-Parole Period	Total	Non-Parole Period
Sarisa Leech	Melbourne, Victoria	1 count of intentionally using a slave; and 1 count of intentionally possessing a slave	N	N	6 years	3 years 6 months	5 years 6 months	3 years
Kam Tin Ho	As Above	1 count of intentionally using a slave	N	N	14 years	11 years	4 years 6 months	Unknown

R v McIvor and Tanuchit [2010] NSWDC 310

The Victims: Sophie, Jasmin, Susie, Yoko, and Mickey

Victim demographics: Who are they?

Trevor McIvor and Kanokporn Tanuchit were both charged in relation to five victims, who were all Thai nationals: Sophie, Jasmin, Susie, Yoko, and Mickey. All the victims were recruited in Thailand and came voluntarily to Australia. With the exception of Yoko, who initially came to do massage, all came specifically to work in the sex industry; however, only Mickey had prior sex work experience (R v McIvor and Tanuchit [2010] NSWDC 310 [2-8]).

Victims' journey to Australia

These victims were all recruited in Thailand and arrived in Australia between 2004 and 2006. However, from the information included in the sentencing remarks, little appears to be known of the person/s in Thailand who recruited them. The victims were all informed that this arrangement would incur a debt; however, the amount of their debt was inaccurately represented to them. Once they arrived in Australia, they became aware of the actual amount of their debt, being somewhere between AUD35,000 and AUD45,000 (R v McIvor & Tanuchit [2010] NSWDC 310 [8.1-8.5]).

Sophie, Jasmin, and Susie were escorted by someone from Thailand when they travelled to Australia. Sophie was accompanied by a female minder known as Chut. Upon her arrival, she was taken to a hotel in Sydney (R v McIvor and Tanuchit [2010] NSWDC 310 [14]). Jasmin was accompanied by a male minder known as John. Like Sophie, McIvor and Tanuchit met Jasmin at a Sydney hotel (R v McIvor & Tanuchit [2010] NSWDC 310 [18]). Susie was accompanied by Pa Phen, Tanuchit's older sister, and her family. McIvor and Tanuchit picked all of them up from the airport (R v McIvor & Tanuchit [2010] NSWDC 310 [23]). The remaining two victims, Yoko and Mickey, travelled to Australia on their own. McIvor and Tanuchit also picked them up from the airport (R v McIvor & Tanuchit [2010] NSWDC 310 [27-29]).

Victims' experience in Australia

The victims were forced to work very long hours. On average, they worked '10am to 2am on Monday to Thursday, […] 10am to 4am on Friday and Saturday and 12pm to 12am on Sunday' (R v McIvor and Tanuchit [2010] NSWDC 310 [8.7]). They were given one free day a week; however, if they chose to work on this day, they were allowed to keep a portion of their earnings. Ultimately, the sentencing judge described McIvor and Tanuchit's treatment of the victims as demeaning (R v McIvor and Tanuchit [2010] NSWDC 310 [33]).

Sophie, Jasmin, and Susie were told they would be required to work while menstruating and would be required to insert a sponge into their vagina to do so, like the first victim in R v

Watcharaporn Nantahkhum SCC149 of 2010 and VP in R v Kanbut [2019] NSWDC 931, discussed in Chapter 5.2. None of the victims could refuse any clients, despite being sick, tired or in pain. Further, they could not refuse clients who refused to engage in safe-sex practices or who were violent or abusive. They were all forced to engage in unsafe oral sex practices (R v McIvor & Tanuchit [2010] NSWDC 310 [15-30]).

Sophie suffered a womb infection and, while she was allowed to see a doctor, she was only allowed to rest for one day, despite experiencing strong pain. On another occasion, Sophie suffered a tear to her vagina. Tanuchit gave Sophie some cream to apply; however, did not allow her to take any time off work (R v McIvor and Tanuchit [2010] NSWDC 310 [15-16]). Susie gave evidence that some clients were violent, and she was also in pain while working (R v McIvor & Tanuchit [2010] NSWDC 310 [24]).

Tanuchit examined Jasmin's body when she arrived in Australia. Jasmin was forced to engage in unsafe sex practices, specifically because 'she had no other selling points' (R v McIvor & Tanuchit [2010] NSWDC 310 [19]. Tanuchit also verbally abused Jasmin for not being able to attract clients, 'because [she was] so dark and fat and [had] saggy breasts' (R v McIvor & Tanuchit [2010] NSWDC 310 [20]). The sentencing judge exemplified this as an example of Tanuchit's humiliating treatment of the victims.

Jasmin spent approximately ten months under contract, which was the longest period of debt bondage of any of the victims in this case. Sophie spent approximately five and half months under contract. Susie spent two and a half months and both Yoko and Mickey spent less than one month under contract. Not all the victims were at the brothel at the same time; however, Susie, Yoko, and Mickey were all there when the Australian Federal Police and immigration officers raided the brothel in June 2006 (R v McIvor and Tanuchit [2010] NSWDC 310 [8]). This explains their period under contract being shorter than that of Jasmin and Sophie. It could also explain why Tanuchit's treatment of these three victims did not appear to be as severe as that toward Sophie and Jasmin.

The Offender: Kanokporn Tanuchit

Offender demographics: Who is she?

Little of Tanuchit's background or pathway into offending was outlined in any detail within the sentencing remarks. The majority of what is discussed about her below has been extracted from the PSR and two of the interviews conducted. This suggests that while the sentencing judge knew this information, they either considered it unimportant for the construction of the sentencing remarks or alternatively, this is indicative of the constraints which judges face during sentencing. While judges are subject to their own constraints, the construction of the sentencing remarks without the inclusion of Tanuchit's experiences as a trafficked victim, render an incomplete picture of the offender, resulting in important gaps regarding the environment in which her offending choices were made.

Tanuchit, who is a Thai national like her victims, and a citizen of Australia, was 42 years old at the time of sentencing in 2010 (R v McIvor and Tanuchit [2010] NSWDC 310 [41]). She is one of six children and described her upbringing as difficult for her entire family. Her father died when she was 14 years old, and her mother was unable to work due to trauma sustained in an armed robbery (B.S. 2010). The author of the PSR suggested that she presented as a person who had experienced a difficult and disadvantaged childhood and, like Rungnapha Kanbut, to be explored in Chapter 5.2, had always wanted to provide her children with opportunities for a better life.

Offenders' journey to Australia

Two different versions of Tanuchit's arrival in Australia emerged during the data collection for this thesis. The author of the PSR stated that Tanuchit migrated to Australia in 1995, when she was 29 years old. Her working arrangements, in which she was to work in a massage parlour, had been made for her prior to her arrival in Australia (B.S. 2010). The sentencing judge stated Tanuchit, 'confirmed her background in Thailand and her migration to Australia', noting that her background was similar also to that of many of her victims (R v McIvor and Tanuchit [2010] NSWDC 310 [42]). However, the fact that her working arrangements were made for her prior to her arrival in Australia was not acknowledged clearly within the

sentencing remarks, despite being a critical element in her background when considering the victim-offender cycle. If accurate, this suggests that Tanuchit was in fact much more of a victim than was ever acknowledged during sentencing.

However, Tanuchit's background was remembered differently by Participant One who maintained during an interview that Tanuchit '*had been brought out here by [McIvor] as his sort of bride […] He was in his 60s and she was in her 20s […] He had met her in Thailand, and she had been brought here basically to marry him*'. Participant One suggested Tanuchit had been a sex worker in Thailand prior to coming out to Australia and met her husband and co-offender, McIvor, '*in one of those sex stores in Thailand*'. Interestingly, as above, this information was not detailed in the sentencing remarks. The sentencing judge either did not know this information or, again, omitted this information when constructing the sentencing remarks.

Offenders' own victimisation

The author of the PSR stated that one year after arriving in Australia, Tanuchit commenced working in a massage parlour, which was owned and run by her co-offender in this trial. Not long after she began working for him, they reportedly began an intimate relationship and eventually married. When she became pregnant with their first child, not long after they commenced a relationship together, she ceased working for him and the massage parlour (B.S. 2010). After she stopped working in the massage parlour, Tanuchit supported her husband in the running of his brothel.

At the time of sentencing, the PSR noted that Tanuchit had recounted being controlled by McIvor to some extent throughout their marriage (B.S. 2010). During an interview, Participant One felt '*[McIvor] was the motivating force behind [the operation]*'. Similarly, during another interview, Judge Two presumed, because '*he was Caucasian and she was Asian, that he was using her background and information to make the contacts to facilitate running brothels on the cheap [in Australia]*.' Participant One, however, did not '*know whether [McIvor] brought her out specially to set up the brothel or whether that just occurred by chance, but […] imagine[d] it was probably his aim right from the beginning*'. Similarly, as discussed earlier in

this chapter, Yotchomchin's co-offender, Sieders, may have also been using his wife's background and connections in Thailand for the same purpose.

Offenders' role

Tanuchit was charged with her husband and co-offender, McIvor, who owned the brothel which she co-managed. McIvor and Tanuchit were described as participating 'in a joint illegal undertaking involving the trafficking of Thai women [into Australia to work] in the sex industry' (R v McIvor & Tanuchit [2010] NSWDC 310 [8.1]). Contacts in Thailand recruited the victims and arranged their visas, travel documentation and air tickets. McIvor and Tanuchit then purchased the victims from their contacts in Thailand for between AUD12,500 and AUD15,000 (R v McIvor & Tanuchit [2010] NSWDC 310 [8.3]).

There was little evidence that McIvor and Tanuchit were involved in recruiting the victims. A potential exception relates to Susie, who was accompanied by Tanuchit's sister (R v McIvor & Tanuchit [2010] NSWDC 310 [8.2]). However, little is contained within the CCN pertaining to this case about the Thai side of the operation and those who recruited each of the victims. In addition to this, little is known about those who escorted the victims to Australia. Despite the minimal amount known about others involved, it was clear there were many people involved in this operation, as detailed in Figure 6. Like Kanbut, discussed in Chapter 5.2, it was unclear who or if there was someone running the overall operation as was observed in R v DS [2005] VSCA 99 and R v Tang, Wei [2006] VCC 637.

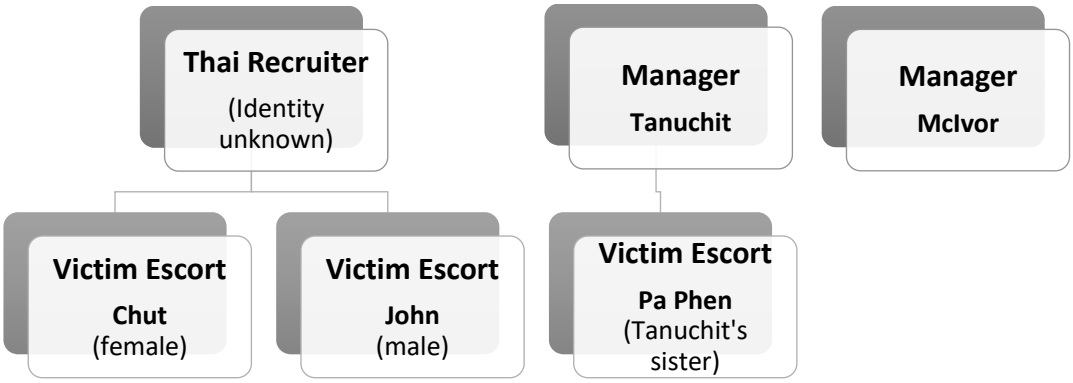

Figure 6: Organisational structure of the operation in which McIvor and Tanuchit participated.

McIvor and Tanuchit controlled what the victims wore, when they worked, and how they worked. Tanuchit often threatened the victims to prevent them from attempting to escape before they had repaid their debt or from speaking to customers about their situation. Tanuchit also at times threatened the victims' families, to again ensure compliance in the arrangement (R v McIvor & Tanuchit [2010] NSWDC 310 [17-26]). McIvor and Tanuchit forced the victims to work and reside in locked premises, at either the brothel or their home. Furthermore, they confiscated their passports and initially placed restrictions on their mobile phone usage (R v McIvor & Tanuchit [2010] NSWDC 310 [8.1-8.5]). Interestingly, Pa Phen, Tanuchit's sister who accompanied Susie from Thailand to Australia, told Susie that her passport and return air ticket were confiscated 'to stop the girls running away' (R v McIvor & Tanuchit [2010] NSWDC 310 [24]). This would indicate that Tanuchit's sister was involved, to some extent, with the operation.

The sentencing judge stated that the evidence suggested there were more than the five victims in this case; however, McIvor and Tanuchit were charged only in relation to the five discussed in this chapter. Interestingly, during an interview, Judge Two suggested that they also thought there were more victims than only the five who were part of this trial, suggesting further, that McIvor and Tanuchit had '*been involved in that business, running a brothel, for many years and had made many previous trips to Thailand*'. In Judge Two's opinion, '*there had been other persons before these particular girls who would have been brought here in similar circumstances but who had gone by the time the police raided [the brothel]*.' This indicates that Tanuchit's involvement in her husband's business may have begun quite soon after she ceased working at his massage parlour. If she was a trafficked victim as her statements in the PSR suggest, this period was quite soon after her work in a massage parlour was arranged for her, and she migrated to Australia. Therefore, there could be elements of coercive control present, as explored in Chapter 2. Furthermore, Judge Two's suggestion further supports an earlier comment made by this judge that Tanuchit's co-offender was likely using her background and contacts in Thailand to enable the running of his Australian brothels cheaply.

Sentence received

As Tanuchit and McIvor were charged together, there was little differentiation between which offender perpetrated which behaviour; nevertheless, the sentencing judge suggested both offenders acted relatively equally. During an interview, Judge Two thought they were both involved and, apart from one minor aspect, '*thought they were equally responsible for what had happened*'. However, Judge Two later suggested during the same interview, that '*McIvor was probably … more controlling than [Tanuchit] was in the situation … [H]e used to do a lot of the organising through contacts he had*'. Thus, from statements made by both Participant One and Judge Two, Tanuchit's co-offender, McIvor, was likely involved to a greater degree than Tanuchit, despite there being little differentiation between the two during sentencing. This speaks to the ways judges do not consider the more subtle elements of coercion, such as coercive control, present in HTCSE cases. Tanuchit, therefore, may potentially be just the more visible actor in the operation.

The sentencing judge described Tanuchit's treatment of the victims as:

> degrading and inhumane … [regarding] them basically as sexual pit ponies who needed to work to pay off an inflated debt for something that lacked any moral or substantive practical value (R v McIvor & Tanuchit [2010] NSWDC 310 [33].

Despite this, during sentencing the judge suggested that Tanuchit's subjective features were slightly more favourable than McIvor's were. This was due primarily to the fact she had no prior convictions, whereas McIvor did (R v McIvor and Tanuchit [2010] NSWDC 310 [56]). Therefore, while both offenders were sentenced to the same overall sentence, as outlined in Table 12, Tanuchit received a slightly shorter non-parole period.

Table 12: Sentencing overview for Kanokporn Tanuchit and Trevor McIvor.

Offender	Location of Offending	Offences Charged	Plead Guilty Y/N	Gave Evidence Y/N	Sentence Imposed	
					Total	Non-Parole Period
Kanokporn Tanuchit	Sydney, New South Wales	5 Counts of intentionally possessing a slave; and 5 Counts of intentionally exercising over a slave, the power attaching to the right of ownership namely the power to use	N	N	12 years	7 years
Trevor McIvor	As Above	As Above	N	Y	12 years	7 years 6 months

R v Netthip [2010] NSWDC 159

The Victims

Victim demographics: Who are they?

This case involved the most victims compared to the other cases discussed in this thesis. Namthip Netthip was charged in relation to 11 victims, although, their names, including acronyms or synonyms of their names, were not identified within the sentencing remarks. Each of the victims was from Thailand and had previously worked in the sex industry before coming to Australia (R v Netthip [2010] NSWDC 159 [5]). Unlike the other Australian cases discussed in this thesis, very little about the victims was outlined within the sentencing remarks. Details about their journey to Australia, therefore, are unknown.

Victims' experience in Australia

The victims in this case had much more freedom than those in any of the other cases discussed. They had the ability to move freely and live in private rental accommodation, which they paid for themselves. Furthermore, they were able to decide how they would get to the brothel; either by being driven or on public transport. They also had access to the internet and phones and could therefore contact their families in Thailand (R v Netthip [2010] NSWDC 159 [6]).

Compared with the other nine cases, money was not withheld from the victims after they serviced clients to repay their debt. Instead, with the exception of one brothel, the brothel would deduct its fee and pay the remainder to the victims. They would then make repayments to Netthip to reduce their debt either by cash or bank transfer. Interestingly, the victims could decide how quickly they repaid their debt and as such, were able to keep some of the money for personal use (R v Netthip [2010] NSWDC 159 [8]). The facts outlined above make this case quite different to other Australian cases discussed in this thesis.

The Offender: Namthip Netthip

Offender demographics: Who is she?

Namthip Netthip, a Thai national, was one of seven children. Unlike the other cases discussed, the sentencing judge did not state how old Netthip was at the time of sentencing. During her childhood, her family was impoverished and, as a result, she had to walk long distances to be able to attend school each day. Both before and after school, Netthip assisted her family on their farm and cleaning houses to contribute to the family's finances (R v Netthip [2010] NSWDC 159 [17]).

Despite the challenges Netthip faced during her schooling years, she attained an education level equivalent to an Australian year 10 and later obtained a Diploma of Accounting. After this, she found work as an accountant and accountant's clerk in Bangkok, during which time she sent money back to her family. However, despite her education, Netthip had limited English-language skills (R v Netthip [2010] NSWDC 159 [18-19]).

Offenders' journey to Australia

Netthip came to Australia in 1987 on a tourist visa and began studying English. She then attempted to find work as an accountant as she had worked in Bangkok; however, she was unsuccessful due her limited English-language skills. Needing to support both herself and her daughter once in Australia, Netthip worked in Thai restaurants. Apart from herself and her daughter, Netthip also needed to support her father in Thailand as her siblings were unable to do so. Netthip was therefore required to send money regularly to Thailand. Due to her

inability to source employment, she eventually accepted work in the sex industry, working as either a sex worker or a receptionist (R v Netthip [2010] NSWDC 159 [19]). In 1994, she became an Australian citizen (R v Netthip [2010] NSWDC 159 [3]). From analysing the sentencing remarks, which contained extracts from the PSR, it appeared Netthip's motivation to offend was due to her financial responsibilities to both her daughter and her family in Thailand. Like Kanbut discussed in Chapter 5.2, Netthip's motivation in life, including prior to the offending, was ensuring the welfare and care of others, especially of her family (R v Netthip [2010] NSWDC 159 [21]).

Offenders' own victimisation

Netthip separated from her current (at the time of sentencing) partner shortly before their daughter was born in 1995 due to their relationship being volatile. She resumed occasional contact with him after her daughter was born because she feared he would try to take her child away from her. During sentencing, the judge described Netthip's relationship with this man as strained (R v Netthip [2010] NSWDC 159 [19-20]).

Offenders' role

Between 2005 and 2008, Netthip organised the placement of 11 Thai women in brothels located around Australia. Cities where these women were placed included Sydney, Wollongong, Newcastle, Canberra, Melbourne, Adelaide, and Perth (R v Netthip [2010] NSWDC 159 [4]). Netthip was not responsible for the arrangement of the victim's passports, visas or travel arrangements, as this was done by a facilitator in Thailand. Details about the facilitator were not detailed within the sentencing remarks.

Prior to the departure of each victim, Netthip discussed the terms of the arrangement. Once the victims arrived in Australia, Netthip was responsible for organising mobile phones, food, initial accommodation, work-related medical expenses, and placing each of the victims in brothels around Australia. If the victim were unhappy or dissatisfied with her placement, Netthip would either negotiate for better working conditions or would transfer the victim to another brothel. Each victim arrived on a tourist visa; however, after arriving, applied for a protection visa with Netthip's assistance (R v Netthip [2010] NSWDC 159 [5-10]).

Sentence received

Apart from DS, Netthip was the only offender who pleaded guilty and provided evidence during sentencing. Netthip's guilty plea resulted in a 25% reduction to her sentence (R v Netthip [2010] NSWDC 159 [29]). Out of the ten offenders, Netthip received the shortest sentence, as outlined in Table 13.

Table 13: Sentencing overview for Namthip Netthip.

Offender	Location of Offending	Offences Charged	Plead Guilty Y/N	Gave Evidence Y/N	Sentence Imposed	
					Total	Non-Parole Period
Namthip Netthip	Sydney, Wollongong, Newcastle, Canberra, Melbourne, Adelaide and Perth	Conducting a business that involved the sexual servitude of 11 other persons, knowing about that sexual servitude	Y	Y	2 years 3 months	1 year 1 month

Conclusion

This chapter provided an original analysis of the victims and offenders relating to six of the cases examined in this thesis: R v DS [2005] VSCA 99; R v Tang, Wei [2006] VCC 637; Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184; CDPP v Ho & Leech (Sentence) [2009] VSC 495; R v McIvor and Tanuchit [2010] NSWDC 310; and R v Netthip [2010] NSWDC 159. These cases occurred between 2005 and 2010. The analysis of these cases was executed within a consistent template, constructed by collating information relating to the victims and offenders within each case from the sentencing remarks, appeal transcripts, PSR, and in some cases, utilising extracts from the semi-structured interviews. This template enabled an original discussion of the key facts relating to the victims and offenders within each of these six cases, which highlighted patterns within the offending and victimisation. The remaining four cases, which occurred between 2012 and 2019 will be discussed in the following chapter.

Chapter 5.2: The Court's Construction of Women's Victimisation and Offending: 2012 to 2019

Introduction

Chapter 5.1 provided an original analysis of the victims and offenders within those Australian cases of human trafficking for commercial sexual exploitation (HTCSE) which occurred between 2005 and 2010. This chapter serves as a continuation of that, to provide an original analysis of the remaining four cases, which occurred between 2012 to 2019: R v Watcharaporn Nantahkhum SCC149 of 2010; R v Chee Mei Wong; The Queen v Lay Foon KHOO [2017] 2105 of 2016; and R v Kanbut [2019] NSWDC 931. Like Chapter 5.1, the discussion of each case within this chapter is constructed using information collated primarily from the sentencing remarks. Available appeal transcripts and pre-sentence reports (PSR) are utilised also, in conjunction with extracts from the semi-structured interviews, where applicable.

As with the previous chapter, the discussion in this chapter will use a consistent template to provide a unique analysis of the key facts related to each case as constructed within the court-constructed narratives (CCN). Firstly, the facts related to the victims within these remaining four cases are explored. Within this discussion their demographics are examined as outlined within the sentencing remarks, including any structural constraints they experienced. Next, their journey to Australia and their experience once in Australia is examined. Following the discussion of the victims, the facts related to the offenders are explored. This discussion follows the same template, however, the offender's role in the organisational structure and the sentence they received are also included. This template is again utilised to allow comparisons to be made between the victims and the offenders in these four cases.

R v Watcharaporn Nantahkhum SCC149 of 2010

The Victims: The first victim and the second victim

Victim demographics: Who are they?

Watcharaporn Nantahkhum was charged in relation to two victims who were Thai nationals. In the sentencing remarks, these Thai citizens were referred to only as 'the first' victim and

'the second' victim within the sentencing remarks. The first victim needed to find work to support her family financially, like L.K. in Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184. While searching for work, the first victim met a woman in Bangkok who informed her of the prospect of coming to Australia to work in the sex industry. She was informed of the debt needing to be repaid and, despite thinking the debt seemed excessive, eventually agreed to come to Australia after speaking to Nantahkhum on the telephone (R v Watcharaporn Nantahkhum SCC149 of 2010 p. 3). However, the details Nantahkhum described to her during this phone call misrepresented the reality she would face once she commenced working in Australia. The second victim, also searching for work, had initially intended to migrate to France. However, she decided to travel to Australia instead. Unlike the first victim, the second victim thought she would be performing massages only and was not told initially she would be undertaking sex work while in Australia (R v Watcharaporn Nantahkhum SCC149 of 2010 p. 5).

Victims' journey to Australia

Both victims' travel to Australia was facilitated in a similar way and they arrived in Australia in 2007. Their visa and travel arrangements were made for them by different people, one of whom was a relative of Nantahkhum. However, the second victim paid for her own airfare from money she had borrowed (R v Watcharaporn Nantahkhum SCC149 of 2010 pp. 3-4). Both victims were granted visas that did not permit them to work in Australia; however, the type of visa was not specified in the CCN.

The first victim arrived initially in Melbourne. Upon her arrival she was met by a man, with whom she formed a friendship. The identity of this man and how he is related to the operation was not documented in the CCN. She then travelled alone to Canberra, where she met Nantahkhum and a man, whose name and relationship were also not specified. The second victim arrived first in Sydney, before also travelling up to Canberra. Little is provided in the CCN about her arrival and journey to Canberra, and there is no indication of when and where she met Nantahkhum (R v Watcharaporn Nantahkhum SCC149 of 2010 pp. 3, 5).

