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Committee Secretary
Joint Standing Committee on Foreign Affairs, Defence and Trade
PO Box 6021
Parliament House
Canberra ACT 2600

**Submission to Joint Standing Committee on Foreign Affairs, Defence and Trade:
Australia's Advocacy for Abolition of the Death Penalty**

Dear Sir / Madam

We welcome the Committee's interest in the obvious and urgent need to engage internationally on the abolition of the death penalty so soon after the execution of two Australian citizens in Indonesia. Our experience is set out at the end of this document. We have grave concerns about the efficacy of the current responses and urge improvement of law and policy as well as advocacy to effect the global abolition of the death penalty and to protect the credibility of justice systems. Non-fatal sentencing is a safer and humane alternative and categories of sentencing ensure issues such as coercion or rehabilitation can be recognised. Effective advocacy enables transnational cooperation.

Australia must continue to advocate for the abolition of the death penalty because:

- The death penalty continues to affect Australian nationals overseas.
- There is no evidence of any deterrent effect in crime rates.
- It is found in developing justice systems.
- Any miscarriage of justice is irreversible.
- Extradition cases are impacted - Australia cannot refool a person to a country where they may face execution

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- Any police or security assistance Australia provides to retentionist jurisdictions could (and perhaps should) be greatly restricted if that assistance might lead to imposition of the death penalty
- The death penalty is a breach of the most basic human right – the right to life.

This submission also raises particular concerns in the context of human trafficking in the global drug trade. It is in such cases, in our experience, that individuals are at risk of facing the death penalty. The current National Action Plan on human trafficking does not address the serious issue of exploitation of people in the criminal justice system and has the potential to create risk that exploited people are at risk of prosecution. These could be Australian citizens or those citizens of our closest neighbours.

In our submission, recent events also require the committee to consider the risk that exploited people are at risk of execution. It is clear from these events that despite significant advocacy by the Australian government, issues of rehabilitation did not persuade Indonesia to commute the penalties for these men. However, one woman due to be executed was reprieved. We have approached this submission by having regard to the case of Mary Jane Veloso; a Philippine national recently sentenced to death in Indonesia for drug trafficking - an offence that appears on the facts to have been committed under circumstances of human trafficking. Ms. Veloso was particularly vulnerable by virtue of her poverty and position relative to her recruiters and employers, and her transportation appears to have been motivated with the express purpose of exploiting that vulnerability to import heroin to Indonesia. Her recruiters have been identified in the Philippines and are currently on trial. The Attorney General of Indonesia appears to have accepted that, if the recruiters are convicted, this would be fresh evidence for Ms. Veloso to appeal for her death penalty to be commuted. Our view is that the decision to free Ms. Veloso should be made after an independent assessment of the evidence and not dependent on the convictions of others. The wider issue for this submission is the ability to combat transnational organised use of exploited and vulnerable people to commit crime and how states can work transnationally to protect victims of human trafficking, particularly where there is a risk of a fatal sanction.

It is important to note that had Ms. Veloso been intercepted in transit through Australia to her ultimate destination, it would be incumbent upon our authorities to recognise her status as a human trafficking victim, rather than mechanically process her through the criminal justice system. The current state of preparedness for Australian authorities to recognise such victims

is lacking, and this is within a highly regulated and transparent system. Ms. Veloso's apprehension in Indonesia meant that not only were these checks and balances missing, but they have exposed her to the death penalty. Australia must work both locally and transnationally to better equip law enforcement officers, legal professionals and members of the judiciary to recognise and tackle likely circumstances of human trafficking and thus reduce the number of vulnerable people exposed to risk of execution.

It is our submission that Australia should continue to engage internationally to promote universal abolition of the death penalty. In addition immediate action must be taken to combat human trafficking in the transnational drug trade. To this end, the following recommendations are made for urgent implementation.

Key Conclusions

Our research and experience has led to ***three key conclusions*** in respect of Australia's advocacy on the death penalty

- (i) That recent advocacy has been ineffective.
- (ii) That Australia risks being in breach of its international law obligations to protect its own citizens from human rights abuses abroad in the context of the death penalty and in the context of human exploitation.
- (iii) That Australia's own law and policies on human trafficking are deficient thus diluting the strength of any advocacy on the international stage

Further, the lack of effective transnational engagement risks failure in investigation and failure to uncover credible evidence that might mitigate criminal offending or lead to protection of the exploited in the context of the drug trade, all of which could enable individuals to seek non-prosecution or non / reduced punishment .

Recommendations

1. Australia must improve its advocacy and protection mechanisms for victims of human trafficking who may ultimately be exposed to the risk of execution in retentionist states.

2. Australia must ensure that any future financial or technical assistance, capacity-building and other support for drug enforcement is conditional on the abolition of the death penalty for drug offences or, at the very least, evidence of an ongoing and committed moratorium on executions.
3. Develop a comprehensive policy document guiding Australia's diplomatic position on abolition of the death penalty
4. Review foreign aid provision to ensure:
 - a) that frontline lawyers and advocacy groups are appropriately funded to defend those facing the death penalty; and
 - b) that Australia is not indirectly contributing to executions by funding programs that result in prosecution for death-eligible charges.
5. Adopt a leadership stance on development of an interim 'minimum standards' guideline for states who insist on retaining the death penalty, at least until full abolition can be achieved.
6. Introduce 'Human Trafficking Protection' Laws modelled on the Modern Slavery Act 2015 in England and Wales
7. Improve Anti- Trafficking Responses There should be a central institution for Australia's anti-Trafficking response, enhancing the current responses of the AFP
8. Pass a legal requirement for mandatory training and reporting for frontline professionals in regulated services (health, social care, education, border forces).
9. Increase resources for combating human trafficking.
10. Provide medical and emotional support for survivors.
11. Launch national awareness-raising campaign.
12. Monitor human trafficking and collect data in the criminal justice systems nationally and transnationally

The Death Penalty

Every day, people are executed as punishment for a variety of crimes – sometimes for acts that should not be criminalised. In some countries it can be for perceived inappropriate relationships, in others it is reserved for acts of terror and murder.

Some countries execute children and those who suffer mental problems. Before people die they are often imprisoned for years on "death row". Not knowing when their time is up, or whether they will see their families one last time.

The death penalty is cruel, inhuman and degrading. It should be opposed at all times - regardless of who is accused, the crime, guilt or innocence or method of execution.¹

There are currently 58 countries that retain the death penalty.² Amnesty International conducted a report in 2014 on the use of the death penalty and found that 22 countries had recorded executions in 2014, and that *at least* 607 executions had been carried out worldwide.³ Amnesty's figures were confirmed and collected through the use of a combination of official figures; information from individuals sentenced to death and their families/representatives; information from other civil society organisations and media reports. However some countries continue to classify data on the use of the death penalty a state secret so these figures are at a very minimum, and the true figures may run into the thousands.

