

**(Supplementary) Submission by Civil Liberties Australia to the Australian Parliament's
Joint Standing Committee on Foreign Affairs, Defence and Trade**

**Inquiry into establishing a Modern Slavery Act in Australia
(comparable to the UK's *Modern Slavery Act 2015*)**

Lead author: Felicity Gerry QC¹

Felicity Gerry QC gave evidence to the Inquiry on the 1st of August 2017 on behalf of Civil Liberties Australia.

She answered questions on three topics:

- Defences for victims who commit crime
- Corporate responsibility
- Borders

These submissions are in addition to written submissions made on behalf of Civil Liberties Australia in Submission No 8 and Ms Gerry's verbal evidence.

These submissions deal with the following questions raised with Ms Gerry by Committee Members during the hearing:

- Information on the approach to defences for human trafficking victims in ASEAN
- Why corporate reporting of slavery in supply chains is as important as reporting bribery, and corruption and other abuse.
- Why border forces and police officers need to be aware of slavery issues

Resources

As a minimum, we recommend the following sources:

- To understand the need for globally harmonised legal structures in relation to modern slavery in local /national / transnational organised crime and national / international corporate structures: The International Bar Association (IBA) Forum on human trafficking at the IBA Conference in 2013 recorded over two hours at this link https://www.ibanet.org/Conferences/Boston_Humantrafficking.aspx

¹ Queen's Counsel in England & Wales and Australia, Hong Kong (ad hoc) and Gibraltar (ad hoc). Member of International Bar Association and the Commonwealth Lawyers Association. Member of the Parameterise Complexity Research Unit for interdisciplinary research on mathematics and law at Charles Darwin University, Australia, an affiliated Member of Research group on *Fundamental Rights and Constitutionalism* at the Vrije Universiteit Brussels and an Adjunct Fellow at the University of Western Sydney. Research specialism is *using technology to combat human trafficking*. Published in Human Trafficking: Emerging Legal Issues and Applications 2017.

- To understand the importance of tackling modern slavery to Australia’s advocacy on the death penalty: Ms Gerry’s joint article on human trafficking, drug trafficking and the death penalty in the Indonesian Law Review for 2016 which deals with the temporary reprieve of Mary Jane Veloso (who was on death row with Australian citizens Chan and Sukhamaran) at this link <http://ilrev.ui.ac.id/index.php/home/article/view/263>
- To follow the progress of the UK legislation: The UK Review of the Modern Slavery Act 2015 one year on at this link <http://stronger2gether.org/review-of-the-uk-modern-slavery-act-one-year-on/>
- To see an analysis of the shortcomings of the UK legislation: UK House of Lords, House of Commons Joint Committee on Human Rights Sixth Report of Session 2016–17 Human Rights and Business 2017:Promoting responsibility and ensuring accountability: <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>

Defences for victims who commit crime

We welcome the indication from the interim report that the language of Trafficking in Persons will be used rather than ‘modern slavery’. This allows for recognition of the many and varied way in which people are exploited for profit as set out in the UN Trafficking Protocol. Defences have been developed in relation to human trafficking in various jurisdictions including the UK.

International Obligations (taken from the submission by Civil Liberties Australia)²:

Key issues and implications for responses included 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 to include the vital importance of ensuring the protection of victims. Here, the criminalization of those, particularly women, who commit crime as a result of abuse, coercion or exploitation, engages Australia’s international commitments pursuant to the UN Trafficking Protocol³ which is designed to identify and define a victim and has an optional framework for protection. Human trafficking is defined in three ways:

- *movement of persons - 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*

² Please note CLA will be providing further submissions on the questions asked to Felicity Gerry QC on corporate reporting, ASEAN and this topic.

³ United Nations Office of the High Commissioner for Human Rights, *Protocol to prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*, (Geneva, 2000). The Protocol was adopted by resolution A/RES/55/25 of 15 November 2000 at the fifty-fifth session of the General Assembly of the United Nations.

giving or receiving of payments or benefits to achieve the consent of a person having control over another person,

- *for the purpose of exploitation which includes, 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 .*

Many nations have committed to tackling human trafficking but there are a range of responses. Article 2 of the UN protocol provides the statement of purpose to:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
- (c) To promote cooperation among States Parties in order to meet those objectives.

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.

