



Victims of crime:

The exemplar of forced labour-servitude-slavery

Submission to the Victorian Law Reform Commission (VLRC)

with respect to supplementary terms of reference
regarding the operation and effectiveness of the
Victims of Crime Assistance Act 1996 (VOCAA) and the
Victims of Crime Assistance Tribunal (VOCAT)

Terms

Charter

The Charter of Human Rights and Responsibilities Act 2006 (the Charter). Section 11 of the Charter refers to freedom from forced labour, servitude and slavery.

Slavery

Forced labour, servitude and slavery are defined in Division 270 of the *Criminal Code Act, 1995* (Cth)

VCAT

Victorian Civil and Administrative Tribunal

VOCAA

Victims of Crime Assistance Act 1996 (Vic)

VOCAT

Victims of Crime Assistance Tribunal (Vic)

VLRC

Victorian Law Reform Commission

Summary

Scope of submission (Para 04 ff)

The Submission refers to forced labour-servitude-slavery ('forcing') as contained in the Victorian Charter of Human Rights and Responsibilities, Section 11, and as defined in Division 270 of the *Criminal Code Act, 1995* (Cth). Slavery goes beyond 'everyday' violence, abuse and exploitation.

Slavery is a crime against humanity, where an expression of remorse by the community is called for. Slavery is a crime where the *nature of the violence* itself is exceptional. This means that Victims of Crime Assistance Tribunal (VOCAT) should not require evidence of exceptional *reactions* to justify assistance. Slavery is a special case where acts of violence can be obscure, cumulative and can affect a 'pool' of people. VOCAT should address these aspects.

For these reasons slavery can be a helpful exemplar for Victorian Law Reform Commission's (VLRC) thinking.

Survivors (Para 16 ff)

The *Victims of Crime Assistance Act, 1996* (VOCAA) uses the term 'victim'. The term 'victim' denotes a person as weak and can reinforce a person's vulnerability. Slavery Links encourage the VLRC to adopt the term 'survivor':

- Think about the whole crime and requirements for recovery from the whole;
- Move away from a remedial model of recovery and encourage processes of development.

Moving from 'victim' to 'survivor' (Para 21 ff)

VLRC should give further thought to the process of moving VOCAA's perspective from 'victim' to 'survivor'. In this regard, it is VOCAT that needs to change, along with the therapeutic model of VOCAT thinking. The Submission argues for a change in thinking by VOCAT, its role and what it can do beyond just offering 'therapy'.

Overcoming deficiencies in the Victims of Crime Assistance Act (VOCAA) (Para 26 ff, 33 ff and 42 ff)

The Victims of Crime Assistance Act (VOCAA) is deficient with regard to:

- recognising an act of violence which is obscure;
- recognising 'a series of related criminal acts';
- recognising the cumulative effects of a series of acts; and
- in dealing with the effect of such acts on a 'pool' of people.

The example of slavery demonstrates why those deficiencies need to be dealt with; and the *indicia* of slavery, tested by the High Court of Australia, provide a rigorous framework for making the change.

Need for nuanced thinking re survivors who are perpetrators (Para 46-55) or blameworthy (Para 56-64)

Where slavery is concerned, there are situations where moral ambiguities and shades of grey need to be taken into account. Where VOCAT reflects a form of rigid, narrow and/or black-and-white thinking, that would be inappropriate in some circumstances. VOCAT needs to be more capable of dealing with moral ambiguity.

The capacity of Victorian officials (Para 63-64)

Paras 63-64 list inspectors and others whose are relevant because their roles may bring them into contact with 'forcing'. In addition to considering the role of Victoria Police, VLRC should assess the capacity of the many other official roles that may come across evidence about the impact of slavery crimes.

Section 11 of the Victorian Charter of Human Rights regarding slavery (Para 65-72)

The Charter requires the Victorian Government, public servants, local councils, Victoria Police and other public authorities to act compatibly with human rights, and to consider human rights when developing policies, making laws, delivering services and making decisions. Section 11 of the Charter (which refers to forced labour, servitude and slavery) means that people in Victoria are entitled to slavery-aware services, including services from VOCAT. VLRF should recommend this, and should recommend changes to VOCAA as indicated above.

01 **Preamble**

02 This Submission responds to an invitation by the Victorian Law Reform Commission (VLRC) to contribute to its review of the ways that victims of crime obtain financial assistance through the Victims of Crime Assistance Act 1996 (VOCAA) and the Victims of Crime Assistance Tribunal (VOCAT). Slavery Links requests an interview to discuss this.

