

## **DEVELOPING A POLICY OF NON - PROSECUTION FOR TRAFFICKED PERSONS WHO COMMIT CRIME: A VICTIM CENTRED APPROACH.**

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### **I. BIO**

Professor Felicity Gerry QC is at Crockett Chambers, Melbourne and Carmelite Chambers, London. She specialises in complex criminal trials, often with an international element. She has a long history of dealing with cases involving trafficked victims including representing trafficked persons who have committed crime at trial and on appeal in the UK. She also assisted lawyers in the Philippines for Mary Jane Veloso (MJV) who was reprieved from execution in Indonesia whilst her status as a human trafficking victim in the drug trade is investigated. Felicity is also Professor of Legal Practice at Deakin University, Melbourne where she teaches Contemporary International Legal Challenges, including Modern Slavery Law. She is a contributing author to *Modern Slavery and Human Trafficking Law and Practice*, Bloomsbury (2018, 2<sup>nd</sup> Ed. forthcoming) and *Human Trafficking: Emerging Legal Issues and Applications*, Lawyers & Judges Publishing Company (2017). Felicity has provided training to the Commonwealth Parliamentary Association as part of The Modern Slavery Project which is a two year multilateral project providing practical advice and support to Commonwealth legislatures in the pursuit of combatting modern slavery and she is leading a Project for ICJV on defences for Human Trafficking Victims. In 2017 she delivered a keynote address at the International Bar Association Conference on the issues of global corporate responsibility that arise from the UN commitment to transformative change.

### **II. INTRODUCTION**

This submission addresses whether the **National Action Plan to Combat Modern Slavery 2020-24 (NAP 2020-2014)** should include positive action to protect trafficked persons who commit crime. Other jurisdictions have protective legislation but there is no such provision in Australia's domestic legal framework, which currently leaves protection to policy-based responses. It is submitted that (i) the NAP 2020-2024 should be drafted in such a way as to work towards legislation in Australia which provides a complete defence for trafficked persons who commit crime and, (ii) in the absence of such legislation, the National Action Plan should set out clear non-prosecution policy. Research shows that the combination of policy and legislation is key to eradicating modern slavery, and to protect and support victims of human trafficking who are exploited particularly in crime.

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<sup>1</sup> Felicity was assisted by research volunteers in a forthcoming project report for the International Commission of Jurists Victoria.

It is submitted that stakeholders, including the Australian Federal Police should advocate/recognise the importance for a legal defence, but short of that, a non-prosecution policy in the NAP 2020-2024 plan is part of Australia 'getting it right.' A non-prosecutorial policy and a criminal defence are both victim-centred because they provide a clear baseline that a victim IS a victim, first and foremost.

The Working Group on Trafficking in Persons in 2010 draws attention to the fear of prosecution and punishment that often prevents victims from seeking protection and assistance.<sup>2</sup> It is common that a trafficked person will be uncooperative due to a lack of trust in public justice officials.<sup>3</sup> A legislative defence can assist in encouraging trafficked persons to come forward and be protected from re trafficking and also potentially provide useful information with respect to the high-level leaders of crimes being committed. A defence would steer focus towards those who are 'most responsible' and protect those whose conduct is a direct consequence of their vulnerable status as victims of human trafficking. In the meantime, policy for protection needs to be comprehensive, safe and publicly available.

The obligation not to impose penalties on victims of human trafficking for offences committed as a result of victimisation, as grounded in international law, must also be a key consideration when developing policy to protect trafficked persons who have participated in criminal activities. Key issues and implications for responses to human trafficking include improving victim identification systems to enable the provision of protection and support and investing in a victim centred approach with appropriate training for law enforcement.<sup>4</sup> Responses include improving trafficked person identification systems to fulfil the purpose of protection in the *U.N. Trafficking in Persons Protocol*.

Prosecution of traffickers and figures for recovery of victims by informal mechanisms (through NGOs and border and police forces) are still low. In practical terms there are only two routes to protection – direct confession to state authorities or confession to defence lawyers who can advise on whether to seek a non -prosecution decision from the prosecuting authority. Here, policy is no guarantee of protection and in Australia there are no appellate processes. The dominant strategy for an accused trafficked person, in the absence of legislation, remains to

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<sup>2</sup> Part III point 6 Working Group on Trafficking in Persons Vienna, 27-29 January 2010 Item 5 of the provisional agenda\*Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking

<sup>3</sup> Hannah Andreovski, Jacqueline Joudo Larsen and Samantha Lyneham, "Barriers to trafficked persons involvement in criminal justice proceedings: An Indonesia case study" (2013) 451 *Trends & Issues in Crime and Criminal Justice* 1, 4.

<sup>4</sup> 2019 UK Modern Slavery Report

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/840059/Modern\\_Slavery\\_Report\\_2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840059/Modern_Slavery_Report_2019.pdf)> and UNODC Global Report on Human Trafficking 2014

<[https://www.unodc.org/res/cld/bibliography/global-report-on-trafficking-in-persons\\_html/GLOTIP\\_2014\\_full\\_report.pdf](https://www.unodc.org/res/cld/bibliography/global-report-on-trafficking-in-persons_html/GLOTIP_2014_full_report.pdf)>

stay silent.<sup>5</sup> Whereas safe legal structures for non -prosecution, can lead to a safe confession, with accused trafficked persons potentially as protected witnesses to a global problem.