Victims' experience in Australia

A large section of the sentencing remarks focused on the first victim, which was likely because the slavery charge in this case related only to her. The first victim's passport and return ticket were taken from her when she arrived in Australia. She was not provided a key to the apartment where she resided, nor was she permitted to leave without being accompanied by either Nantahkhum or Nantahkhum's friend. The first victim knew very little English and was taught the minimal required to provide sexual services to clients and to understand basic instructions on how to engage in safe sex practices. This resulted in her often engaging in unsafe practices (R v Watcharaporn Nantahkhum SCC149 of 2010 pp. 3-4). The first victim worked six days every week. If she chose to work on the seventh day, she was allowed to keep a portion of the fee that would otherwise go to reduce her debt.

The first victim was able to negotiate her debt from AUD45,000 to AUD43,000. Due to detailed records kept by the first victim, it was shown she serviced 700 clients, being required to see up 14 clients per day. She was required to work while menstruating and was provided with a sponge to insert into her vagina.[28] She found this very difficult to do until another sex worker helped her. This caused her pain; however, she was not allowed to take time off (R v Watcharaporn Nantahkhum SCC149 of 2010 p. 4).

The conditions under which the first victim was forced to work were described as severe, much like Nantahkhum's were when she first arrived in Australia as a contracted sex worker (R v Watcharaporn Nantahkhum SCC149 of 2010 p. 3), as will be explored shortly. From analysing the sentencing remarks, it was unclear whether these same conditions existed for the second victim. However, as Nantahkhum was charged only with intentionally possessing a slave in relation to the first victim, it is likely the conditions under which the second victim was held were less severe than those under which the first was.

When the second victim arrived in Australia, she was accommodated in the same apartment block as the first victim. She agreed to share half of the money earnt from undertaking sex

[28] This was similar to the experiences of VP in R v Kanbut [2019] NSWDC 931, discussed later in this chapter, and Sophie, Jasmin and Susie in R v McIvor & Tanuchit [2010] NSWDC 310, discussed in Chapter 5.1.

work with Nantahkhum. After some time, the first and second victim moved into a house which had been arranged by Nantahkhum. Nantahkhum charged both victims AUD200 per day in rent and other services, such as advertising and reception services. This AUD200 was due whether the victims worked or not (R v Watcharaporn Nantahkhum SCC149 of 2010 pp. 4-5).

The Offender: Watcharaporn Nantahkhum

Offender demographics: Who is she?

Nantahkhum, a Thai national and one of four children, was 45 years old at the time of sentencing in 2012. Her father made a bad business investment when she was young, which resulted in a family debt. To shield his family from the financial burden of this debt, her father committed suicide (R v Watcharaporn Nantahkhum SCC149 of 2010 p. 6). Nantahkhum was educated to the equivalent of an Australian year 10; however, she had little formal education in English. In 1984, at the age of 17, Nantahkhum had a son. The father of her child soon moved to Japan and married another woman. When her son was four years old, Nantahkhum also moved to Japan to work in a factory, leaving her son with her family (R v Watcharaporn Nantahkhum SCC149 of 2010 p. 6).

During her time in Australia, Nantahkhum supported her family financially. In particular, she cared for and supported her sister who was suffering from terminal cancer. Nantahkhum paid for her sister's entire medical treatment and returned to Thailand to arrange the funeral after she died (R v Watcharaporn Nantahkhum SCC149 of 2010 p. 7).

Information related to the offender's relationships, including other's views of them and their lives, was provided and explored in relation to two cases only: Nantahkhum and Rungnapha Kanbut, which are discussed later in this chapter. Both were in the group of cases that occurred from 2012 onwards and demonstrates one of the ways in which later cases allocated more time to understand the offender's' background than was evidenced in those cases that occurred between 2005 to 2010. The sentencing remarks for the remaining eight cases did not include elements of the offender's character.

Nantahkhum's partner at the time of sentencing described her as 'the nicest person [he had] ever met in [his] entire life' (R v Watcharaporn Nantahkhum SCC149 of 2010, p. 7). He described her as being a devout Buddhist who regularly attended the local temple and helped with fundraising events. Her partner also recalled a time where Nantahkhum visited a local orphanage in Thailand, and helped care for the children giving them food, candy, and toys. These statements served to provide the offender with some humanity, rather than rendering her simply 'the offender'.

Offenders' journey to Australia

When Nantahkhum's mother ran into debt, arrangements were made for Nantahkhum to travel to Australia to earn money to support the family financially (R v Watcharaporn Nantahkhum SCC149 of 2010 p. 6). The sentencing judge stated Nantahkhum had been sold and in 2004, just three years prior to both victims arriving in Australia, she arrived in Sydney. The author of the PSR stated that Nantahkhum knew she would be working as a 'sex worker in a brothel' (J.B. 2012, p. 2); however, it was unclear whether she knew the specific details of that work.

Nantahkhum was escorted by a Caucasian person on her journey to Australia. After her arrival, a husband and wife met her at a hotel. They took Nantahkhum to their house, confiscated her passport and return ticket, and informed her that she owed AUD45,000 to repay the expenses related to her travel, accommodation, and work in Australia that had been organised for her. After less than a month, Nantahkhum stated she wished to go back to Thailand (J.B. 2012).

Offenders' own victimisation

Like DS and Sarisa Leech, Nantahkhum was a victim of HTCSE. The sentencing judge in this case acknowledged that Nantahkhum was a contracted sex worker herself. In addition, the sentencing judge considered her background, and did so more thoroughly than any other sentencing judge did in the other cases. Both Nantahkhum and the first victim came to Australia under contract due to the financial burden they faced to support their families. Both

the sentencing judge and Judge Six acknowledged the similarities present between the conditions under which Nantahkhum was kept whilst working under debt bondage and the conditions under which the first victim in this case were held. However, these similarities were used by the sentencing judge to intensify Nantahkhum's offending to ultimately suggest, 'she should have known' better (R v Watcharaporn Nantahkhum SCC149 of 2010 p. 10), which can be viewed as an example of the judge imposing an (over)simplified narrative. This will be discussed in Chapter 7.

During sentencing, the conditions under which Nantahkhum worked were described as severe; that is, similar to those under which the first victim was forced to work (R v Watcharaporn Nantahkhum SCC149 of 2010 pp. 3, 6). As she was 'at least 10 or 12 years older than the other girls, she had to take whatever clients were given to her and could not demand they wore condoms' (J.B. 2012, p. 2). This she reportedly found very distressing. Nantahkhum eventually sought the help of a client to escape with AUD300 in cash. However, as she had not repaid her debt, she was unable to take her passport or return air ticket. This significantly increased her vulnerability in Australia. She stayed with this former client for some time before noting an advertisement for private sex work in Canberra. She then moved to Canberra and began working as a sex worker (J.B. 2012). Details of her time working as a sex worker after she escaped the contractual situation have, however, been redacted for legal reasons.[29]

Sometime after moving to Canberra, Nantahkhum was contacted by a woman with whom she had worked previously in Sydney, who told her their former brothel had been raided. It was claimed that, in return for agreeing to give evidence, all the women had been granted temporary visas allowing them to stay and work in Australia. This prompted Nantahkhum to voluntarily contact the police and she agreed to give evidence at the trial against her former employers who were facing very similar charges to those she was faced the analysed case. There was, however, no finding of guilt in relation to the offences committed against Nantahkhum (J.B. 2012). As such, and as was the case with Lay Foon Khoo which will be explored later in this chapter, no one was held accountable for the significant harm caused to Nantahkhum.

[29] This redaction was due potentially to the case involving her former employers – those who held her as a contracted sex worker – progressing through the court.

Offenders' role

The operation in which Nantahkhum was involved was not a sophisticated, 'significant or large-scale operation' (R v Watcharaporn Nantahkhum SCC149 of 2010 p. 9). However, she was the principal actor in the operation and kept all the financial benefits made from each victim. There appeared to be only one other person who was involved in the operation – a woman who acted as the Thai facilitator, and who arranged the victims' travel documents. Despite this, nothing was detailed about this woman within the sentencing remarks.

Nantahkhum stated that, prior to the offending behaviour, she had been in contact with an agency in Bangkok. As she missed her family back in Thailand, she contacted the agency with the hope of bringing a niece or nephew to Australia to be with her; however, the fees were too high. It was after this, she stated, that the same agency later contacted her in relation to each of the victims (J.B. 2012). This information was not detailed in the sentencing remarks, but rather in the PSR. It was unclear within the CCN whether the Bangkok agency was ever investigated, despite possessing the potential to explain how Nantahkhum became involved in the operation after she was a trafficked victim herself.

Sentence received

Nantahkhum did not plead guilty or provide evidence during sentencing. Additionally, due to her background as a contracted sex worker, she reportedly rejected some of the claims made against her by the victims. Nantahkhum denied holding the first victim as a slave as stipulated in the terms in the legislation (R v Watcharaporn Nantahkhum SCC149 of 2010 p. 7). She denied taking the victims' passports and not providing either victim with a key to the apartment (J.B. 2012). She argued she would never do this due to the fact she had experienced similar conditions herself when she came to Australia and worked in Sydney (J.B. 2012; R v Watcharaporn Nantahkhum SCC149 of 2010, p. 7).

Nantahkhum felt the victims had made false accusations against her. She expressed confusion and distress as to why these women had lied, rather than demonstrating any specific remorse

(J.B. 2012). By doing so, the sentencing judge maintained that she had lost any chance of leniency that could be provided to her for showing remorse and by accepting responsibility and accountability for her actions (R v Watcharaporn Nantahkhum SCC149 of 2010 p. 7). See Table 14 for an overview of the sentence Nantahkhum received. As Nantahkhum was not an Australia citizen at the time of sentencing and was only on a Criminal Justice Stay visa due to the matter against her former employers progressing through the court, the Commonwealth Department of Public Prosecutions advised her visa would be cancelled at the completion of her sentence and she would be placed into detention pending deportation (J.B. 2012).

Table 14: Sentencing overview for Watcharaporn Nantahkhum.

Offender	Location of Offending	Offences Charged	Plead Guilty Y/N	Gave Evidence Y/N	Original Sentence Imposed		Sentence after Appeal	
					Total	Non-Parole Period	Total	Non-Parole Period
Watcharaporn Nantahkhum	Canberra, Australia Capital Territory	1 count of intentionally possessing a slave	N	N	8 years 10 months	4 years 9 months	6 years 10 months	3 years 6 months

R v Chee Mei Wong

The Victims: K.K., U.R., G.P., and S.A.

Victim demographics: Who are they?

Chee Mei Wong was charged in relation to seven victims who were all from Malaysia. The cases of four of these: K.K., U.R., G.P., and S.A., pertained only to charges relating to sexual servitude and exploitation. The remaining three cases: S. H. B., A.R., and M. S., pertained only to charges contrary to the *Migration Act 1958* (Cth), as outlined in Chapter 4. Only the four victims related to the sexual servitude and exploitation charges will be discussed in this section. The sentencing judge suggested that K.K., U.R., G.P., and S.A. had 'been forced into sex work in Malaysia because of the need to support families or themselves or for a lack of other options' (R v Chee Mei Wong, p. 10). Many of the victims feared their families would find out they were engaging in sex work. Wong used this fear to ensure their compliance (R v Chee Mei Wong, pp. 3-8).

Victims' journey to Australia

The victims arrived in Australia between 2008 and 2009 on student visas under the pretext that they would be attending educational courses in Australia. However, unlike the other cases,[30] the victims in this case were not escorted on their journey to Australia. Each of the victims knew they would be working in a brothel in Australia, and all had sex work experience in Malaysia. Upon arrival in Australia, each victim had a slightly different experience (R v Chee Mei Wong, pp. 2-3).

When K.M. arrived in Australia, she went to a flat to where she had been directed to go. Wong met her at this flat and instructed her to begin work the next day. K.M. had been provided AUD500 cash, in case the Australian Immigration Officials required her to show she had sufficient funds to travel. Wong removed this money soon after she arrived (R v Chee Mei Wong, p. 3). U.R. had been directed to go to the same flat as K.M. upon her arrival to Australia, which she did. U.R. then went to the brothel, which is where she met Wong. As with K.M., Wong removed the money U.R. had been provided prior to leaving Malaysia (R v Chee Mei Wong, pp. 4-5).

When G.P. arrived in Australia, she called Wong using a phone number she had been provided. Wong then instructed G.P. to go to the same flat as K.M. and U.R.. Later that same night, however, G.P. was instructed to go to a Chinese restaurant, which is where she met Wong who was with other working girls from the brothel (R v Chee Mei Wong, p. 6). Finally, S.A. went to a different apartment than K.M. and U.R. had been instructed to go. The following day, she met Wong at the flat who proceeded to inspect S.A.'s body (R v Chee Mei Wong, p. 7).

Victims' experience in Australia

The debt each victim had to repay was between AUD5,000 and AUD6,000 (R v Chee Mei Wong, p. 10). This amount was considerably lower than the other cases discussed in this thesis. From the sentencing remarks, it appeared that the victims were able also to retain

[30] See R v DS [2005] VSCA 99; R v Tang, Wei [2006] VCC 637; R v McIvor & Tanuchit [2010] NSWDC 310

possession of their passports and return air tickets, which was in striking contrast to all other cases discussed, apart from R v Netthip [2010] NSWDC 159.

All the victims had expenses added to their initial debt. From the information outlined in the sentencing remarks, U. R. and G.P. had to pay for their accommodation and transport to and from the brothel, which was added to their debt, while K.M. and G.P. had to borrow money from Wong to buy food, which was again added to their debt (R v Chee Mei Wong, pp. 3-7). However, considering the similarities for each victim, it is possible that all four victims were required to pay for their accommodation, transport, and food, despite it not being outlined clearly within the sentencing remarks.

When each of the victims commenced work at the brothel, Wong instructed them to perform oral sex on customers without a condom, alternating between Chinese tea and ice cubes in their mouth (R v Chee Mei Wong, pp. 3-7). Wong forced the victims to work while sick and while menstruating, forcing them further to regulate their periods with medication. They were identified by a number and dressed in transparent clothing (R v Chee Mei Wong, p. 10). The victims' working hours varied but were usually between 10am until 5am the following day. The victims were at times assaulted by either clients or Wong herself and were threatened with harm either to themselves or their families if they attempted to leave prior to their debt being repaid (R v Chee Mei Wong, pp. 3, 8).

The Offender: Chee Mei Wong

Offender demographics: Who is she?

Chee Mei Wong, a Malay national, was 39 years old at the time of sentencing in 2013 (R v Chee Mei Wong, p. 13). The psychiatric report tendered during Wong's sentencing described her childhood as deprived (Dr S 2013). [31] Similarly, the PSR suggested Wong, who had three siblings, had a childhood characterised by poverty. As a result, she received only an education equivalent to an Australian year six. During her childhood, she was required to help sell food

[31] The psychiatrist who compiled the report submitted during Wong's sentencing was de-identified within the publicly available material. Therefore, they will not be identified in this thesis. Additionally, authors of all other psychological or psychiatric reports analysed in this thesis are also de-identified.

on her family's street stall. After she left primary school, she commenced working full time on a street stall (M.T. 2013),[32] and as a kitchen hand to support her family financially (Dr S 2013).

Wong was married three times; she had one child with her first husband and two with her second. After she and her second husband divorced in 2002, Wong needed to financially support the two children from this marriage as her ex-husband was unable to (M.T. 2013). Additionally, Wong was required to financially support her elderly mother who remained in Malaysia (Dr S 2013). The psychiatrist who prepared a report for sentencing purposes suggested that Wong, on multiple occasions, 'was in despair and lamented on her failing responsibility to support her children and her mother' (Dr S 2013, p. 5). This observation reinforced the effects of the socio-economic constraints that Wong was subjected to, particularly the financial burden she carried, and it demonstrated the degree to which Wong was forced to support her family.

Very little information about Wong was contained within the sentencing remarks. This is possibly because the sentencing judge considered Wong to be an '[un]reliable historian' due to the conflicting information she provided in different sources (R v Chee Mei Wong, p. 13). Consequently, much of the information available about Wong prior to the offending was extracted from the PSR and psychiatric report tendered during sentencing.

Offenders' journey to Australia

Wong arrived in Australia in 2004, on a student visa, like her victims, to study English and become employed to support her children living in Malaysia. For three years between 2004 and 2007, she worked as a cleaner. In 2007, Wong commenced working in a brothel. Originally, she classified her role within the brothel as the receptionist; however, changed her position title to madam. Her tasks whilst working at the brothel included 'welcoming clients and cleaning the premises, cleaning floors and laundering bedding' (M.T. 2013, p. 2).

[32] Similarly, the probation officer who compiled the PSR was not named throughout the publicly available material. They are, therefore, de-identified also. Additionally, the authors of all other PSR analysed in this thesis are de-identified.

In 2008, Wong began a relationship with her current partner (at the time of sentencing) and co-offender. Also, in 2008, she began working for her boyfriend's brothel (Dr S 2013). It is unclear from the sentencing remarks which occurred first: her relationship or her working at her boyfriend's brothel. Additionally, the sentencing judge stated that Wong's offending commenced in 2008, when the first victim, K.M., arrived in Australia (R v Chee Mei Wong, p. 2). This indicates her offending began quite soon after she commenced the relationship with her current partner and co-offender, and, shortly after she commenced working in his brothel.

Offenders' own victimisation

The psychiatrist and PSR tendered during sentencing stated Wong had been married three times (Dr S 2013; M.T. 2013). Her first husband died; her second husband was an intravenous drug user; and her third husband had gambling debts which, combined with situations of DFV, contributed to the marriage breakdown (Dr S 2013). During an interview, Participant One thought Wong presented similarly to Kanokporn Tanuchit in that she was controlled by her partner. Despite little evidence of this being put forward to the judge during Wong's sentencing, Participant One admitted they thought this case and R v McIvor & Tanuchit [2010] NSWDC 310 were likely very similar.

Because of Participant One's thoughts regarding the relationship dynamic between Wong and her partner/co-offender, and the comparisons made between the two cases, it is possible Wong was introduced and coerced into the offending by her partner. The reports tendered during sentencing allude to the fact K.L., Wong's business partner, was her co-offender and her boyfriend. However, the interpersonal connection between Wong and K.L., the owner of the brothels where the victims worked, was not acknowledged or explored at any stage within the sentencing remarks. Thus, any elements of coercive control were not considered either.

Offenders' role

The sentencing judge argued that Wong held a primary role in the business in which the four victims worked (R v Chee Mei Wong, p. 10). Despite not being the owner of the premises, Wong assisted in the management of two brothels, exercising control and direction over both businesses, as well as the victims. The victims all referred to her as 'the boss' (R v Chee Mei Wong, p. 2). Agents in Malaysia organised for the victims to come to Australia, and while Wong did not recruit the victims, she communicated with these agents and was aware of the victims' arrival. She was, therefore, involved in the organisation for each victim to come to Australia (R v Chee Mei Wong, p. 9).

Additionally, Wong was involved in organising their educational courses by speaking with an education agent and arranging the appearance of each of them at the facility. She earnt a commission from this agent who organised the victims' enrolment in various courses; however, the victims did not attend them. Instead, Wong manipulated the attendance records so it would appear that the victims had attended at specified times (R v Chee Mei Wong, p. 9).

The victims' accommodation was owned or leased by Wong's partner, K.L., or various members of his family; however, Wong oversaw the accommodation arrangements. She referred to the victims' accommodation as dormitories, which seems fitting as the victims

> lived in crowded conditions, sleeping on mattresses on floors or in double bunks, four bunks to a room, paying rent disproportionate to the accommodation which had no space for clothes or personal belongings (R v Chee Mei Wong, p. 9).

This was one aspect of the victims' experience that the sentencing judge considered dehumanising treatment by Wong.

Wong met each victim upon their arrival in Australia and directed them regarding the hours they were to work, where they would work, and how they were to work. Like other previously mentioned victims, Wong instructed the victims to work while menstruating and while they

were sick. To work while menstruating, however, Wong forced the victims to regulate their periods by medication (R v Chee Mei Wong, pp. 9-10), instead of inserting a sponge into their vagina as was observed in the other cases.

Like Tanuchit's reported treatment of the victims in R v McIvor & Tanuchit [2010] NSWDC 310, the sentencing judge suggested Wong's treatment of the victims was dehumanising also, an example of which included the victims 'being paraded in front of potential customers wearing numbers for identification' (R v Chee Mei Wong, p. 11). Ultimately, the sentencing judge suggested Wong treated the victims 'not as human beings but as commodities, as machines to make money' (R v Chee Mei Wong, p. 11). They were forced often to engage in unprotected sex and sexual acts against their wishes and were never able to refuse a client (R v Chee Mei Wong, pp. 9-10). If the victims protested against drunk and violent clients, or if the clients complained about the women, Wong would accuse them of losing customers and they would not receive payment for those clients (R v Chee Mei WONG pp. 3-4).

Sentence received

Wong did not give evidence during the trial, and despite her defence counsel declaring she was remorseful, the sentencing judge said they saw no evidence of that. Furthermore, no remorse was expressed to Dr S, the psychiatrist, or M.T., the probation officer. As a result, Wong was not entitled to any reduction to her sentence, outlined in Table 15.

Table 15: Sentencing overview for Chee Mei Wong.

Offender	Location of Offending	Offences Charged	Plead Guilty Y/N	Gave Evidence Y/N	Original Sentence Imposed	
					Total	Non-Parole Period
Chee Mei Wong	Sydney, New South Wales	1 count of conducting a business that involved the sexual servitude of others	N	N	9 years	3 years

The Queen v Lay Foon KHOO [2017] 2105 of 2016

The Victim: Ms Lai

Victim demographics: Who is she?

Lay Foon Khoo was charged in relation to one victim: Ms Lai. Ms Lai and Khoo were from the same village in Malaysia and had been friends for some time, despite Khoo being 12 years older than Ms Lai (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 425). The sentencing remarks did not detail anything more about Ms Lai's background.

Victims' journey to Australia

Prior to Ms Lai arriving in Australia, Khoo had discussed sex work in Australia with her. Ms Lai maintained Khoo suggested that she come to Australia to work in this capacity to make some money. Khoo, however, maintained Ms Lai had been asking her about this type of work and the work that Khoo was undertaking in Australia in the sex industry. At this stage, however, Ms Lai showed little intertest in undertaking sex work (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 425). A short time later, however, Ms Lai approached Khoo and said she would like to come to Australia for a holiday and to look for available work opportunities. Ms Lai then proceeded to make her own travel arrangements. However, Ms Lai asked Khoo to assist her with these arrangements, which Khoo did (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 435).

Victims' experience in Australia

Ms Lai arrived in Perth, Australia in late-December 2015. Khoo and her partner picked Ms Lai up from the airport and bought her a sim card, groceries, and some personal hygiene products. This was similar to the treatment Khoo received from Ms Cai when she first arrived in Australia, as will be discussed shortly. Khoo then took Ms Lai to what Ms Lai thought was to be her accommodation but was in fact the brothel where she was to work. Ms Lai's passport was taken. It is unclear by whom; however, Khoo's partner eventually returned it to her (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 426-435).

There was no specific debt Ms Lai was forced to repay in this case. She did, however, need to repay the cost associated with her air ticket, which Khoo had assisted her with initially. She

further needed to repay a loan taken out through a loan shark, which was again organised by Khoo (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 435).

Ms Lai was well looked after at the brothel; the establishment was hygienic and clean, and it was clear from the CCTV footage played at the trial, that she was not mis-treated (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 436). She also had her mobile phone on her and was able to contact people if she wanted to (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 428). Ms Lai was provided, or had access to, condoms and there was never any mention of the sexual conduct which she was forced to participate in being violent or dangerous (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 437). The level of freedom Ms Lai experienced was considerably greater than the other cases discussed in this thesis, apart from R v Netthip [2010] NSWDC 159. Additionally, the conditions under which she worked were also less severe than those which the victims experienced in other cases. Furthermore, the fact Ms Lai primarily made her own travel arrangements, rather than these being made for her by a facilitator, is unique also.

The sentencing judge argued, nonetheless, that the brothel was not where Ms Lai chose to be. While she was not forced physically to stay, as were the victims in the other cases, she was not an Australian national. She did not have her passport and was unfamiliar with the laws and support available in Australia (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 436). Further, the sentencing judge accepted that Ms Lai had little understanding of the sex industry in Australia as what had been told to her was an inaccurate representation of the reality of that industry (The Queen v Lay Foon KHOO [2017] 2105 of 2016, pp. 435-436). These facts increased Ms Lai's vulnerability while in Australia.

The Offender: Lay Foon Khoo

Offender demographics: Who is she?

Lay Foon Khoo, a Malay national, was 38 years old at the time of sentencing in 2017. The sentencing judge acknowledged Khoo's childhood had been very difficult and distressing, owing primarily to the fact she had been born in prison where her parents were serving a sentence for drug trafficking. She lived at the prison for the first three years of her life until

she was then raised by her grandmother, older sister, aunt, and uncle, in a village in Malaysia (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 438). Those that raised her were, however, physically abusive towards her, due to the circumstances of her birth.