In addition there are a series of other communications from the UN as to the importance of non-punishment especially in relation to women and girls. This is reinforced by the International Labour Office (ILO) Protocol of June 2014 (updating the existing ILO Convention 29 on Forced Labour). Article 4(2) of the ILO Protocol 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.

The obligation for states, against this background, not to prosecute or punish victims of human trafficking for crimes they were compelled to commit logically ought to move victims who commit crime from the position of suspect to witness.⁴

Sample International Responses (taken in part from the submission by Civil Liberties Australia and developed)⁵.

⁴ Felicity Gerry and Lyndon Harris, 'Women in Prison: Is the Justice System Fit for Purpose?' (Policy Paper, Lexis Nexis Halsbury's Law Exchange, 2014 <<http://www.halsburyslawexchange.co.uk/category/policy-papers/>>). Both on the curriculum for Oxford Criminology.

ASEAN

The ASEAN Convention Against Trafficking in Persons Article 14 (7) 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 directly related to the acts of trafficking.

This gives some flexibility but must engage non-prosecution guidance, defences and non-punishment sentencing guidance. In Indonesia, for example, law No 21 of 2007 provides complete protection for a victim who commits a crime, although the definition of victim has some limitations.

EU (Taken in part from a book chapter by Felicity Gerry QC (forthcoming))

It is important to note that the EU Trafficking Directive has direct effect on the English approach. In the EU the Trafficking Protocol has a non-punishment provision which 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.

This does not *require* non-prosecution or non-punishment but allows for the provision of systems to recognize the possibility of not bringing a prosecution or not imposing any penalty where people act under ‘compulsion’. The Inquiry is aware of the *Rantzev* case and the requirement for credible evidence to identify victims in criminal justice. This requires a formal system, not just policy or action plans on arrest and at borders.

UK (Taken in part from a book chapter by Felicity Gerry QC (forthcoming)).

In the UK, the *Modern Slavery Act 2015* creates a human trafficking defence to criminal activity but in limited circumstances as the defences in section 45 are subject to narrower application for adults and limited to certain offences set out in schedule 4. Section 45 provides as follows:

Defence for slavery or trafficking victims who commit an offence

- (1) A person is not guilty of an offence if—
 - (a) the person is aged 18 or over when the person does the act which constitutes the offence,
 - (b) the person does that act because the person is compelled to do it,

⁵ Please note CLA will be providing further submissions on the questions asked to Felicity Gerry QC on corporate reporting, ASEAN and this topic.

- (c) the compulsion is attributable to slavery or to relevant exploitation, and
 - (d) a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.
- (2) A person may be compelled to do something by another person or by the person's circumstances.
 - (3) Compulsion is attributable to slavery or to relevant exploitation only if—
 - (a) it is, or is part of, conduct which constitutes an offence under section 1 or conduct which constitutes relevant exploitation, or
 - (b) it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation.
 - (4) A person is not guilty of an offence if—
 - (a) the person is under the age of 18 when the person does the act which constitutes the offence,
 - (b) the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation, and
 - (c) a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act.
 - (5) For the purposes of this section—"relevant characteristics" means age, sex and any physical or mental illness or disability; "relevant exploitation" is exploitation (within the meaning of section 3) that is attributable to the exploited person being, or having been, a victim of human trafficking.
 - (6) In this section references to an act include an omission.
 - (7) Subsections (1) and (4) do not apply to an offence listed in Schedule 4.
 - (8) The Secretary of State may by regulations amend Schedule 4.

The UK have therefore managed to draft a suitable defence but have used policy to limit the offences to which it applies (as set out in schedule 4). This has no logical basis in relation to a range of circumstances, similar to the issues set out in relation to Australia below.

The use of abuse of process for those already wrongly convicted

In addition, where the defendant is a victim of trafficking, the abuse of process procedure to stay any charges on the basis that the accused cannot receive a fair trial has been used successfully at appellate level.⁶ The approach of the appellate courts has been to quash convictions when effectively a victim of trafficking should never have been prosecuted.