The rationale for non -prosecution (and therefore non -criminalization) has also been well advocated by scholars and stakeholders. For example, the OSCE has argued 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.<sup>6</sup> This has been well argued by Gallagher who noted that:<sup>7</sup>

[T]he notion of protecting trafficked persons from criminalisation for status related offences is not particularly innovative or radical. Rather, it reflects basic principles recognised in most national legal systems relating to responsibility and accountability for criminal offenses.

For Hoshi, the need to include principles of non-criminalisation arises because of the exacerbated traumatising of a victim, when he/she is treated as criminal.<sup>8</sup> Prosecution or application of penalties results in secondary victimisation. The difficulties are compounded where accused trafficked persons are fearful of authorities where s/he may have committed a criminal act.

### III. SUMMARY OF SUBMISSION

This submission suggests that criminal defences in Australia are *insufficient* to protect victims of modern slavery who commit crimes due to their being trafficked or enslaved. Accordingly, as a policy framework, the NAP 2020 to 2024 needs to ensure that trafficked persons are not prosecuted and, in particular, that policing approaches ensure that trafficked persons are safeguarded and not doubly victimised by the State. This fits with a commitment to “maintain a robust and comprehensive legislative framework to combat modern slavery” which is in turn an opportunity to consider specific criminal defences for accused trafficked persons<sup>9</sup>.

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<sup>5</sup> Gerry et al Game Theory and the Human Trafficking Dilemma Journal of Human Trafficking published online 16<sup>th</sup> December 201

<<https://www.tandfonline.com/doi/abs/10.1080/23322705.2019.1688086?journalCode=uhmt20>>

<sup>6</sup> ‘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>>

<sup>7</sup> A. Gallagher, *The International Law of Human Trafficking*, New York: Cambridge University Press, 2010, p.288

<sup>8</sup> Bijan Hoshi, “The Trafficking Defence: A proposed model for the non-criminalisation of trafficked persons in international law.” *Groningen Journal of International Law*, Vol. 1, No.2 2013, 54-72

<sup>9</sup> <https://www.homeaffairs.gov.au/reports-and-pubs/files/combating-modern-slavery-2020-24-consultation-paper.pdf>

First, this submission gives an overview of human trafficking in organised crime and Australia's international commitments to combatting human trafficking. Examples of protective legal provisions are provided from Europe and ASEAN states. The ASEAN approach focuses on victimhood and this submission posits that Australia should not just look to England and Wales for its approach to this issue.

Secondly, it analyses the UK modern slavery defence and posits that while s 45 of the Act is effective in providing a specific defence to *some* trafficked persons and victims of modern slavery, Schedule 4 creates significant limitations which limit the defence to types of crime rather than focussing on the slavery and trafficking. Accordingly, it is submitted that the Australian approach should focus on trafficked persons as victims of a global problem in criminal activity as well as corporate supply chains. The NAP 2020-2024 is an opportunity to address and adequacy of domestic responses to this issue.

In the absence of comprehensive criminal defences in Australia, this submission suggests that the approach by the UK to County Lines investigations provides a helpful template from which to develop non-prosecution policy.

It would also be helpful to develop policy in relation to criminal investigations into corporate reporting of slavery in supply chains.

#### IV. HUMAN TRAFFICKING IN ORGANISED CRIME AND AUSTRALIA'S INTERNATIONAL COMMITMENTS

Australia is a signatory to The UN *Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children* ('the Trafficking Protocol'). It is therefore obliged to ensure the protection of victims of human trafficking, and to ensure that they are not subject to penalties for offences committed as a result of their victimisation.<sup>10</sup> The Trafficking Protocol is a supplement to the UN *Convention Against Transnational Organised Crime*. Accordingly, it is envisaged that human trafficking occurs in organised crime. Australia is a party to this Convention. Although the Trafficking Protocol does not expressly provide for non-punishment of victims of trafficking, one of its key stated purposes is to 'protect and assist the victims of such trafficking, with full respect for their human rights.'<sup>11</sup>

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<sup>10</sup> See eg, Find int. conventions protocols that are relevant to this point

<sup>11</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime*, UN Doc A/Res/55/25 art 2(b).

In this context, the Working Group on Trafficking in Persons recommended in 2009 that State Parties should ‘consider, in line with their domestic legislation not punishing...trafficked persons...for unlawful acts committed by them as a consequence of their situation.’<sup>12</sup> That working group went further in 2010 to explicitly suggest the incorporation of provisions for non-punishment and non-prosecution of trafficked persons in domestic legislation.<sup>13</sup>

The UN Trafficking Principles and Guidelines, at principle 7 states:

Trafficked Persons shall not be detained, charged or prosecuted for their illegal entry into or residence in countries of transit or destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.<sup>14</sup>

Further, Article 4(2) of the International Labour Office (ILO) Protocol of June 2014 (updated the existing ILO Convention 29 on Forced Labour) requires states to:

...take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour.<sup>15</sup>

As above, the point is that policy needs to be more robust, but equally there is a need to enshrine a complete defence in law, because ultimately policy is enacted discretionarily, and the law gives a baseline whereby it becomes safe for a victim to confess. Taking a victim-centred approach means there is a clear presumption that victims should not be prosecuted.