Khoo struggled and suffered badly at school, being bullied because her mother had been a sex worker. Due to this, she eventually left school when she was 15 (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 438). After Khoo left school, she travelled to Singapore to learn English. This enabled her to find work in a karaoke bar in Malaysia upon her return, when she was approximately 17 years old. Despite undertaking English lessons for two years, Khoo's English-language skills were still poor at the time of sentencing (The Queen v Lay Foon KHOO [2017] 2105 of 2016, pp. 438-440).

Offenders' journey to Australia

During sentencing, Khoo's legal representation argued that the story of how she came to Australia was very similar to that of the victim in this case: 'Kathy Wong set her up with the idea of coming to Perth. The story is unfortunately like what happened to Ms Lai' (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 430). This was interesting because the two scenarios were being noted as similar in terms of how Khoo and Ms Lai came to be working in Australia; however, these scenarios were not considered in the same manner. Despite Khoo and Ms Lai's victimisation experiences being similar, Khoo was no longer deemed as being deserving of holding the victim role, as was explored in Chapter 2.

While in Malaysia, Khoo started a friendship with a woman named Kathy Wong and a man named Danny Cai, a relation of Ms Cai, for whom she worked once in Australia. Ms Wong and Mr Cai informed Khoo of the prospect of coming to Australia to earn money as a sex worker in the sex industry. Khoo agreed to come to Australia for this purpose. Ms Wong made Khoo's travel arrangements; however, Khoo was deceived about the fees she would need to repay (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 430). Khoo arrived in Australia in 2015, the same year that the victim, Ms Lai, also arrived.

Khoo's legal representation argued that her choice to come to Australia to perform sex work was not an easy one for her to make, nor one she wanted to make. This was likely due to the fact that her mother was a sex worker and, therefore, Khoo was treated poorly. However, she was in a desperate situation. She needed to earn money to support her children and was told she could earn good money in Australia (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 430). As explored in Chapter 6, when women have limited vocational opportunities available to them, sex work is one option they have to improve their economic position. After arriving in Australia, Khoo was told she must repay the costs associated with arranging her travel and visa. She was informed also there would be ongoing fees she would have to pay; these were referred to as agency fees.

Offenders' own victimisation

Khoo experienced victimisation on multiple occasions. She suffered domestic and family violence (DFV) throughout her childhood and then throughout all three of her primary relationships. Additionally, she came to Australia under a situation of debt bondage.

Khoo met her first husband in Singapore when she was 15 years old and married him when she was 20, having her first child at 21. The sentencing judge acknowledged her first husband, while wealthy, also gambled and was unfaithful. He was also quite violent towards her, and the marriage ended when she was 28. Not long after, she commenced a relationship with her second partner. This was abusive also, and she was forced to support her husband's former wife and children, as well as her own family. During an interview, Judge Five suggested '*it's not an uncommon situation [to sentence] women whose husbands are violent and gamble*'. Judge Five further considered it difficult to '*think of a woman […] [they had sentenced] who hadn't been the victim of violence at the hands of at least one partner…*'. Upon sentencing, the judge suggested Khoo described her current relationship as also containing some abuse (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 438-439). Therefore, Khoo's childhood, and all three of her primary relationships, contained DFV.

When Khoo's second marriage ended, she was left with no money which resulted in her attempting to sell her jewellery to raise the funds to travel to Australia (The Queen v Lay Foon

KHOO [2017] 2105 of 2016, p. 439). This would indicate Khoo had endeavoured to come to Australia prior to encountering Ms Wong, the woman who eventually arranged her travel. These circumstances, however, left her vulnerable to those who recruited her to work in Australia: Ms Wong and Mr Cai.

When Khoo arrived in Australia, she worked in another brothel before being transferred to the one Ms Cai owned, or at least, managed. The exact status of Ms Cai in relation to the brothel is unclear. Khoo maintained Ms Cai provided great assistance to her, supporting her financially by providing her with accommodation, clothing, and hygiene products, among other things. Like the victim, Ms Lai, Khoo's passport was taken from her when she began working at the brothel, supposedly for safekeeping. It is unclear by whom, but it could be reasonably suggested this was done by Ms Cai. This did not seem suspicious to Khoo, as she was working in a brothel and her passport was an important document (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 430). Khoo met her current (at the time of sentencing) partner through her work at the brothel. Despite him allegedly being abusive, he agreed to support her financially if she left the brothel. At this point, she ceased working as a sex worker (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 439).

The prosecution remarked that the circumstances of Khoo's arrival in Australia, due in part to Ms Cai, were in fact investigated; however, 'a decision was made that no charges would be laid in relation to that matter' (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 433). Therefore, while Khoo has been charged and sentenced for this matter, as was Watcharaporn Nantahkhum who was discussed previously, no one was held accountable for the victimisation Khoo experienced, which further placed her in the position to commence offending. This results in the 'offender' being punished for her actions, while supporting the victim and simultaneously choosing not to respond to the offender's victimisation. This results further in only one part of the victim-offender cycle being responded to and does little to address the harm caused to the offender upon her own arrival in Australia, which was arguably what led her to begin the behaviour for which she was charged.

Offenders' role

After Khoo ceased working at the brothel, she reportedly felt an obligation to Ms Cai. Using the term 'pay back', Khoo felt that she needed to repay Ms Cai's favour in the form of support that she had shown to Khoo on her initial arrival in Australia. It was this desire to repay Ms Cai that led to her initial offending, which consisted of her recruiting Ms Lai to work at Ms Cai's brothel (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 426). The offending in this case appears to be quite different to the larger international operations present in other cases such as R v DS [2005] VSCA 99; R v Tang, Wei [2006] VCC 637; CDPP v Ho & Leech (Sentence) [2009] VSC 495 [45]); and Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184.

Prior to Ms Lai arriving in Australia, Khoo advised Ms Cai of her upcoming arrival. In text messages between Khoo and Ms Cai, Khoo referred to Ms Cai as Lady Boss when reciting what she had told Ms Lai. When Ms Lai arrived in Australia, the sentencing judge suggested she had no idea she would be taken to work in a brothel (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 435).

Once at the brothel, Khoo made it clear to Ms Lai she was to work as a sex worker to pay back the costs associated with arranging her travel. Part of these costs included the loan, which Khoo arranged for the victim to take out through a loan shark and the associated, albeit exaggerated, interest rates. The prosecution argued, therefore, that Khoo was motivated by financial gain; however, Khoo maintained that her motivations centred instead around repaying Ms Cai for her support when Khoo arrived in Australia (The Queen v Lay Foon KHOO [2017] 2105 of 2016, pp. 433-435).

The sentencing judge noted Ms Lai serviced at least 35 clients during the week under which she worked at the brothel. Khoo, however, received only Ms Lai's phone and $900, which was for the air ticket (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 438). While the $900 was reportedly double the cost of the ticket, this amount still appears minimal when considering Ms Cai's potential profits from the sex work performed by Ms Lai. Khoo's statement that she was doing this to repay Ms Cai appears supported when considered in these terms.

Ms Lai contacted the police after a week of working at the brothel, after which time, Khoo sent implied threats to Ms Lai. These threats included information relating to Ms Lai's family property in Malaysia, her younger brother and her daughter. The sentencing judge argued this was done so Ms Lai would retract what she had said to the police (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 437).

The sentencing judge accepted there may have been a degree of pressure on Khoo, by Ms Cai, when she first arrived in Australia. However, the judge suggested further, that this pressure no longer existed as the fact Khoo was arranging for women to come from Asia to work for her demonstrated the friendship that which now existed (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 435). While Khoo may have considered Ms Cai a friend, this point of view does not consider the possible coercive elements present, as were explored in Chapter 2. Ms Cai managed Khoo while she was under a condition of debt bondage in Australia, which creates a power imbalance between the two. Khoo referred to Ms Cai as the Lady Boss throughout the arrangements for Ms Lai to come to Australia. Therefore, despite a friendship now supposedly existing between Khoo and Ms Cai, Khoo continued to consider her the boss. While there are only two primary people involved in the offending in this case, there existed a clear hierarchical element, as demonstrated in Figure 7, which was not highlighted by the sentencing judge.

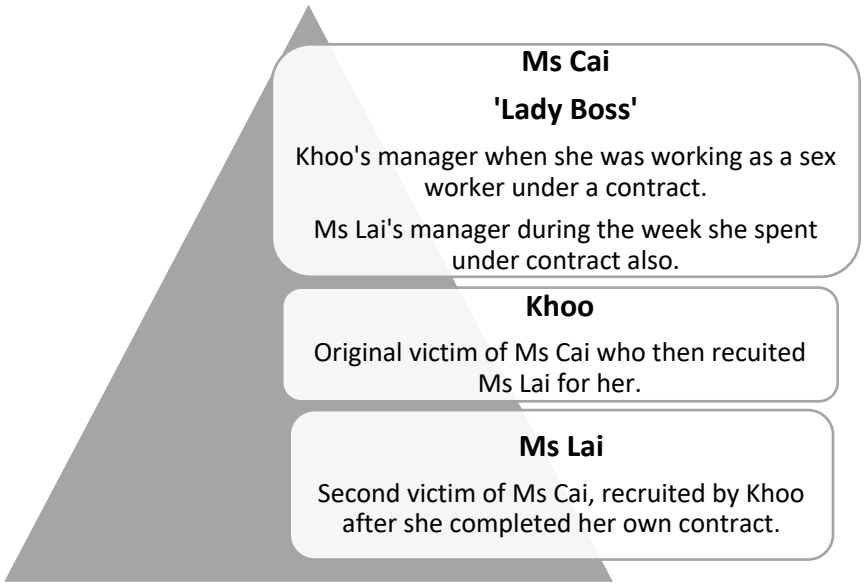

Figure 7: The hierarchical relationship between Ms Cai, Khoo, and Ms Lai.

Ultimately, the sentencing judge maintained Khoo had misused a friendship and placed a woman in a position where she had no choice but to service multiple clients to repay a debt (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 437). As stated above, Khoo maintained she did not do what she did for financial gain or because of any financial arrangement. Rather, she was doing this to assist Ms Cai and to repay her for the friendship and support she had shown Khoo upon her own arrival to Australia.

Interestingly, from that which can be ascertained from the sentencing remarks, neither Ms Cai nor Khoo's partner were ever charged with anything in relation to this case. As explored earlier, the prosecution stated that Ms Cai had been investigated in relation to Khoo's arrival in Australia, but no charges were ever laid. Furthermore, Ms Cai has not appeared to have been charged with anything related to Ms Lai, whom she managed after she arrived in Australia also. While Khoo's partner had been present when the victim was collected from the airport and taken to the brothel, and was also the person who likely took away Ms Lai's passport initially, and later returned it, he was also not charged with any offences. Additionally, no charges were laid against Ms Wong or Mr Cai, the two people who recruited Khoo. Therefore, despite Khoo being also a victim of Ms Cai, only Khoo was charged in relation to the offences against Ms Lai.

Sentence received

As outlined in Table 16, Khoo did not plead guilty, nor did she personally give evidence at the trial. The psychiatrist's report tendered during Khoo's sentencing suggested she was '… unable to acknowledge wrongdoing and unable to demonstrate an understanding of how [her] conduct […] harmed the victim…'. The sentencing judge accepted:

> … that's in part because of the harsh treatment that [she had] received throughout [her] life and the circumstances of how [she] came to be working at the brothel in Australia and that these experiences […] distorted what [she understood] to be an appropriate way of dealing with people and their freedoms (The Queen v Lay Foon KHOO [2017] 2105 of 2016 p. 439).

Khoo's defence argued that Khoo's conduct during the trial attempted to minimise any trauma to Ms Lai which could have been caused to her during the trial (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 432). The sentencing judge accepted that some concessions had been made at the trial. Regardless, however, a trial did still occur, and Ms Lai was still required to give evidence (The Queen v Lay Foon KHOO [2017] 2105 of 2016, p. 440).

Table 16: Sentencing overview for Lay Foon Khoo.

Offender	Location of Offending	Offences Charged	Plead Guilty Y/N	Gave Evidence Y/N	Sentence Imposed	
					Total	Non-Parole Period
Lay Foon Khoo	Perth, Western Australia	1 count of organising or facilitating the entry of another person into Australia, including the deception about the fact their entry into Australia would involve the provision of sexual services for exploitation or the confiscation of their passport.	N	N	4 years	18 months

R v Kanbut [2019] NSWDC 931

The Victims: VP and RB

Victim demographics: Who are they?

Kanbut was charged in relation to two victims, who were both Thai nationals: VP and RB. Whilst repaying her contract, VP had limited English-language skills. The sentencing remarks, however, do not contain information regarding the level of RB's English-language skills. A victim impact statement (VIS) was provided by VP. This was included in the sentencing remarks and was where most of the information about VP was provided. This was the only case to include a VIS in the sentencing remarks. As RB did not provide a VIS, nothing prior to her period of victimisation in this case was detailed within the sentencing remarks.

In the VIS, VP stated her life had not been easy. When her mother passed away, she had to help her grandmother support her younger brother. She had learnt to support herself financially from a young age. She was educated only to a year six level and since the age of 18, had worked in the sex industry in Thailand, but had done so on her own terms. As a result, she had no experience in other occupations and, therefore, found it difficult to move out of the sex industry, despite wishing to (R v Kanbut [2019] NSWDC 931 [52-54]).

Victims' journey to Australia

VP and RB were recruited and travelled to Australia in similar ways. VP and RB arrived in Sydney, New South Wales, in 2004 and 2005, respectively. Both victims were recruited to travel to Australia as sex workers by a man named Chang. Chang organised the travel documentation for both victims, including their passports and air tickets (R v Kanbut [2019] NSWDC 931 [11, 24]). Chang did not tell either of the victims how much the debt would be once they were in Australia (R v Kanbut [2019] NSWDC 931 [14]). Prior to VP and RB leaving Thailand, Chang took naked photographs of both women. This was done to ensure the victims did not attempt to leave before they had repaid their debt. They were each told if they did try to leave, the photos would be used to shame them (R v Kanbut [2019] NSWDC 931 [12,

25]). This element was unique to this case, as this tactic was not known to have been used in any of the other cases discussed.

A male escort accompanied VP to Australia. Chang instructed VP to tell Australian Immigration Officials that he was her boyfriend, and they were travelling to Australia for a holiday. Chang further informed VP she would stay with a person named Rung[33] after she arrived in Australia (R v Kanbut [2019] NSWDC 931 [13]). RB was not accompanied by a male escort as VP was. Instead, Chang picked RB up from her apartment and took her to the airport. On the way, they stopped to purchase an outfit so RB would look like a businesswoman. Chang instructed RB to tell Australian Immigration Officials she was a secretary, and she was only staying in Australia for one week. Should they have any questions, RB was to show them the documents Chang had given her. Chang further gave RB money, which she was to give to the person who would collect her from the airport (R v Kanbut [2019] NSWDC 931 [26-28]).

Victims' experience in Australia

Upon VP's arrival in Australia, Kanbut, her husband, and niece collected VP from the Sydney city centre. She was taken to Kanbut's home where Kanbut informed her she had to repay a AUD45,000 debt by working as a sex worker. VP was required to work at least from 10am to 10pm every day; however, some days she would work later than 10pm. She did not receive any days off, as Kanbut told VP if she worked every day, Kanbut would send $1000 per month to VP's family. Kanbut sent $4000 to VP's family, but added that amount onto her original AUD45,000 debt. VP was not paid any wages while working at the brothel but was allowed to keep any tips she earnt from her clients (R v Kanbut [2019] NSWDC 931 [16-20]).

VP was not allowed to travel on her own, and Kanbut's husband would drive her to and from the brothel. She was required to work while menstruating and suffered physical abuse from her clients, including being spat on and bruised. Kanbut was unsympathetic to this abuse, forcing VP to accept it until the client's time was finished. Whilst VP was still repaying the debt, she commenced a relationship with a client (R v Kanbut [2019] NSWDC 931 [20]).

[33] Rung is short for Rungnapha, which is Kanbut's first name.

VP stated in her VIS that she felt helplessness at never being able to say no to clients or to working at any time while under contract; she could, therefore, never be in control of her own body. She could remember the pain she felt each time she was forced to insert a sponge into her vagina in order to continue working while menstruating (R v Kanbut [2019] NSWDC 931 [46]). Once she had repaid her debt, 'she was caught in a situation where she could not leave the sex industry and change her lifestyle because of being brought to Australia' (R v Kanbut [2019] NSWDC 931 [57]). Furthermore, as she found it difficult to get a lease in her own name, she resided in share accommodation with other sex workers.

After RB arrived in Australia, a man named Tanae Sakaew collected her from the airport. RB gave Mr Sakaew the money Chang had given her in Thailand, and he drove them to McDonalds in Chinatown where a man came to look at RB. After Mr Sakaew checked RB into a hotel, Kanbut and her husband collected her from the hotel and took her to their house, similar to VP. RB worked from 10am to midnight most days. Unlike VP, who was forced to work while menstruating, RB could choose whether she worked during this time. At some stage while RB was repaying the debt, she commenced a relationship with Mr Sakaew – the man who collected her from the airport upon her initial arrival in Sydney (R v Kanbut [2019] NSWDC 931 [29-38]).

Both VP and RB had their passports taken upon the commencement of their debt. They both incurred a debt of AUD45,000 that they had to repay by working as sex workers at brothels. VP and RB both referred to Kanbut as 'mothertac', meaning 'someone who is looking after the working girls' (R v Kanbut [2019] NSWDC 931 [37]). Macioti et al. (2020, p. 1) suggest that Thai women define the term 'mothertac' as 'the mother of contract, the older female, of the same nationality as the sex workers whom they owe the debt for travel/visa and opportunity…'. Upon completion of the contract, both victims' passports were returned to them, and they could choose when and where they worked (R v Kanbut [2019] NSWDC 931 [11-39]).

The Offender: Rungnapha Kanbut

Offender demographics: Who is she?

Before Kanbut was born, her parents separated. After Kanbut was born, her mother was unable to care for both Kanbut and her sister. They moved into their maternal grandmother's small house, where they lived with three aunts and one uncle. During her childhood, Kanbut suggested that her family suffered 'significant financial challenges and often did not have enough money for food' (R v Kanbut [2019] NSWDC 931 [76]). Like Namthip Netthip discussed in Chapter 5.1, the sentencing judge did not state how old Kanbut was at the time of sentencing. When Kanbut was seven, her mother had another child. Kanbut left school at this time to help her mother care for the newborn child. When Kanbut was 13 or 14 years old, she began demanding work as a farm hand on a rubber plantation, during which time she got up at 4am each day to walk to work. After a few years, she became a caregiver to an elderly lady (R v Kanbut [2019] NSWDC 931 [77]).

Two different people reinforced what had been stated of Kanbut's early life in the psychological report tendered during sentencing. Kanbut's daughter stated that her mother:

> had a very tough life [and] she had sacrificed her education so that her sister who had health problems could go to school. [Kanbut] worked in any way she could to help the family survive. She would find fruit and vegetables to sell at the markets, cook and do housework, cleaning and washing clothes (R v Kanbut [2019] NSWDC 931 [106]).

A long-time friend of Kanbut's former partner in Australia also supported this view, maintaining Kanbut 'had a terrible life […] and she had generally lived a life of adversity in Thailand' (R v Kanbut [2019] NSWDC 931 [133]). Despite this, it was evident Kanbut cared deeply for her family and felt the burden of supporting them even when she was young.

As discussed earlier in this chapter, information related to the offenders' relationships, including others' views of them and their lives, was provided and explored in relation to two cases only: Watcharaporn Nantahkhum, discussed at the beginning of this chapter, and Kanbut. However, the present case is unique insofar as six people provided character

references for Kanbut to which the judge referred during sentencing, whereas only one person provided a reference for Nantahkhum. For this reason, there was more information provided for Kanbut than was included in the discussion of Nantahkhum.

Offenders' journey to Australia

Kanbut arrived in Australia in 2001 because she wanted to provide a better life for her two older children, whom she had with her first partner. She wanted to allow them access to better education than that available in Thailand. Her actions in relation to her children were like those regarding her family when she was young; she did all she could for them to ensure they had the best life possible. The daughter of Kanbut's former partner, with whom she had a son, suggested that Kanbut believed people 'can have a better life if given the opportunity' (R v Kanbut [2019] NSWDC 931 [119]). However, Kanbut was very aware of the cultural differences between Thailand and Australia; in fact, she found these quite difficult to negotiate at times.

A particular aspect of Thai culture, as noted in the sentencing remarks, is the practice of families relying on one another and helping each other when required. After Kanbut immigrated to Australia, four members of her family also came out to Australia: her two children, her cousin and her sister. All four people depended heavily on Kanbut and, in continuing Thai cultural practice, she did everything she could to ensure each was cared for, looked after and 'always ensured the children had food waiting for them when they finished school' (R v Kanbut [2019] NSWDC 931 [108]). Kanbut's daughter suggested she 'found it difficult living in Australia compared to Thailand principally because of the lack of family support' (R v Kanbut [2019] NSWDC 931 [108]) as in Thai culture, 'the community supports each other very much' (R v Kanbut [2019] NSWDC 931 [110]). Because of this, Kanbut's Daughter suggested that '… it is relevant to think of the cultural differences and difficultly for some people immigrating to Australia' (R v Kanbut [2019] NSWDC 931 [126]) when considering Kanbut's actions.

Offenders' own victimisation

When Kanbut was 18 years old, she moved to Bangkok and began attending night school while working at her uncle's watch shop. During this time, Kanbut attempted to continue the education she was forced to abandon when she was seven. During this time, her uncle attempted to force her to marry a friend of his. Kanbut refused this marriage and ran away from her uncle to escape this situation (R v Kanbut [2019] NSWDC 931 [78]).

While working as a hairdresser in Thailand, Kanbut married one of her clients, who worked in the army; however, he became physically and emotionally abusive and their relationship deteriorated quickly. The abuse was reportedly so severe, her husband would 'lock her up in their home for a few days at a time' (R v Kanbut [2019] NSWDC 931 [79]). Nevertheless, Kanbut had two children with this man, so despite the deterioration of their relationship, she moved to North Thailand with him where they opened a Thai restaurant. Despite the success of this restaurant, her husband continued to be physically abusive towards her and would frequently hit her (R v Kanbut [2019] NSWDC 931 [80-81]).

Offenders' role

As discussed above, Chang was the primary person involved in recruiting VP and RB. Kanbut was not part of this stage of the operation and her role commenced only once the victims arrived in Australia. However, Kanbut was the one person identified as exercising a role of authority within the Sydney component of the operation (R v Kanbut [2019] NSWDC 931 [269]). Importantly, how Kanbut became involved in the operation and met others, such as Chang, who recruited VP and RB, was not available (R v Kanbut [2019] NSWDC 931 [11], [24]). It would appear that this connection was not investigated in any meaningful way, as no passage within the sentencing remarks speaks to this element. Additionally, from the publicly available information related to this case, Chang was not charged with any offences relating to the recruitment of VP and RB.

Kanbut oversaw VP and RB once they arrived in Australia. She collected both victims after they arrived in Sydney. She explained where, when, and how each would work and organised

their transport to and from the brothel. Kanbut provided both VP and RB with accommodation and meals at her house, which showed compassion; however, she also knew about the naked photos Chang had taken of at least VP (R v Kanbut [2019] NSWDC 931 [270-271]). Furthermore, Kanbut collected both VP and RB's earnings and recorded the money that each made in a notebook (R v Kanbut [2019] NSWDC 931 [16-34]).

Despite this, Kanbut's legal representation suggested she had 'provide[d] the victims with somewhere to live and provide[d] them with items for work' (R v Kanbut [2019] NSWDC 931 [213]). Additionally, while Kanbut's defence agreed that she had a hands-on role in the operation, they argued further that 'she was not without compassion for the victims' (R v Kanbut [2019] NSWDC 931 [218]), with which the sentencing judge agreed (R v Kanbut [2019] NSWDC 931 [272]). These claims support VP and RB referring to Kanbut as 'mothertac', which translates into someone who looks after the working girls, as stated above.

Chang was responsible for the organisation and recruitment of the women. He was additionally responsible for the coercive element in the human trafficking definition outlined in Chapter 2. This was demonstrated by the naked pictures he took of the women for the purpose of shaming them, if required. Thus, while Kanbut appeared to hold a more senior role, it is possible her role was simply more visible, as she was in Australia, and the structure of the organisation was more like that highlighted in Figure 8.