In 2014 Amnesty International documented positive developments (in terms of reduced executions) in all regions of the world, with the exception of Europe and Central Asia (Belarus resumed executions after a 24 month hiatus). The 607 people known to have been executed in 2014 represent a 22% decrease in the 2013 figure.

Despite this, at least 2466 people were sentenced to death in 2014 across 55 countries, and this represented a 28% increase from 2013.

The trend however is definitely towards universal abolition. In 1977 only 16 countries had abolished the death penalty; by 1995 that had increased to 59 and at the end of 2014 that number stood at 98. Australia must continue to make abolition of the death penalty a consistent policy measure in its diplomatic relations, crime and security arrangements and trade negotiations; and encourage as many states as possible to move towards a permanent cessation of the use of the death penalty.

International Law on the Death Penalty

A broader understanding of human rights in the global community has resulted in significant numbers of countries choosing to abolish the death penalty either in law or in practice,

¹ Adapted in part from the Amnesty International Overview < <https://www.amnesty.org/en/what-we-do/death-penalty/> >

² <http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries>

³ <https://www.amnesty.org/en/documents/act50/0001/2015/en/>

however there remains significant gaps in practical implementation of international obligations by death penalty states.

The seminal human rights document, the *Universal Declaration of Human Rights* provides that ‘everyone has the right to life, liberty and security of person.’⁴This post World War II statement on the sanctity of life was later given legal force under the *International Covenant on Civil and Political Rights* (ICCPR) which seeks to limit the death penalty where it is still applied.

The ICCPR states that ‘no one shall be arbitrarily deprived of his life;’ that ‘sentence of death may be imposed only for the most serious of crimes pursuant to a final judgement of a competent court;’ and that ‘anyone sentenced to death shall have the right to seek pardon or commutation.’ Further, that ‘sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.’⁵ 168 states are party to the ICCPR, an almost universal adoption.

The second optional protocol to the ICCPR abolishes the death penalty entirely (with provision made for states to reserve serious wartime crimes of a military nature); and envisions that state parties will undertake an international commitment to abolish the death penalty. 81 states are party to the second optional protocol, including Australia.

Particular protections from the death penalty exist in international law for vulnerable groups such as minors, pregnant women and the mentally impaired.

In addition to the ICCPR’s express prohibition against execution for a crime committed when a person was under 18 years of age, the *U.N. Convention on the Rights of the Child*⁶ and the *American Convention on Human Rights*⁷ also preclude the death penalty being imposed in such circumstances. The ban is so broadly accepted that it is considered a norm of customary international law.⁸ Despite this, Amnesty has received reports indicating that at least 14

⁴ *Universal Declaration of Human Rights*, GA Res 217A (III) UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), art 3.

⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976).

⁶ Article 37 (a).

⁷ Article 4 (5).

⁸ Richard C Dieter, ‘The Death Penalty and Human Rights: U.S. Death Penalty and International Law’, Death Penalty Information Centre <http://www.deathpenaltyinfo.org/Oxfordpaper.pdf>.

people were executed in Iran for crimes they allegedly committed when they were under 18, and Egypt, Iran and Sri Lanka all sentenced juvenile offenders to death in 2014.⁹

In 1997, the U.N.'s Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions called for a cessation of executions upon the mentally impaired; and stated that they were 'in contravention of relevant international standards.'¹⁰In Amnesty's 2014 report, they noted that people with a mental impairment were under sentence of death in several countries including Indonesia, Japan, Malaysia, Pakistan, Trinidad and Tobago and the USA.

Also, in 1997 the U.N. High Commission for Human Rights approved a resolution that the 'abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights.' Subsequent resolutions called for restriction of death eligible offences and for a moratorium on all executions (leading to abolition).¹¹

The European Union has made abolition of the death penalty a precondition for entry into the Union, a move which has undoubtedly contributed to Russia's commutation of the sentences of over 700 people on death row and consideration of abolition legislation.¹²Poland, Yugoslavia, Serbia and Montenegro have all also voted to end the death penalty. Additionally, the member states of the Council of Europe have established Protocol 6 to the *European Convention of Human Rights* which calls for abolition, and the *American Convention on Human Rights* has added an optional protocol supporting an end to the use of the death penalty among its member states.

The *Vienna Convention on Consular Relations* provides a framework for consular relations between independent countries. Article 36 provides for foreign nationals who are arrested or detained to be given notice 'without delay' of their right to have their embassy notified of that arrest so that they may receive consular advice and support. There are 177 state parties to this convention, however its use in practice is severely limited by the training of front line enforcement officers and their being made aware of the accused rights under it. Without this,

⁹ https://www.amnestyusa.org/pdfs/DeathSentencesAndExecutions2014_EN.pdf

¹⁰ Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions by Mr. Bacre Waly Ndiaye, E/CN.4/1998/68/Add.3, at 145.

¹¹ United Nations High Commission for Human Rights Resolution , E/CN.4/1997/12 (April 3, 1997).

¹² Richard C Dieter, 'The Death Penalty and Human Rights: U.S. Death Penalty and International Law', Death Penalty Information Centre <http://www.deathpenaltyinfo.org/Oxfordpaper.pdf>.

many individuals on death row may make culturally inappropriate decisions regarding their case, with lethal consequences.¹³

Clearly it is desirable that Australia should advocate for worldwide abolition of the death penalty, but as outlined above it is also a legal requirement that Australia do so. Australia was a founding member of the United Nations and was one of eight nations involved in drafting the *Universal Declaration of Human Rights*. The *Convention on the Rights of the Child*¹⁴ is a longstanding and widely accepted commitment of Australia under international law, that demands protection be afforded to all minors within a framework of international co-operation where required.¹⁵ Most importantly, Australia is signatory to the *International Covenant on Civil and Political Rights*¹⁶ and has acceded to its *Second Optional Protocol*¹⁷ which obliges our commitment to work towards universal abolition of the death penalty. These commitments alone would demand a comprehensive policy framework, however when combined with signature to the *United Nations Convention against Transnational Organised Crime*,¹⁸ and its supplementary *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*¹⁹; it is apparent that Australia's obligations under international law go far beyond domestic abolition. They create a responsibility to play a major global role in both death penalty reform and protection of human trafficking victims.

Drugs and the Death Penalty

Approximately 1000 people are executed each year for drug offences, with 33 countries retaining the death penalty for drug trafficking and/or drug possession. Of these however, only six countries — China, Iran, Saudi Arabia, Vietnam, Malaysia and Singapore — routinely execute drug offenders.²⁰ Drug-related executions are on the rise in some regions, including Iran, Indonesia and China.²¹

¹³ *Breard v. Greene*, 140 L.Ed.2d 529.