### *England and Wales*

The trajectory of the UK responses to human trafficking have been driven by membership of the EU and the effect of Article 4 of the European Convention on Human Rights (ECHR)

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<sup>12</sup> UN, *Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009*, CTOC/COP/WG.4/20009/2 (21 April 2009), <[http://www.unodc.org/documents/treaties/organized\\_crime/Final\\_report\\_English\\_TIP.pdf](http://www.unodc.org/documents/treaties/organized_crime/Final_report_English_TIP.pdf)>, accessed 7 February 2020.

<sup>13</sup> United Nations, *Report on the meeting of the Working Group on Trafficking in Persons held in Vienna from 27 to 29 January 2010*, CTOC/COP/WG.4/2010/6 (17 February 2010), <[http://www.unodc.org/documents/treaties/organized\\_crime/2010\\_CTOC\\_COP\\_WG4/CTOC\\_COP\\_WG4\\_2010\\_final\\_report\\_E.pdf](http://www.unodc.org/documents/treaties/organized_crime/2010_CTOC_COP_WG4/CTOC_COP_WG4_2010_final_report_E.pdf)>

<sup>14</sup> United Nations Office of the High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, UN Doc E/2002/68/Add.1 (20 May 2002), [https://www.unodc.org/e4j/data/\\_university\\_uni\\_/recommended\\_principles\\_and\\_guidelines\\_on\\_human\\_rights\\_and\\_human\\_trafficking.html?lng=en](https://www.unodc.org/e4j/data/_university_uni_/recommended_principles_and_guidelines_on_human_rights_and_human_trafficking.html?lng=en).

<sup>15</sup> International Labour Organisation, *P029 – Protocol of 2014 to the Forced Labour Convention, 1930*. 2014.

which prohibits slavery, servitude and forced or compulsory labour. Violations of ECHR are enforceable in the UK through the Human Rights Act 1998 and there is a mechanism for bringing challenges on behalf of individuals (after domestic remedies are exhausted) through the European Court of Human Rights. The UK is committed to tackling human trafficking through EU Council Framework Decision 2002/629/JHA and the EU Convention on Action Against Trafficking in human beings ('The CoE Trafficking Convention'). Article 26 of Convention provides that:

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.

The “added value” provided by the CoE Trafficking Convention includes affirming that human trafficking is a violation of human rights, recognising the particular need for victim protection and international cooperation, providing monitoring machinery and mainstreaming gender equality.<sup>16</sup> The Convention was given legal force in the UK in 2011 through Directive 2011/36/EU ‘on preventing and combating trafficking in human beings and protecting its victims’ (‘the EU Trafficking Directive’). The adoption of the EU Trafficking Directive followed an effort to bring binding legislation “to prevent trafficking, to effectively prosecute criminals, and to better protect victims, in line with the highest European standards”.<sup>17</sup> The EU Trafficking Directive gives a wider definition of human trafficking to include forced begging by children.<sup>18</sup> It takes a victim-centred approach, including a gender perspective<sup>19</sup> and goes further than the *U.N. Trafficking in Persons Protocol* in providing an evaluation mechanism and including a requirement for gender specific support.<sup>20</sup> The Directive (2011) provides a binding mechanism to prevent trafficking, to prosecute criminals effectively and better to protect the victims. It adopts a broader concept of what should be considered trafficking in human beings including forced begging as a form of forced labour or services. The Directive (2011) provides as follows:

(14) Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators. This safeguard should not exclude

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<sup>16</sup> <http://www.worldlii.org/int/other/COETSER/2005/3.html>

<sup>17</sup> [https://ec.europa.eu/anti-trafficking/legislation-and-case-law-eu-legislation-criminal-law/directive-201136eu\\_en](https://ec.europa.eu/anti-trafficking/legislation-and-case-law-eu-legislation-criminal-law/directive-201136eu_en)

<sup>18</sup> Section 11.

<sup>19</sup> Section 3.

<sup>20</sup> [https://ec.europa.eu/anti-trafficking/legislation-and-case-law-eu-legislation-criminal-law/directive-201136eu\\_en](https://ec.europa.eu/anti-trafficking/legislation-and-case-law-eu-legislation-criminal-law/directive-201136eu_en)

prosecution or punishment for offences that a person has voluntarily committed or participated in.

The effort to implement the protective purposes of *U.N. Trafficking in Persons Protocol* in the UK was driven by the victim perspective through the implementation of the *Code of Practice for Victims of Crime* (Ministry of Justice, 2015), which was developed following the European Union (EU) Victims Directive,<sup>21</sup> the EU Human Trafficking Directive,<sup>22</sup> and the EU Child Sexual Exploitation Directive.<sup>23</sup> Initially the response was reflected in a series of criminal appeals on behalf of accused trafficked persons. Cross recognised that “perceiving a person who engaged in a criminal act as a victim is counter-intuitive to the criminal justice system”.<sup>24</sup>

Following the EU Convention and Directive, protection and non-punishment began in the UK by the creation of laws to prosecute traffickers and a national human trafficking referral mechanism to allow for identification and protection of trafficked children and adult trafficked persons, for adults this is by consent. The effect on the UK frameworks occurred in four ways:

- Firstly, appeals were brought by those who could show credible evidence of their trafficking status and their consequent criminal convictions were quashed.<sup>25</sup>
- Secondly, policy and guidance was developed to divert victims away from prosecution altogether.<sup>26</sup>
- Thirdly, working alongside the prosecutorial discretion, statutory reform through the 2015 Modern Slavery Act (UK) now provides a complete defence in relation to certain crimes.<sup>27</sup>
- Fourthly, academic research supported some limited change in sentencing approaches for drug mules although human trafficking is still not a specific category of mitigation in sentencing guidance.<sup>28</sup> Numbers protected are on the rise.<sup>29</sup>

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<sup>21</sup> 2012/29/EU

<sup>22</sup> 2011/36/EU

<sup>23</sup> 2011/92/EU

<sup>24</sup> Allison, L. Cross, “Slipping through the cracks: the dual victimization of human-trafficking survivors”, *McGeorge Law Review*, Vol. 44, 2013, 395- 422, p. 401

<sup>25</sup> (*L, HVN, THN and T v R* [2013] EWCA Crim 991; *R v. Joseph and others* (Anti-Slavery International intervening) [2017] EWCA Crim 16.

<sup>26</sup> (Crown Prosecution Service, human trafficking, smuggling and slavery < <https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery>>

<sup>27</sup> Report on internal review of human Trafficking Legislation 2011 (UK) < [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/97846/human-trafficking-legislation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/97846/human-trafficking-legislation.pdf)>

<sup>28</sup> (Sentencing Council for England and Wales 12 drug mules case studies 2011 < [https://www.sentencingcouncil.org.uk/wp-content/uploads/Drug\\_mules\\_bulletin.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Drug_mules_bulletin.pdf)>

<sup>29</sup> Gerry et al Game Theory and the Human Trafficking Dilemma *Journal of Human Trafficking* published online 16<sup>th</sup> December 201  
<<https://www.tandfonline.com/doi/abs/10.1080/23322705.2019.1688086?journalCode=uhmt20>>

## ASEAN

ASEAN has committed to combating human trafficking through the ASEAN Convention on Trafficking in Persons ('the ASEAN Trafficking Convention') which follows the U.N. model and has similar definitions of human trafficking and objectives to punish perpetrators and protect victims.<sup>30</sup> Implementation is anticipated to be through the ASEAN Plan of Action Against Trafficking in Persons, Especially Women and Children ('APA')<sup>31</sup> and ASEAN guidelines on Corporate Social Responsibility in Labour ('CSR')<sup>32</sup> General Principle 4 of the ASEAN Human Rights Declaration provides that "the rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms" and principle 13 provides that "no person shall be held in servitude or slavery in any of its forms, or be subject to human smuggling or trafficking in persons, including for the purpose of trafficking in human organs". Article 14 of the ASEAN Convention Against Trafficking in Persons Especially Women and Children provides protective provisions including Article 14(7) which provides

Each party shall, subject to its domestic laws, rules, regulations and policies, and in appropriate cases, consider not holding victims of trafficking in persons criminally or administratively liable, for unlawful acts committed by them, if such acts are directedly related to the acts of trafficking.

The 2004 ASEAN Declaration Against Trafficking in Persons Particularly Women and Children states the importance of distinguishing victims of trafficking from perpetrators and reinforces the need to ensure that the 'dignity and human rights of genuine victims of trafficking' are respected.<sup>33</sup> Additionally, at the Sixth Experts Working Group Meeting on ASEAN Convention on Trafficking in Persons and Regional Plan of Action<sup>34</sup>, the Chair of the meeting noted that: 'It is also important that victims of trafficking are not treated like irregular migrants and deported or charged with criminal offences even before they are identified as victims.'<sup>35</sup>

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<sup>30</sup> <http://www.asean.org/wp-content/uploads/2015/12/ACTIP.pdf>

<sup>31</sup> <http://www.asean.org/wp-content/uploads/2015/12/ACTIP.pdf> The ASEAN Trafficking Convention is not the first instrument in the region relating to human trafficking: It reaffirmed "commitment to the ASEAN Declaration Against Trafficking in Persons Particularly Women and Children adopted in 2004; the Criminal Justice Responses to Trafficking in Persons; Ending Impunity for Traffickers and Securing Justice for Victims in 2007 ("ASEAN Practitioner Guidelines"); The ASEAN Leaders' Joint Statement in Enhancing Cooperation Against Trafficking in Persons in South East Asia in 2011; and ASEAN's efforts in promoting human rights including the ASEAN Human Rights Declaration in 2012".

<sup>32</sup> <http://asean.org/storage/2012/05/ASEAN-Guideline-on-CSR-in-Labour.pdf>

<sup>33</sup> Preamble.

<sup>34</sup> (3-5 June 2014, Yangon, Myanmar)

<sup>35</sup> Available at <<http://www.asean.org/news/asean-secretariat-news/item/asean-commits-to-combat-trafficking-in-persons>>.