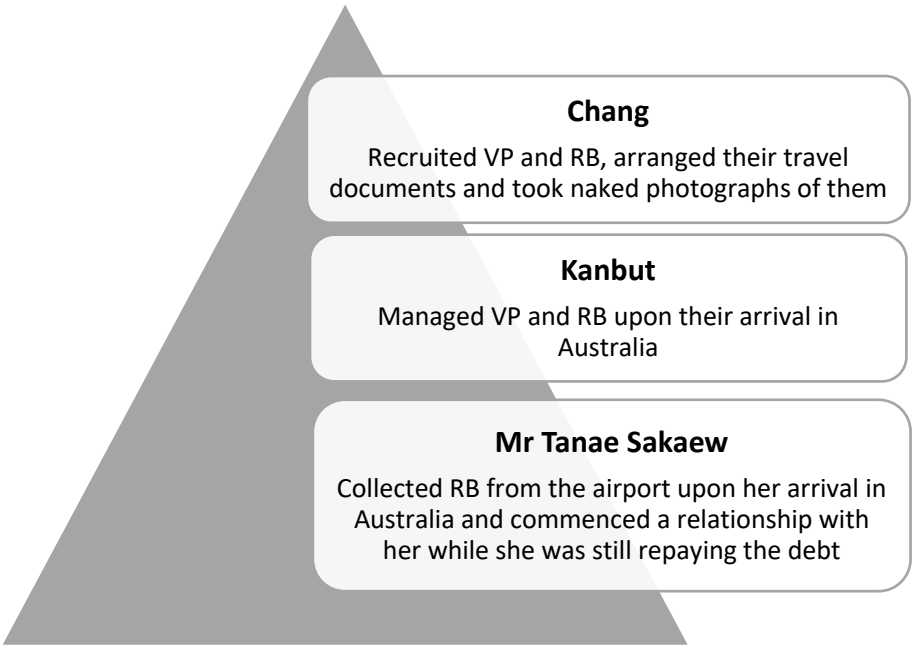

Figure 8: Highlighting the possible hierarchy present between Chang, Kanbut and Mr. Sakaew, when considering the roles different actors held.

Additionally, as explored above, Kanbut's husband was present also when each victim was collected upon their arrival in Australia. He was also the one who drove at least VP to and from work at the brothels. Despite this, the sentencing judge suggested it was 'unclear as to [Kanbut's] husband's role and […] the court could not be satisfied […] he was recruited into the operation' (R v Kanbut [2019] NSWDC 931 [219]. Consequently, Kanbut was the one who received the harshest treatment, despite having faced significant structural constraints since an early age and being only one person in an operation with multiple people.

Sentence received

The prosecution argued that Kanbut's 'conduct was planned and premeditated' (R v Kanbut [2019] NSWDC 931 [192]). Further, she exploited the freedoms of two vulnerable women for no reason other than for her own financial gain. Additionally, she had not co-operated with law enforcement, nor had she shown any remorse for her actions. She, therefore, was not entitled to any reduction in the sentence outlined in Table 17.

Kanbut's legal representation argued that the offending did not cease because she got caught, rather it ceased because she chose to stop. At the time of sentencing in 2019, Kanbut's youngest son was 14 years old (R v Kanbut [2019] NSWDC 931 [84]). The offences, as stated above, occurred between 2004 and 2005. While it was not stated clearly in any of the available CCN when her youngest son was born, if he was 14 years old at the time of sentencing, that would indicate he was born in 2005. Therefore, while it was not explicitly reported within the sentencing remarks why Kanbut ceased this conduct, the birth of her son could offer some explanation for the termination of her role in the operation.

Table 17: Sentencing overview for Rungnapha Kanbut.

Offender	Location of Offending	Offences Charged	Plead Guilty Y/N	Gave Evidence Y/N	Original Sentence Imposed	
					Total	Non-Parole Period
Rungnapha Kanbut	Sydney, New South Wales	2 counts of intentionally possessing a slave; and 2 counts of exercise over a slave, any powers attaching to the right of ownership namely the power to use	N	N	8 years 2 months 30 days	5 years 2 months 30 days

Conclusion

This chapter provides an original discussion of the victims and offenders relating to the remaining four cases examined in this thesis: R v Watcharaporn Nantahkhum SCC149 of 2010; R v Chee Mei Wong; The Queen v Lay Foon KHOO [2017] 2105 of 2016; and R v Kanbut [2019] NSWDC 931. A template was utilised throughout to enable a consistent discussion of each case. Despite many similarities present between the victims' experiences and the offenders', these were often not clearly acknowledged by the judges during sentencing. Therefore, an obvious awareness of the cyclical pattern inherent in these types of offences, as discussed in Chapter 2, appears absent within the sentencing remarks for each offender. Utilisation of the developed template allowed these similarities to be identified in a detailed way that had not been undertaken previously.

Chapter 5.1 contained a discussion of those six cases, which occurred between 2005 and 2010. Throughout that discussion, what becomes evident is the often minimal information about the offender considered during sentencing, specifically relating to her background and her own victimisation prior to the offending. The earlier cases discussed in Chapter 5.1, particularly, R v DS [2005] VSCA 99; R v Tang, Wei [2006] VCC 637; and CDPP v Ho & Leech (Sentence) [2009] VSC 495, demonstrate the outwardly minimal weight allocated within the sentencing remarks to the structural constraints and victimisation experienced by the offender.

The discussion within this chapter highlights the increased level of attention dedicated to considering aspects of the offender's lives, compared to those six cases discussed in Chapter 5.1. As explored above, the sentencing judge in R v Watcharaporn Nantahkhum SCC149 of 2010 considered Nantahkhum's victimisation in a more profound way than any other sentencing judge within the cases identified. Additionally, the sentencing judge in R v Kanbut [2019] NSWDC 931 utilised all of the six character references submitted in support of Kanbut, while sentencing her. These examples speak to the increased attention allocated to understanding the offender and her background.

Despite this, sentencing judges continued to sentence these women in ways that do not appear to apportion sufficient weight, or appreciate the influence that constraining structures and prior victimisation have on offending. This is particularly true of cases where the offender is also a trafficked victim. While the sentencing judges may acknowledge the offender's victimisation and the structural constraints in their lives on some level, the minimal weight given to these aspects, as well as the cyclical nature of the victimisation within the sentencing remarks, results in judges using these to suggest that these women 'should have known' better (R v Watcharaporn Nantahkhum SCC149 of 2010 p. 10). A consequence of this is the possible practice of judges imposing an oversimplified narrative onto these women, as will be explored in Chapter 7. As a result, judges, perhaps unintentionally, place their knowledges onto these women (Smart 1990; Hunter 2019), with little consideration of the differences between the knowledges that they, as judges, possess, and the habitus (Bourdieu 1987) in which they are situated, and the knowledges that these women possess.

Chapter 6: Judicial Constructions of Victimisation, Offending, and Choice: Constraint Imposed through Moral Judgement

Introduction

This chapter explores two of the four layers of constraint which the ten women identified as acting in offending roles in Australian cases of human trafficking for commercial sexual exploitation (HTCSE) experienced. The first layer of constraint relates to the individual level. This layer refers to the situational constraints placed onto these women through the victimisation they experienced and the constraining structures in their lives, as acknowledged within the sentencing remarks. The following part of this chapter explores the second layer of constraint, which relates to the constraint imposed onto these women through the moral judgement applied by judges to their choices. As demonstrated in the previous two chapters, judges frame women's choices through a morality positioning; however, these choices are demonstrative of the ways in which women exercise agency while experiencing considerable constraint. Thus, a paradox of choice is uncovered: women are making choices, which indicates agency, but they are the *wrong* choices.

This final section of this chapter, therefore, explores the concepts of choice and agency, and how these are viewed often by judges through a moral positioning. This chapter argues that when their choices are not coupled with an understanding of the structural constraints in their lives, and the constraining impact of these structures on their choices, women's choices are framed as greed, rather than survival or empowerment. For this reason, Giddens (1979) theorising of the relationship between structure and agency, as explored in Chapter 3, is a valuable addition to a feminist framework through which to view these cases.

Situational Constraints the Women Experienced

The first section of this chapter explores the initial layer of constraint these women experienced, as it is constructed within the sentencing remarks. This layer represents the situational constraints placed onto these women stemming from the victimisation they experienced, and the constraining structures present in their lives from a very young age. This

section will examine the judge's construction of these situational constraints, as discussed thoroughly in Chapters 5.1 and 5.2.

Judge's Construction of 'Offending' Women's Victimisation

Throughout the court-constructed narrative (CCN), and specifically in the sentencing remarks, the respective judges acknowledged that nine of the ten identified women suffered victimisation at some stage throughout their life, prior to the commencement of their offending. As identified in Chapter 4, sentencing remarks are a crucial document in which to ascertain which elements of the offender's life prior to their offending are extracted by the judge. In some cases, the pre-sentence and/or psychological/psychiatric reports tendered during sentencing provided additional information about the offender that was not contained within the sentencing remarks, despite the respective sentencing judges having access to these documents. This demonstrates the construction element of the term court-*constructed* narratives developed within this thesis. In order to construct the offender's narrative, the sentencing judges decided which pieces of information they would include within the sentencing remarks from the sources available to them when sentencing an offender.

As outlined in Table 18, the analysis of the CCN highlights seven (70%) of the offenders identified had similar backgrounds to their victims. Five (50%) of the offenders were themselves victims of trafficking; however, only four had experience of being a trafficked victim which was acknowledged clearly within the sentencing remarks. Six (60%) offenders suffered domestic and family violence (DFV), as either a child or an adult. One offender experienced an attempted forced marriage, and one offender was raped and held hostage for three days when she was 13 years old. At least, eight (80%) of these women were victimised in multiple ways. This demonstrates the multi-dimensional nature of the victimisation these women experienced. From the narrative contained within the sentencing remarks, however, the effects of these victimisation experiences on their offending were not effectively considered throughout the sentencing process. The only offender without victimisation clearly identified was Wei Tang, likely due to very little of Tang's background being explored. This is particularly interesting, as this was the only Australian HTCSE case that

progressed all the way to the High Court of Australia. As a result, it cannot be ascertained with certainty whether Tang experienced any victimisation prior to her offending.

Table 18: Previous victimisation experiences of each offender as identified by the judge within the sentencing remarks.

	Previous Victimisation			
	Victim of Trafficking	Similar Background to Victim/s	Domestic and Family Violence	Other Forms of Victimisation
DS	✓	✓		
Rungnapha **KANBUT**			✓	✓[34]
Lay Foon **KHOO**	✓	✓	✓	
Sarisa **LEECH**	✓	✓		
Watcharaporn **NANTAHKHUM**	✓	✓		
Namthip **NETTHIP**		✓	✓	
Wei **TANG**				
Kanokporn **TANUCHIT**	✓	✓	✓	
Chee Mei **WONG**			✓	
Somsri **YOTCHOMCHIN**		✓	✓	✓[35]

Regarding the four offenders – DS and Sarisa Leech (see Chapter 5.1) and Watcharaporn Nantahkhum and Lay Foon Khoo (see Chapter 5.2) – whose experiences of being a trafficked victim were acknowledged by the sentencing judges, there were clear similarities between their own victimisation and that of their victims. Despite this, and from the information contained within the sentencing remarks, the impact that prior victimisation of such a similar nature has on future offending, was not highlighted within the sentencing remarks. Additionally, while the sentencing judges could often identify the severely exploitative nature of the conditions under which the victims in the identified cases were held, this acknowledgment was not extended to the offenders. The case, CDPP v Ho & Leech (Sentence) [2009] VSC 495, speaks to this; precisely, the way in which the same, or similar, aspects were considered differently depending on whether the victim or the offender was being discussed.

Judges regularly passed judgement on those women who acted in offending roles using both what was and what was not known about each of them. In the more recent cases, such as those involving Lay Foon Khoo and Rungnapha Kanbut, greater attention was given during

[34] In addition to suffering DFV perpetrated by her husbands, Kanbut was also a victim of an attempted forced marriage.
[35] In addition to suffering DFV from her father and stepfather, Yotchomchin was raped and held hostage by her rapist for three days.

sentencing to understanding the offenders' backgrounds. However, in older cases, particularly those involving DS, Wei Tang, and Sarisa Leech, little understanding of the offenders' backgrounds prior to the commencement of their offending translated through the narrative within the sentencing remarks. This is the result of the offender's legal representation being ineffective and not putting this information before the court or, alternatively, a result of the victims' rights movement, which saw a greater focus being placed on the victims rather than the offenders. These elements act as constraint on judges and, as discussed in Chapter 7, represent the third layer of constraint imposed on the offenders. Both elements can alter the narrative put before the court, resulting in parts of the women's narrative being denied. In addition to the victimisation identified within the sentencing remarks that nine of the ten offenders experienced, eight offenders experienced at least one identified structural constraint. However, similar to the elements of victimisation within these cases, little understanding of the constraining structures which were present in the offenders' lives translated through the narrative within the sentencing remarks.

Judges' Construction of Constraining Structures

Constraining structures in the women's lives were identified from an analysis of the CCN, primarily the sentencing remarks. Only those constraining structures acknowledged within the sentencing remarks are discussed within this thesis. This, however, does not mean these were the only structural constraints these women faced throughout their lives. In fact, considering the constraints imposed by the criminal justice system (CJS), such as ineffective legal representation and a greater focus on the victims rather than the offenders, it is possible that these women experienced additional constraints than only those acknowledged within the sentencing remarks.

In addition to the acknowledged victimisation which the offenders experienced, the sentencing judges acknowledged that at least eight identified offenders experienced one or more socio-economic structural constraint throughout their lives. As outlined in Chapter 3, structural constraints pose limitations on behaviour and the level of choice that an individual has (Hindelang, Gottredson and Garofalo 1978). These shape an individual's daily life including decisions to engage in criminal or deviant behaviours or responses to victimisation

(Turanovic, Pratt & Piquero 2016). Oppressive structures under which women find themselves can therefore reshape and confine women's goals (Meyers 2014). From that stated within the sentencing remarks, six offenders experienced multiple constraints. Structural constraints can therefore be multiple and overlapping in many cases. The four primary socio-economic structural constraints identified from the analysis of the sentencing remarks have been outlined in Table 19.

Table 19: Elements acknowledged by the judges within the sentencing remarks that could act as structural constraints.

	Socio-Economic Structural Constraints			
	Impoverished/Disadvantaged Background	Financial Burden to Support Family	Limited Education[36]	Limited English-Language Skills
DS[37]	*Unknown*	*Unknown*	*Unknown*	*Unknown*
Rungnapha **KANBUT**	✓	✓	✓	
Lay Foon **KHOO**	✓	✓	✓	
Sarisa **LEECH**[38]	*Unknown*	*Unknown*	*Unknown*	*Unknown*
Watcharaporn **NANTAHKHUM**		✓	✓	✓
Namthip **NETTHIP**	✓	✓		✓
Wei **TANG**[39]	✓			
Kanokporn **TANUCHIT**	✓			
Chee Mei **WONG**	✓	✓	✓	
Somsri **YOTCHOMCHIN**	✓	✓	✓	

The two structural constraints of impoverished and disadvantaged background, and financial burden to support family, are exacerbated by financial elements, in particular, poverty. The remaining two structural constraints, limited education and limited English-language skills, are aggravated often by the families' impoverished circumstances and can inhibit the offenders' social capabilities. This is often done through influencing the options available to them, as they are forced into work, due to their families' impoverished circumstances. These

[36] Limited education refers to any level of schooling under an Australian equivalent high school/secondary school achievement.
[37] Little is known about DS's background, apart from her history as a contracted sex worker. It is likely, however, she suffered similar structural constraints.
[38] Compared to other identified offenders, and like DS and Wei Tang, limited information was detailed about Leech's background. However, as she was also a victim of HTCSE herself, it is again likely she suffered similar structural constraints.
[39] Not enough is known about Wei Tang's background to say with any certainty whether she experienced any of these factors. This in itself is problematic. However, it could be suggested that due to the acknowledgement of her experience of repression and the harsh background she endured socially, politically and economically she suffered certain structural constraints that may or may not fit into the above categories.

four structural constraints have been grouped under the broader category of socio-economic structural constraints.

When the offenders migrated to Australia, their limited education and English-language skills restricted further the options available to them. As explored in Chapter 5.1, this was evidenced by Namthip Netthip in particular, who –despite being educated and able to find work in Thailand– found it increasingly difficult to find a job in Australia due to her limited English-language skills. This led her to begin work in the sex industry. A combination of little formal education and a lack of viable economic opportunities resulting in a lack of financial security fuels the migration of women in search of better work opportunities. This process, as well as societal and cultural norms, which act to reinforce gender inequalities, render them vulnerable to the trafficking process (Konstantopoulos et al. 2013).

Socio-Economic Structural Constraints

The judges acknowledged that seven (70%) of the offenders experienced impoverished and disadvantaged backgrounds when they were very young. When they began experiencing the severe level of hardship documented within the sentencing remarks, they were minors, with some only very young children. Goździak et al. (2006) suggested poverty and family instability caused by a parent's death were two factors that placed pressure on young girls to contribute to the family's income. In this study, the authors found that at times it was the girl's decision to migrate. At other times, it was the idea of a family member or a friend. Aligning with the literature, Watcharaporn Nantahkhum's family made the arrangements for Nantahkhum to travel to Australian in a condition of debt bondage, to provide financially for her family when her mother ran into debt. After her period of contact ended, Nantahkhum was still required to support family members in Thailand (R v Watcharaporn Nantahkhum SCC149 of 2010, p. 6).

Supporting the literature, during an interview Judge Six suggested that, in their experience, '*frequently, women who come into the criminal justice system have had many difficult experiences before they enter that system*'. The judges' constructions of the offenders' lives suggested that many were impacted by poverty. This often resulted in an inability to complete

their education and/or develop their English-language skills and, further, in a financial burden to provide for their families. This highlights the multi-dimensional nature of the structural constraints identified.

At least six (60%) of the offenders identified had a financial burden placed on them whereby they needed to help with their family's finances. In some cases, the familial financial responsibly fell solely on the offenders. For example, Lay Foon Khoo made the decision to undertake sex work in Australia as she needed to earn money to support her family financially (The Queen v Lay Foon KHOO [2017] 2105 of 2016). Namthip Netthip also carried the financial burden to support her family. While the pre-sentence report (PSR) was not able to be accessed, extracts were included within the sentencing remarks. The author of the PSR noted:

> The offender presented as a person who has **chosen** to earn a living on the fringe of society, appearing to take an amoral view of her profession as the best available means to provide for her family. She has few external resources […] She has displayed a lifelong commitment to her birth family, and has, […] been driven by the need to financially support her parents and later her daughter [emphasis added] (R v Netthip [2010] NSWDC 159 [21]).

However, from that which was included in the sentencing remarks, an awareness of the impact of the structural constraints that Netthip experienced with regard to her choices was absent from the PSR. Netthip struggled to locate work in Australia due to the structural constraint she experienced –limited English-language skills– despite being educated to a greater level than any other offender identified. Thus, this was a significant element influencing her choices, which was missing in the PSR.

Ultimately, Khoo, Nantahkhum, and Netthip's need to financially support their families appeared to be a strong motivator for their offending. In addition to highlighting the structural constraints that the offenders experienced, poverty and a financial burden to support their families are examples of the difficult circumstances of which Judge Six spoke during an interview. These constraints, therefore, were potentially key elements in the decisions many of the offenders made when they travelled to Australia.

Poverty and disadvantage were strong themes identified from an analysis of the CCN which pertained to all offenders identified. As explored later in this chapter, Judge Three suggested poverty and disadvantage were strong motivators in the minds of both the victims and the offenders. The financial need placed on the offenders, and in some cases the victims, positioned these women into the situation of having to financially provide for their families, despite having limited means with which to do so. This was the consequence of socio-economic structural constraints.

During sentencing, the respective judges identified that five (50%) of the offenders accessed limited education and at least two (20%) possessed limited English-Language skills. Their limited education was due often to their family's impoverished circumstances, as this meant the family did not have money for their schooling. This also meant that the offenders were further required to help provide the family's finances from an early age. The offenders regularly experienced multiple structural constraints and often they were overlapping and difficult to discuss independently of one another.

All four socio-economic constraints faced by various offenders, as identified from the sentencing remarks, offered them limited opportunities available to them to improve their economic position. As such, these women made choices using the knowledge they had, as well as the opportunities available to them, to financially support both themselves and various family members. This was despite often possessing limited education and/or English-language skills. As stated previously, these choices were made while being considerably constrained; however, this element in their decision making is noticeably absent within the sentencing remarks, with judges framing their choices often around greed, rather than survival.

Constraints Imposed by Judges: Gendered Moral Judgement within the Criminal Justice System

In addition, to the situational constraints these offenders experienced, discussed above, judges imposed an additional layer of constraint onto these women. The practice of judges' applying moral judgement to these cases enhanced the level of constraint these women

endured. Framing the choices by these women within a moral positioning and in terms of greed rather than survival acted as the second layer of constraint, as it disregarded the impact of the first layer of constraint in the women's lives.

Gendered Morality and Moral Culpability

The concept of morality surfaced throughout the sentencing remarks as a factor in the judges' decision-making during sentencing, as well as throughout eight of the interviews. This was found in five out of the ten offenders identified. Morality refers to codes of conduct put forth by a certain group or society. If a person is not part of the relevant group who have made or tabled the particular set of codes or conduct which create the relevant morality, then this account of morality has no implications for how one should behave (Gert & Gert 2017). As discussed in Chapter 3, those who commit acts viewed as immoral within a society are viewed as less deserving of leniency in their punishment than those whose actions are not viewed as immoral. Moral judgement, therefore, refers to the application of morality to a situation, whereby the severity of that situation is increased if viewed as immoral, as the choices made within that situation are deemed unacceptable. While not always overtly evident, at least six of the cases examined showed the judges applying moral judgements through the introduction of morality to their narrative within the sentencing remarks.

When discussing the differences between morality and the law during an interview, Judge Six suggested that morality is not as constant as the law: '*the law is the law, and everyone is bound by it […] morality is quite different*'. As such, Judge Six further suggested that judges need to be careful not to impose their own individual views: *'… it's very important to be careful to […] make a distinction between a kind of personal view of morality that judges have and that more somewhat objective view of culpability*'. During The Queen v Wei Tang [2009] VSCA 182 [40], Tang's defence counsel argued that when judging the seriousness of Tang's behaviour, 'the Court must avoid moral judgements about prostitution'. Likewise, during R v McIvor & Tanuchit [2010] NSWDC 310 [63], the sentencing judge argued that their judgement was not framed as a moral argument in the form of expressing outrage at the sex industry, but rather it reflected the 'moral reprehensibility to be placed on the exploitation of some human beings by others **who ought to know better'** [emphasis added]. When asked generally

during an interview whether some judges allow their personal views of morality to influence their judgements, Judge Six responded with: '*Yes, I do. Yes, I do. Yes, I do*'.

Judge Five concluded during an interview that there was an element of judgement based on personal politics and morality that caused judges to disregard the effects of victimisation offenders had previously experienced or witnessed throughout their lives. Ultimately, Judge Five surmised:

> *it seems […] to be a moral misjudgement […] to disregard the effects of [victimisation] […] most judges would say [prior victimisation is] a matter of mitigation but to turn around and say, well you're a victim, you should have known better than to do the same thing, [is incorrect].*

Consequently, Judge Five suggested the fact that DS, Sarisa Leech, Watcharaporn Nantahkhum, and Lay Foon Khoo had been victims of HTCSE prior to the commencement of their offending, was being used as a matter of aggravation, in part due to the application of morality to the situation. Three of the judges interviewed considered those offenders who were trafficked victims to be more morally culpable due to their own experiences of exploitation and victimisation.

Often, the terms morality and moral culpability were used interchangeably throughout the interviews with the seven of the ten judges. Moral culpability refers to the explanation for the intent of the individual's actions (McCartney & Parent 2015). During an interview, Judge Six suggested moral culpability is used during sentencing and refers to an individual's '*personal liability for [a] criminal act*'. In other words, for the purpose of sentencing, intention to harm someone is viewed more seriously than harming someone without intent. To conceptualise this further, Judge Two provided an example of someone who drinks and then drives:

> *someone drinks and drives to rush their sick child to hospital, the offence is the same, but their moral culpability is low. Someone who drinks and drives and goes out just to go for a drive, well their moral culpability is a lot higher*.

In relation to those offenders who were clearly acknowledged within the sentencing remarks to be trafficked victims also: DS, Sarisa Leech, Watcharaporn Nantahkhum, and Lay Foon Khoo, specifically, Judge Two suggested, 'the only issues […] previous experience of that particular offending would go to would be someone's moral culpability for offending'. In these cases, the offenders' moral culpability was increased because they had suffered in similar ways and experienced similar victimisation. To the judges, the offenders knew what it would be like for their victims, yet still participated in the exploitation of others. Therefore, having been a contracted sex worker and possessing experience of the associated exploitation, despite being considerably structurally constrained themselves, increased the moral culpability of these women, particularly when their actions were viewed as being motivated by greed. The construction of greed in these cases is problematic, however, as it is possible these women considered it survival.