¹⁴ Signed 22 August 1990; Ratification 17 December 1990.

¹⁵ Article 4.

¹⁶ Signature 18 December, 1972; Ratification 10 December 1975.

¹⁷ Accession 2 October 1990.

¹⁸ Signature 13 December 2000; Ratification 27 May 2004.

¹⁹ Signature 11 December 2002.

²⁰ International Harm Reduction Association. 'Complicity or Abolition? The death penalty and international support for drug enforcement,' London UK, 2010.

²¹ The Economist. Which countries have the death penalty for drug smuggling? 2015 [cited 2015 25 August]. Available from: <http://www.economist.com/blogs/economist-explains/2015/04/economist-explains-28>.

International law requires that the death penalty, if applied, must be reserved for the ‘most serious crimes,’²² and it has been stressed by the UN Human Rights Committee and the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions that drug crimes do not meet this definition.²³ The increasing application of the death penalty for drug offences is of particular concern given the poor measures of police and judicial integrity and lack of fair trial norms particularly in parts of central and East Asia.

Currently, 27 Australian citizens are detained for drug offences across Mainland China, Hong Kong and Malaysia,²⁴ with nine facing the death penalty in China alone. Despite the Australian Crime Commission’s view that a significant number of these were duped or manipulated by crime syndicates,²⁵ Australia’s federal police continue to provide information to death penalty states to facilitate identification and apprehension of possible suspects. Information obtained under FOI reveals that between 2010 and 2014 the Australian Federal Police (AFP) exposed over 1700 Australians²⁶ to the risk of execution for drug offences by sharing intelligence with death penalty states. Where assistance was requested in relation to alleged drug offences, the AFP approved the provision of information in over 95 percent of cases, despite an identified risk of execution.

In addition to direct law enforcement cooperation, Australia provides funding for a range of counter-narcotics activities worldwide. The direct link between internationally funded counter narcotics programs and drug-related executions has been recognised by a number of European states, including the UK, Ireland and Denmark. These nations have recently withdrawn funding for supply control operations in Iran.²⁷

Australian-funded initiatives include PAKU83,²⁸ a 5-year program focusing on illicit trafficking and border management in Pakistan. Australia has contributed US\$4.5 million to

²² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976) art 6 (2).

²³ International Harm Reduction Association, ‘The Death Penalty for Drug Offences: A Violation of International Human Rights Law,’ London UK, 2007.

²⁴ Sarah Gill, ‘AFP exposes Australians to the risk of execution in foreign countries more often than you think’, *The Age* (Online), September 8 2015 < <http://www.theage.com.au/comment/the-afp-peddles-injustice-by-helping-asian-death-penalty-states-20150902-gidvu3.html>>.

²⁵ Sean Rubinsztein-Dunlop and Jeanavive McGregor, ‘West African syndicates tricking Australians into risking death on drug-running missions,’ *ABC News* (Online), 5 August 2015 < <http://www.abc.net.au/news/2015-08-05/vulnerable-australians-face-death-after-lured-drug-smuggling/6675360>>.

²⁶ <http://www.afp.gov.au/about-the-afp/information-publication-scheme/routinely-requested-information>.

²⁷ Human Rights Watch, *UN: Freeze Funding of Iran Counter-Narcotics Efforts* (17 December 2014) < <https://www.hrw.org/news/2014/12/17/un-freeze-funding-iran-counter-narcotics-efforts>>.

²⁸ United Nations Office on Drugs and Crime, *Illicit Trafficking and Border Management* < <https://www.unodc.org/pakistan/en/illicit-trafficking-and-border-management.html>>.

enhance core capacities of Pakistani law enforcement with key indicators including increased arrests, prosecutions and convictions. Reprieve UK has identified a significant number of European nationals who have been arrested in Pakistan with death-eligible quantities of narcotics following implementation of PAKU83.

As a result of these twin activities, Australia is effectively complicit in drug executions - in violation of international human rights law and its own stance as an abolitionist nation - with little or no evidence of any broader community benefit. Despite substantial financial contributions and drug-related arrests, the United Nations Office on Drugs and Crime (UNODC) concedes that opiate flows from northern Afghanistan into Central Asia have not lessened in recent years.²⁹ A recent Australian study³⁰ funded by the National Drug Law Enforcement Research Fund, revealed that drug seizures by Australian police had no effect on drug-related harm as measured by emergency department admissions or arrests. These conclusions are consistent with research by MacCoun and Reuter³¹ suggesting that supply reduction is an unrealistic objective in drug markets that are well established and diverse.

There are three important milestones for a nation to be considered truly abolitionist: abolition of the death penalty as a sentence of law; non-refoulement of people to face the death penalty in other countries; and a refusal to provide information or other assistance to facilitate application of the death penalty by others.³²

Australia must ensure that any future financial or technical assistance, capacity-building and other support for drug enforcement is conditional on the abolition of the death penalty for drug offences or, at the very least, evidence of an ongoing and committed moratorium on executions.

Human Trafficking

Article 3 of the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Particularly Women and Children (“the Trafficking Protocol”) defines trafficking as follows:

²⁹ United Nations Office on Drugs and Crime, *Opiate Flows Through Northern Afghanistan* <https://www.unodc.org/documents/data-and-analysis/Studies/Afghanistan_northern_route_2012_web.pdf>.

³⁰ Wai-Yin Wan DW, Grant Wardlaw, Vasilis Sarafidis and Grant Sara, *Supply-side reduction policy and drug related harm*, Canberra 2014.

³¹ MacCoun, R.J. and Reuter, P. (2001) *Drug War Heresies: Learning from Other Vices, Times and Places* Cambridge University Press.

³² Eric Neumayer, ‘Death penalty: the political foundations of the global trend toward abolition,’ *Human Rights Review* (2008) 9 (2) 268.

Trafficking in persons shall mean 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 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 removal of organs.³³

Some of these forms of exploitation are defined elsewhere. For instance, the 1926 Slavery Convention defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”³⁴ The 1930 ILO Forced Labour Convention (C29) defines forced labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.³⁵

Unsurprisingly given the global scale, the practice of human exploitation is highly lucrative.³⁶ One of the conclusions of the 2014 International Labour Office report was that ‘there is an urgent need to address the socio-economic root causes of this hugely profitable illegal practice if it is to be overcome.’³⁷ In 2013, the UNODC reported on transnational organised crime in East Asia and the Pacific (the UNODC Report).³⁸ The UNODC Report identified human trafficking as a major issue and found that human trafficking is on the rise in a quarter of countries around the world.