In Indonesia, an ASEAN member, the *U.N. Trafficking in Persons Protocol* has been implemented through the passing of the Trafficking in Persons law, Number 21 of 2007. Article 18 states:

“A victim forced to commit a crime by human traffickers, shall not be convicted.”<sup>36</sup>

The Philippines, also an ASEAN member, affords substantial legal protection to victims of trafficking and invests in their rehabilitation. Filipino women are recognised in statute as common victims, and as such are deserving of explicit protection. Legislation includes the following:

- Section 24(a) Republic Act No. 9208 provides that trafficked persons come under the category of ‘Overseas Filipino in Distress’ for legal aid, per Republic Act No. 8042;
- Section 4(b) Republic Act No. 9208 defines ‘acts of trafficking in persons’, as that explicitly involving any Filipino women who are “introduced or matched for money, profit, material, economic or other consideration ... to a foreign national, for marriage for the purpose of acquiring, buying, offering, selling or trading him/ her to engage in prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude or debt bondage;
- Section 16 Republic Act No. 9208 sets out rehabilitative Programs that Address Trafficking in Persons, which mandates the government to ‘implement preventative, protective and rehabilitative programs for trafficked persons ...’;
- Section 16 Republic Act No. 9208 sets out the Department of Social Welfare and Development (DSWD) as the agency mandated under the section to ‘implement rehabilitative and protective programs for trafficked persons ...’; and
- Section 23 Republic Act No. 9208 dictates ‘Mandatory Services to Trafficked Persons’ ‘to ensure recovery, rehabilitation and reintegration into mainstream of society ...’.

In relation to human trafficking victims who commit crime, by Republic Act No 9208, section 17, reads as follows:

Section 17 Legal Protection to Trafficked Persons – Trafficked persons shall be recognised as victims of the act or acts of trafficking and as such shall not be penalised for crimes directly related to the acts of trafficking enumerated in this Act or in obedience to the order made by the trafficker in relation thereto. In this regard, the consent of a trafficked person to the intended exploitation set forth in this Act shall be irrelevant.

Section 17 Republic Act No. 10364 amends section 17 to offer legal protection to trafficked persons who committed unlawful acts as a *direct result of*, or as an incident in relation to being trafficked. It is notable that the Philippine Inter-Agency Council Against Trafficking (IACAT) mission statement at paragraph 4 lists international cooperation as a core function of what is

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<sup>36</sup> Note – forced is capable of being widely defined to include the purposes of the Protocol.

“the central authority of the Republic of the Philippines”.<sup>37</sup> In addition, the UN Convention Against Transnational Organised Crime (UNTOC) is pertinent:

Per Article 27 UNTOC the Philippines is legally bound to cooperate with other countries and work towards enhancing the effectiveness of domestic and overseas law enforcement actions to combat transnational crime;

Legal protection of trafficked persons who commit crime is greater outside of Australia and the NAP 2020 to 2024 needs to do significant work to compensate.

## V. APPLICATION OF THE UK MODERN SLAVERY CRIMINAL DEFENCE

In March 2015, the *Modern Slavery Act* (2015) (UK) (‘the UK Act’) came into force in the United Kingdom, applying to England and Wales. Specific to victim support, the UK Act created a statutory defence for trafficking victims who have engaged in criminal activity because of their being trafficked or enslaved.<sup>38</sup>

Since this time, an independent review (‘the review’) of the Act was established to ‘... consider the operations and effectiveness of the Act and to suggest potential improvements’. In May 2019, the review issued the *Independent Review of the Modern Slavery Act 2015: Final Report*.<sup>39</sup> The government has responded to the review’s report and recommendations.<sup>40</sup>

This section will summarise the Act, the report issued by the independent review, and the United Kingdom’s response to that review, as far as they relate to victim defence provisions. The UK Modern Slavery approach is helpful but still not comprehensive.

### *A Section 45 of the Modern Slavery Act UK*

Section 45 of the Act provides a statutory defence for victims of modern slavery, for certain criminal offences which they were compelled to carry out as a result of their exploitation, such as being forced to produce or sell illegal drugs. It does not apply to the many other serious crimes. The statutory defence was designed to provide further encouragement to victims of

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<sup>37</sup> Republic of the Philippines Department of Justice, ‘Vision, Mission, Quality Policy/ Objectives, Mandate and Functions,’ (web page) <<https://www.doj.gov.ph/vision-mission-and-mandate.html>>.

<sup>38</sup> The UK Act s 45.

<sup>39</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/803406/Independent\\_review\\_of\\_the\\_Modern\\_Slavery\\_Act\\_-\\_final\\_report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf)

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/815410/Government\\_Response\\_to\\_Independent\\_Review\\_of\\_MS\\_Act.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815410/Government_Response_to_Independent_Review_of_MS_Act.pdf)

slavery to come forward and give evidence without fear of being convicted for offences connected to their slavery or trafficking situation.<sup>41</sup>

In the second reading speech given in the House of Commons on 8 July 2014, Mrs Theresa May said the following about victims of slavery and trafficking, and the need for a defence:

Modern slavery is a crime that inflicts immense suffering and misery. At the heart of the Bill and all our work is the desire to ensure that victims receive the protection and support they deserve, as well as help to recover from their traumatic ordeal. We must also ensure that victims, who have already suffered so much, do not suffer again through the criminal justice system.

Victims of modern slavery are sometimes forced by organised criminals to commit crimes such as cannabis cultivation. Fear of prosecution can deter victims from coming forward to help the police with investigations and from acting as witnesses in court. It is vital that we give them the confidence to come forward without the fear of prosecution. The Crown Prosecution Service already has guidance in place to prevent the prosecution of victims who have been forced to commit crime, but I think we can, and should, go further.