⁶ R v Joseph and others (Anti-Slavery International intervening) [2017] All ER (D) 100 (Feb); R. v. LM ([2010] All ER (D) 202 (Oct)), R. v. N; R. v. E ([2012] All ER (D) 128 (Feb)) and R. v. L ([2014] 1 All ER 113)

Whilst cases will be fact specific, the criteria most recently set out by the Court of Appeal are as follows⁷:

- (i) The non-punishment provisions of Art.26 of the Council of Europe Convention of Action against Trafficking in Human Beings (CoE Trafficking Convention) has been given effect in English Law through the common law defences of duress and necessity and Crown Prosecution Service (CPS) guidance on the exercise of the discretion to prosecute in trafficking cases and the power of the court to stay a prosecution for abuse of process.
- (ii) In a case where there was reason to believe the defendant who had committed an offence had been trafficked for the purpose of exploitation and there was evidence the offence had been committed as a result of compulsion arising from trafficking, the prosecutor had to consider more than common law defences of duress or necessity but also whether it was in the public interest to prosecute at all.
- (iii) The court's power to stay charges on an indictment is a power to ensure that international obligations are complied with and properly applied. If proper consideration had not been given, then a stay should be granted. However, where proper consideration had been given, the court should not substitute its own judgment for that of the prosecutor.
- (iv) Continuation of a prosecution would depend on various factors including the gravity of the offence, the degree of continuing compulsion and the alternatives reasonably available to the defendant.
- (v) In cases where the evidence supports a conclusion that the defendant was under levels of compulsion which meant that culpability had been extinguished (defined as no realistic alternative available to the person but to comply with the dominant force of another individual or group of individuals) an abuse of process submission was likely to succeed.
- (vi) In other cases culpability might be diminished but nevertheless be significant. For those individuals, prosecution might well be appropriate, with due allowance to be made in the sentencing decision for their diminished culpability. In yet other cases, the fact that the defendant was a victim of trafficking would provide no more than a colourable excuse for criminality which was unconnected to and did not arise from their victimisation. In such cases, an abuse of process submission would fail.
- (vii) On the position of a child victim: it is not necessary to prove compulsion. Once it was established that a child had been a victim of trafficking for the purposes of exploitation, the relevant consideration was whether there had been a sufficient nexus between the trafficking for the purposes of exploitation and the offence; it was not necessary to go so far as to show there had been compulsion to commit the offence required in the case of an adult.
- (viii) Any decision of the Competent Authority on whether the defendant was a trafficking victim did not bind the court. A careful analysis of the facts was

⁷ R v Joseph and others (Anti-Slavery International intervening) [2017] All ER (D) 100. Ibid n 37

required, including close examination of the individual's account and proper focus on the evidence of the nexus between the trafficking and the offence with which they were charged⁸.

The approach of the Court of Appeal in *Joseph and others*⁹ was to try to ensure cases are diverted before any court hearing. There will be some cases that slip through the decision making process or where more evidence comes to light.

Australia

Australia does not have a Modern Slavery Act and has not enacted the defences set out in the UK legislation. It should provide for a more comprehensive system including non-prosecution and non-punishment legislation.

It is believed that Australia has never used the abuse of process procedure (as set out above) in this context. Felicity Gerry QC has one ongoing case on this topic in Australia but it is currently confidential. There is good reason to audit at least women in prison and to allow for appeals. The right to second and out of time appeals are also limited in Australia so a specific audit is to be preferred.

The effects of Modern Slavery, human trafficking, forced labour and servitude fall in what two of Australia's Law Professors, Bronitt and McSherry, call the "blurred space" between conduct and fault. The effects of Modern Slavery can have profound effects on the voluntariness and/or the mental health of a victim which does not fit neatly with notions of intention or recklessness or innocent agency. Some recognition of these effects, where it reaches levels of PTSD, has been made in the context of women who kill an abusive partner but not in a wider context to provide a full or partial defence in this context or in a domestic context.

The following is a non-exhaustive list of problems with the current Australian framework:

- The effects of Modern Slavery may not be to the level of mental impairment so fitness to plead or insanity may be difficult to apply. In any event a system which effectively waits for a victim to be so traumatised is cruel and contrary to Australia's protective obligations.
- Mental impairment defences are not available in all cases.
- The effects of Modern Slavery may not be to the level of automatism and Australian law does not recognise volition in the same way as other jurisdictions. In any event a

⁸ Criminal law Trafficking People for Exploitation CL & JW Vol.181 No.7.
<<https://www.criminallawandjustice.co.uk/clj-reporter/R-v-Joseph-and-others-Anti-Slavery-International-intervening-2017-All-ER-D-100-Feb>>

⁹ (Anti-Slavery International intervening) [2017] All ER (D) 100

system which effectively waits for a victim to be so traumatised is cruel and contrary to Australia’s protective obligations.