03 The Submission refers to the VLRC Discussion Paper to be found on line.¹ Numbers on the left of the page denote the Paragraph of this Submission. Numbers on the right of the page refer to relevant paragraphs of the VLRC Discussion Paper.

04 **Subject of Submission**

05 The Submission refers to forced labour-servitude-slavery as mentioned in the Victorian Charter of Human Rights and Responsibilities, s11. Slavery is defined in Division 270 of the *Criminal Code Act, 1995* (Cth). Slavery goes beyond 'everyday' violence, abuse and exploitation. It is a special case and can be a helpful exemplar for VLRC thinking.

06 **Slavery Links Australia Inc**

07 The Submission is made by Slavery Links Australia Incorporated. Slavery Links is a charity incorporated in Victoria. It addresses the ways that Australia can be exposed to the slavery problem in the Indo-Asia-Pacific and, potentially, part of the solution.

08 **Need for community and professional education**

09 Members of Slavery Links began work in 2005. We have found instances where legal professionals and bureaucrats have not known about slavery in Australia, the laws relating to it and to jurisprudence on the subject. We hope to encourage officers of the Victorian Law Reform Commission (VLRC) and the Victims of Crime Assistance Tribunal (VOCAT) to appreciate the problem more fully.

10 **Recognising slavery in Australia**

11 Cases of slavery have been found in Australia. Tang's Case, *R v Wei Tang* (2008) 237 CLR 1 and *R v Kovacs* [2007] QCA 143 involved people who came to Australia as free persons and were enslaved in this country, in plain sight of other Australians who did not recognise what was happening and who did nothing about this matter.

12 Since 2011 the Commonwealth Attorney-General's Department has encouraged community education² so that lay people, families, communities and potential jurors know how to recognise slavery and understand who to contact (see Para 65 ff).

¹ Victims of Crime Assistance Act - Supplementary Consultation Paper. Go to:

<http://www.lawreform.vic.gov.au/projects/victims-crime-assistance-act-1996/victims-crime-assistance-act-supplementary-consultation>

² Attorney-General's Department (2011) *The Criminal Justice Response to Slavery and People Trafficking; Reparation; and Vulnerable Witness Protections*. Discussion Paper, Attorney-General's Department, Barton, ACT. Go to: <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/DiscussionPaper-TheCriminalJusticeresponsetoslaveryandpeopletraffickingreparationandvulnerablewitnessprotections.pdf>

- 13 Slavery Links has undertaken research, published findings, developed workshops, and delivered seminars and public addresses to assist in educating communities. Summaries of these and other papers can be found in the Slavery Links Library.³
- 14 With regard to Victoria:
- In 2015 Slavery Links prepared and delivered a seminar for the Department of Justice and Regulation (DOJAR).⁴
 - In 2016 Slavery Links published an appreciation of Section 11 of the Victorian Charter of Human Rights regarding forced labour-servitude-slavery.⁵
- 15 Details of these activities and findings can be provided to VLRC if requested.
- 16 **Survivors and not victims**
- 17 Slavery Links takes issue with the term 'victim'. It denotes a person as weak and can reinforce one's vulnerability. We encourage the VLRC to adopt the term 'survivor'.
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- A person who has been victimised is not destined to become a 'victim' in the sense of *'one who is reduced or destined to suffer under some oppressive or destructive agency'*.⁶
 - On the contrary such people may be damaged but may also show a capacity for survival. Indeed survival and recovery is a stated aim of the VOCAT system. 29
 - Recovery needs to be an 'everyday' aim of VOCAT and not exceptional.
- 19 With respect to recovery and making good: *'Special financial assistance is a lump sum awarded as a symbolic expression by the state of the community's sympathy and recognition of harms suffered.'* This is exactly the sort of understanding and recompense which is appropriate with respect to the special case of slavery. In Tang's case, the High Court of Australia characterised slavery as a crime against humanity. 30
- 20 Slavery Links commends this way of thinking about the whole crime, firstly because it offers a solution to a dilemma considered in the VLRC Discussion paper: namely the re-traumatising effect of requiring documents that attest to trauma. *'Such assessments are a non-therapeutic assessment tool and may cause further distress to a victim'*. 22