Judge Six suggested that, '*people [who have been a victim of trafficking] see that [situation] as a kind of normal and so their morality about the circumstances they experienced is dulled a bi*t'. However, '*the moral culpability of someone is very relevant to the sentence that [a judge is] going to impose*'. In relation to the identified cases involving women who were previously a contracted sex worker, Judge Six suggested:

> *She had experienced that herself and then to put that on somebody else is, is more serious, is more culpable*. *So, on the one hand, her experiences justified some sympathy but on the other hand those experiences should have led her to reject that imposition on others [emphasis added].*

However, within this extract exists little engagement with the possibility that the exploitation has been normalised for these women and their offending relates more to a rite of passage. These women made a success out of their situation and could view their 'offending' as a suitable way to provide for their families, considering the financial burden placed on them, within the significant constraint they experienced.

The following interview extract highlights the importance of considering an individual's personal background prior to the offending, as suggested by Judge Two:

> *A person's personal circumstances has to be considered in sentencing […] you've got to balance out their personal circumstances and how serious the offence was and their moral culpability in the offence […] A person's personal background […] people who are coming from really deprived backgrounds, involving […] violence […] has to be a consideration taken into account when sentencing someone.*

This, Judge Two argued, was particularly important when someone had committed a similar offence on another. However, despite the suggested importance of considering an offender's personal background, including structural constraints and experiences of victimisation, Judge Six suggested:

> *the level to which the victimhood can be positive and mitigatory is […] limited because it's counterbalanced and to some extent overtaken by the fact that if you know that […] this is what you been through […] then it's more […] culpable […] to impose that on somebody else.*

Therefore, being a trafficked victim, being held in a condition of debt bondage, and then perpetrating similar harms on others, are viewed by judges in a way that makes the offender more morally culpable. A focus on morality in this way, however, is damaging to those women who transgress gender stereotypes (Smart 1992), as was explored in Chapter 3.

In contrast to the beliefs held often by judges, people with knowledge of HTCSE view the offending from women who were themselves trafficked victims as a promotion on the ladder of exploitation. Participant One, an Australian anti-trafficking expert, suggested:

> *It's a bit like a promotion. She's gone from being a working girl who made some money to the one who could now use her skills and knowledge of the way the industry worked […] to not have to prostitute but to live off the exploitation of others.*

As someone with experience of HTCSE in Australia, Participant One could understand the process whereby these women made the decision to become managers rather than continue being sex workers.

Officially, of those formally charged, there were two men and ten women offenders in the ten cases. However, unofficially, as explored in Chapters 5.1 and 5.2, there were nine men and ten women. Despite at times holding higher roles in the hierarchy than the women who had been formally charged and found guilty (such as Chang in R v Kanbut [2019] NSWDC 931, K. L. in R v Chee Mei Wong, and 'Sam' in R v DS [2005] VSCA 99), from the information contained within the sentencing remarks, these men were not charged. More often than not, these women were simply more visible, rather than holding roles higher-up within the organisational structure.

Outside the court, these offenders were survivors who used the tools and knowledge they possessed to improve their lives after experiencing significant constraint. Participant One concluded during an interview that the offending in these cases was most likely '*about survival […] it was about a need to provide money for family members [and] extended families*', due to the financial burden carried by many of the women examined. Inside the court, however, they could be either the victim or the offender; survivor was not a title they could hold. The damnation of the CJS was inescapable for these women. The element of sex work increased the moral judgement applied to these cases.

Racialised and Gendered Morality Linked to the Sex Industry

As explored in Chapters 5.1 and 5.2, experience in the sex industry by either the victims or offenders, whether clearly acknowledged by the judges or not, was a common element in 100% of the cases identified. Like many of the victims, nine (90%) of the offenders had experience in the sex industry acknowledged. The element of sex work in these cases increased the moral judgement applied to the offending.

As someone with knowledge of the sex industry, Participant Two suggested that sex work is viewed often as a '*last resort undertaken by people who obviously have no other option*'. Despite sex work being skilled labour, Participant Two reported further, '*the skills involved in the sex industry are rarely recognised as legitimate*'. Furthermore, this participant stated that judges hold certain beliefs regarding sex workers, which affect the treatment of both sex workers and those accused of trafficking-related crimes within the sex industry:

> *The judiciary does not appropriately unpack the nuances of each, and every sex work case brought before them. Assumptions are made that sex workers are uneducated and to be pitied. Sex workers are seen as inhabiting one of the lowest rungs on the societal ladder and are assumed, therefore, more likely to engage in criminal activity.*

Due to these assumptions, cases involving sex work are at risk of being viewed with a greater level of moral judgement.

The sex industry factor alone was not the only element enhancing the application of moral judgement. The fact that these women 'chose' to enter this industry, despite this choice being made whilst being considerably constrained, increased the level of moral judgement once more. Participant Three informed that many women, within the limited number of choices available to them, would make the decision to come to Australia, often, '*with full knowledge that they would be coming into the sex industry and were somewhere between embracing and accepting of that*'. This presented the issue of morality once more within the patriarchal habitus (Bourdieu 1987) of the court, since the judges did not consider this an appropriate choice to make. However, this still constitutes human trafficking under international definitions and is why a discussion of slavery and sexual servitude, as they appear in the Australia commonwealth legislation, was necessary.

There were additional factors which were intertwined that may exacerbate the level of moral judgement applied by sentencing judges. In addition to the element of choice and choosing to enter the sex industry, being an Asian defendant is described as a further layer to consider by Judge Six. The following interview extract from Judge Six highlighted that, at times, judges' personal views would override an objective opinion in cases involving Asian defendants:

> *In [human trafficking] cases, I think it is difficult […] and I think it's almost inevitable. At one level, judges are human [and] it's almost impossible to divorce your personal views from the circumstances […] I'd like to think that it would be rarer for judges to approach Asian defendants in a less objective way than they would approach other defendants […] but again, there will be some judges whose personal views would incline them.*

The fact that the identified cases involved women of Asian ethnicity, who 'chose' to undertake sex work, therefore ran the real risk of increasing the level of moral judgement applied to these cases.

Race, like gender, is a social construct, which produces inferior and superior groups within society (Zuberi 2001). It is reinforced throughout the CJS (Lopez 1996), due to the predominate maleness and whiteness of the law and the court (Smart 1990). Owing to the social construction of race, offenders' experiences within the CJS are shaped often by the way they look (Belknap 2007). Within HTCSE, sexualised and racialised stereotypical images possessed by those in Australian society regarding predominately Asian women play a role in the construction of narratives within the sex industry (Chong 2014), and influence the level of moral judgment applied. When Judges '*… [let] a view of sex or ethnicity interfere with a more objective and dispassionate view of the offending*', as suggested by Judge Six during an interview, they continue to re-enforce the social construction of race.

In addition to the assumptions made about sex work generally, Participant Three proposed that racialised assumptions regarding Asian women extended into the CJS. Participant Three suggested that a particularly misogynistic, racialised stereotype was that: '*Asian women were made for [sex work] […] Asian women are hyper-sexualised and Asian women love to serve [men] …*' Furthermore, an ideology exists that Asian women are '*sweet and almost unsexed and [therefore] you can impose what you want*'. Participant Three argued that judges have traditionally been very blind to all forms of violence against women, which Judge Six explained occurs because women are viewed as inferior, and this blindness extends to those involved in sex work.

Judge Two was the only judge who considered that different societies may possess different conceptualisations of morality, as suggested by Gert and Gert (2017). As a result, not all cultures consider the same acts moral or immoral. Judge Two stated that,

> *sexual morality may be regarded a lot differently in Thailand [for example] than it is in Australia […] So, if she had done [sex work] in Thailand, having come from that sort of background, it is more understandable*.

Seven of the offenders spent a large part of their life in Thailand, where sex work is illegal. However, due to the social and cultural environment in which the sex industry operates in Thailand, sex work is not often viewed as immoral (Lyttleton 1994; Molland 2012). Therefore, the moral code that many of the women lived with prior to coming to Australia was different to the moral code held by the Australian CJS within which they were sentenced.

Nevertheless, sex work is often framed as a serious moral and criminal act (Wolken 2006). Due to this, the offenders already had a heavily ingrained presumption of guilt against them, despite the differing versions of morality held throughout different societies. Goździak (2021) suggests sex trafficking victims match the image of the ideal victim, as explored in chapter 2. However, the good girl/bad girl, good sex/bad sex dichotomy that exists in relation to sex work (Kesler 2002) encourages the application of morality to these cases and the choices these women make, rendering women acting in offending roles in HTCSE cases as more morally culpable.

A Paradox of Choice

The concept of choice surfaced throughout the analysed CCN, to the extent that the judges believed these offenders made the *choice* to exploit other women. The choices made by these women, however, were exercised while they were being considerably structurally constrained. These choices were usually made as a way for women to enhance their own agency. However, judges framed these decisions as completely free choices; they were not made to enhance their agency but rather were motivated by greed at times. Consequently, a paradox of choice is uncovered: women are deemed to be making choices, which indicates agency, but they are the *wrong* choices.

The judge who sentenced Watcharaporn Nantahkhum continually framed Nantahkhum's actions as being motivated by greed. This is evident in the following extracts from the sentencing remarks: 'there was clearly an element of greed in the offence'; '…the offence was primarily committed for greed' (R v Watcharaporn Nantahkhum SCC149 of 2010 p. 10); and '… the slavery offence demands sufficient punishment, especially as here it was motivated by greed' (R v Watcharaporn Nantahkhum SCC149 of 2010 p. 12). The framing of choice in this

way disregarded any impact of victimisation and the various structural constraints Nantahkhum faced.

As discussed at the beginning of this chapter, the judges acknowledged that the offenders' experienced various forms of victimisation throughout their lives and shared similar characteristics with their victims. Victimisation experiences included, domestic and family violence, attempted forced marriage, rape, debt bondage, and exploitation as a trafficked individual. Additionally, they were subjected also to various socio-economic structural constraints. These structural constraints resulted in the offenders having limited education, few English-language skills, and fewer employment opportunities available to them, which culminated in severely constrained choices.

The choices these women made, therefore, were made after experiencing gender-based violence and struggle. Within these situations exists coercion, which was apparent in various forms throughout the ten identified cases. In those cases where the offenders were clearly acknowledged as trafficked victims – DS, Sarisa Leech, Lay Foon Khoo, and Watcharaporn Nantahkhum – the contract under which they served was a form of debt bondage. However, the sentencing judges did not consider this a form of coercion. During an interview, Judge Six considered Australia to be relatively immune to situations of debt bondage:

> *… in other societies, particularly, developing societies, debt bondage and other forms of slavery […] is much more likely. [It is] much less likely to occur in a country like Australia.*

This statement sheds light on why the respective judges in these cases did not consider the element of debt bondage as coercion; the element of debt bondage was not even identified as such, therefore, there was little way it could be considered coercion.

Additionally, coercion was present in one case where the woman, Kanokporn Tanuchit, was charged with a male co-offender who was also her husband. As explored in Chapter 5.1, Tanuchit reported being controlled by her husband and co-offender, Trevor McIvor, in the PSR (B. S. 2010). Furthermore, while not clearly explored within the sentencing remarks, those cases where a man was involved in the offending but was not formally charged, such

as R v DS [2005] VSCA 99; CDPP v Ho & Leech (Sentence) [2009] VSC 495; R v Chee Mei Wong and R v Kanbut [2019] NSWDC 931, coercion could again be present. Importantly, however, the discussion within this thesis demonstrates coercive control can also occur between women more experienced in the industry coercively controlling their victims. Therefore, it is not exclusive to relationships between men and women. Nevertheless, these coercive elements were not considered as such by the sentencing judges and, therefore, do not emerge in the narrative contained within the sentencing remarks.

Despite the coercive elements within these cases, the judges and the Commonwealth Department of Public Prosecution, at times, framed these choices around the desire to earn a significant amount of money with little consideration of the preceding events which constrained the women's available choices. The sentencing judge in R v Kanbut [2019] NSWDC 931 [240] suggested that individuals who participate in human trafficking make a choice to do so, stating that:

> Slavery derogates fundamentally from the human condition and takes away basic human rights. Slavery reduces those who are subjected to it to being little more than a commodity. Those who **choose** to involve themselves in slavery reap significant financial benefit at the great cost of those enslaved. A society which fails to denounce slavery is gravely diminished [emphasis added].

Within this extract, there exists little engagement with the constraining environment in which these 'choices' were made. Additionally, the author of the PSR tendered in Namthip Netthip's sentencing stated:

> The offender presented as a person who has **chosen** to earn a living on the fringe of society, appearing to take an amoral view of her profession [sex work] as the best available means to provide for her family. She appears to have few external resources, but for years has displayed an apparently consistent level of internal fortitude… [emphasis added].

While there is more engagement with the constraining environment in which Netthip began working in the sex industry, there remains an emphasis on her 'choice' to enter the sex

industry. The lack of choices in the offenders' lives often meant that the sex industry was one of the few options available to them to earn an income and support their family.

Sex Work: Employment for Women Experiencing Constraint

For women who experience disadvantage and poverty from a young age, sex work is one of the few options available to improve their economic standing and to survive under the constraint of the burden to support their families (Kessler 2002; Miriam 2005). In many countries, women are only able to access limited options to earn a living. As someone with knowledge of the sex industry in Australia, Participant Two suggested during an interview, the social construct in which we live commands an income is necessary for survival. Consequently, '*many [women] choose to do sex work simply to make ends meet*' as some societies provide greater economic opportunities for women than others. As discussed in chapter 3, Larissa Sandy's (2014) work demonstrates Cambodian sex worker narratives show sex work is often considered the best option available for women who are faced with a narrow range of options.

Judge Three considered poverty a large motivating force for the victims choosing to undertake sex work in the cases analysed. Judge Three further stated that this also contributed to their decision to come to Australia under contract, as was '*the impact of poverty on people. They willingly came to earn money*'. In other words, these women made the choice to come to Australia, as sex workers, to earn money due to the limited opportunities available to them in their home country.

Similarly, Judge Three could also see also the impact of poverty on the offenders and their decision to exploit others, rather than to be the ones exploited. The following interview extract demonstrates a greater understanding of the offenders' positions compared with that which emerged from the sentencing remarks:

> *[People] become the trafficker just out of economic necessity […] A person comes over here as a slave, she then works very hard and builds up money and I suppose she opens a brothel herself and says well I'll do the same thing. I'm sure that's how it has happened. She's realised that she's been able to make*

her way, not the normal recommended way but […] when you've come from a place of poverty that's what happens isn't it [emphasis added].

This judge, therefore, thought poverty and underprivilege largely motivated both the victims and offenders, who were often from the same geographical area and experienced similar constraints, in a similar way. Consequently, the interviews with the judges, including Judge Three, elucidate a strong understanding of the victim-offender cycle in these cases. This understanding, however, does not translate through the narratives within the sentencing remarks.

In the cases identified, the victims and the offenders were primarily from South-East Asian countries, specifically Thailand and Malaysia. The narratives constructed by the judges suggest that many of the offenders went into sex work to earn an income and provide for their families. The need to provide for their families was resultant of the financial burden placed on these women and, as discussed earlier in this chapter, was one of the primary constraining structures in the offenders' lives. The offenders' prior experience in the sex industry was acknowledged in all but two cases: those of Wei Tang and Chee Mei Wong.

In Wei Tang's case, the possibility that she had experience working in the sex industry prior to her involvement in the trafficking organisation where the offending occurred was not considered during sentencing. It was only during an interview, that Judge Three revealed that Tang had prior experience in the sex industry and could also potentially be a trafficked victim also. However, from their knowledge of the case, these scenarios were not put forward at any stage during the trial or sentencing. This could be a consequence of the offenders' poor legal representation or due to the emphasis placed on understanding and responding to the harm caused to the victim, borne from the victims' rights movement, and resulting in a shift away from the offender and the harm they have suffered. As will be explored in Chapter 7, both elements caused constraint on the judges, as well as the offenders.

In Chee Mei Wong's case, information related to her prior work in the sex industry was not obtained from the sentencing remarks either. Instead, this was obtained from the pre-sentence and psychological reports tendered during sentencing and, like Wei Tang, from

interviews with selected participants. This speaks to the way in which the narratives about these offenders are constructed by the court; more specifically, how judges can impose an oversimplified narrative through the act of choosing which passages, from the information available to them, to include during sentencing.

The sex industry has been argued to be a form of patriarchal oppression serving to reinforce men's dominance over women (Overall 1992; Pateman 1988). Goździak (2021) suggests those who align with an abolitionist viewpoint consider women's consent to engage in sex work as meaningless. As such, sex work can never be voluntary. Despite this, the sex industry offers employment opportunities to women who are considerably structurally constrained and have limited opportunities otherwise (Satz 1995; Miriam 2005). The sex industry was one option for the offenders, who came primarily from impoverished/disadvantaged backgrounds, and many had limited education or employment opportunities, and limited English-language skills. In addition to these constraints, many women also carried the financial burden to provide for their families. This burden, suggested Judge One during an interview, was a common element in many women's backgrounds: they '*all had families they [needed] to support*' despite often having limited opportunities available to them.

Sex work is one opportunity available to women to improve their life and the lives of their families (Sandy 2014). Many women engage in sex work for economic reasons, linked primarily to survival and support. Meyers (2014) suggests, therefore, that women's equality and freedom are best achieved by destigmatising sex work and improving the conditions of employment for those women who engage in it. This includes those who may have been trafficked and wish to stay in the sex industry. However, the fact that these women chose to enter the sex industry to improve their economic position resulted in judges applying moral judgment to these cases, which structured their narratives in a way that disregarded the elements in their lives which impacted the women's choices.

Despite the opportunity that sex work offers to earn an income for women experiencing significant constraint, the element of sex work results in a moral stance taken by the judges. Judge six suggested that few fathers want their daughter to grow up and become a sex worker:

> *Sex work is generally frowned upon. I mean, few fathers want their daughters to be sex workers as they might want them to be doctors, or you know farmers or whatever. And so, there's still that difficulty within the community about this kind of work no matter how much the Scarlet Alliance talks about, you know, it being a choice and okay for work.*

Sex work, as a form of labour, is not considered as such and is therefore deemed to be immoral employment for women. Judge Six added that:

> *Until we make [sex work] respectable […] it's always going to be a little bit on the, on the negative end of the spectrum of, of life and society and that brings with it risks and vulnerabilities.*

These viewpoints express the negative side of sex work and do not consider the possibility of empowerment through it (Kessler 2002), within a social order structured by patriarchy (Miriam 2005). While it cannot be said that all judges hold this view, it speaks to the possibility of judges' personal views seeping into the narrative constructed within the sentencing remarks, as suggested by Participant Two and Judge Six. Sex work offers opportunities to women within a constrained social context that otherwise offers few options, which demonstrates how women exercise agency over their own lives while being structurally constrained (Sandy 2014). However, simplistic representations of HTCSE and sex work that portray all migrant sex workers as powerless victims, such as those discussed in chapter 2, 'conceal the agency of migrants working in the sex industry' (Andrijasevic & Mai 2016, p. 2). The level of formal and informal support these women receive (or do not receive) throughout their lives influences the choices available to them. Therefore, an account of agency that acknowledges the compatibility of agency and victimisation (Meyers 2014), or agency and structure (Giddens 1979; 1984) is necessary to view agency as empowerment and resilience.

How Lack of Formal and Informal Support Systems Influence Agentic Choices

In addition to prior victimisation and constraining structures, explored at the beginning of this chapter, lack of formal and informal support, as highlighted in Chapter 2, is a further factor that facilitates women exercising agency in a way that results in other women being exploited. Formal support relates to support from institutions including schools, when they were young,

and psychological and migration support after they arrived in Australia. Informal support, on the other hand, relates to women's personal networks, which include friends and family. The lack of support these women received manifested in various ways and influenced the number and types of opportunities available to them. Lack of support was evident during their childhood, whereby they suffered extreme hardship in many cases. In cases where the offender was a trafficked victim, the lack of support was evident after they arrived in Australia.

When the offenders were young, many experienced significant hardships, consisting of poverty and disadvantage. This resulted in these women receiving limited education and having few English-language skills. Additionally, many offenders were subjected to the burden to provide financially for their families. Thus, they had inadequate opportunities available to them to improve their economic position.

Support in Australia was essential but absent often in various forms: from psychological support and support from friends and family, to help with visas and migration. For example, during Rungnapha Kanbut's sentencing, Kanbut's daughter told the court that her mother 'found it difficult living in Australia compared to Thailand principally because of the lack of family support' (R v Kanbut [2019] NSWDC 931 [108]). During an interview, Participant Four stated: '*I absolutely think it is the lack of support, including psycho/social, financial as well as migration/visa support which facilitates women to then become a trafficker*'. However, Participant Four further added:

> *If they were provided with the proper psycho/social support […] they would be able to work through the trauma they have experienced […] Additionally, with the financial support, and the visa/migration situation not being problematic, they wouldn't have to rely on informal areas to generate income.*

As a result of the lack of support for these women, particularly in cases where those who were trafficked victims had repaid their debt, Participant Four suggested that:

> *Women are forced to make money to survive, or sometimes, they are forced to stay with violent partners who are continuing to exploit them, even using them to engage other women to be able to exploit them, for financial reasons.*

In this extract, the impact of socio-economic structural constraints is evident, as are the elements of gender-based violence and struggle, coercion, and coercive control.

As explored in Chapter 5.2, both Watcharaporn Nantahkhum and Lay Foon Khoo's traffickers were investigated, which highlighted clearly the cyclical nature inherent in cases of HTCSE. Regarding Nantahkhum's traffickers, there was no finding of guilt in relation to the offences committed against her. Concerning Khoo, her traffickers were investigated; however, no charges were ever laid against them in relation to her victimisation.

Despite pleading guilty, DS was initially charged together with those individuals who had managed her as a contracted sex worker under a debt bondage contract, prior to her involvement in the organisation. Additionally, when considering other Australian cases examined within this thesis, it is feasible that, unlike Nantahkhum and Khoo, Sarisa Leech offended and was charged also with those who had managed her and her contract whilst she was a contracted sex worker. This is not able to be confirmed. However, in both situations, from the publicly available information for each offender, neither DS or Leech's traffickers were ever investigated, charged or held accountable for the victimisation that DS and Leech personally suffered.[40] Therefore, none of these offenders received any help or formal support they required to recover from their own victimisation. As someone with knowledge of HTCSE cases in Australia, Participant Three suggested that when:

> *… women haven't been able to get justice that in turn limits their options. If you've experienced trafficking, it limits your options so deeply, for many women, the only option is to go to the other side […] It creates a path for [women] that possibly isn't the one they would have chosen for themselves.*

[40] Wei Tang, who was part of the group who managed DS while she worked as a contracted sex work under a condition of debt bondage, was charged. Details of this case are explored in chapter 5.1. However, these charges did not relate to DS's exploitation.

This participant suggested that the space where a trafficked woman becomes the trafficker is interesting due to the questions it raises around the impact of a lack of justice for these women.

The lack of support for the offender, both during and after her period of victimisation, was, provided little space within the judge's narrative throughout the sentencing remarks. As will be explored in Chapter 7, this was due potentially to the shift whereby greater attention is provided to the victim and the harms they suffered at the expense of understanding the harms the offender suffered. As a result, the relevant judges focused primarily on their offending with a limited understanding translating through the sentencing remarks, that the offending occurred due, in part, to their own victimisation, compounded by the limited support they received. If the women identified as offenders within this thesis had received the support needed when they were still victims (in the court's eyes), as Participant Four suggested above, the cycle of victimisation and offending could well have been broken.

Conclusion

The victimisation each offender experienced, coupled with the constraining structures in their lives, as identified within the sentencing remarks, acted as the first level of constraint on these women. Despite the extent of victimisation that the women suffered and the many constraining structures in their lives, there seemed to be minimal appreciation of the effects of this on their offending throughout the sentencing remarks. This was particularly evident in the cases involving offenders who were also trafficked victims. Additionally, the minimisation of the offenders' backgrounds which included victimisation and structural constraints, and the absence of any consideration of the coercion present within each situation, is problematic as it renders a complete understanding of the full trajectory of the victim-offender cycle absent and speaks to how the court constructs oversimplified narratives about these women.

The discussion within this chapter begins to highlight the way in which the court constructs the choices made by these offenders. It becomes apparent that the judges do not consider the choices made by these women a suitable pathway into offending that is deserving of any mitigation. This is the case even when the choices were made while the women were faced

with considerable structural constraints and after they had experienced significant victimisation.

Frequently, the judges applied a level of moral judgment to these cases. Although morality was discussed primarily by the judges throughout the analysed sentencing remarks, as well as during the interviews, moral culpability was discussed primarily throughout the interviews. The application of morality to these cases acted as the second level of constraint placed onto these women. There was a clear decision by the judges that the offenders' actions were worse, in terms of morality, because they had been victims themselves. As will be explored in Chapter 7, the judges therefore adopted the view that these women should have known better. By doing so, the judges imposed an oversimplified narrative onto these offenders.