- The effects of Modern Slavery may be to the level of duress which might provide a complete defence but this defence is not consistent across States and Territories particularly in relation to accessories. Here the allegations against the women who assassinated Kim Jong–nam may be pertinent. If, as news agencies suggest, they were duped and their vulnerability abused, if the events occurred in Australia, this may reduce murder to manslaughter but the system should allow for investigation and decision making as to their trafficked status and the nexus with the crime.
- The effects of Modern Slavery may be admissible in relation to provocation and loss of control and self-defence but these are not consistent across Australia and not always complete defences. A more structured system is necessary.
- Marital coercion remains as a common law defence in Australia but not in the Code States and only in the presence of the spouse rather than being extended to other locations or other relationships. This defence has been abolished in England and Wales. A new offence of coercive control in the UK allows for the prosecution of perpetrators but no corresponding defence for those coerced to commit crime.
- Human Trafficking offences do not provide corresponding defences for example for women who have little choice to act as principals or accessories in order to survive.
- The defence of Necessity involves a claim by the accused that s/he was compelled to do what s/he did by reason of some extraordinary emergency. This does not account for the types of short or long term abuse, exploitation or coercion suffered by victims of Modern Slavery.
- Investigations on arrest or at borders prioritise detection of crime not victim protection.

The importance of awareness for all stakeholders – including the relevant issues for judicial direction and expert evidence in criminal trials

Human Trafficking indicators are many and varied and likely to be outside the experience of all stakeholders in justice and border systems. Expert evidence will need to be relevant and admissible in a particular case in hand but much assistance can be provided by the material produced by the UN Office on Drugs and Crime as follows¹⁰:

General Indicators	<p><i>People who have been trafficked may:</i></p> <ul style="list-style-type: none"> • Believe that they must work against their will • Be unable to leave their work environment • Show signs that their movements are being controlled • Feel that they cannot leave • Show fear or anxiety • Be subjected to violence or threats of violence against themselves or against their family members and loved ones
---------------------------	--

¹⁰ UNODC HT Indicators Infographic < https://www.unodc.org/pdf/HT_indicators_E_LOWRES.pdf>

	<ul style="list-style-type: none"> • Suffer injuries that appear to be the result of an assault • Suffer injuries or impairments typical of certain jobs or control measures • Suffer injuries that appear to be the result of the application of control measures • Be distrustful of the authorities • Be threatened with being handed over to the authorities • Be afraid of revealing their immigration status • Not be in possession of their passports or other travel or identity documents, as those documents are being held by someone else • Have false identity or travel documents • Be found in or connected to a type of location likely to be used for exploiting people • Be unfamiliar with the local language • Not know their home or work address • Allow others to speak for them when addressed directly • Act as if they were instructed by someone else • Be forced to work under certain conditions • Be disciplined through punishment • Be unable to negotiate working conditions • Receive little or no payment • Have no access to their earnings • Work excessively long hours over long periods • Not have any days off • Live in poor or substandard accommodations • Have no access to medical care • Have limited or no social interaction • Have limited contact with their families or with people outside of their immediate environment • Be unable to communicate freely with others • Be under the perception that they are bonded by debt • Be in a situation of dependence • Come from a place known to be a source of human trafficking • Have had the fees for their transport to the country of destination paid for by facilitators, whom they must pay back by working or providing services in the destination • Have acted on the basis of false promises
<p>Children</p>	<p><i>Children who have been trafficked may:</i></p> <ul style="list-style-type: none"> • Have no access to their parents or guardians • Look intimidated and behave in a way that does not correspond with behaviour typical of children their age • Have no friends of their own age outside of work • Have no access to education • Have no time for playing