³ Go to: www.library.slaverylinks.org

⁴ Slavery Links (2015) How government engages with slavery in Victoria, Seminar for staff of the Department of Justice and Regulation (DOJAR), 121 Exhibition Street, Melbourne, 9 September 2015. (© Slavery Links Australia Inc., Melbourne)

⁵ Slavery Links (2016) When precarious work becomes 'forcing': Implementing Section 11 of the Victorian Charter of Human Rights regarding forced labour-servitude-slavery. Briefing Papers on Slavery: Briefing Paper No 2 (© Slavery Links Australia Inc, Melbourne)

⁶ Little, William, Fowler, H.W. and Coulson, J. (1969) The Shorter Oxford Dictionary on Historical Principles, (London: Oxford at the Clarendon Press), Third Edition, page 2355

21 **Moving from 'victim' to 'survivor'**

22 The VLRC Discussion Paper noted:

'... the Commission will consider whether the scheme should define 'reasonable' for the purposes of certain expenses, such as counselling, and consider whether the focus should be on assistance rather than recovery.' [underline added]

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The phrase 'assistance rather than recovery' raises deep questions which would require a separate submission. Slavery Links encourages VLRC to consider this further.

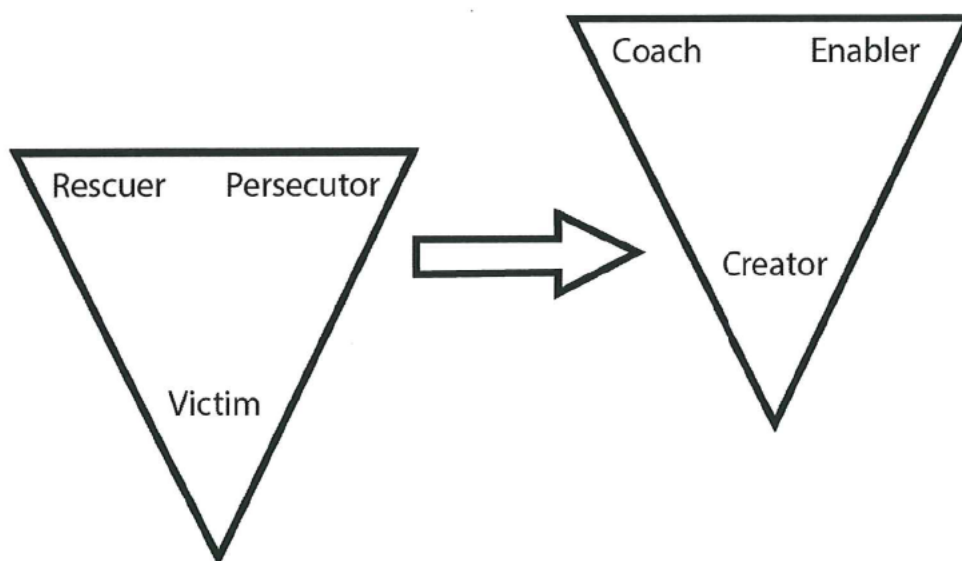
As to assistance and a process of 'non-therapeutic assessment': Slavery Links firstly draws attention to the Karpman Drama Triangle (see below) as a framework for encouraging:

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- the movement of a person from the role of 'victim' to the role of a 'survivor' who seeks to create a new way of living (with access to adequate support);
- the movement of VOCAT from the remedial role of 'rescuer' to the enhancing role of 'coach'; and
- the movement of a therapist from the model of an expert evaluating/judging to a supportive enabler/challenger who facilitates ways of moving towards supported recovery.



23 Secondly, thinking about the whole of the crime would address another aspect of VLRC's remit, namely what to do about the specificity of definitions. In considering eligibility, the Commission's Discussion Paper considered whether definitions of acts of violence and or survivor categories should be expanded or whether to refine the definitions or to clarify (hone or sharpen) the meaning of the survivor's

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24 In the Submission of Slavery Links, and in the special case of a survivor of slavery, the benefit lies in tightening and not expanding the way the experience is defined, so that it is in accord with the law which defines the offence that led to the trauma or injury.