That is why the Bill includes a statutory defence for victims. The defence includes substantial safeguards against abuse and it will not apply to a number of serious offences—mainly violent and sexual offences—which are set out in the Bill. However, even in cases where the defence does not apply, prosecutors will still need to look carefully at all the circumstances to see whether it is in the public interest to prosecute victims.

Helping more victims to testify in court is crucial in our fight against the perpetrators. We need to give victims—who can face threats and intimidation—greater assurance that they can access special measures, such as giving evidence by video link or behind a screen. The Bill therefore extends to all modern slavery victims existing provisions that help trafficking victims gain access to special measures.<sup>42</sup>

In a criminal trial the legal burden remains on the prosecution.<sup>43</sup> Schedule 4 of the Act outlines the common law and statutory offences for which section 45 of the Act will **not** apply. This is contrary to the ASEAN approach which focuses on the victim not the crime. The best approach

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<sup>41</sup> The report, 1.4.

<sup>42</sup> Second Reading Speech, House of Commons, 8 July 2014, Column 177.

<sup>43</sup> *MK v R and Gega v R* [2018] EWCA Crim 667

is to take a victim-centric approach, looking at the offender's status as a victim of human trafficking or slavery, as opposed to the alleged offence committed.

‘The principle of non-punishment derives its force from a recognition that those exploited in criminal networks are victims. Muraszkievicz argues that accused trafficked persons are not liable for the crime, rather liability falls on the trafficker. Concepts of protection can be challenged where there are competing rights, including the rights of the victim of the crime. Implementation of the obligations under the *U.N. Trafficking in Persons Protocol* can then be inadequate and “may lead to trafficked persons not being protected from liability. Thus, the aim of non-liability principle will not be achieved”.<sup>44</sup> Implementation is not achieved where legal frameworks are non-existent or non-effective.<sup>45</sup> Taking a victim centred approach in both policy and law can provide protection but also the necessary education.<sup>46</sup>

Legal systems impose criminal responsibility on those who commit a criminal offence, however this responsibility has the potential to be averted or mitigated in cases where there is a recognised defence to their actions. Law has an important role to play in ensuring people in vulnerable positions, such as victims of human trafficking, are not denied their right to safety and assistance.

#### *Relevant Findings of the Independent Review of the Modern Slavery Act 2015*

The review considered section 45 of the Act and noted that there was no quantitative data available to assess the impact of the defence, thus, could not report on how it had been used or misused.<sup>47</sup> It was submitted to the review that the use of the defence was on the increase, but it could not be determined what factors lead to this.

The review went on to consider the burden of proof and opined that the burden of proof should remain with the prosecution.<sup>48</sup> The review found that the risk of this defence being abused was outweighed by the need for the defence to be available to genuine victims,<sup>49</sup> reiterating that protecting vulnerable persons was the purpose of the Act.<sup>50</sup>

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<sup>44</sup> Muraszkievicz, *Protecting Victims of Human Trafficking From Liability The European Approach* Palgrave 2018, p. 200).

<sup>45</sup> Organisation for Security and Co-operation in Europe, ‘Policy and Legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking’ (2013) 10.

<sup>46</sup> UNODC Education 4 Justice Program <<https://www.unodc.org/e4j/>>

<sup>47</sup> The report, 4.1.3.

<sup>48</sup> The report, 4.2.4.

<sup>49</sup> The report, 4.2.4.

<sup>50</sup> The report, 4.2.5.

The review made no recommendations to amend Schedule 4 of the Act, which provides the criminal offences for which section 45 cannot be raised.<sup>51</sup>

The review opined that in the case of children, where the statutory defence had not been raised but there are enough indicators that it is necessary, Judges and Magistrates should question at pre-trial whether the defence is necessary.<sup>52</sup> Further, that this should be considered by Judges and Magistrates in all cases involving children.<sup>53</sup>

In relation to the statutory defence the review recommended that ‘... Government should work closely with relevant organisations (including the Crown Prosecution Service, College of Policing, Criminal Bar Association, professional bodies representing solicitors and the Judicial College) to review the available training and guidance to ensure it includes clear and consistent information on the statutory defence. This should highlight the Court of Appeal ruling and where the burden of proof lies. Progress should be regularly monitored by a cross-government forum, such as the Prime Minister’s Task Force.’<sup>54</sup>

The report further recommended that ‘... as a priority, the police, the CPS and HM Courts and Tribunals Service record data on how the statutory defence is being used by adults and children. The overall use of the defence needs to be captured, as well as cases where the defence has been appropriately deployed, where it has been claimed and subsequently disproved, and instances where it, arguably, ought to have been deployed earlier on.’<sup>55</sup>

As it relates to the recommendations regarding statutory defences, the UK Government accepted the findings of the reviewer/s.<sup>56</sup>

The UK Government response issued a response to the review in July 2019. The response noted the concerns raised by law enforcement and prosecutors regarding its ability to disprove the section 45 defence to a criminal standard, but concluded that the current jury system was the appropriate way to test the defence.<sup>57</sup>

The response also states that the Anti-Slavery Commission will ‘...work with criminal justice agencies to better understand what is happening on the ground.’