The UNODC Report highlights key issues and implications for response to transnational organised crime including improving victim identification systems to enable the provision of protection and support and investing in a victim centred approach with appropriate training

³³ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organised Crime

³⁴ 1926 Slavery Convention

³⁵ 1930 C29 ILO

³⁶ Polaris Project Human Trafficking An Overview <<http://www.polarisproject.org/human-trafficking/overview>>

³⁷ 2014 International Labour Office report, “Profits and Poverty: The economics of forced labour” <http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_243391/lang--en/index.htm>

³⁸ UNDOC Report “Transnational Organised Crime in East Asia and the Pacific: A threat Assessment” <http://www.unodc.org/documents/data-and-analysis/Studies/TOCTA_EAP_web.pdf>

for law enforcement to include the vital importance of ensuring the protection of victims.³⁹All require standardised mechanisms, collaborative responses and inter-agency coordination with data collection and properly trained specialists. It also requires a re-think of attitudes away from the traditional view of (our example) “illegal immigrants” or “drug traffickers” in order to differentiate between traffickers and victims.

These issues and opportunities for improved victim identification are particularly highlighted by the experience of Mary Jane Veloso. Ms. Veloso is a young Filipina woman who had sought work abroad with the intention of supporting her family; but was arrested at Indonesia’s Yogyakarta Airport for alleged possession of 2.6 kilograms of heroin and was subsequently sentenced to death. Ms. Veloso came from a background of abject poverty and was an easy target to be utilised as a drug ‘mule’ given her position of vulnerability relative to her recruiters and employers; in addition to her transportation between states under the promise of work. Had Ms. Veloso’s possible status as a victim of human trafficking been credibly identified by trained law enforcement professionals at the outset, she may have been able to take advantage of Indonesia’s existing mandatory protection mechanisms, potentially avoiding charge and been diverted into support programs but, at the very least receiving a short sentence that reflects both her mitigating circumstances and the assistance she has provided to the authorities to identify those further up the chain of command. At the time of writing Ms. Veloso has spent 5 years on death row, albeit currently with a temporary reprieve while investigation of her claims to victim status are examined, and her alleged traffickers are trialled at home in the Philippines.

At the time of writing Ms. Veloso has spent 5 years on death row, albeit currently with a temporary reprieve while investigation of her claims to victim status are examined, and her alleged traffickers are trialled at home in the Philippines.

If a referral mechanism is to be effective, credible evidence of the person’s status as a victim of human trafficking ought to be obtained at the investigation stage when the drug trafficking charges are being considered. This is an opportunity to divert the person to support rather than to prosecute. If the investigation has not been done, not done effectively or further evidence is adduced at trial, the responsibility continues to ensure that decisions are made to stop inappropriate prosecutions or, depending on the allegation, to impose a reduced sentence

³⁹ UNDOC Report “Transnational Organised Crime in East Asia and the Pacific: A threat Assessment” p139. <http://www.unodc.org/documents/data-and-analysis/Studies/TOCTA_EAP_web.pdf>

from that which might otherwise be available. It is here that states must work together transnationally to take the opportunity to ensure that the protection intended for victims of human trafficking is actually effective.

Identification of victims is the most vital since progress will never be made unless efforts are made to separately identify bosses from workers, victims from perpetrators, conspirators from pawns, terrorists from innocents. It is in this context of dealing with transnational organised crime that states must establish suitable mechanisms to seek out and identify victims of human trafficking. From a criminal law perspective, if the person accused of being a drug “mule” has acted voluntarily where the relevant mental element in relation to the drug trafficking has priority over the coercion or deception or other aspects of the trafficking definition, then the person will proceed as normal through criminal justice system⁴⁰. However, to reach a reliable assessment on whether the person acted voluntarily, the proportionate response is to ensure that such assessments are made on a case by case basis. The question is not simply whether the person can be identified as a perpetrator or as a victim, but what influences were operative upon them and what factors caused the crime. This balanced approach allows for rational conclusions, based on evidence as to whether the person’s condition is as a victim, whether their status is a mitigating factor or whether the assertion of victimhood can be rejected. Blanket laws and policies in relation to drug trafficking prevent such an assessment taking place, and commonly cause conflict between provisions designed for individual protection and those seen as protective of the general society. In the context of human trafficking, the case by case approach recognises the complex and societal issues that arise in the individual coercion as part of global human exploitation⁴¹.

Australia has an opportunity to fashion our policy on abolition of the death penalty around a global co-operation to identify victims of human trafficking. These victims, who may otherwise be viewed solely as criminal offenders, are often most at risk of receiving death penalties as retentionist states also experience high volumes of human trafficking. It is only through a harmonised, collaborative approach that recognition of their appropriate status can be credibly confirmed by appropriately trained law enforcement officers, legal representatives and members of the judiciary in each relevant jurisdiction.

⁴⁰ Taken in part from a forthcoming publication by Felicity Gerry QC and 4 other international academics.

⁴¹ Adapted in part from *The role of technology in the fight against human trafficking: reflections on privacy and data protection concerns* by Gerry QC, Muraszkievicz and Vavoula (forthcoming)

Human Trafficking, Drugs and the Death Penalty

While the death penalty is contrary to international law for *all* drug-related offences, it is even more abhorrent when directed toward exploited or vulnerable individuals. The UN Office on Drugs and Crime concede that many victims of human trafficking are used to ferry drugs across international borders, sometimes at risk of the death penalty.

Human trafficking involves the recruitment, transportation or transfer of persons, by means of the threat, coercion, deception or the abuse of power, for the purpose of exploitation. According to the UN, individuals who meet these criteria and who have been coerced into trafficking drugs should be considered victims of human trafficking.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, which supplements the United Nations Convention against Transnational Organized Crime, stresses that prosecution and punishment should not endanger the safety of the victim. Unfortunately the obligations imposed by the Convention are not always well understood even by signatory states, and protections which should be afforded to trafficked persons are not always guaranteed. The Trafficking protocol places responsibility on signatories to identify and not to punish trafficked victims:

Article 26- Non-punishment provision

Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so

Putting aside pre conceived notions of criminal liability, the modern approach to modern slavery must involve non-punishment, that is; not to prosecute even clear criminal offending that occurs due to exploitation. For any prosecution authority (or investigating judge) that has to balance the public interest in prosecuting or not, these are issues that ought to be taken into account. In the right case, it ought to be possible to argue that a trafficked individual should

not be prosecuted at all, or that they should not be punished. With or without the protocol this is a simple solution that can be achieved which will have even greater effect with the right support services in place. European cases have dealt with the factual need to identify an individual's status as a victim on credible evidence⁴². Any jurisdiction would require the same. On an evidential basis this can mean more than testimony but following up and tracking histories. For those victims apprehended committing crime (national or transnational) if such evidence is sensitively gathered at an early stage, prosecutors (or investigating judges) can give consideration to the question of whether to proceed with prosecuting a suspect who might be a victim of trafficking, particularly where the suspect has been compelled or coerced to commit a criminal offence as a direct consequence of being trafficked. Guidance in the UK is that prosecutors should adopt a three stage assessment:

- Is there a reason to believe that the person has been trafficked? if so,
- If there is clear evidence of a credible defence of duress, the case should be discontinued on evidential grounds; but
- Even where there is no clear evidence of duress, but the offence may have been committed as a result of compulsion arising from trafficking, prosecutors should consider whether the public interest lies in proceeding to prosecute or not⁴³.