	<ul style="list-style-type: none"> • Live apart from other children and in substandard accommodations • Eat apart from other members of the “family” • Be given only leftovers to eat • Be engaged in work that is not suitable for children • Travel unaccompanied by adults • Travel in groups with persons who are not relatives <p><i>The following might also indicate that children have been trafficked:</i></p> <ul style="list-style-type: none"> • The presence of child-sized clothing typically worn for doing manual or sex work • The presence of toys, beds and children's clothing in inappropriate places such as brothels and factories • The claim made by an adult that he or she has “found” an unaccompanied child • The finding of unaccompanied children carrying telephone numbers for calling taxis • The discovery of cases involving illegal adoption • Have no choice of accommodation • Never leave the work premises without their employer • Be unable to move freely • Be subject to security measures designed to keep them on the work premises • Be disciplined through fines • Be subjected to insults, abuse, threats or violence • Lack basic training and professional licences <p><i>The following might also indicate that people have been trafficked for labour exploitation:</i></p> <ul style="list-style-type: none"> • Notices have been posted in languages other than the local language. • There are no health and safety notices • The employer or manager is unable to show the documents required for employing workers from other countries • The employer or manager is unable to show records of wages paid to workers • The health and safety equipment is of poor quality or is missing • Equipment is designed or has been modified so that it can be operated by children • There is evidence that labour laws are being breached • There is evidence that workers must pay for tools, food or accommodation or that those costs are being deducted from their wages
<p>Domestic Servitude</p>	<p><i>People who have been trafficked for the purpose of domestic servitude may:</i></p> <ul style="list-style-type: none"> • Live with a family

	<ul style="list-style-type: none"> • Not eat with the rest of the family • Have no private space • Sleep in a shared or inappropriate space • Be reported missing by their employer even though they are still living in their employer's house • Never or rarely leave the house for social reasons • Never leave the house without their employer • Be given only leftovers to eat • Be subjected to insults, abuse, threats or violence
<p>Sexual Exploitation</p>	<p><i>People who have been trafficked for the purpose of sexual exploitation may:</i></p> <ul style="list-style-type: none"> • Be of any age, although the age may vary according to the location and the market • Move from one brothel to the next or work in various locations • Be escorted whenever they go to and return from work and other outside activities • Have tattoos or other marks indicating “ownership” by their exploiters • Work long hours or have few if any days off • Sleep where they work • Live or travel in a group, sometimes with other women who do not speak the same language • Have very few items of clothing • Have clothes that are mostly the kind typically worn for doing sex work • Only know how to say sex-related words in the local language or in the language of the client group • Have no cash of their own • Be unable to show an identity document <p><i>The following might also indicate that children have been trafficked:</i></p> <ul style="list-style-type: none"> • There is evidence that suspected victims have had unprotected and/or violent sex • There is evidence that suspected victims cannot refuse unprotected and/or violent sex • There is evidence that a person has been bought and sold • There is evidence that groups of women are under the control of others • Advertisements are placed for brothels or similar places offering the services of women of a particular ethnicity or nationality • It is reported that sex workers provide services to a clientele of a particular ethnicity or nationality • It is reported by clients that sex workers do not smile
<p>Labour Exploitation</p>	<p>People who have been trafficked for the purpose of labour exploitation are typically made to work in sectors such as agriculture, construction, entertainment, service industry and manufacturing (in sweatshops).</p>

	<p><i>People who have been trafficked for labour exploitation may:</i></p> <ul style="list-style-type: none"> • Live in groups in the same place where they work and leave those premises infrequently, if at all • Live in degraded, unsuitable places, such as in agricultural or industrial buildings • Not be dressed adequately for the work they do: for example, they may lack protective equipment or warm clothing • Be given only leftovers to eat • Have no access to their earnings • Have no labour contract • Work excessively long hours • Depend on their employer for a number of services, including work, transportation and accommodation
<p>Begging and petty crime</p>	<p><i>People who have been trafficked for the purpose of begging or committing petty crimes may:</i></p> <ul style="list-style-type: none"> • Be children, elderly persons or disabled migrants who tend to beg in public places and on public transport • Be children carrying and/or selling illicit drugs • Have physical impairments that appear to be the result of mutilation • Be children of the same nationality or ethnicity who move in large groups with only a few adults • Be unaccompanied minors who have been “found” by an adult of the same nationality or ethnicity • Move in groups while travelling on public transport: for example, they may walk up and down the length of trains • Participate in the activities of organized criminal gangs • Be part of large groups of children who have the same adult guardian • Be punished if they do not collect or steal enough • Live with members of their gang • Travel with members of their gang to the country of destination • Live, as gang members, with adults who are not their parents • Move daily in large groups and over considerable distances <p><i>The following might also indicate that people have been trafficked for begging or for committing petty crimes:</i></p> <ul style="list-style-type: none"> • New forms of gang-related crime appear • There is evidence that the group of suspected victims has moved, over a period of time, through a number of countries • There is evidence that suspected victims have been involved in begging or in committing petty crimes in another country