Chapter 7: Constraint Imposed by the Criminal Justice System: Oversimplified Court-Constructed Narratives within an Adversarial Legal System

Introduction

The previous chapter explored the first and second layers of constraint these women experienced: the individual-level situational constraints and the constraint imposed by judges through the practice of applying moral judgement to their choices. This first part of this chapter will explore the third layer, which relates to those constraints imposed by the criminal justice system (CJS). The adversarial legal system within which the Australian CJS operates creates challenges and places constraint on both women and judges. These constraints, such as the quality of the offender's legal representation, the rise of the victims' rights movement, and the differential treatment of women offenders, structures women's narratives further.

The following section of the chapter will explore the fourth layer of constraint these women faced, which relates to constraint imposed by the judges that is caused by the systemic constraints of the CJS. A consequence of this layer of constraint is the practice of judges constructing oversimplified narratives. These narratives, which are replicated through future cases, are exemplified within the opinion that the offenders 'should have known' better. The appellate judges' response to Sarisa Leech's background of being a trafficked victim is used to highlight this replication. This final layer of constraint is evident also in the practice of judges imposing their own knowledges onto these women, and structuring this as the *right* knowledge base (Smart 1990; Smart 1992). This section will showcase the ways in which judges foisted their own narrative onto these offenders.

The final section of this chapter explores the existence of agency and choice within structure and constraint (Giddens 1979). This discussion serves to conclude the four analysis chapters by speaking to the level of choice these women really had. When their choices are considered in conjunction with the extensive constraint they experienced, including the individual level situational constraint, constraint imposed by the judges at two specific periods and the constraint imposed by the CJS, their level of choice appears marginal, at best.

Systemic Constraints Imposed by the Criminal Justice System

The third layer of constraint these women experienced relates to those constraints imposed by the CJS. This level occurs after the individual-level situational constraints and those constraints imposed by the judges through the application of moral judgement. The quality of the offender's legal representation, the rise of the victims' rights movement, and the differential treatment of women offenders all act as constraints imposed by the CJS. These constraints structure women's narratives in a way that denies parts of their experience. Importantly, the constraints imposed by the CJS result in further constraint applied by the judges, which will be discussed later in this chapter.

Failures of the Adversarial System

Australia adopts an adversarial legal system, within which the primary responsibility is to investigate and advance a case, and define important issues. This responsibility rests with the two parties, rather than the judge (Australian Law Reform Commission 2000). Finkelstein (2011, p. 136) argues that the system which Australia adopts is not well-adapted at uncovering the truth as 'the judge must make do with the evidence presented and hope that the parties know what they are doing'. Within the adversarial system, Strier (1994) suggested that a greater importance is assigned to destroying the opposition's case, in contrast with the inquisitorial system in which truth-seeking is prioritised over proof-making (Freiberg 2011).

Rossner and Tait (2011) argue that the law is not necessarily a formal set of rules but is reflective rather of encounters between different actors who hold certain roles and power. The adversarial system has been criticised therefore, for being antagonistic and confrontational (Strier 1994), as well as 'associated with verbal jousting between lawyers over irrelevant matters […] victims being humiliated and intimated and defendants marginalised' (Rossner & Tait 2011, p. 241). Throughout this thesis, three failures of the Australian adversarial system were identified: the quality of the offender's legal representation, the rise of the victims' rights movement, and the differential treatment of women offenders.

Offenders' Legal Representation

The judges' construction of the offenders' narrative is influenced by the quality of the offenders' legal representation. During an interview, Judge Two explained that:

> *What quite often happens in the sentencing process, you'll get perhaps a psychologist's report or a pre-sentence report from community corrections, which will give you either in great detail, or not so much detail, information about the person's background and life. In a lot of cases, you never hear from the defendant/the perpetrator. So, you're going on second-hand information given to these other people.*

The decision for offenders not to give evidence during sentencing and the subsequent need for the judge to rely on second-hand information are controlled significantly by the quality of the offenders' legal representation and its quality. This influences how their narratives are structured within the juridical field (Bourdieu 1987), as judges can only act on what they have before them.

During separate interviews, Judge One and Participant One both expressed their opinions regarding the quality of Chee Mei Wong's legal representation during both her trial and sentencing. The following extracts highlight the way that narratives about women are created within the court environment. Additionally, it showcases the way in which the legal field is impenetrable for some which, in part, dictates the way women's stories are told. This is particularly the case for individuals from vulnerable populations.

Chee Mei Wong: An example of poor legal representation

During an interview, Participant One maintained that during Chee Mei Wong's trial, '*even if [there was] a conviction, [it would] go on appeal because of the incompetence of her counsel*'. Wong was found guilty by the jury, and to the surprise of Participant One, did not appeal. When asked why, Participant One surmised this was:

> *probably because she […] ask[ed] the man who ran the trial whether she had grounds for appeal. And the only grounds she would have had was incompetence of counsel because it was just terrible the way he ran the trial.*

Similarly, the reason so little was known about Wong's background during sentencing was, again, due primarily to her legal representation. During a separate interview, Judge One suggested that:

> *her counsel was not good counsel. He didn't call her to give evidence personally of her remorse. [He] put pretty limited information [about her] before the court during sentencing […] There's a range of how good or how bad counsel can be on sentence and he was not good.*

Therefore, the quality of Wong's legal representation influenced both the trial, as well as the information available to the judge during sentencing and, subsequently, the construction of her narrative.

Finally, it was evident that the relationship between Wong and Leung, the man who owned the brothel where Wong managed her victims, was never explored. Participant One believed there was a chance that Wong was being exploited by Leung. According to Participant One during an interview, their relationship was never made clear: '*how they met, how he involved her in the running of the brothel. None of it was ever made clear*'. Despite the importance of understanding the dynamics of this relationship when considering elements of coercion and coercive control in human trafficking for commercial sexual exploitation (HTCSE) cases, this is one consequence of Wong's counsel providing such limited information about her.

These extracts illustrate the perceived incompetence of Wong's counsel, who was a former police prosecutor, and speak loudly to the lack of information available about her background. Additionally, they refer to the ways in which narratives about women are created within the court environment. The legal field is impenetrable to those outside of this realm, which dictates largely the way women's stories are told (Smart 1990). Alternatively, the limited recognition of the offenders' background in many of the cases identified relates to the victims' rights movement, which caused a swing to occur in which the attention moved from the offender to the victim.

Victims' Rights Movement

Due to the impact of crime on victims often being neglected by the Australian CJS, the victims' rights movement emerged (Erez 1991). This movement resulted in the diminished recognition of the offenders' rights. As discussed in Chapter 3, the use of victim impact statements (VIS) within the court signalled a shift in realising the importance of narratives within the legal context (Burn 2017). However, this narrative is one that emphasises the narrative of those identified as victims, over that of those identified as offenders. During an interview, Judge Six suggested that during sentencing, before the introduction of VIS:

> *you only had the offender, and you heard a lot about the offender and often their sad circumstances because most offenders, you know, were in situations [involving] the same circumstances [as the victims] and the majority of criminal defendants [were] people [that] have had difficulties in their early life*

An outcome of the victims' rights movement, however, Judge Six suggested further:

> *has been a kind of a swing back, which has resonated, particularly with the more conservatives in our community, of balancing the victims […] victims are the ones who are never heard, or were never heard in the criminal justice system, and they've started to find their voice.*

As a result of the victims' rights movement, the focus landed on victims and the ways the crime impacted them and their families. Consequently, there now exists a greater importance on the need for courts to balance the needs of victims and meet the recognition of harms done to them by offenders, suggested Judge Six. Therefore:

> *the reality is that adequately recognising the difficult circumstances, and the oppression suffered, and the victimhood of offenders, can only result in penalties that may not be seen to adequately recognise the circumstances of the victim.*

Sufficiently recognising the prior experiences of offenders, the structural constraints with which they are faced, their own experiences of victimisation, and the ways in which these

factors influenced the offending, have been constrained by the victims' rights movement. Judge Six supports this movement but also identifies the challenges it poses for balancing the rights of the offender.

Throughout the sentencing process, Judge Six suggested that the pressures placed on the courts impact the time that judges are able to spend on each case. Due to the victims' rights movement and the focus realigned being with victims, most of the court's time is spent on understanding the harm done to the victims. Accordingly, the circumstances of the offender can appear to be minimised, or even ignored. Judge Six surmised during an interview:

> *as courts get busier and pressures for speed and efficiency grow, sometimes the expression of those difficulties [faced by the offender], as part of a context in the sentencing remarks, become perhaps less, if not sometimes even ignored […] [despite being] one of the important factors to give adequate recognition to.*

In order to improve this, Judge Six suggested that there needs to be different alternatives available:

> *[judges] have plenty of discretion at the moment, although the tendency now for mandatory minimum sentences constrains that and that's unfortunate. But I think it's not so much discretion as options. I think the options are we need to start thinking creatively about alternatives and that's really what the drug and alcohol courts, for instance, does and the Koori court does. They provide more options for the sentencing judge.*

In the context of sentencing, judicial discretion enables sentences to be individualised and proportionate to the crime and is an essential part of the Australian CJS (Dobinson 2005). Judicial discretion is exercised when judges are granted a power to choose between different courses of action. When these decisions are made, judges exhibit autonomy, whereby they are free from strict legal rules and can exercise their judgement considering the specific circumstances of the case (Lacey 2004). However, choices available to judges are bound by guidelines, which act as a form of constraint on judges, and the discretion available to them can be limited. While judges may have discretion, what they lack are alternative options in

complex cases, such as those identified within this thesis. Finally, it is the perception of women who transgress gender roles during their offending within a patriarchal society which influences the court's treatment of women offenders.

Differential Treatment of Women Offenders

Women who act in offending roles are considered doubly deviant and, thus, are frequently treated more severely when they enter the CJS (Chesney-Lind 1987; Herzog & Oreg 2008). Offending women are viewed as more (morally) culpable and blameworthy for their actions than men who perpetrate the same offence (Tillyer, Hartley & Ward 2015). This thesis demonstrates judges recognise these women have agency as they maintain these women have made a choice to exploit other women. However, these women are being punished for making the wrong choices. Choice equals power and women are not meant to exercise power in a way that steps outside the confines of gender norms. This presents a paradox for how women's choices are considered.

Under the evil woman hypothesis, women who do not adhere to socially constructed gender roles will not be entitled to chivalrous treatment by the CJS, such as that considered under the chivalry hypothesis (Koons-Witt 2002; Griffin & Wooldredge 2006). The chivalry hypothesis stipulates that women who adhere to constructed gender roles within their society, or at least, the perception of those roles within a patriarchal context, tend to receive a more lenient sentence. Alternatively, the selective chivalry hypothesis suggests that not all women are considered worthy of a more lenient sentence; employment acts as one factor that influences whether a woman is perceived as deserving of one (Freiburger 2011). In the cases explored in this thesis, the element of sex work not only ran the risk of enhancing the level of moral judgement applied by judges, but it additionally jeopardised their level of deservedness of leniency. This is because sex work is rarely viewed as a legitimate career choice, within a patriarchal society, as expressed by Participant Two in Chapter 6.

Women who commit crimes viewed as masculine or traditionally attributed to men, tend to be viewed as evil (Rodriguez, Curry & Lee 2006). Supporting the evil woman hypothesis, Judge Six suggested during an interview:

> *if you're a woman and you're doing bad things [that is] kind of worse than a man [doing the same thing] because women don't do bad things […] aggressive women are regarded more negatively than similarly aggressive men and […] I think there is a little bit of that [in] the criminal justice system.*

Narratives about HTCSE often adhere to the female victim/male offender paradigm, continuing the idea that women are the victims and men are the perpetrators. Due to this conception, women who are charged as traffickers are charged with a masculine crime and are viewed either more, or at least as, negatively, as men who commit the same crime. This is evidenced by the sentences each woman received, as outlined throughout Chapters 5.1 and 5.2.

These three failures of the Australian CJS exist because the adversarial system promotes an environment in which each party's argument is assigned greater importance than uncovering the truth within the juridical field. The degree to which the offenders' voices are heard and shaped during sentencing depends heavily on the quality of their legal representation and the information provided to the sentencing judges. Victims have had to fight to be heard, which has resulted in offenders' voices becoming further marginalised, as the victims' suffering and experience are prioritised over that of the offenders. Finally, the CJS's differential treatment of women offenders, due to the patriarchal construction of gender roles, further shapes their experience and the way their experiences are constructed by judges during sentencing. These three constraints imposed by the CJS create an additional, and final, layer of constraint.

Constraint Imposed by Judges due to Systemic Constraints of the Criminal Justice System

The following section explores the fourth layer of constraint these women faced: constraints imposed by judges which are caused by the systemic constraints of the CJS. One consequence of this layer of constraint is the process of judges constructing oversimplified narratives. These oversimplified narratives are illustrated within the opinion these offenders 'should have known' better, and are observed to be replicated throughout later cases. The appellate judges' responses to Sarisa Leech's background of being a trafficked victim is used to highlight this replication as they clearly exemplify the process of both sentencing and appellate judges

which, in relation to one offender, replicate an oversimplified narrative, which was created initially by a judge sentencing an earlier case.

Court-Constructed Narratives of Oversimplification

Sentencing remarks consist of the judge's voice and therefore reflect the judge's highly constructed narrative. Oversimplified narratives occur, then, when offenders' experiences have been over reduced, changing the context in which these choices were made from constraint to greed, as evident in R v Watcharaporn Nantahkhum SCC149 of 2010, and discussed in Chapter 6. By doing this, judges impose their own narratives, which are shaped from their own knowledges formed within the juridical field in which they exist, onto these offenders (Bourdieu 1987).

An example of judges' potential to oversimplify complex situations was observed during an interview with Judge Four. During this interview, Judge Four continued to refer to both DS and Leech (sentenced in Victoria in 2005 and 2009, respectively) as 'prostitutes'. This can be observed by the following three extracts, which occurred at various stages throughout the interview:

> *There was DS, who was one of the suppliers of services to Wei Tang and she had been a prostitute before she became part of the machinery to get other prostitutes to work for Wei Tang. Then there's Leech who had been a prostitute before she became part of the machinery.*
>
> *The victimisation point was relied upon by counsel but he fitted the fact that she herself [Leech] had been a prostitute before becoming a prostitute's manager into her personal circumstances.*
>
> *Now, if you take Ms Leech, well she'd been a prostitute alright, and she became an organiser of prostitutes. Those facts are clear.*

Their status as a sex worker was, however, only one part of the overall complex situation.

In 2010, Victoria renamed the *Prostitution Control Act 1994* the *Sex Work Act 1994* to reflect the changes occurring within the sex industry (Parliamentary Library Research Service 2011).

Sex work was becoming viewed as a career, with sex workers given agency and autonomy to make choices about their bodies. Prostitution, in Victoria, was henceforth referred to as sex work within this state; this judge, however, had not updated his language to reflect the changing legislation. Referring to these women as prostitutes flattens their personalities and experiences into a mono-dimensional category. Little interest was shown in court and throughout the interview that there were other dimensions worth acknowledging.

'She should have known': Replication of Oversimplified Court-Constructed Narratives

Due to judges applying moral judgement to these cases, and the ability for this to influence the offenders' moral culpability, a logical step in the judicial analysis is that these offenders 'should have known' better. Despite all the offenders suffering victimisation, and the literature surrounding the victim-offender cycle, four sentencing judges and three appellate judges were of the opinion that five of the offenders – Watcharaporn Nantahkhum, Wei Tang, DS, Somsri Yotchomchin, and Sarisa Leech – 'should have known' better than to do what they did. They should have known not to conduct a business the way they did. They should have known not to treat other women the way they did. They should have known what it was like to be in a position of exploitation and should, therefore, have known not to subject other women to these experiences.

Watcharaporn Nantahkhum, Wei Tang and DS

The sentencing judge acknowledged that Watcharaporn Nantahkhum was a trafficked victim prior to the commencement of her offending, and conceded the harsh conditions to which she was subjected during her period of contract. As discussed in Chapter 5.2, the judge in this case considered these elements in greater detail than any other sentencing judge. Despite this, these elements were used to condemn her offending further, as can be observed through the following extract from the sentencing remarks:

> I also take into account that Ms Nantahkhum herself experienced difficult working conditions when she was working in the sex industry. This has both positive and negative elements to it so far as sentencing is concerned. **She knew what it was like to be constrained in this way […] She should have**

> **known this was not the way to conduct such a business** [emphasis added] (R v Watcharaporn Nantahkhum SCC149 of 2010 p. 10).

Considering Nantahkhum's experience as a contracted sex worker, however, perhaps this was the only way she knew how to run a business within this industry.

Wei Tang was not known to be a victim of trafficking; however, Judge Three suggested that this could be a possibility based on her background. During sentencing, the judge acknowledged the harsh circumstances present throughout much of her life, but used this to suggest that she also should have known better:

> I accept the harsh background, both socially, politically and economically that Wei Tang endured in China […] from 1968 through to 1998 […] However, […] **given her background and experience of repression, it is surprising that she chose to commit such serious crimes against humanity** [emphasis added] (R v Tang, Wei [2006] VCC 637 [26]).

Both extracts exemplify the process of judges imposing their own, oversimplified narrative onto these offenders and their experiences. In doing so, judges placed their own knowledges onto these women with minimal regard for the knowledges the women possessed.

Finally, and similar to Watcharaporn Nantahkhum, the sentencing judge acknowledged that DS was a trafficked victim. However, DS's sentence was the first instance where a judge maintained that being a prior victim of trafficking was not a mitigating factor, despite the distinct similarities present between what was known about DS's period under contract and the period under which her victims were also subject to contracts. As evidenced in the following extract from DS's sentencing, this judge used DS's victimisation to suggest that 'she should have known' better, while also passing judgement on the moral nature of the crime:

> The appellant well knew that the scheme involved robbing the victims of their basic rights - **she was such a victim herself at one stage, yet she participated in the illegal and highly immoral scheme** [emphasis added] (R v DS [2005] VSCA 99 [18]).

This passage was cited further by the respective judges sentencing Watcharaporn Nantahkhum,[41] and Somsri Yotchomchin,[42] and then, later, by the three appellate judges in Sarisa Leech's appeal.[43] By citing this passage, these judges continued to replicate the narrative constructed within the original case - R v DS [2005] VSCA 99 - instead of viewing the situation through a different lens.

These viewpoints demonstrate a minimal understanding of these offenders' backgrounds throughout the narratives within the sentencing remarks and portray an overly simplistic, yet highly sophisticated way of viewing the entire situation. These perspectives come from the judges imposing their own knowledges onto women who possessed different knowledges (Smart 1990), without taking this into consideration. Sarisa Leech's appeal will be explored as an example to illustrate the ability of earlier held judgments to influence future cases, which highlights the process of judges replicating the same oversimplified narrative.

Replication of Oversimplified Narratives: Sarisa Leech

Sarisa Leech appealed her initial sentence. One of the grounds relied upon during this appeal was the fact she had once been a contracted sex worker (Ho v The Queen; Leech v The Queen [2011] VSCA 344). The case and the responses by the appellate judges illustrate the replication of the narrative constructed in R v DS [2005] VSCA 99, and further, how this impacted Leech's outcome on appeal.

On appeal, Leech's counsel argued that the sentence imposed was excessive due, in part, to her personal circumstance of once being a contracted sex worker herself (Ho v The Queen; Leech v The Queen [2011] VSCA 344 [128]). The appellate judges argued that the fact that Leech had previously been a contracted sex worker had, in fact, had an adverse effect, from her perspective. In response to this ground, the appellate judges and the Crown prosecutor cited the sentencing judge in R v DS [2005] VSCA 99 [18], using this narrative to suggest that

[41] R v Watcharaporn Nantahkhum SCC139 of 2010.
[42] Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [127].
[43] Kam Tin Ho v The Queen and Ho Kam Ho v The Queen; Kam Tin Ho v The Queen and Sarisa Leech v The Queen [2011] VSCA 344.

Leech 'should have known' better due to her own victimisation (Ho v The Queen; Leech v The Queen [2011] VSCA 344 [128]).

During an interview, Judge Four suggested that the reason for this was a because a judge in a previous case (R v DS [2005] VSCA 99) had '*poured cold water on the idea that a person [who] had been a victim and became an offender [in human trafficking cases] was a mitigating circumstance*'. The reason for this viewpoint, suggested Judge Four, was because:

> *a person ought to have known better, ought to have known what she was exposing the other women to having been in servitude herself. It didn't stand in her favour that she was now acting to put other people in servitude.*

This, however, is not the narrative used with all crimes, for example, in intimate partner violence (IPV) and childhood sexual abuse. Judge Six suggested that judges know that '*victims of abuse are often perpetrators: both kids in physical and sexual abuse often become perpetrators*'. The term 'normalising trauma' is offered to explain how violence may become an expected element of relationships in adulthood for women who have previously been abused in childhood (Rumgay 2004; 2005). This process has been noted in studies of women who have been involved in both physically and sexually violent relationships and lifestyles (Høigård & Finstad 1992). Such experiences have the power to constrain women within lifestyles in which diminished personal resources impair women's ability to make appropriate problem-solving choices and lead them to a readiness to contemplate illegal solutions to a variety of problems (Rumgay 2004).

From their knowledge of this case, Judge Four suggested that the debate on whether the fact that someone who has been a victim and becomes an offender in HTCSE cases, specifically, should be a mitigating circumstance was dealt with quickly and without much thought during Leech's appeal. In fact, this was handled with just one sentence: '*the fact she had once been a contracted slave had both positive and negative aspects from her perspective*'. At the time of the interview, Judge Four considered this a valid response to this element of Leech's background. Therefore, not only did this example highlight the replication of a particular CCN, but also further illustrated the way in which judges, through imposing their own narrative

onto these offenders, oversimplified the complex context in which the decisions that led to the offending occurred.

When asked to explain the positive and negative aspects they spoke of, Judge Four suggested that the positive aspect was:

> *That is just a part of her life story. She'd had a pretty tough time and as part of a life story if someone's had a hard time of it, you tend to feel some sympathy. It's a sort of natural sympathy for someone that has done it tough. You'd sort of say, oh well, she only went into prostitution in the first place because life was tough in Thailand and she was offered a bit of a carrot to come out here, but it really wasn't a very desirable thing that she landed herself in, so you feel a natural sympathy for her there.*

Alternatively, Judge Four suggested the negative aspect was similar to the view of the sentencing judge in R v DS [2005] VSCA 99; specifically, that:

> *Having been a slave or in a position akin to that of a slave, she would have an awareness of the pretty vile conditions in which she and people like her had been kept. Now in a position of a slave organiser, she was acting as part of a group of people who were doing to others precisely what had been done to her.*

This, argued Judge Four, should have discouraged Leech from behaving in the way she did. In other words, this meant that Leech 'should have known' better and therefore, meant this fact served to aggravate further her offending.

Similarly, Judge Six suggested, throughout Watcharaporn Nantahkhum's case, that there were similar positive and negative aspects. However, '*the negative aspects [were] more significant than the positive aspects in the sentencing process*'. As such, they agreed with the narrative constructed originally by the sentencing judge in R v DS [2005] VSCA 99, and replicated further in Leech's appeal. Both cases occurred before Nantahkhum was sentenced. Therefore, even though there were clear parallels between Leech's victimisation and offending, parallels that were acknowledged by both the sentencing and appellate judges,

this fact was still used to intensify her status as an offender. This case was an example of how earlier cases can influence the outcomes in later cases if judges are not willing to view similar situations through a different lens, or, alternatively, are restricted to continue with already developed narratives due to constraints imposed by the CJS.

Judge Six surmised that there exists an unwillingness to view complex situations, such as these, through a different lens because, '*it's so much easier to be black and white and say well you know this is […] a complete[ly] evil [thing to do]*'. However, what some judges forget, added Judge Six, is that offenders are human beings:

> *it's very easy to, to think of people as bad when in fact they're still human beings, they're still people who are loved and love and do good things to their kids or their neighbours.*

For some offenders, their children were most important to them and they did what they could, using the skills they had, to provide them with a good life. Judge Six stated, '*it's really easy to describe a defendant in terms that make [them] some kind of subhuman, an 'other' […] instead of grappling with [complex issues]*'. In these cases, the complex issues presented are the cyclical nature of the offending and the significant overlap between the offender's experience of victimisation, which is reproduced when they are not recognised as a victim, and their offending.

Reproduction of Harm throughout Court-Constructed Narratives

The concept of harm, in relation to that caused by the offender to the victim/s in these cases, is one of great importance to the judges. This is partly due to the constraint imposed by the victims' rights movement, explored earlier in this chapter. However, little is mentioned about the harm caused to the offender throughout her life and nothing is mentioned regarding what happens when this harm is ignored. By inadequately acknowledging past histories of victimisation, particularly histories closely related to the offending, judges perpetuate further victimisation. Through the judges' refusal or perhaps, inability, to acknowledge and understand each offender's past trauma during sentencing, further harm is consequently caused.