25 To illustrate and explain this point, we turn to the *indicia* of slavery (see below).

- 26 **The *indicia* of slavery: A rigorous and holistic way of thinking about related criminal acts**
- 27 Assistance under VOCAA requires that an act of violence has taken place. The *indicia* of slavery would assist VLRC in considering the nature of injury, the role of a perpetrator and what it can take to become a survivor of one or ‘a series of related criminal acts’ that occurred in Victoria that ‘directly resulted in injury or death to one or more persons’. 12
- 28 In Tang’s Case, the High Court considered slavery in context of the extreme forms of over-control that are used to keep a slave in place. The Court enunciated a list of tests or *indicia* which had been formulated by the International war crimes tribunal for the former Yugoslavia.⁷ The *indicia* of slavery were enunciated by Gleeson CJ in the leading judgment in R v Wei Tang (2008) 237 CLR 1, Para 28:
- 29 ‘In the case of Prosecutor v Kunarac, before the International Criminal Tribunal for the Former Yugoslavia, where the charges were of “enslavement”, both the Trial Chamber and the Appeals Chamber adopted a view of the offence that was not limited to chattel slavery. The Trial Chamber, after an extensive review of relevant authorities and materials, concluded that enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person; the actus reus of the violation being the exercise of any or all of such powers and the mens rea consisting in the intentional exercise of such powers. The Trial Chamber identified, as factors to be taken into account, control of movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.’ (Citations removed. Underlining of *indicia* added)
- 30 The principal publication and reference work produced by Slavery Links, entitled ‘Australians and Modern Slavery’,⁸ begins with a recitation of the *indicia* of slavery. Why? Slavery is no longer marked by the literal presence of chains, as in chattel slavery. Slavery can be present in possibly unfamiliar or obscure ways.
- 31 The *indicia* are rigorous and stringent tests. The *indicia* encourage holistic thinking about the forms of over-control which can operate together in a coherent, integrated way.
- 32 VOCAA should be re-framed using the *indicia* as a model. VOCAA favours a segmented or partial reckoning of the impact of a pattern of act(s) on a survivor. VOCAA ‘requires the act of violence to directly result in injury—that is, actual physical bodily harm, mental illness or disorder’ ...[and] . ‘The narrow definition of an act of violence under the Act also may not recognise the harm experienced by some victims of non-physical criminal offences.’ 13 & 20

⁷ The war in Croatia ran from 1991-1995. The war in Bosnia and Herzegovina ran from 1992-1995. The trial of Prosecutor v Kunarac was held in 2001 and the Appeal Chamber re Kunarac sat in 2002

⁸ Howell, Roscoe (2011) *Australians and Modern Slavery*, (Slavery Links Australia Inc, Brighton, Victoria), With a Foreword by The Hon Catherine Branson QC, former President of the Australian Human Rights Commission. Refer to the introduction on line at: <http://library.slaverylinks.org/wp-content/uploads/sites/2/2013/07/AAMS-Extract.pdf>

33 **Protracted acts and acts against a 'pool'**

34 In Tang's case (see Para 29 above), the High Court referred to 'duration' as one of the factors which could be taken into account in testing whether extreme forms of over-control would amount to the exercise of any or all of the powers attaching to the right of ownership over a person. 'Duration' allows for a combination of forces to operate.

35 The essence of the *indicia* lies in their 'gestalt', the recognition that the combination of extreme forms of over-control do function together to produce a result (slavery) which is different from and goes well beyond 'everyday' violence, abuse and exploitation.

36 The VLRC Discussion Paper noted that:

'Awards can be reduced as a result of the 'related criminal acts' provision which enables such acts to be treated as a single act of violence. These include circumstances where they were committed against the same person and occurred at the same time or share some other common feature.' 31 & 42

37 And

38 *'.. special financial assistance categories may not account for the impact of cumulative harm caused by persistent and protracted patterns of abuse.'* 38

39 And

40 *'The Act also limits the maximum amount of financial assistance payable to a pool of related victims to \$100,000, which can result in some victims being adversely impacted by the cap.'* 34

41 In the submission of Slavery Links, the VOCAA will (at some point) need to be amended to take account of forced labour-servitude-slavery and the fact that several people can be enslaved together (i.e. in a protracted 'pool'). Of course pooling occurs: slavery happens because someone can make a profit. Slavery involves theft of labour and it is more cost efficient to use one control mechanism to steal from more than one enslaved person.