Australia's action plans to tackle violence against women and girls and Human Trafficking

Australia's action plans centre on victimhood so it is illogical that this is ignored in the context of criminal suspects or border control. Victims of Trafficking may be children or adults. Many will have suffered significant trauma and will be fearful of engaging with those in authority. Some may have additional vulnerabilities based on their intellectual functioning or physical or mental disabilities. Others will be in fear of testifying. The court process is inevitably daunting and complaining against traffickers may also put the witness or defendant at personal risk.

Article 12 Council of Europe Convention on Action against Trafficking in Human Beings also provides for assistance to victims as follows:

1. Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least:
 - a. standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;
 - b. access to emergency medical treatment;
 - c. translation and interpretation services, when appropriate;
 - d. counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;
 - e. assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;
 - f. access to education for children.
2. Each Party shall take due account of the victim's safety and protection needs.
3. In addition, each Party shall provide necessary medical or other assistance to victims fully resident within its territory who do not have adequate resources and need such help.
4. Each Party shall adopt the rules under which victims lawfully resident within its territory shall be authorised to have access to the labour market, to vocational training and education.
5. Each Party shall take measures, where appropriate and under the conditions provided for by its internal law, to co-operate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims.
6. Each Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness.
7. For the implementation of the provisions set out in this article, each Party shall ensure that services are provided on a consensual and informed basis, taking due account of the special needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care.

Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings establishes a set of victims' rights in criminal proceedings, which includes access without delay to legal counselling and to legal representation, including for the purpose of claiming compensation: The Decision continues:

- Furthermore, on the basis of an individual risk assessment carried out in accordance with national procedures, victims should be protected from retaliation, from intimidation, and from the risk of being re-trafficked.
- Victims of trafficking who have already suffered the abuse and degrading treatment which trafficking commonly entails, such as sexual exploitation, sexual abuse, rape, slavery-like practices or the removal of organs, should be protected from secondary victimisation and further trauma during the criminal proceedings. Unnecessary repetition of interviews during investigation, prosecution and trial should be avoided, for instance, where appropriate, through the production, as soon as possible in the proceedings, of video recordings of those interviews. To this end victims of trafficking should during criminal investigations and proceedings receive treatment that is appropriate to their individual needs. The assessment of their individual needs should take into consideration circumstances such as their age, whether they are pregnant, their health, a disability they may have and other personal circumstances, as well as the physical and psychological consequences of the criminal activity to which the victim was subjected. Whether and how the treatment is applied is to be decided in accordance with grounds defined by national law, rules of judicial discretion, practice and guidance, on a case-by-case basis.
- Assistance and support measures should be provided to victims on a consensual and informed basis. Victims should therefore be informed of the important aspects of those measures and they should not be imposed on the victims. A victim's refusal of assistance or support measures should not entail obligations for the competent authorities of the Member State concerned to provide the victim with alternative measures.

Procedural developments in England and Wales have included use of interpreters, special measures to assist witnesses with communication difficulties outside of translation, measures to adapt the court room and processes and other support. Victim support measures might include protection for the individual and their family members, relocation, change of identity, protection from potential retaliation or intimidation for victims and their families¹¹. Prosecutors are encouraged to meet witnesses in advance of trial. Regard should be had to the *Code of Practice for Victims of Crime* (2015) which was developed following the Victim's

¹¹ DIRECTIVE 2011/36/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

Directive,¹² the Human Trafficking Directive¹³, and also incorporates the Child Sexual Exploitation Directive.¹⁴