The rationale for non-punishment of victims of trafficking is that, whilst, on the face of it, a victim may have committed an offence, the reality is that the trafficked person acts without real autonomy. They have no, or limited, free will because of the degree of control exercised over them and the methods used by traffickers, consequently they are not responsible for the commission of the offence and should not therefore be considered accountable for the unlawful act committed. The vulnerable situation of the trafficked person becomes worse where the State fails to identify such a person as a victim of trafficking, as a consequence of which they may be denied their right to safety and assistance as a trafficked person and instead be treated as an ordinary criminal suspect⁴⁴. This requires qualified and trained officials. If evidence or information obtained supports the fact that the suspect has

⁴² Rantsev v Cyprus and Russia Application no. 25965/04 (Strasbourg 7 January 2010) and CASE OF M. AND OTHERS v. ITALY AND BULGARIA Application no. 40020/03 (31st July 2012)

⁴³ Taken from UK CPS Legal Guidance at www.cps.co.uk

⁴⁴ 'Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking': <http://www.osce.org/secretariat/101002?download=true>

been trafficked and committed the offence whilst they were coerced, informed consideration can be given to diverting the victim away from prosecution and into programmes at home. It requires Governments to ensure support is available nationally, transnationally and internationally. Cooperation is required to ensure that those who have acted under coercion will be sympathetically treated wherever they are apprehended and, not subjected to the risk of the death penalty⁴⁵.

Not every drug offender can be considered a trafficked person, however it is increasingly recognised that the vast majority of individuals apprehended with drugs in their possession – so-called ‘drug mules’ - are not the primary initiators, financiers, or profiteers behind drug trafficking operations. In recognition of the low status that most drug traffickers occupy within drug syndicates, Singapore recently amended its mandatory sentencing⁴⁶ to allow judicial discretion in cases where an offender could be considered a ‘courier’, rather than a supplier or organizer.

While Malaysia retains the mandatory death sentence for drug trafficking, recent public opinion polls reveal that a large majority of Malaysians favour a restricted use of a ‘discretionary death sentence’, allowing the individual circumstances of the offence and the offender to be considered in sentencing.⁴⁷

Following a 2007 decision in the Constitutional Court, there are also signs Indonesia may move toward a more restricted application of the death penalty, with recommendations to amend the criminal code such that capital punishment is imposed with a 10-year probation period, and commuted to life in prison if the convict demonstrates ‘good behaviour.’⁴⁸

In view of these trends, Australia has an opportunity to help the region move toward abolition by advocating, in appropriate fora, for greater restrictions on the use of the death penalty, including more proportionate sentencing and guaranteed protections for vulnerable and exploited people.

⁴⁵ Taken from Gerry, F., Let’s talk about slaves...Human Trafficking: Exposing hidden victims and criminal profit and how lawyers can help end a global epidemic (2015) 1 Griffith Journal of Law and Human Dignity 1.

⁴⁶ Mohamed Faizal Mohamed Abdul Kadir & Wong Woon Kwong. Changes to the Mandatory Death Penalty Regime - An Overview of the Changes and Some Preliminary Reflections 2012 [cited 2015 30 August]. Available from: <http://www.lawgazette.com.sg/2013-09/842.htm>.

⁴⁷ Hood R. The Death Penalty in Malaysia. Public opinion on the mandatory death penalty for drug trafficking, murder and firearm offences. London: 2013.

⁴⁸ Natalie Zerial. Decision No. 2-3/PUU-V/2007 [2007] (Indonesian Constitutional Court),. Australian International Law Journal. 2007;15:218-26.

Australia's Approach to Human Trafficking in the context of drug trafficking and the Death Penalty⁴⁹

The Global Slavery Index estimates that 36 million people are living in modern slavery today. However, the absence of a general defence that an offender was trafficked in order to commit criminal offences on behalf of others means that the protection of trafficked victims is left to referral mechanisms and witness protection not directed towards those victims who commit crime themselves.

The Australian laws criminalising human trafficking are contained within the *Crimes Act 1914* (Crimes Act) and Divisions 270 and 271 of the *Criminal Code Act 1995* both as amended by the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Slavery Act) and the *Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Act 2013*. The amendments focus on investigation and prosecution and on support for alleged victims. Quite properly the broadest range of exploitative conduct is criminalised.⁵⁰ The legislation recognises the vulnerability of trafficked victims and the Attorney General's office asserts that the provisions are designed to 'ensure Australia's law enforcement authorities are well equipped to investigate and prosecute human trafficking and slavery, and that trafficked people are afforded appropriate support and protection when engaging with the criminal justice system.'

At 30 June 2014, there were 31,200 male prisoners in Australian prisons, an increase of 10% (2,774 prisoners) from 28,426 prisoners at 30 June 2013. The number of female prisoners also increased by 10% (242 prisoners), from 2,349 prisoners at 30 June 2013 to 2,591 prisoners at 30 June 2014. This is the highest number of male and female prisoners since 2004.⁵¹

In 2004 a study of women prisoners sentenced for drug/alcohol related crime across six jurisdictions found that 87% were victims of sexual, physical or emotional abuse in either

⁴⁹ Taken from Gerry, F., Trafficked Victims Suffer Doubly < <http://www.cla.asn.au/News/trafficked-women-suffer-doubly/>> and a forthcoming paper by Felicity Gerry QC

⁵⁰ Commonwealth AG's Website

<<http://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Pages/Humantraffickinglegislation.aspx>>

⁵¹ ABS, 4517.0 Prisoners in Australia

<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2014~Main%20Features~Sex~5>>

childhood (63%) or adulthood (78%). Most were victims of multiple forms of abuse.⁵² A significant majority of women in prison are mothers of dependent children⁵³. Not much has changed: The Australian Institute of Family Studies reports that “the characteristics of the female inmate population have changed, with more mental ill-health, substance abuse and social disadvantage present, particularly among remandees. Female offenders demonstrate high levels of previous victimisation, poor mental health, substance misuse and social disadvantage compared to women in the community” (Australian Institute of Health and Welfare [AIHW], 2009; Clark & Fileborn, 2011; Forsythe & Adams, 2009; Kilroy, 2001).⁵⁴

According to the Australian Federal Police (AFP) information about the number of trafficking-related investigations and assessments; “by 30 June 2014, a total of 235 persons had been referred to the Australian Government’s Support for Trafficked People Program since the program’s inception in 2004.”⁵⁵ Official figures confirm that the great majority of known victims of trafficking in persons in Australia are women. Trafficking involving male victims or children are very rare by comparison. NGO figures are much higher.