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<sup>51</sup> The report, 4.3.3.

<sup>52</sup> The report, 4.4.4.

<sup>53</sup> The report, 4.4.4.

<sup>54</sup> The report, 5.1.2.

<sup>55</sup> The report, 5.2.1.

<sup>56</sup> Government response, 78.

<sup>57</sup> Government response, 78.

## *Australia*

Research by the Australian Institute of Criminology found that “the majority of persons trafficked into Australia are known to originate from South East Asia”.<sup>58</sup> It has been estimated that there are approximately four undetected victims for every victim detected in Australia.<sup>59</sup> Between 2004 and 2017, 841 possible cases of human trafficking and slavery were reported to the Australian Federal Police, resulting in 350 victims being referred to the Support for Trafficked People Program and 21 offenders being convicted<sup>60</sup>. This contrasts with the number of human trafficking and slavery victims in Australia in 2015–16 and 2016–17 which was estimated between 1,300 and 1,900.<sup>61</sup> Notably, the collection of data does not appear to specifically assess cases involving defence mitigation which amounts to coercion or compulsion.

Australia is a signatory to the *U.N. Trafficking in Persons Protocol* and has enacted offences criminalizing human trafficking in the Commonwealth Criminal Code Act 1995. Divisions 270 and 271 of the Criminal Code Act 1995 contain offences for human trafficking, slavery, and slavery-like practices including servitude, forced labour, deceptive recruiting for labour or services, debt bondage, and forced marriage. The human trafficking offences include provisions for individuals trafficking people into, out of, and within Australia, and specific provisions for domestic trafficking, organ trafficking and trafficking in children. Penalties for individual offenders in Divisions 270 and 271 range from four years' imprisonment for debt bondage, to 25 years' imprisonment for slavery and trafficking in children.<sup>62</sup> Like the UK the definition in the UN Trafficking in Persons Protocol has been largely adopted for the purpose of prosecution but, here there is no legal defence for accused trafficked persons at all. The focus remains on prosecution of crime not comprehensive protection.

Australia's mechanisms for accused trafficked persons remain a matter for policy. Australia had a National Action Plan to Combat Human Trafficking and Slavery running from 2015 to

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<sup>58</sup> <<http://www.sbs.com.au/news/article/2013/06/07/human-trafficking-crime-21st-century>>

<sup>59</sup> Lyneham S, Dowling C & Bricknell S 2019. *Estimating the dark figure of human trafficking and slavery victimisation in Australia*. Statistical Bulletins no. 16. Canberra: Australian Institute of Criminology. <https://aic.gov.au/publications/sb/sb16>

<sup>60</sup> Lyneham S, Dowling C & Bricknell S 2019. *Estimating the dark figure of human trafficking and slavery victimisation in Australia*. Statistical Bulletins no. 16. Canberra: Australian Institute of Criminology. <https://aic.gov.au/publications/sb/sb16>

<sup>61</sup> Lyneham S, Dowling C & Bricknell S 2019. *Estimating the dark figure of human trafficking and slavery victimisation in Australia*. Statistical Bulletins no. 16. Canberra: Australian Institute of Criminology. <https://aic.gov.au/publications/sb/sb16>

<sup>62</sup> Australian Government Human Trafficking legislation: <http://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Pages/Humantraffickinglegislation.aspx> >

2019 ('the NAP')<sup>63</sup>. The NAP provided "the strategic framework for Australia's whole-of-community response to human trafficking and slavery and sets clear goals and action items which align to Australia's domestic laws and international obligations and are underpinned by key performance indicators for monitoring purposes". A complimentary International Strategy was launched in March 2016.<sup>64</sup> Together, the intention was that the measures would "address the full cycle of human trafficking and slavery from recruitment to reintegration and give equal weight to the critical areas of prevention, enforcement and victim support".<sup>65</sup> Both the domestic and international strategies are founded on four central pillars:

1. Prevention and Deterrence
2. Detection and Investigation
3. Prosecution and Compliance, and
4. Victim Support and Protection.

The NAP 2015 to 2019 did not specifically address protection of trafficked persons accused of committing crime.

In February 2017, the Australian Attorney General commissioned the Joint Standing Committee on Foreign Affairs, Defence and Trade ('the Committee') to investigate measures to better combat modern slavery in Australia and around the world ('the Inquiry'). The Inquiry examined Australia's legislative and policy frameworks in light of recent international developments to assess how the Australian Government can better tackle "slavery and slavery-like practices" as defined in the NAP 2015 to 2019.<sup>66</sup> The Inquiry particularly focused on assessing the effectiveness of the United Kingdom's *Modern Slavery Act* 2015 (MSA (UK)). It recommended similar or improved measures could be introduced in Australia. The *Hidden in Plain Sight* report found evidence that suggested more could be done to "combat these crimes and to better support victims". It recommended consideration of developing defences for trafficked victims and an appellate process similar to the UK model. The *Modern Slavery Act* 2018 (Cth) came into force on 1 Jan 2019. It is limited to corporate reporting of slavery in supply chains.