Acting as a mode of reproducing victimisation, Participant Three suggested that during an interview, it further perpetuates the victim-offender cycle: '*The legal situation in terms of them not really being recognised as a victim of a crime is a[n] […] additional lack of choice*'. This, in a way, makes it worse as the process of participating in acts that transitioned these women from victim to offender within the judges' eyes, was done to regain their agency and subsequent ability to make choices, amongst significant constraints.

Throughout the highlighted case involving Leech, it was evident that the judges continued to replicate the narrative constructed in an earlier case, instead of viewing the situation through a different lens. This discussion emphasises the idea that these opinions are replicated in future trials due to the narrative set by earlier judges and the unwillingness or inability to deviate from this narrative. Relying on remarks from previous judges and choosing to ineffectively address the fact that the offender was also a victim herself, these judges applied additional constraint on the offender, further replicating the harm she suffered.

During an interview, Judge Four specifically acknowledged the lack of interest shared by all associated appellate judges to enter into a discussion of whether a history of victimisation should be a mitigating circumstance. Despite the offender's victimisation acknowledged as having a direct link to the offending, the judges hearing this case decided to avoid any real type of acknowledgement or discussion of her background as a trafficked victim involving debt bondage, and the impact of this on her offending. This resulted in the continued replication of the original narrative constructed in R v DS [2005] VSCA 99. The construction of oversimplified narratives comes from judges placing their own knowledges onto these offenders and viewing their choices through a sophisticated lens situated within the juridical field.

Judge's Knowledges versus Women's Knowledges

The juridical field, or habitus (Bourdieu 1987) of the judges is inherently different to the overall habitus shared by the women identified in this thesis. As such, the knowledges shared by each –the judges and the women identified– differ also. The construction of oversimplified

narratives occurs in part due to the practice of judges placing their own knowledges onto the women who act in offending roles, rather than considering the knowledges these women possessed. Judges imposing their own knowledges onto these women resulted in judges passing judgement on the actions of these women (Smart 1990; Smart 1992). This section showcases the ways in which judges impose their own narrative onto these women by imposing their own morality and their own narrative over psychiatric assessment.

Morality Judgments

Judges have been shown to operate through assumptions and impose their own morality within an oversimplified narrative onto the offenders in the cases identified. Throughout this process, by applying moral judgement, as explored in Chapter 6, the judiciary used the offender's victimisation to condemn their offending further. During an interview, Judge Three maintained Watcharaporn Nantahkhum, Wei Tang, DS, and Sarisa Leech should have known better than to do what they did, due to their own victimisation, stating:

> *you reckon a person who has been through it wouldn't then subject others to it. I'm not saying that it's aggravated by the fact that they've been previously [a victim], but it's certainly not a factor that is going to reduce a matter […] you would ask yourself, if you had been in slavery yourself, why would you impose it on any on else?*

This interview extract highlights the process of judges imposing their own narratives onto the women they sentence, constructed through *their* own knowledges. This illustrates the way the habitus in which the judges were situated is inherently different to the habitus in which the women were situated.

Additionally, through the imposition of their own narrative onto these women, judges deny the structural world in which the offender existed. Considering this was the world she (the offender) knew, it is logical that she would have tried to advance her life within this domain, using the tools, knowledge, and experience she possessed. However, to the judges, the decisions these women made to advance their lives, within the realm they were situated,

were not appropriate decisions to make. Applying moral judgement to these cases, as explored in Chapter 6, damned these women further.

During separate interviews, Judges One, Two, Five and Six, and Participant One, were more reflective of the overall situation. Despite partially understanding why a sentencing judge may hold the opinion that these offenders 'should have known' better, none of the interviewees supported the viewpoints of those judges. Participant One suggested that someone who has been a victim is more likely to become an offender:

> *… by virtue of [having been a victim] because […] it's counter intuitive but clearly that's what the statistics show in a number of areas […] [maybe] it's because it's something that they've seen happen and it's happened to them, and it's been normalised in some sort of way.*

Being a victim prior to the offending behaviour/s, surmised Participant One, should be a factor used to explain why they may have committed the offences and should be taken into account to mitigate their sentences.

Judge Five felt the view that someone who has been victimised should know better than to replicate the same, or similar, behaviours onto others was not consistent with what is known about victimisation and how experiences of victimisation can lead to offending behaviour. During an interview, Judge Five suggested:

> *It's not consistent with the well-known criminological phenomena of people learning from what's happened to them. Children who are abused sometimes go on and become abusers because they learn about it from their own experience, and that happens in many areas […] There are some people who, having been the victim of some bad behaviour, or even having observed it in the family, will avoid it like the plague because they know it causes trouble. But more often, the reverse is the case. It's a little unfair to say well you were a victim of […] well, it can hardly be a matter of aggravation I think, in my view.*

Throughout the interview, Judge Five remained surprised at the view that the various sentencing judges had taken regarding the offender's prior victimisation, particularly in cases where she was also a trafficked victim. They suggested further:

> *It's quite unrealistic, it's not the point of view that I would have taken. The factors of aggravation or mitigation in a case, well to say you should have known better disregards the fact that [there's] a powerful educative influence […] in being the victim of misconduct […] people tend to do what they've done in the past; past behaviour is always the best predicator of future behaviour. It's very hard for people to escape the context in which they've lived.*

Supporting the view held by Judge Five, Participant One, based on their experience with HTCSE in Australia, argued that the way each judge had acknowledged the offender's prior history of victimisation was incorrect:

> *[It] is completely wrong. They're more likely to become the offender by virtue of [prior victimisation] […] It's the wrong way for judges to use it. I think they should use it as something that explains why they might have committed the offences and should be taken into account to mitigate their sentences rather than to aggravate them.*

Despite Judge Three stating that their prior victimisation was not used to aggravate their sentence, as discussed above, Participant One disagreed. Furthermore, Participant One believed prior victimisation, particularly those experiences which are closely related to the offending behaviour, should be used to mitigate, rather than aggravate, the sentence they receive.

To a certain degree, Judge One understood why a sentencing judge may hold a viewpoint such as that above. On the surface, it could be quite surprising that someone, having been through a similar process, would want to inflict that on others, themselves knowing themselves how bad it could be:

I kind of understand it. And so, part of the reaction is you'd think mm yeah, why would she do that when that had been her experience? So, in some ways it surprises me that she would do that with that experience and in some ways it doesn't, because that's her experience.

However, the very fact that this was her experience is what makes these acts understandable. Throughout the interview, Judge One took a moment to try and understand why a victim may begin perpetrating similar harms onto others, suggesting that:

… maybe that's all she knew and that was the only way she knew to make a life, make a living. People […] unless they're shown something else, they can only operate within what they know. So, if that's her experience, that might mean, she might think "that's what I'll do".

[…]

What you know, that's what you do. It would depend I think on the individual personality to think – well I didn't enjoy that, so I'm not going to do that to someone else. But that's a kind, probably, of sophisticated way of thinking, whereas someone who goes ok well I did that, and I got through it, I managed […] I didn't enjoy it, but I survived, so I'll go and do that.

Therefore, Judge One was reflective enough to understand that viewing prior victimisation in that way is a particularly simple, yet sophisticated way of viewing a complex situation.

Similarly, based on their own experience with HTCSE in Australia, Participant Three suggested during an interview that these situations were complex, and the women involved often had little options available to them:

It's not a black and white thing but when you experience a lot of violence with no justice and no recognition […] if there's no other pathway out for [these women], if [they're] either going to be stuck in that or something that seems as bad or worse, [they] can't afford to dwell on that.

Participant Three suggested further, '*it is easy to sit in judgement when you're in a position that is highly renumerated, highly respected and where you have many choices in your life*'.

However, Participant Three did not think it was realistic to expect that the person entangled in the situation to dismantle the environment that caused the conditions conducive to these situations.

> *It's systemic, it's not an individual failure […] it's pretty cheap to blame someone for not themselves dismantling a system that caught them.We know that not everyone who is brutalised becomes brutal, but we do know that that can be a dynamic and again I think it's everyone else's responsibility to undo that. [It is unrealistic to] expect the person who suffered from it most to be the one to somehow dismantle it […] It seems pretty limited and harsh.*

Ultimately, Participant Three claimed, it was about making a bad situation better in any way they knew how. In Participant Three's view, there existed an element of agency to the decisions made in these situations, which were inclusive of considerable constraint.

Judge Six also acknowledged the difficulties and complexities involved when people lack the power to change their circumstances and suggested it was important to consider that:

> *You know, we piously as judges and lawyers say ignorance of the law is no excuse […] But the reality is that life is much more complex from that, and people, particularly from different cultures, won't necessarily understand the circumstances in which we operate […] I can understand [these women] not knowing how to, how to challenge those difficult circumstances […] if you don't know […] how to do that, it reinforces your powerlessness, which […] brings a sort of stasis, so that you keep going as you are because there is no way out.*

This judge echoed the suggestion made by Judge One that people can only act within what they know and expecting them to act otherwise is a highly sophisticated way of viewing a complex situation. In stating this, Judge Six began to identify the different knowledges present within these cases. However, this level of understanding did not translate throughout the sentencing remarks for these offenders.

Judge Two, on one hand, also thought the comments were overly based on the judge's own moral compass. Nevertheless, Judge Two suggested that if the offender did not personally

discuss their victimisation experiences with the court, it was possible that the judges would consider their actions in a harsher light: '*if the person didn't say anything [the judge] may think, ok they knew what this person was going through, that does make it a bit worse for them*'. As explored in the beginning of this chapter, offenders who did not discuss their backgrounds or victimisation experiences were often acting on the advice of their legal representation. Thus, the quality of an offender's legal representation can structure women's narrative within the juridical field (Bourdieu 1987), limiting the amount of information available to the judge and consequently, resulting in an additional layer of constraint imposed by the judges. Similar judgement was also placed on psychiatric conditions, evidenced in Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [96-97].

Judgement on Psychiatric Conditions: Somsri Yotchomchin

As part of the judgements made about the offenders' backgrounds and the construction of their choices, in one case the sentencing judge and the Commonwealth Department of Public Prosecution (CDPP) made a judgement regarding the causal link between an offender's psychiatric condition and her offending. During Yotchomchin's sentencing, a psychological report was tendered within which a psychologist expressed the view that Yotchomchin was suffering from a post traumatic condition known as Disorder of Extreme Stress Not Otherwise Specified. The psychologist suggested this condition, which was like post-traumatic stress disorder, was a consequence of her rape and detention when she was 13 years old, and subsequent ostracism from her village due to the resultant pregnancy. Furthermore, they argued that this condition was aggravated further by Yotchomchin needing to leave her son to go and find work at the age of 15 (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [96-97]).

Both the sentencing judge and the CDPP, despite acknowledging Yotchomchin's severe subjective circumstances, did not accept that her psychiatric condition had any causal relationship with the offence for which she had been found guilty. The judge suggested that the report did provide some analysis of the offender's background. However, they were not persuaded that there was any connection between the condition described within the report

and Yotchomchin's offending (Regina v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184 [101-102]).

Attempting to place oneself in the position of the offender in these cases is problematic and unrealistic, particularly regarding the limited attention that her background had been allocated during sentencing. As discussed, Participant Three believed it is easy to pass judgement over these women when the one passing judgment is in a highly respected position and has many funds and options available to them. Echoing Participant Three, Judge One suggested that people can only operate within what they know; people do what they know and expecting them to act outside this is a highly sophisticated way of viewing a complex situation – one that comes from being in a highly respected, educated, and remunerated position. As such, it becomes problematic when judges attempt to place their own knowledges onto these women with the belief that this knowledge is the *right* knowledge, without considering how it differs from the knowledges possessed by the women they are sentencing.

The adversarial legal system within which the Australian CJS operates creates challenges for the judiciary; challenges which act as a layer of constraint on both the judges and the women who enter the court as offenders. The constraint imposed by the CJS ultimately creates an additional layer of constraint for these women, as the systemic constraints imposed on the judges result in a further layer of constraint imposed by the judges on these women. Therefore, the final section of this chapter explores the existence of agency and choice within structure and constraint. When the identified offenders' 'choices' are examined within an understanding of the four layers of constraint they faced, the extent of their agency is reduced with each additional layer of constraint. After their victimisation and the structural constraints in their own lives, at the end of their journey through the CJS, the level of agency they possessed appears marginal, at best.

The Existence of Agency and Choice within Structure and Constraint

Agency can be exercised, and choices can be made, in a variety of ways. However, these choices are often constrained by other factors. Women exercise agency by choosing to enter

into the sex industry to earn a living, yet as circumstances change, the more constrained the choices available to women can become (Miriam 2005; Smart 1999). As discussed in Chapter 6, when women experience multiple structural constraints and their choices become significantly limited, sex work becomes one of the only options available. When their choices become further constrained, women can exercise agency by entering a situation involving debt bondage, due to the potential income to be derived upon completion of the contract. Then, they may exercise their agency to remain in the sex industry once their debt has been repaid. Finally, the 'choice', albeit constrained, to become a madam and exploit others to spare themselves from being exploited, is another example of these women exercising their agency.

When considering the interrelationship between agency and structure, Giddens (1979) discusses the notion of systems of social interaction: social and system integration. These systems refer to the interdependence of groups, whereby action is both enabled and constrained by structure. As explained in Chapter 3, system integration can be comprehended as the interdependence of action. Two of the three different ways this can be observed are applicable to this exploration of choice and agency: homeostasis causal loops, and self-regulation through feedback (Giddens 1979; 1984).

Homeostasis causal loops represent a pattern of circular causal relations. Within a homeostasis causal loop, a change in one event can be seen to initiate a sequence of events. A key element demoting a causal loop is that the events return to the initial event that initiated the loop (Giddens 1979; 1984). Figure 9 illustrates an example of a homeostasis causal loop that can be applied to the offenders explored throughout this thesis: low socio-economic status $\rightarrow$ limited education and English-language skills $\rightarrow$ limited employment opportunities $\rightarrow$ low socio-economic status.

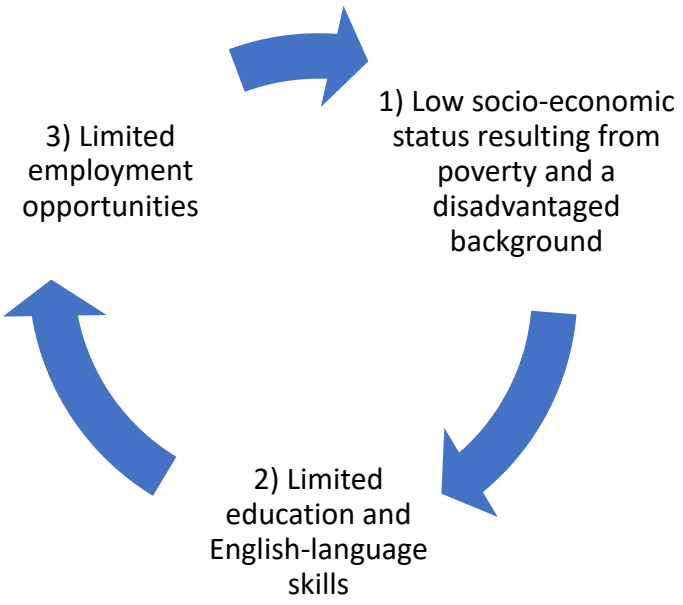

Figure 9: A poverty cycle forming a homeostasis causal loop adapted from Giddens (1979).

Homeostasis is, however, only one level of interdependence and is not the same as self-regulation through feedback. A key feature of self-regulation through feedback –the second way system integration can be understood– is that it enables agency to be exercised through the ability to produce directional and controlled change, which homeostasis causal loops cannot (Giddens 1979). Figure 10 illustrates a continuation from the homeostasis causal loop pictured in Figure 9, with the addition of self-regulation through feedback. In this figure, if it were to be only a homeostasis causal loop, it would look like the following: low-level employment → accept work in the sex industry → come to Australia under contract → complete contract with little-to-no money and re-enter the sex industry in the same status as prior to the contract → low-level employment. With the addition of self-regulation through feedback self-regulation through feedback, which, as noted above, produces the ability for controlled, directional change, the individual in this scenario, instead of completing the homeostasis loop and returning to low-level employment, makes a choice.

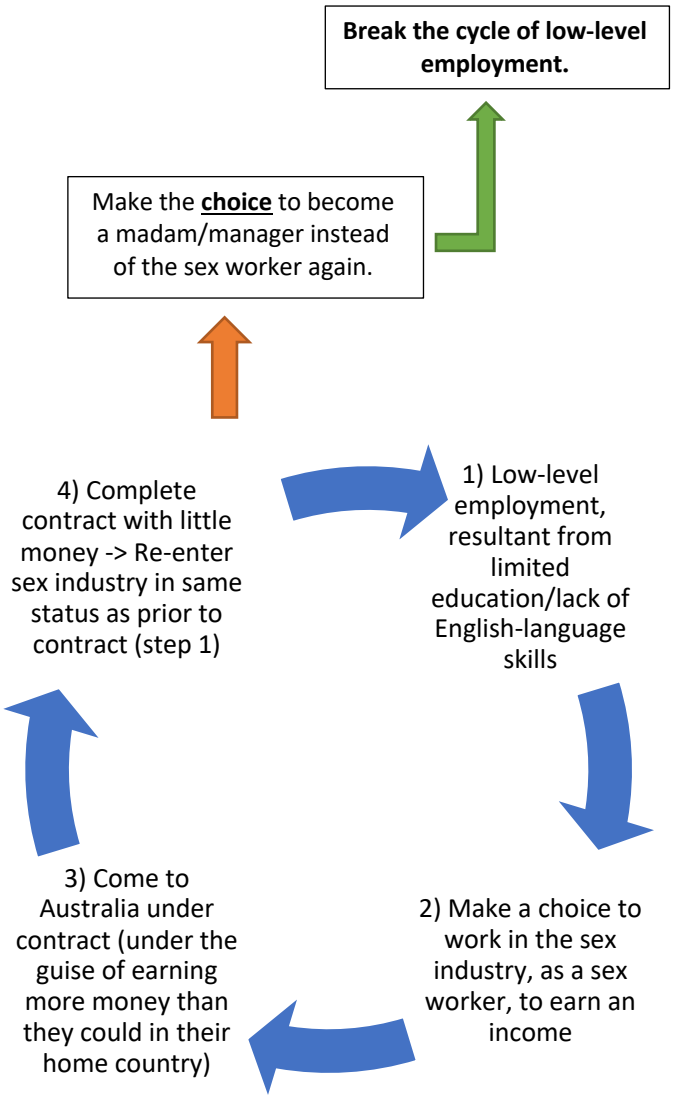

Figure 10: An adjusted continuation from the homeostasis loop (blue) in Figure 9, beginning where the first loop ended (complete contract and re-enter low-level employment), with the addition of self-regulation through feedback (orange) adapted from Giddens (1979). [44]

Here, the choice is made to become a madam/manager instead of re-entering low-level employment as the sex worker. However, this choice is one that is made within significant structural constraints, which is why a conceptualisation acknowledging the interrelationship between agency and structure is so important. While the individual in this scenario is, to a degree, making the 'choice' the become the madam instead of remaining as the sex worker,

[44] Section 2 of the figure is not to imply that sex work is a bad career/vocation choice. However, for many of the women in this research, sex work was one of the few options available to them (in some cases, the only option) to improve their economic situation, due to the significant structural constraints in their lives.

this is done so within a significantly constrained situation. Thus, through information filtering, the person has broken the cycle of low-level employment by using their agency to make a controlled choice about their actions.

These offenders who were also trafficked women have transitioned through many stages – sex worker, sex worker in debt bondage (trafficked victim), back to sex worker (free from the trafficking, supposedly), and finally, to madam. Often coming from impoverished circumstances, with families who they need to support, this final transition to madam placed them in a position to improve their economic position and help relieve the burden they carried to provide for their family. However, this position meant that they too were now exploiting other women in a similar way to how they were once exploited.

The dynamics of coercion are all about power, argue Gerry and Harris (2016). Once a person enters a contractual situation and becomes what is known as a 'victim' of HTCSE, much of their power is removed. Allowing them the consideration that they have made choices throughout the various stages of the process, including the choice to become the madam/manager, returns some of this power (Miriam 2005). Yet the judiciary use their choices to punish them, as highlighted in the previous chapter. Participant Three believed strongly in the idea of agency and choice for all individuals, including for those women who had been victims of HTCSE. During an interview, Participant Three stated:

> *The reality of some women, when they would pay off their debt, they often had pretty limited English, […] [and] were here unlawfully […] So, for many of them, although the very worst bit was the beginning of being prostituted essentially, the constraining of their choices just got worse and worse from there.*
>
> *For them, within that, when they finished their contracts […] they'd come out with some really, really limited choices. But of course, they've still got agency, and they're doing what they can with the choices they have available to them […] often the agency was about […] [trying to] find the less crappy brothel.*
>
> *So, they didn't always have a lot of choice. But there are all sorts of ways that people exercise choice […] I think though, for many of those women, their pathways were very, very limited. It's pretty hard to get out of the sex industry,*

> *even though a lot of them wanted to, after they've been trafficked into a country where there isn't very much support ....*

Ultimately, Participant Three believed, while those women who managed to pay of their debts had very limited and constrained choices, they still had agency and exercised this within the bounds of what they knew and the limitations they faced. In many cases, in Participant Three's experience, agency was exhibited by their ability to choose which brothel they worked in.

Nine of the ten offenders identified exercised their agency further and instead of being sex workers, became the ones managing other women. This is where Giddens' (1979) conceptualisation of systems and the relationship between structure and agency are particularly useful. Exercising agency in this way, however, subsequently rendered them offenders within the eyes of the court. As discussed in Chapter 5.2, the CCN stated Kanbut believed that people 'can have a better life if given the opportunity' (R v Kanbut [2019] NSWDC 931 [119]). It is possible, therefore, these women (the offenders) saw themselves as providing the victims an opportunity for a better life.

Regarding those offenders who were trafficked victims also, Judges One and Six both viewed the offenders' actions as a means to improve their own circumstances using the knowledges and experience that they possessed. However, this viewpoint did not translate through the sentencing remarks. Rather, they were extracted during interviews with both judges. During an interview, Judge One suggested that it was possible these offenders had the mindset of, '*ok well I did that, and I got through it, I managed […] I survived, so I'll go and do that*'. To those women, becoming the madam/manager of other women was a way of improving their life. However, elements of survival did not translate through the narrative within the sentencing remarks. Similarly, Judge Six suggested during an interview, that it was highly likely these women tried to better their own circumstances within what they knew, using the knowledges and experience they had:

> *[they] saw, no doubt, the madam or the owner of the brothel […] as getting money and having a good life and they thought, well I can do this too […] I've got contacts in […] Thailand [or Malaysia] and I can bring these girls out.*

Judge Six could see the concept of empowerment within these cases as one that was worth exploring, and further suggested a reasonable conclusion to draw from these cases was that becoming the offender was done potentially to regain their agency (power) that was limited while they were victimised.

While these acts enabled these women to regain their agency, despite being significantly structurally constrained, their gender meant their actions appeared worse. As explored in Chapter 3, gender is a socially constructed concept (Belknap 2007). Women who offend are viewed as doubly deviant, which results in the third layer of constraint these women experienced. Judge Six admitted that they assumed offenders of HTCSE would be men and someone who had not been a sex worker or suffered as these women had. They were surprised by the gender of the offenders identified, particularly those who were trafficked victims also. Additionally, like Judge One, Judge Six demonstrated a form of surprise that these women had replicated the harms perpetrated against them onto others. This surprise from Judge Six occurred early in the interview, and prior to the above comment whereby they suggested these offenders were bettering their lives. Thus, this surprise is demonstrative of the limited understanding of the victim-offender cycle present in HTCSE cases involving women offenders with significant victimisation histories.

Significantly, not every individual may make the decisions that these offenders have, and not everyone who has been victimised goes on to offend, as discussed in Chapter 2. However, victimisation does increase a person's chance of offending. During an interview, Judge Six suggested that rather than beginning with the victimisation and assuming a victim will become a perpetrator, it is more consistent to look backwards and search for victimisation in an offender's background, as 70% to 90% of offenders have histories involving some type of victimisation.

As a way of improving their own lives, these offenders, suggested Judge One during an interview, made the choice to be a success rather than be the one who was exploited or victimised. Similarly, to Judge Six discussed above, this was a viewpoint supported by Participant Three who, during a separate interview, suggested that many women decided to try and make the best of the situation they found themselves in. Despite the constrained

choices with which they were faced, these women made the decision '*… it's happened to me, I've survived, and I can make some money this way*'. It is important, however, to not view this decision through privileged eyes. Women who experience a great deal of violence or victimisation cannot be viewed through a black or white lens, suggested Participant Three; this is a problem that employing a binary system, labelling a person as either a victim *or* an offender, does not consider.