In order to effectively tackle trafficking in human beings (THB), States need to identify all types of victims and divert them out of criminal justice systems. This includes in cases where there is credible evidence they have been trafficked in order to commit criminal offences on behalf of those who make criminal profit. Where there is a causal link between the trafficking and the crime, this is where principles of non-prosecution or non-punishment of those who are trafficked to commit crime can and should be effective. Some of those individuals will be in prison as a result of their status as trafficked victims not being picked up during the criminal justice process.

Where those who are investigated or charged with criminal offences and are able to demonstrate credible evidence that they are victims of human trafficking, they must have avenues to pursue non-prosecution and non-punishment or to mitigate their offending. The

⁵² Holly Johnson *Drugs and Crime: A study of Female Incarcerated Offenders*, Research and Public Policy Series, No 63, Australian Institute of Criminology, Canberra, 2004

⁵³ Debbie Kilroy, Reanna Maloney; Kobie Mulligan, Suzi Quixley and Kate Warner, *Human Rights in Action: A Resource for Women in Prisons (and their advocates)*, Sisters Inside Brisbane, 2009, p8.

⁵⁴ AIFS, *Addressing women's victimisation histories in custodial settings* <<http://www.aifs.gov.au/acssa/pubs/issue/i13/i13b.html>>

⁵⁵ Interdepartmental Committee on Human Trafficking and Slavery, *Trafficking in Persons: The Australian Government’s Response 1 July 2013–30 June 2014* (2014) 30.

consequence of failure to allow for this is to undermine overall efforts to tackle trafficking in human beings. Definitions of human trafficking in the UN Trafficking Protocol and the Australian legislation reflect that in committing a crime, victims of human trafficking do not act voluntarily. However, in Australia there is no defence (partial or complete) that the suspect was a victim of human trafficking and therefore exploited nor do defences of mental impairment allow for involuntary acts in the context of human trafficking. This needs to change.

The duties in England to protect trafficked victims arise from the recently enacted *Modern Slavery Act 2015* which creates a defence for slavery or trafficking victims who commit an offence and improved reporting mechanisms. This follows EU Directive 2012/29/EU which establishes minimum standards on the rights, support and protection of victims of crime and *Directive 2011/36/EU* of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings

In some cases victims of human trafficking have been convicted without these issues being addressed either on the question of guilt or sentence and currently are held on prison sentences. These people may have grounds to appeal, may have exhausted opportunities for legal aid or may not have funds to do so.

There is a clear need to:

1. Identify situations where conviction and sentence have been passed on victims of human trafficking by Judges who do not understand the issues around human trafficking; or
2. Where the Judge has been informed of this but has nevertheless passed a sentence deemed to be inappropriate under the circumstances and therefore needs to be appealed; or
3. Where prosecutors have not been made aware that the prosecuted is a victim and referral mechanisms need to be implemented.

It is important to understand that the appeal concept is not new and it is here that reserach can be undertaken to identify those who may have grounds to appeal due to their trafficked status. This can be particularly complex in Australia when appeals involve fresh evidence but in the context of modern slavery this is an issue which needs to be tackled.

For example, research by the UK Sentencing Council interviewed drug mules. The information collected related to their trafficked status for sentencing purposes.⁵⁶ However, this is not just a sentencing issue. Trafficked victims need to be identified before they are charged, during any legal proceedings and for the purposes of appeal.

In relation to post conviction appeals, the process is already underway in England and Wales: In *R v N; R v LE*,⁵⁷ the UK Court of Appeal considered four unconnected appeals involving offenders who, at different stages after conviction, had been found to be victims of trafficking in human beings and to have been coerced into committing the offences which were integrally related to their exploitation. In giving judgement, the Court of Appeal gave guidance on:

‘how the interests of those who were or might be victims of human trafficking and who became enmeshed in criminal activities in consequence, in particular child victims, should be approached after proceedings had begun.’

The court had the advantage of European Directive 2011/36 and previous decisions.⁵⁸ The court noted that the reasoning for what is effectively immunity from prosecution is that “the culpability of the victims might be significantly diminished, and sometimes effectively extinguished, not merely because of age, but because no realistic alternative was available to them but to comply with those controlling them.” The court went on to state that ‘where a court considered issues relevant to age, trafficking and exploitation, the prosecution would be stayed if the court disagreed with the decision to prosecute.’ The Court made clear that the international frameworks did not prohibit the prosecution or punishment of victims of trafficking *per se*, but did require the Prosecutor to give careful consideration as to whether public policy calls for a prosecution at all.⁵⁹ The court quashed the convictions of more than one of the appellants effectively on the basis that the whole proceeding had been an abuse of process.⁶⁰

⁵⁶ UK Sentencing Council, *Drug ‘Mules’: Twelve Case Studies*, Office of the Sentencing Council, March, 2011, 4.

⁵⁷ [2012] EWCA Crim 189

⁵⁸ *R. v LM* [2010] EWCA Crim 2327, [2011] 1 Cr. App. R. 12 and *R. v N* [2012] EWCA Crim 189, [2013] Q.B. 379 applied.

⁵⁹ See also *R v O* [2008] EWCA Crim 2835, *R v LM, MB, DG, Talbot and Tijani* [2010] EWCA Crim 2327 and *R v O* [2011] EWCA Crim 226. Emphasis added.

⁶⁰ *R v N; R v LE* [2012] EWCA Crim 189 paras 45, 54-55, 67, 74

Where there is credible evidence that an individual is a victim of human trafficking they must have avenues to pursue non-prosecution and non-punishment or to mitigate their offending. The consequence of failure to allow for this undermines overall efforts to tackle THB. The central principle underpinning this argument is that in committing a crime, victims of human trafficking do not act voluntarily and thus the position of guilt cannot be reached. It follows from this that to tackle the global exploitation of people in the drugs trade, in addition to effective and supportive law enforcement, courts and other law enforcement bodies need to develop robust methods of application and interpretation of law to allow ongoing protection for a victim of trafficking who appears to commit a drug trafficking offence.