In Australia, there have been some policies for protection but, save for some limited police figures, no empirical evidence that these are being widely applied by prosecuting authorities when making decisions on who to prosecute or not. In addition, there is no statutory defence to criminal offending at Commonwealth level in the *Modern Slavery Act* (Australia) 2018 nor

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<sup>63</sup> <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Trafficking-NationalActionPlanToCombatHumanTraffickingAndSlavery2015-19.pdf>

<sup>64</sup> NAP. Page 9

<sup>65</sup> NAP. Page 9.

<sup>66</sup> NAP 2015-2019 <<https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Trafficking-NationalActionPlanToCombatHumanTraffickingAndSlavery2015-19.pdf>>Page 4 but note the Inquiry Report (page 96) recommended excluding practices such as forced marriage that are 'unlikely to be present' in business practices and supply chains

in State legislation. Again, in practical terms, if there is no specific obligation then there will be no specific investigation and credible evidence of an accused trafficked person's status will be lost. The result is that protection for trafficked persons is less available in Australia than the UK.

## VI. CONCLUSIONS AND RECOMMENDATIONS

This submission primarily argues that there should be a legislative defence to all crimes for trafficked persons, including accessories. In the absence of such legislation in Australia, policy should be developed that is strictly and comprehensively protective. This may be counter intuitive for investigators and prosecutors but it is a logical response to what is known about human trafficking in crime and to Australia's international commitments for protection.

### *Take a victim centred approach*

International prosecutorial frameworks seek to convey the message that impunity will not be tolerated<sup>67</sup>, and the focus is on high-level leaders of the crimes committed as the most effective way of achieving that objective.<sup>68</sup>

One protection is to commit to protected confessions so that it is agreed between investigators and suspects at a very early stage that any confession to a crime will not be relied on in criminal proceedings as against a person who raises credible evidence of their trafficked status. It should also be noted that protection should not be directly dependent on witness testimony against traffickers. In requiring a victim to provide testimony against their trafficker, there is a distinct risk that their rights would be breached, as, in the course of giving testimony, the victim may necessarily be required to confess to a crime which they were compelled to commit in the course of their being trafficked. The non-existence of a clear defence provision to protect victims from criminal charges in these cases reflects a clear weakness in existing legislation.

### *Publishing non-prosecution policy*

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<sup>67</sup> David P Stewart, *International Criminal Law in a Nutshell* (West Academic Publishing, 2014) 19-20;

<sup>68</sup> Dale Stephens and Thomas Wooden, 'War Crimes: Increasing Compliance with International Humanitarian Law through International Criminal Law?' in Philipp Kastner (ed) *International Criminal Law in Context* (Routledge, 2018) 109, 123–125; Christian M. De Vos, 'The International Criminal Court: Between Law and Politics' in Philipp Kastner (ed) *International Criminal Law in Context* (Routledge, 2018) 240, 258; Allison Marston Danner and Jenny S Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005)93(1) *California Law Review* 75, 148.

The published non-prosecution policy of the CPS in the UK is relatively comprehensive and freely available<sup>69</sup> In Scotland, Section 6 of the *Human Trafficking and Exploitation (Scotland) Act 2015* provides that the Lord Advocate ‘must issue and publish instructions about the prosecution or trafficking/slavery victims compelled to commit an offence, where that compulsion is ‘directly attributable’ to being a victim of trafficking or slavery. Where child victims are concerned, the act need not be ‘directly attributable’ but rather a ‘consequence of the child's victimhood.’

It is submitted that the NAP 2020-2014 should at the very least commit to publication of both policy on non-prosecution and protection by the Commonwealth and State DDPs.

### *Joint safeguarding operations*

In the absence of comprehensive criminal defences in Australia, this submission suggests that the approach by the UK to County Lines Exploitation and Drug Supply operations provide a helpful template from which to develop non-prosecution policy<sup>70</sup>. The approach of investigating and safeguarding simultaneously has caused a significant drop in the prosecution of the young and vulnerable.<sup>71</sup>

### *Develop transnational policy*

As set out above, protection for trafficked persons who commit crime is more developed overseas. However, often in transnational cases, the trafficking may have begun in Australia. This can lead to citizens facing significant penalties, including the death penalty overseas. Developing a non -prosecution policy should also occur in relation to transnational cooperation which, for example, should include standing arrangements for repatriation of trafficked citizens.

It would also be helpful to develop policy in relation to criminal investigations into corporate reporting of slavery in supply chains. This is under developed. One example is slavery in illegal logging. Failure to use due diligence in the import of illegal logging is a criminal offence.

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<sup>69</sup> CPS Prosecution Guidance last updated 20<sup>th</sup> January 2020 Human Trafficking, smuggling and slavery <<https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery>>

<sup>70</sup> County Lines Violence, Exploitation & Drug Supply 2017 <<https://www.nationalcrimeagency.gov.uk/who-we-are/publications/234-county-lines-violence-exploitation-drug-supply-2017/file>> and 2018 <<https://nationalcrimeagency.gov.uk/who-we-are/publications/257-county-lines-drug-supply-vulnerability-and-harm-2018/file>> and 2019 <<https://www.nationalcrimeagency.gov.uk/news/record-numbers-arrested-and-hundreds-of-children-protected-as-county-lines-drug-networks-targeted>>

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<sup>71</sup> Ibid

Modern Slavery reporting under the Commonwealth Act does not carry a criminal penalty but the two overlap and policy ought to be developed.

This submission is an overview of my research. I can provide further, if required.