From their experience and knowledge with HTCSE in Australia, Participant Four believed that every individual has agency, despite their available choices being, at times, considerably constrained. The limited opportunities these women had in their home countries led to the choice to enter the sex industry and is one example of women exercising agency within constraining structures. However, despite their choice to enter the sex industry, albeit an arguably constrained choice, damaging stereotypes do exist. These maintain that, '*Asian women [in particular] are predominantly seen as powerless […] [and] have little or no agency*', suggests Participant Two. From Participant Four's experience, no one is a helpless victim void of any agency or choice, not even trafficked women:

> *Women have agency, some more than others, but [all] have agency. Survivors of human trafficking are some of the most resilient women I have ever met and if you think about it from that perspective,* ***it is this resilience and agency which then provides the space for them to become the trafficker*** *[emphasis added].*

It is trafficked victims exercising their agency while experiencing considerable structural constraint that can result in them becoming the offender.

Like Participant Four, Participant Three also believed that people always have a choice. During an interview, they suggested:

> *People make choices amongst choices. I never liked the idea […] that someone doesn't have a choice. That's very rarely the case. But what often those women had, were increasingly constrained choices […] For all the women I spoke to, what they expected and what they got were very different. Even when they*

> *knew they were coming into the sex industry; they really imagined a lot more choice than they ended up with.*
>
> *So, often what happens is the impact of having their choices constrained, which meant of course rape and near rape experiences being a very strong part of that […] It really limited people's choice and sense of agency. Within that, however, women will find whatever ways they can to manage.*

Ultimately, Participants Three and Four both believed that people always make choices; however, as Smart (1999) argued, as explored in Chapter 3, even though a choice is being made, it is being done so under certain, often constrained, conditions. Many Judges articulated their surprise at the actions of these offenders and the choices they made, especially considering their own experiences of victimisation. This resulted in the view they 'should have known' better. During the interviews with Participants Three and Four, it was evident that they could both understand what many of judges could not: why those women who were trafficked victims would perpetrate similar exploitative conditions onto others.

When an offending woman's ability to make a choice is not acknowledged, their agency has been removed completely. Therefore, unless these women are denied of all agency, the acknowledgement needs to be made that they can and do make decisions, and importantly, that these decisions are made within conditions of significant constraint. However, when their choices are not coupled with an understanding of the constraints in their lives, and of the constraining impact of these structures upon their choices, these choices are framed not in terms of survival or empowerment but, rather, greed.

As explored throughout this chapter and in Chapter 6, four layers of constraint have been applied to the identified women. Each layer of constraint, ranging from individual level situational constraint to systemic constraint, acts to further limit women's choices and deny parts of their narrative. With each additional layer of constraint applied, women's narratives become less of their own voice and more of constructions by the judge. When these women's narratives are considered in conjunction with the four layers of constraint they faced, the level of agency that they really had appears marginal, at best.

Conclusion

This chapter highlights the ways that the adversarial legal system, within which the Australian CJS operates, creates challenges for judges and acts as an additional layer of constraint on women. To those outside of the court environment, the impenetrability of the legal field largely dictates the way women's stories are told. The amount (or lack thereof) of information available to judges about women offenders during sentencing is influenced by the quality of the offenders' legal representation, the rise of the victims' rights movement, and judges' differential treatment of women offenders. Each of these elements influences the ways narratives about women are created within the court environment and subsequently, the way women's stories are told; that is, structuring women's narratives in a way that denies important elements of them.

Throughout this chapter, the practice of judges imposing their own narratives onto these women offenders, shaped from their own knowledges and formed within the legal habitus (Bourdieu 1987) in which they exist, has been highlighted to showcase the way oversimplified narratives are constructed. Throughout this process, the offenders' experiences have been oversimplified, changing the context in which these decisions were made from constraint to greed. Often, these oversimplified narratives were created as result of the systemic constraints imposed by the CJS, which act as the fourth layer of constraint these women offenders faced. These oversimplified narratives were observed to be replicated throughout multiple cases; the discussion of the appellate judges' response to Sarisa Leech's background as a trafficked victim highlighted the replicative process evident within these cases.

Finally, this chapter explored the existence of agency and choice within structure and constraint. When these women's narratives were considered in conjunction with the four layers of constraint placed on them, the level of agency they actually had becomes questionable. Prior to entering the CJS, these women faced significant individual level situational constraints caused by their victimisation and the constraining structures in their lives. However, throughout their journey through the CJS, they experienced three further layers of constraint, which resulted in the construction of a narrative in which their agency became marginal, at best.

Chapter 8: Conclusion and Recommendations

Myth versus Reality: Women Acting in Offending Roles in Human Trafficking for Commercial Sexual Exploitation

Human trafficking for commercial sexual exploitation (HTCSE) is a crime that is primarily constructed as an offence perpetrated by men against young women and girls (Jones 2014). Within existing gendered dominant narratives, there has been a focus on the female victim/male perpetrator paradigm (Wijkman & Kleemans 2019, p. 56). As women are the victims and a victim can never be a perpetrator, this construction renders women traffickers nearly invisible. This has resulted in a limited understanding of women who act in offending roles in cases of HTCSE (Choi-Fitzpatrick 2016; McCarthy 2020; Wijkman & Kleemans 2019). This is problematic when global data from the United Nations Office on Drugs and Crime (UNODC) suggests the percentage of women convicted for acting in offending roles in cases of human trafficking has rarely dropped below 30%.

Data from the UNODC *Global Report on Trafficking in Persons* (GLOTiP) demonstrates that the percentages of women acting in offending roles in trafficking cases globally have remained consistent since 2009 (UNODC 2009; 2012; 2014; 2016; 2018). The UNODC has suggested that the 'prominence of female offending rates related to trafficking in persons is a clear exception in the criminological taxonomy [as] few other crimes record this level of female participation' (UNODC 2012, p. 29). Thus, the number of women being identified as acting in offending roles in cases of human trafficking is notable (UNODC 2016; UNODC 2012) and challenges dominants narratives of HTCSE, which construct women as victims and men as perpetrators.

Global data reveals that a recurring feature in cases of women convicted as the trafficker is the prevalence of those who were previously victims (Kienast, Lakner & Neulet 2014; UNODC 2020). Many women have been trafficked themselves (Hughes & Denisova 2003; UNODC, 2012; UNODC 2020). Kienast, Lakner & Neulet (2014) suggest that victim's' options to exit are often restrained by an absence of prospects outside of the trafficking business. As a result, many women will remain in the sex industry as it may be the only industry they know in which to earn an income. To improve their own working conditions, some women will become the traffickers (Kabance 2014).

In Australia, 16 individuals were convicted of human trafficking-related offences involving commercial sexual exploitation between 2005 and 2019. Ten of these were women. Therefore, 63% of those convicted for HTCSE in Australia were women. Aligning with the global data, all ten of these women experienced victimisation prior to the commencement of their offending behaviour. Importantly, five were themselves also a victim of HTCSE. Thus, global and national human trafficking data has indicated the presence of the victim-offender cycle, which highlights the overlap between victimisation and offending and demonstrates victims and offenders are not always distinct groups (Sampson & Lauristen 1990; Tillyer & Wright 2014). However, the victim-offender cycle has yet to be thoroughly applied to HTCSE.

Despite global trends highlighting the prevalence of women acting in offending roles in human trafficking, limited knowledge exists about these women, their victimisation experiences, and the socio-economic structural constraints in their lives that influenced their choices. Even less is known about the way these elements are constructed by judges within a patriarchal court environment and how this construction shapes women's narratives. More recently, as explored in Chapter 2, a shift has started to occur whereby scholars, most notably Broad (2015), Wijkman and Kleemans (2019), Baxter (2019), and McCarthy (2020) have begun to focus on those women identified as acting in offending roles in human trafficking.

Contextualising the Research within Previous Research: A Gap in Knowledge

Broad (2015) examined women identified as the traffickers in the United Kingdom. She argued a greater understanding of the ways women become involved as perpetrators of human trafficking and the roles they hold is required to determine how the criminal justice system can respond to these women more effectively. Wijkman & Kleemans (2019) studied women in the Netherlands and McCarthy (2020) explored women in Russia who acted in offending roles in cases of human trafficking. In Australia, Baxter (2019) analysed Australian HTCSE cases involving women acting in offending roles. Noting the presence of the victim-offender cycle with Australian cases, this study highlighted that the judiciary's understanding of the cycle within Australian HTCSE cases was limited.

Until recently, there has been little understanding of the link between the high prevalence of women holding offending roles and the documented overlap between victimisation and offending, despite these elements being acknowledged by the UNODC throughout various GLOTiP reports. As a result, little understanding existed of the way judges considered women HTCSE 'offenders' who were previously a victim of trafficking themselves. In 2020, the UNODC compiled a case law report in 2020 analysing 53 cases from 16 jurisdictions, including Australia (UNODC 2020). This analysis provides the most comprehensive global overview of women convicted of trafficking-related offences worldwide who were themselves a victim of HTCSE.

As discussed in Chapter 2, global attention has begun to shift whereby a focus is placed on those women identified as traffickers, as well as those identified as victims. However, aside from the UNODC (2020) report outlined above, there remains little known about judges' understanding of the victim-offender cycle present in such cases and the way that judges sentencing these women construct their offending in relation to their victimisation and the various constraining structures present in their lives. Gaining an understanding of judges' construction of these elements in an Australian context, specifically, was the primary objective of this thesis when considering that 63% of those individuals convicted of HTCSE in Australia were women. Also notable was the recurring element of victimisation in cases of women convicted as traffickers globally (Kienast, Lakner & Neulet 2014; UNODC 2020).

Contribution to Knowledge: Research Findings

Knowing information about how and why people commit trafficking crimes is vitally important to help establish ways to identify traffickers. More importantly, understanding the factors that influence women to start acting in offending roles could help enable women themselves to have more options to choose from. This could provide ways to prevent women from persuing this route before any harm is done (UN.GIFT 2008). Knowing how judges construct women's offending in HTCSE, in relation to their victimisation and the constraining structures in their lives, enables an awareness of the victim-offender cycle within the court. This knowledge renders visible the impact of the dominant gendered narratives of HTCSE on women who are identified as acting in offending roles in HTCSE.

As discussed in the previous section, other researchers in various jurisdictions have studied women identified as acting in offending roles. This research builds upon this earlier research by applying a structure/agency framework to Australian cases of HTCSE, as discussed in detail in Chapter 3. This framework enables an understanding of how women exercise agency despite being considerably constrained by structures. Further, the addition of a critical legal feminist lens to this framework, fosters an understanding of how the Australian courts, and specifically, judges, construct womens' offending (agency) in relation to their victimisation and the structural constraints in their lives. It highlights the victim-offender cycle present often in women identified as traffickers, demonstrating that the factors leading women to become victims of HTCSE, also render them vulnerable to acting in offending roles.

Victimisation and Constraining Structures in Women's Lives

An analysis of court-constructed narratives (CCN), specifically sentencing remarks, highlights that the respective judges acknowledged nine of the ten women suffered victimisation at some stage throughout their life, prior to the commencement of their offending. As summarised in Chapter 6, seven of the offenders identified had similar backgrounds to their victims. Six women suffered domestic and family violence. One offender experienced an attempted forced marriage, and one offender was raped and held hostage for three days when she was 13 years old. Eight of these women were victimised in multiple ways. Thus, demonstrating the multi-dimensional nature of the victimisation these women experienced. Most notably, five of the women were themselves also victims of trafficking. Importantly, however, only four had their experience as trafficked victims acknowledged clearly within the sentencing remarks. From the narratives contained within the sentencing remarks, the effect of this victimisation on their offending was not effectively considered throughout the sentencing process.

In addition to the acknowledged victimisation that the women experienced, the sentencing judges acknowledged at least eight offenders identified experienced one or more socio-economic structural constraint throughout their lives. The judges acknowledged seven of the women experienced impoverished and disadvantaged backgrounds when they were young.

The analysis of the judge's constructions of women's narratives demonstrates many of the women's lives were impacted by poverty. This resulted at least six of the women facing a financial burden to provide for their families. Consequently, at least five women were unable to complete their education and at least two had limited English-language skills. Often, the women experienced multiple structural constraints. Accordingly, these constraints can be overlapping and problematic to discuss in isolation of one another. This highlights the multi-dimensional nature of the structural constraints identified.

Considering that women's narratives within the court environment are heavily structured by various factors, as explored in Chapter 3, it is important to re-enforce that both their victimisation and the structural constraints they experienced is only that which was *acknowledged* by the judges. This is not to suggest these were the only forms of victimisation or structural constraints that these women experienced throughout their lives.

These structural constraints, in conjunction with the various forms of victimisation that they suffered, acted as a level of constraint in their lives. As these women progressed through the criminal justice system (CJS), specifically, the court, they experienced further layers of constraint. These layers of constraint, impacted the choices available to them, rendering them, in some cases, limited. With the addition of each layer of constraint, as discussed in the following section, the level of choice these women had, reduced.

Layers of Constraint: Individual, Judicial, and Systemic

Four primary layers of constraint were identified from the analysis contained within this thesis. As these women progressed through the CJS, specifically the trial and then their sentencing, the constraint these women experienced increased. The constraint in their lives prior to their offending acted as the first layer of constraint; however, after they entered the court system, they experienced three further layers of constraint.

The first layer of constraint that these offenders experienced was in the form of individual level situational constraints. This layer consists of the situational constraints placed onto these women by the victimisation they experienced, and the constraining structures present

in their lives from a very young age. This initial layer of constraint was present before these women entered the CJS and impacted the level of choices available to them prior to the commencement of their offending.

The second layer of constraint these women experienced was imposed by the sentencing judges. This layer is evident throughout the process of judges applying morality to these women. The analysis within this thesis highlights how the judges' applied moral judgements to these women. In doing so, the judges framed the choices made by these women in terms of greed, rather than survival, which enhanced the level of constraint that these women faced. Thus, framing the choices by these women in this way acted as the second layer of constraint, as it disregarded the impact of the first layer of constraint, consisting of the victimisation and constraining structures in the women's lives. A significant consequence of this was the under-acknowledgment of the victim-offender cycle present in these cases.

The third layer of constraint was present through three systemic failures of the CJS. This layer is situated after the situational constraints and those constraints imposed by sentencing judges through the application of moral judgement. The first failure of the CJS relates to the quality of the offenders' legal representation. This was often poor and resulted in women's narratives being severely structured by the court as their voices were rarely included in the process. The second failure relates to the rise of the victims' rights movement was a welcomed achievement for victims, as they were given a space for their voices to be heard throughout the criminal justice processes. However, this was often given at the expense of the space for the offender's experiences to be acknowledged and understood by sentencing judges. Consequently, the rise of the victims' rights movement shifted the attention from the offender/s to the victim/s. This often resulted in the experiences of the offenders being excluded, or minimised, within the judges' sentencing remarks. The third, and final, failure of the CJS relates to the differential treatment of women offenders by the CJS. The way offending women are treated differently to offending men structures women's narratives further, in a way that denies parts of their experience.

The fourth and final layer of constraint these women experienced was imposed by the judges. Importantly, this final layer of constraint was caused due to the constraints caused by the

systemic failures of the CJS. Due to the ability for the failures of the CJS to structure women's narratives and influence the way they are told, the analysis within this thesis highlighted the practice of selected judges applying oversimplified narratives to explain the women's actions. In cases where the woman was also a trafficked victim, these narratives were exemplified in the judgement that these offenders 'should have known' better. These oversimplified narratives were then observed to be replicated in future cases. The appellate judges' response to Sarisa Leech's background of being a trafficked victim is used within this thesis to highlight the replication. This case illustrates the process of judges from different courts replicating an oversimplified narrative. When the level of choice these women had is interrogated in combination with the four identified layers of constraint, the level of choice they *realistically* had appears marginal, at best.

The possibility exists that these offenders did not do what they did for greed, as suggested by some sentencing judges, but to help improve the lives of their victims, as well as their own lives. This was done using the skills and knowledges they possessed, which were formed throughout their own life experiences within their own habitus (Bourdieu 1987). Importantly, however, their skills and knowledges differed significantly to the knowledges held by the judges sentencing these women. This created a disconnect between the reality of the offenders' lives and the judges' views of their offending.

When individuals live within different structures – as judges live outside the structures these women live in and vice versa – each group possesses vastly different skills and knowledges, which can influence the level of choice each has. Judges preside over trials and sentence women. They judge the evidence and the narrative offered to the court by both parties. The different habitus in which judges sit, compared to the habitus in which these women exist, results in sentences that do not comprehend the structures in women's lives and the impact of such structures on women's choices. As demonstrated in this thesis, during sentencing, these women's choices are not considered in relation to their victimisation and the constraining structures in their lives. In fact, women's choices are seen to be punished, as to the judges, these women made the *wrong* choices. Thus, an understanding of the victim-offender cycle present within these cases remains absent.

A greater appreciation of these elements on their choices emerged from the interviews with the selected judges. This was an unexpected finding that emerged from the research. Judges, it appeared from the interviews, showed an understanding of the extent of constraint placed on these women and the ability of these constraints to influence their offending. However, this appreciation did not translate throughout their sentencing remarks. Reasons for this can be linked to the constraints imposed by the systemic failures of the CJS, which some of the selected judges interviewed identified, and the ensuing creation and replication of oversimplified narratives to explain these women's offending. Consequently, this thesis offers two recommendations to develop and enhance the understanding of the victim-offender cycle present in HTCSE cases involving women identified as acting in offending roles, who have themselves also been victimised and experienced the effects of structural constraints on their choices.

Recommendations

Recommendation 1: Deliver specific training on the victim-offender cycle evident in cases of human trafficking. The training should be targeted to judges and other criminal justice actors to improve their understanding of the complexities in the lives of women identified as acting in offending roles.

The analysis of the sentencing remarks pertaining to each woman identified as acting in offending roles within Australian cases of HTCSE, uncovered that judges possessed a limited awareness of the impact prior victimisation has on future offending in trafficking cases. This limited awareness was replicated further in the interview with Judge Four. The United States of America's 2020 Trafficking in Persons report highlighted the importance of providing training to criminal justice actors and recommends that Australia, specifically, increases its training for prosecutors and judges (United States Department of State 2020). Various organisations including the UNODC, the United Nations Interregional Crime and Justice Research Institute (UNICRI), and the International Centre for Migration Policy Development (ICMPD) have all previously provided training on human trafficking to different cohorts of judges. The UNODC has partnered previously with judges from Thailand (UNODC n.d.) and Kyrgyzstan (UNODC 2021). UNICRI (n.d.) offers training and learning activities upon request,

and the ICMPD (2006) supplies anti-trafficking training material for judges and prosecutors. However, none of these training opportunities provides training on the victim-offender cycle and the ways this presents in cases of human trafficking.

This research, therefore, has identified a gap in the content of the training that exists currently. The first recommendation of this thesis is for the United Nations to conduct specific training for judges and other criminal justice actors on the complexities of the lives of women who have been identified as acting in an offending role and what this means for the offending. This includes the possibility that these women may have been a victim of trafficking themselves. This is a scenario which needs to be openly addressed as part of the training, at international level, and in Australia. Importantly, however, as judges act on what is presented to them, the individuals delivering this training also need to understand the complexities in these cases, and why it is important for judges to have this information.

Additionally, within the Australian context, professional development programs are another output to increase judicial knowledge on this issue. These programs update 'judicial officers on developments in the law or topics of particular relevance to the work of the court' (National Judicial College of Australia 2012). Therefore, a similar course developed by the United Nations could be implemented into professional development programs for judges and other criminal justice actors to enhance their understanding of the victim-offender cycle in Australian cases of HTCSE. To further develop this understanding, the term 'victim-offender' can be adopted to refer to an individual who is simultaneously both a victim *and* an offender.

Recommendation 2: Adopt the term victim-offender in cases where an individual is both a victim and an offender, to acknowledge their victimisation without detracting from the victim's own experiences.

This thesis has used to the term 'offender' as this is what the identified women have been labelled by the CJS. In a thesis analysing how judges construct the narratives of women who have been identified as acting in an offending role, it is important to use the term adopted by the actors constructing the narratives. However, the analysis contained within this thesis,

presents the need to rethink the adopted terminology. Moving from offender to victim-offender acknowledges the victimisation experiences suffered by these women and additionally, allows women to be both victims *and* offenders, simultaneously, rather than being forced to be a victim *or* an offender as is current practice within the Australian CJS.

Balancing the rights of the victim and the rights of the offender is not an easy task for judges. As discussed in Chapter 7, Judge Six spoke specifically to this difficulty. Due to the rise of the victims' rights movement, Judge Six suggested, a greater focus is now placed on those identified as the victims and the harms they have suffered, at times, at the expense of the offenders and their harms suffered. As this thesis suggests, however, the offending in at least five of the ten analysed cases is significantly influenced by the victimisation each offender experienced, as well as by the various constraining structures in their lives. These elements become integral to the offending and the reasons why it has occurred. Thus, to understand why women are acting in offending roles, it is vital to acknowledge and understand that they too were victims and they too, like the victims in the identified cases, experienced significant structural constraint. Adopting the term victim-offender in HTCSE cases where the woman offender is a victim also will provide the space for this understanding to develop. Based on the research, this thesis has identified one area which, while out of the scope of the research, requires a greater level of consideration; thus an examination of the link between coercive control and HTCSE is recommended for future research.

Coercive Control and Human Trafficking for Commercial Sexual Exploitation: The Direction of Future Research

Coercive elements surfaced throughout this thesis when discussing cases involving a man and a woman, including cases with a man and woman as co-offenders, as well as those cases where a man was involved but was not formally charged. Cases where the man was charged with the woman as her co-offender, such as R v McIvor and Tanuchit [2010] NSWDC 310, involved coercive elements. Additionally, in those cases where a man was involved in the offending but was not formally charged, such as R v DS [2005] VSCA 99; R v Chee Mei Wong and R v Kanbut [2019] NSWDC 931, the possibility of coercive elements existing could again be present. However, these coercive elements were not considered as such by the sentencing

judges and, therefore, do not come through in the narratives contained within the sentencing remarks analysed within this thesis. Importantly, coercive control is not limited to relationships involving a man and woman. In fact, coercive control can occur between two women, as evidenced by the data showing that many women acting in offending roles originate from the same geographical location, speak the same language, and share the same ethnic background as their victims (Simmons et al. 2013; UNDOC 2016).

The above-mentioned UNODC (2020) case law analysis provides the most comprehensive overview of women convicted of trafficking-related offences worldwide who were themselves victims of HTCSE. This study is particularly important to the study of HTCSE as it discovered that the gender dimension in HTCSE cases was rarely considered by sentencing judges when they were faced with women acting in offending roles. The analysis found that some judicial decisions recognised more subtle forms of coercion that aligned with coercive control, which is a gendered phenomenon (Stark 2007) that captures the 'multi-faceted forms of oppression' women experience, including harms to their autonomy (Stark 2013, p. 18). However, many decisions restricted instances of coercion to the strict interpretation stated within the UN definition, as discussed in Chapter 2. The resulting report noted in the majority of the 53 cases examined that involved a man and a woman co-offender, the judges who sentenced these women did not consider 'the possibility of coercive control as the means employed to obtain participation', nor did they examine the nature of the domestic/intimate partner relationship (UNODC 2020, p. 81).

The UNODC consequently recommended that elements of coercive control need to be considered when responding to HTCSE cases where the offender is a woman and a trafficked victim also – particularly in those cases involving co-offenders who were intimately involved. While beyond the scope of this thesis, the concept of coercive control is thus vital to the study of women traffickers. As coercion impacts on women's choices, an examination of coercive control can assist with the understanding of more subtle forms of coercion that exist and influence women victims to act in offending roles in HTCSE. Understanding the gender dimensions of HTCSE, including the presence of coercive control, requires further in-depth consideration in future research examining women acting in offending roles in cases of HTCSE.

Concluding Remarks

As discussed throughout this thesis, the UNODC has consistently reported on the high prevalence of women acting in offending roles in human trafficking. The analysis of ten Australian cases of HTCSE in which women were identified as acting in offending roles uncovered that all ten women had experienced victimisation prior to the commencement of their offending behaviour. Most notably, five were themselves trafficked victims. Thus, the findings from this thesis support the existing literature which highlights that prior victimisation is a recurring characteristic of women who act in offending roles in cases of HTCSE (Kienast, Lakner & Neulet 2014; UNODC 2020).

However, an analysis of the sentencing remarks pertaining to these ten women indicates that the judges sentencing them do not understand the full trajectory of the victim-offender cycle within cases of HTCSE. Judges are powerful actors who hold the ability to structure women's experiences. Their remarks also potentially have a significant impact outside of the courtroom (Potts & Weare 2018). This thesis demonstrates that judges do acknowledge the history of these women. Yet, it also shows that judges reconstruct their narratives through the male gaze of a fundamentally patriarchal legal system, which results in a limited recognition of the relationship between agency and structure within women's offending. Judicial understanding of the victim-offender cycle is, thus, necessary for the CJS to respond effectively to women acting in offending roles in cases of HTCSE that progress through the courts. If the understanding of the victim-offender cycle continues to remain deficient however, the response to these victimised offenders will remain ineffective and the risk of women victims of HTCSE acting in offending roles will remain present.

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