Australia needs to improve its approach internationally to combat human trafficking and to better support victims to be diverted from the criminal justice system where appropriate. Within the 10 ASEAN countries;⁶¹ Indonesia, Malaysia, Singapore, Thailand and Vietnam continue to retain the death penalty as an available punishment for drug offences. Australia must continue to play a diplomatic and financial role in advocating for abolition within these regions, particularly as they represent areas to which Australians frequently travel and may be at risk of being trafficked and subsequently exposed to charges for death eligible offences.

Proposals

1. Improve advocacy and protection mechanisms for victims of human trafficking who may ultimately be exposed to the risk of execution in retentionist states.

Advocacy for victims of human trafficking must be available at a frontline position, with law enforcement and legal professionals trained to differentiate them from a regular criminal offender. Where a victim is identified, streamlined systems for protection must be made available to ensure that the individual is diverted from the criminal justice system and into support programs. For this level of advocacy to be achieved, awareness campaigns must be directed towards the non-government organisations and civil societies assigned to represent alleged offenders so that their status can be immediately identified and appropriate actions taken.

2. Financial or technical assistance, capacity-building and other support for drug enforcement should become conditional on the abolition of the death penalty for drug

⁶¹ Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam

offences or, at the very least, evidence of an ongoing and committed moratorium on executions.

Our submission has outlined the very real possibility that Australian efforts to co-operate at the international level of counter-narcotics programs are exposing Australians and others to the risk of execution. Australia has an opportunity to make a genuine commitment towards abolition of the death penalty by ceasing to contribute to operations that enable it. Stemming the trade in illicit drugs must of course be a priority for Australian law enforcement; but at the Federal level where capacity building and intelligence provision is utilised internationally, there is presently an unacceptable level of facilitation being provided to achieve prosecution of drug traffickers in retentionist states. Australia cannot meaningfully continue to espouse abolitionist rhetoric while simultaneously expediting the path to execution for convicted offenders, albeit indirectly.

3. Develop a comprehensive policy document guiding Australia's diplomatic position on abolition of the death penalty

As a signatory to the *Second Optional Protocol to the International Covenant on Civil and Political Rights*, Australia has made a commitment to work towards universal abolition of the death penalty. In both bilateral relations and as a member of multilateral bodies such as the United Nations, Commonwealth Heads of Government and the Association of South East Asian Nations; Australia is highly respected and is in an excellent position to express our views diplomatically and to encourage our neighbours and trading partners to abolish the death penalty - or at the very least establish moratoriums.

The approach must be consistent and culturally sensitive, which is why it is imperative that the Department of Foreign Affairs and Trade develop a comprehensive strategy document to guide our diplomat's conversation with retentionist states. An excellent example is that developed by the United Kingdom, in its 'Strategy for Abolition of the Death Penalty 2010-2015.'⁶² The UK policy document sets out defined objectives, identifies priority countries (which interestingly include two of Australia's largest trading partners in China and the USA) and even includes what can only be described as a 'ready reckoner' for posts to identify

⁶² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35448/death-penalty-strategy-oct-11-15.pdf

practical steps they can take to advance the strategy's objectives. The strategy also outlines the UK government's commitment to fund legal representation for those on death row. Australia must develop a similarly comprehensive policy if we are to meet our international obligation to promote universal abolition of the death penalty.

4. Review foreign aid provision to ensure:

- a) that frontline lawyers and advocacy groups are appropriately funded to defend those facing the death penalty; and
- b) that Australia is not indirectly contributing to executions by funding programs that result in prosecution for death-eligible charges.

Resourcing the organisations and legal teams that represent individuals on death row and campaign for abolition is a vital part of Australia's role in ending executions internationally. The death penalty continues to be used in ASEAN nations and given that Australia is committed to applying foreign aid in our own region, this is an ideal opportunity to bring the advancement of human rights and universal abolition within that scope. Equipping regional activist organisations and lawyers on the ground with the resources to adequately represent those awaiting execution would speak volumes on the international stage about Australia's commitment to ending the death penalty.

Additionally, Australia should make abolition or moratorium of the death penalty a condition precedent to funding of international counter-narcotics programs. This would give practical, consistent effect to our domestic stance of abolition and remove the opportunity for our funding to be applied in ways that indirectly results in execution for drug offences. If Australia is to take a bona fide stance against the death penalty internationally, we must examine the way in which funds provided to counter-narcotics 'supply control' programs may be indirectly contributing to executions. Australia must follow the example of Denmark, Ireland and the UK in examining the extent to which our donations to supply control programs are ultimately contributing to executions.⁶³

⁶³ <http://cphpost.dk/news14/international-news14/denmark-ends-iranian-drug-crime-support.html>

5. Adopt a leadership stance on development of an interim ‘minimum standards’ guideline for states who insist on retaining the death penalty, at least until full abolition can be achieved.

Australia should provide regional leadership towards development of a ‘minimum standards’ death penalty guideline for the Asiatic region – such as that employed by the European Union.⁶⁴ It provides that where states insist on retaining the death penalty, that minimum standards are imposed. These include reserving the death penalty for the most serious of crimes (i.e. with an intentional element and a lethal or extremely grave outcome) and prohibiting its use for non-violent acts such as financial crimes, religious practice or expression of conscience and sexual relations between consenting adults.

Minimum standards would also include that the death penalty is not imposed as a mandatory sentence. Judicial discretion must be paramount in all such cases, to enable the full spectrum of sentences to be available depending on the gravity of the charge.

Any proposed minimum standards protocol must preclude children, pregnant women and mentally impaired people from being subject to a death sentence under any circumstances.

6. Introduce ‘Human Trafficking Protection’ Laws modelled on the Modern Slavery Act 2015 in England and Wales

This submission has outlined progressive case law developments in England and Wales over recent years that have utilised provisions of the *Modern Slavery Act 2015* creating a defence for slavery or trafficking victims who commit an offence and improved reporting mechanisms. This follows EU Directive 2012/29/EU which establishes minimum standards on the rights, support and protection of victims of crime and *Directive 2011/36/EU* of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings. Australia has an opportunity enact similarly progressive provisions that create a non-prosecution option for alleged offenders who may ultimately be shown to be legitimate human trafficking victims. Australia’s leadership in the region on this issue will enable more robust pressure to be placed on retentionist states to adopt similar provisions.

⁶⁴ <http://www.consilium.europa.eu/uedocs/cmsUpload/10015.en08.pdf>

7. Improve Anti- Trafficking Responses

There should be a central institution for Australia's anti-Trafficking response, enhancing the current responses of the AFP. This type of centralised institution is closely linked to the increase in training and awareness of law enforcement officers, and would ideally be sourced from within existing security bodies but developed to enhance capabilities of staff to recognise and appropriately manage likely instances of human trafficking.