42 **What is meant by exceptional and out of the ordinary?**

43 The VLRC Discussion Paper noted that:

44 *'While VOCAT has wide discretion to grant additional financial assistance to assist recovery in exceptional circumstances ... VCAT's interpretation of exceptional circumstances as 'out of the ordinary' means that only victims who suffer an unusual or uncommon reaction seem to be eligible for an award for recovery expenses. This means that awards for recovery expenses may not always be awarded to those who need them the most.'* 37

45 VCAT's interpretation is not informed about slavery and or unaware that enslavement is exceptional by virtue of being a crime against humanity. The crime is exceptional. There is no formula for predicting how an enslaved person will react or recover or how long will be required for these responses to emerge. VCAT needs guidance on this aspect.

46 **Need for nuanced thinking re survivors who are perpetrators**

47 The VLRC Discussion Paper noted that:

48 *'... section 54 of the Act requires VOCAT to consider a number of further matters before determining whether or not to make an award, or in determining the amount of the award. These include 'the character, behaviour (including past criminal activity and the number and nature of any findings of guilt or convictions) or attitude of the applicant ..'*

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49 And

50 *'The main issues with respect to section 54 of the Act relate to character and behaviour considerations which require a victim's character and behaviour to be scrutinised, particularly with respect to prior criminal offending, current or previous drug and alcohol use, and other lifestyle factors interpreted as problematic, as well as the victim's 'contributory conduct' or 'provocation'.'*

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51 In 2012 Slavery Links provided a Conference paper for a meeting of judicial officers.⁹ The paper characterised the sorts of cases that might come before the courts and where an aspect of forced labour-servitude-slavery may not be recognised. One possible case involved 'contract' or forced labour by a crop sitter who might otherwise be blameless.

52 Such a case eventuated in 2014. Thi Hong Tran, an international student, pleaded guilty to a charge of cultivating a commercial quantity of cannabis.¹⁰ Sexton J noted that this offence had a maximum penalty of 25 years' imprisonment.¹¹ While awaiting trial, Tran found stable employment and accommodation and returned to tertiary study where she performed well. Sexton J remarked:

53 *'The fact that you have managed to get back on track while facing a sentence for a serious offence is, in my view, quite exceptional. It shows a determination to make amends for your crime, and also a strength of purpose.'*¹²

54 Tran was convicted and sentenced to 18 months' imprisonment. The whole of that sentence was suspended for two years.¹³

55 This example illustrates that, where slavery is concerned, there are situations where moral ambiguities and shades of grey need to be taken into account. Rigid, narrow and or black-and-white thinking by VOCAT would not be appropriate in such circumstances.

⁹ Howell, Roscoe and Robert Evans (2012) "How the Court system might encounter forms of slavery in Australia" Paper delivered at the Conference of the Australian Institute of Judicial Administration entitled "Doing Justice for Young People – Issues and Challenges for Judicial Administration in Australia and New Zealand". 23-25 August 2012, Brisbane. Go to: <http://library.slaverylinks.org/wp-content/uploads/sites/2/2013/07/How-the-court-system-might-encounter-forms-of-slavery-in-Australia.pdf>

¹⁰ DPP v Tran [2014] VCC 1992 (28 November 2014)

¹¹ Ibid., Para 1.

¹² Ibid., Para 17

¹³ Ibid., Para 35

56 **Moral ambiguity in migrant work and visa over-stay**

57 The VOCAA allows for an award with respect to funeral expenses. Consider the following, which was described by Slavery Links in a report about precarious work:¹⁴

58 In September, 2015, a cleaner found a body in a roadside public toilet near Mildura. The Police were called. The body was identified as that of Ewe Leong Lim, from Malaysia. ABC News reported:

59 *'An Asian man found dead in a public toilet block in north-west Victoria last week likely did not seek treatment for a medical condition as he had overstayed his working visa, police say. The 47-year-old has been formally identified by police who believe his body was dumped at Boundary Bend, south-east of Mildura, for authorities to find.'*

60 *'Detective Senior Constable Matt Pasco said they were investigating whether the man had been working illegally on a farm in the area.'*¹⁵

61 A context for this gruesome find had been provided by a 2010 review of the Migration Act, 1958 which found that there were between 50,000 and 100,000 migrants in Australia's workforce who were working without visas. Such individuals were reported by the review to be vulnerable; and potentially exposed to pressure from criminals.¹⁶

62 In the submission of Slavery Links, it is in the interests of the VLRC Inquiry to consult with officials who may come into contact with such 'undocumented' workers.¹⁷ The same officials have the same responsibilities with respect to the general population (Para 65ff).