Guidance from the UK Crown Prosecution Service sets out the requirement for prosecutors to be “alert to particular circumstances or situations where someone suspected of committing a criminal offence might also be a victim of trafficking or slavery”. The example given is “an unaccompanied foreign national child committing offences such as pickpocketing or cultivation of cannabis or, in the case of adults, committing offences such as those involving immigration documents, or controlling prostitution”. The guidance reminds prosecutors making charging decisions of the relevant obligations under Article 4 of ECHR which prohibits slavery and forced labour and Article 26 of the Council of Europe Anti-Trafficking Convention which requires the United Kingdom to: “... provide for the possibility of not imposing penalties on victims [of trafficking] for their involvement in unlawful activities, to the extent that they have been compelled to do so” and Article 8 of EU Anti-Trafficking Directive 2011/36/EU whereby “national authorities are entitled not to prosecute or impose penalties on victims of trafficking human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to trafficking”. There is a duty of the prosecutor to make “proper enquiries” in criminal prosecutions involving individuals who may be victims of trafficking or slavery.

In England and Wales, in relation to witnesses giving evidence and those giving evidence in relation to offences under sections 1 and 2 of the Modern Slavery Act 2015, orders can be made for them to give evidence in private¹⁵ with associated restrictions on reporting.¹⁶ In cases involving accused persons who are also victims of trafficking, the statutory framework for witnesses expressly excludes defendants from the assistance of special measures save that a child with intellectual impairment, impairment of social functioning or a mental disorder may apply for an order to give evidence by live link.¹⁷ A live link is not available for adult defendants.¹⁸ However, over the last two decades there has been a growing recognition that young defendants should have access to effective communication arrangements to enable them to fully participate in order to receive a fair trial¹⁹.

Directive (EU) 2016/800 of the European Parliament and of the Council of 11th May 2011 provides procedural safeguards for children who are suspects or accused persons in criminal proceedings or subject to a European arrest warrant: The purpose of the Directive is to ensure that children, meaning persons under the age of 18, who are suspects or accused persons in criminal proceedings, are able to understand and follow those proceedings, and to exercise their right to a fair trial, and to prevent children from reoffending and foster their social

¹² 2012/29/EU

¹³ 2011/36/EU

¹⁴ 2011/92/EU

¹⁵ Section 25 YJCEA as amended by section 46 Modern Slavery Act 2015.

¹⁶ Section 46 YJCEA 1999.

¹⁷ section 33A.

¹⁸ *R v Ukpabio* [2008] 1 Cr App R 6; *R (Hamberger) v CPS* [2014] EWHC 2814 (Admin)

¹⁹ *Camberwell Green Youth Court, ex parte D* [2005] 1 All ER 999

integration. The Directive establishes minimum rules on the protection of procedural rights of children who are suspects or accused persons which include the following²⁰:

- Rights to information
- Right to have the holder of parental responsibility informed
- Assistance by a lawyer
- Right to an individual assessment concerning protection, education, training and social integration
- Right to a medical examination
- Audiovisual recording of questioning
- Limitation on deprivation of liberty
- Alternative measures to detention
- Separate detention from adults
- Timely and diligent treatment of cases
- Right to protection of privacy
- Right to be accompanied by the holder of parental responsibility during the proceedings
- Right to appear in person and participate in their trial
- Right to legal aid
- Effective remedies for breach of rights
- Specific training of law enforcement authorities and of detention facilities who handle cases involving children to a level appropriate to their contact with children with regard to children's rights, appropriate questioning techniques, child psychology, and communication in a language adapted to the child. This includes the judiciary and the legal profession and child support organisations.

In relation to vulnerable adults, the children's Directive does not apply but on the 30th of November 2009, the Council of the European Union adopted a Resolution on a Roadmap for strengthening the procedural rights of all suspected or accused persons in criminal proceedings. Taking a step by step approach the road map calls for adoption of measures regarding the right to translation and interpretation, the right to information on rights and information about the charges, the right to legal advice and legal aid, the right to communicate with relatives, employers and consular authorities and special safeguards for suspected or accused persons who are vulnerable.²¹ Some procedural rights have been

²⁰ Directive (EU) 2016/800 of the European Parliament and of the Council of 11th May 2011 provides procedural safeguards for children who are suspects or accused persons in criminal proceedings < <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0800>>

²¹ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (Text with EEA relevance)

adopted through Directives 2010/64/EU²² on interpretation and translation, 2012/13/EU²³ right to information and EU 2013/48/ EU²⁴ on access to a lawyer and having persons informed of arrest and 2016/343/ EU²⁵ on strengthening the presumption of innocence and the right to be present at trial.