8. Pass a legal requirement for mandatory training and reporting for frontline professionals in regulated services (health, social care, education, border forces).

Improved capability of law enforcement officers, legal professional and the judiciary will be achieved by understanding precisely the scale of the human trafficking problem, both within Australia and transnationally. Currently Australia's capacity to measure this scale is hampered by minimal data retention on human trafficking. Such a mandatory training and reporting requirement for frontline professionals would not be overly onerous or costly given that such roles are usually already under mandatory reporting regimes of some kind. The only challenge is informing professionals of what to look for in a human trafficking victim. Australia's professional bodies have an excellent record of identifying and reporting domestic violence, child abuse and other risk exposure criteria, it is not unreasonable to assume that they also have the capacity to deliver excellent reporting results as to those they find exposed, either to a risk of human trafficking or existing victim status.

9. Increase resources for combating human trafficking

Funding provision must be allocated to facilitate increased training and awareness at all levels of interaction with possible victims and perpetrators of human trafficking. Programs that ensure early intervention and identification must be developed, and these should be easily integrated into law enforcement bodies, legal professional bodies and health and social services. Reform should be modelled to align with the Trafficking Protocol and other international instruments affording protection to vulnerable groups such as women, children and the mentally impaired. Recent evidence of Australians being unwittingly caught up in

elaborate crime syndicates are indicative of the need to ensure that funds are made available to equip professionals to identify and protect human trafficking victims.

10. Provide medical and emotional support for survivors.

Australia is currently well equipped to provide world class medical and emotional support for a range of vulnerable groups, and trafficking victims must be incorporated into this regime. Again, the training provided to frontline healthcare and social services bodies is an integral part in ensuring that the appropriate care is applied to this unique group of susceptible individuals.

11. Launch national awareness-raising campaign.

The experience of Mary Jane Veloso and her connection to Australians Andrew Chan and Myuran Sukumaran represents a unique opportunity to contextualise human trafficking for a public awareness campaign. In addition to the increased capability that such a campaign would serve to achieve for frontline professionals in this area, the general public's comprehension of the issues would be greatly increased and thus contribute to support for Australia's activities undertaken towards abolition of the death penalty.

12. Monitor human trafficking and collect data in the criminal justice systems nationally and transnationally

Transnational cooperation is essential in collecting accurate data from the various criminal justice systems that are experiencing human trafficking and its links to imposition of the death penalty. Ensuring that Australia is contributing such data collection as well as advising other states in the region on its importance will enable more meaningful conclusions to be drawn that enable appropriate reforms to be made.

Conclusions

This submission has shown that Australia's present approach towards advocating for abolition of the death penalty is insufficient, and requires comprehensive policy reform.

Australia has made commitments at international level to make bona fide efforts to promote abolition, and is legally bound to meaningfully advocate in this regard – both for our own citizens facing the death penalty abroad, and by diplomatic means with states imposing it under their domestic laws. As outlined in this submission, where the death penalty is being imposed it should be for the most serious of crimes. Nonetheless many countries continue to sentence people to death for crimes related to drugs. Australia's international engagement for abolition must include a focused approach towards pressing retentionist states to abandon the death penalty as a sentencing option for drug crime.

Co-operation with non-government organisations, bilateral engagements and other diplomatic activities should be conducted under robust and consistent guidelines. A comprehensive policy directive that presents Australia's position in the strongest terms will enable diplomatic pressure to be placed on retentionist states, and priority assistance to be given to frontline organisations.

Further steps Australia could take to advocate for worldwide abolition would include recognising the link between the death penalty and human trafficking. Through the experience of Mary Jane Veloso it can be seen that it is most often the vulnerable 'mule' that is apprehended by law enforcement and not the powerful leaders of crime syndicates. It is unacceptable that those vulnerable individuals may face execution for acts committed under threat of force, coercion, fraud, deception or abuse of power. For this reason it is vital that a system of victim identification is developed, including better training for law enforcement, legal representatives and members of the judiciary. Systemic protection and support is not currently available and will require standardised mechanisms, collaborative responses and inter-agency coordination with data collection and properly trained specialists. Crucially, cultural change is required to achieve a change in attitude away from the traditional view of criminal offenders so that they might be differentiated from human trafficking victims.

Australia's adoption of some or all of the recommendations contained in this submission will serve to genuinely improve our position as an abolitionist state, committed to eliminating the

death penalty permanently throughout the world. We would welcome the opportunity to assist in this regard.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Felicity Gerry QC'. The signature is written in a cursive, fluid style with a long, sweeping underline that extends to the left.

Felicity Gerry QC⁶⁵ and Narelle Sherwill⁶⁶

CHARLES DARWIN UNIVERSITY

⁶⁵ **Felicity Gerry QC** is admitted to the Bar in England and Wales and the Supreme Court of the Northern Territory of Australia where she is coordinating a legal clinic, launching an innocence project and has a grant funded project on women's health and the law. She has been recognised in the UK Legal 500 as a "Fearless and effective advocate" and "Tenacious in court" and "An expert in the field of sex offences" and in Chambers and Partners UK as "A vastly experienced advocate noted for her experience in serious sexual cases, homicides and frauds". At the independent Bar, Felicity has prosecuted and defended in numerous cases involving major, serious and complex crime, often with an international element. This has included cross-jurisdictional rape, murder by foreign nationals involving evidence obtained from abroad, conspiracy to import illegal immigrants and international fraud. Her significant trial and appellate experience has also led to an expertise in online offending in the context of online abuse and exploitation, money laundering and online fraud. She has, for example, used data and metadata as evidence in criminal cases. Felicity is also a senior lecturer in the School of Law at Charles Darwin University, in the Northern Territory of Australia, focussing on data and rights, particularly in the context of violence against women and girls and the rule of law online. She lectures in Advanced Criminal Law and Evidence Law and is Chair of the Research and Research Training Committee in the School of Law at Charles Darwin University. She recently launched an indigenous justice project and runs the indigenous justice stream of the legal clinic. Felicity is co-author of *The Sexual Offences Handbook* (2nd Edition 2014) that sets out all the English law, practice and procedure from 1957 to date in this difficult field of law. She regularly publishes in the broadsheet and legal press as well as peer reviewed papers. Her research into the global law on human trafficking recently enabled her to assist transnationally in the reprieve from execution of Philippine national Mary Jane Veloso. Felicity has published papers on slavery and the use of technology to combat human trafficking and she recently provided a report for the ILRC of the American Bar Association Justice Defenders Programme on the draft cyber law for Cambodia.

⁶⁶ Student at Charles Darwin University currently undertaking an internship with Reprieve Australia