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- Police have an essential role in detecting the crime of forced labour-servitude-slavery ('forcing'), regardless of the industry where it occurs; along with other possible actors, such as workplace inspectors (under the Occupational Health and Safety Act 2004 (Vic)) and inspectors of rooming houses (under the Residential Tenancies (Rooming House Standards) Regulations 2012 (Vic)).

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- Other possible sources of workplace monitoring would include agriculture, construction, forestry or fishing inspectors; and VicRoads officers engaged in truck-stops. Owner operators in the transport, forestry and fishing sectors, as well as owners of farm or other property, may have an interest in reporting suspicious work gangs where 'undocumented' workers could be found.

¹⁴ Slavery Links (2016) When precarious work becomes 'forcing': Implementing Section 11 of the Victorian Charter of Human Rights regarding forced labour-servitude-slavery. Briefing Papers on Slavery: Briefing Paper No 2 (Slavery Links Australia Inc, Melbourne), page 10

¹⁵ ABC News (2015) Illegal worker dumped in toilet block near Mildura died from treatable condition, police say, ABC Mildura-Swan Hill .Posted 22 September 2015. Go to: <http://www.abc.net.au/news/2015-09-22/illegal-worker-dumped-in-toilet-died-from-treatable-condition/6794308>

¹⁶ Stephen Howells (2011) Report of the 2010 Review of the Migration Amendment (Employer Sanctions) Act 2007, Report to the Minister for Immigration and Citizenship. Go to: http://www.immi.gov.au/media/publications/compliance/review-employer-sanctions/pdf/howells_report.pdf

¹⁷ Slavery Links (2016) *Op. Cit.*, pages 14-15

65 **Implementing Section 11 of the Victorian Charter of Human Rights regarding forced labour-servitude-slavery**

66 We repeat: it is in the interests of the VLRC Inquiry to consult with officials who may come into contact with 'forcing'. Section 11 of the Victorian Charter of Human Rights (the Charter) refers to the serious crimes of forced labour, servitude and slavery. The Charter therefore comes into the purview of this submission. How is the Charter relevant to survivors of crime? The Victorian Equal Opportunity and Human Rights Commission put it this way:¹⁸

67 *'The Charter of Human Rights and Responsibilities Act 2006 (the Charter) is a Victorian law that sets out the basic rights, freedoms and responsibilities of all people in Victoria. It is about the relationship between government and the people it serves. (Underlining added)*

68 *The Charter requires public authorities, such as Victorian state and local government departments and agencies, and people delivering services on behalf of government, to act consistently with the human rights in the Charter.*

69 *The Charter requires the Victorian Government, public servants, local councils, Victoria Police and other public authorities) [sic] to act compatibly with human rights, and to consider human rights when developing policies, making laws, delivering services and making decisions. So no matter which state or local government agency the community is dealing with, the same human rights apply.'* (Underlining added)

70 With respect to several of the rights embodied in the charter, the Victorian Equal Opportunity and Human Rights Commission does provide education and training for public servants, officials and others who work in relevant roles. Regrettably the Commission does not do this with respect to forced labour, servitude and slavery.

71 It appears that Section 11 of the Charter has in effect been dormant for some years; apparently neither resourced nor implemented by Labour and Coalition governments in Victoria. For reasons that are not understood, the 2015 Review of the Charter did not cover Section 11, forced labour, servitude and slavery.¹⁹ Nevertheless people in Victoria are entitled to slavery-aware services, including services from VOCAT.

72 Assistance under the Victims of Crime Assistance Act (VOCAA) requires that an act of violence has taken place. Enslavement is a violent act (see Para 27). In the submission of Slavery Links, it is in the interests of the VLRC Review to address the responsibilities of the Victorian government under the Charter with respect to assistance to be made available in the event that a person in Victoria is subject to the violence of 'forcing'.

¹⁸ Victorian Equal Opportunity and Human Rights Commission (n.d.) Victoria's Charter of Human Rights and Responsibilities. Go to: <https://www.humanrightscommission.vic.gov.au/human-rights/the-charter>

¹⁹ Michael Brett-Young (2015) 'From commitment to culture: The 2015 Review of the Victorian Charter of Human Rights and Responsibilities Act 2006' (Authorised and published by Michael Brett-Young, Level 24, 121 Exhibition Street, Melbourne. September 2015)