In England and Wales, the Criminal Procedure Rules 3D to G provide the current approach to children and vulnerable adults accused appearing in the Crown Court. This requires the particular vulnerability to be recognised and is intended to enable the accused person to effectively participate in the proceedings. This exercise ought to take into account the age, maturity, identified conditions and development of the accused person concerned and all other circumstances of the case.²⁶

The approach to be taken by criminal courts and the advocates is to ensure that the welfare of the child or otherwise vulnerable defendant is considered²⁷ and the process should be adapted to ensure the defendant can comprehend the proceedings and engage fully in his / her defence.²⁸ Trauma-informed procedures can enhance victim engagement and decrease the potentially negative experiences a court process may have.

Australia's current approach is nowhere near as comprehensive. The consequence is that Australia is failing vulnerable adults and children.

A note on Sentencing

In England and Wales, where a victim of human trafficking commits an offence and a decision has been made to proceed with a prosecution, on a conviction either by guilty plea or a trial, sentencing will follow. The first question for the sentencing court to resolve will be whether there is evidence to support the submission that the appellant was the victim of trafficking on the relevant occasion and acting under the control of traffickers when s/he

²² DIRECTIVE 2010/64/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 October 2010 on the right to interpretation and translation in criminal proceedings

²³ DIRECTIVE 2012/13/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2012 on the right to information in criminal proceedings

²⁴ DIRECTIVE 2013/48/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty

²⁵ DIRECTIVE (EU) 2016/343 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings

²⁶ *H* [2006] EWCA Crim 853

²⁷ Section 44 Children and Young Persons Act 1933

²⁸ *R(TP) v West London Youth Court* [2005] EWHC 2583; *SC v UK* [2004] EHRR 10.

committed the offence²⁹. In principle, the courts should consider non punishment or reduced punishment having regard to the obligations under Article 26 of the EU Trafficking Convention so there can be greater consideration of discharges, community penalties or suspended sentences as well as the effects of any ancillary orders.

This is not an approach that is clearly taken in Australia other than through mitigation. Consideration should be given to issuing sentencing guidance in this context.

Towards Global Corporate Responsibility for Modern Slavery

In March 2016, certain large companies operating in the UK became liable to report under the UK Modern Slavery Act. In practice this means that each organisation must provide an annual, board-approved, publicly available statement that describes what is being done within the organisation to eliminate slavery in supply chains. So far over 1700 companies have released statements which are now searchable online. Leading companies include Hewlett Packard, Apple, Primark, and British American Tobacco. The movement towards transparency on issues such as human exploitation and child labour means the impact of the Act is more than administrative. It is said to demonstrate the power of collaboration between governments globally, corporates and civil society to achieve a level playing field³⁰.

Setting the corporate limit for reporting in Australia must be meaningful. Setting it too high suggests that Australia is not really interested in tackling the exploitation involved in trafficking in persons. It is surprising to see such a high level in the interim report and we wonder whether the Committee has considered the reputational damage to Australia from a failure to commit to meaningful corporate responsibility. Australia has already suffered considerable reputational damage in the context of child abuse and treatment of refugees, condoning modern slavery by failing to require corporate action should not be added to the list of human rights failures.

Global corporate organisations function by outsourcing production, often to more than one country. The regulatory framework is therefore a patchwork of differing systems and levels of compliance. It becomes almost impossible for a single nation state to regulate corporate conduct. The risks of human exploitation in global supply chains is high. Arguments on cost for such abuse should play a secondary part to the proposals for regulation.

Modern slavery has a particular effect on women. From a human rights perspective, it become necessary to consider how corporate giants can be held to account for the effect production can have on the health, welfare and environment for people who depends on those

²⁹ *R v Khalifa* [2016] EWCA Crim 1967

³⁰ Bloomer., P: A year after the UK Modern Slavery Act, time for a Global Modern Slavery Agreement? <<http://news.trust.org/item/20170331091619-akvgh/>>

organisations for their income. From a corporate perspective, the burden of compliance with international human rights goals raises issues not just around jurisdiction but cost. The way for corporates to cope with an ever-increasing legal and regulatory burden – imposing requirements which differs from country to country – is for legislative approaches to harmonise.

The issue of modern slavery inevitably engages the exploitation of women. There are other international treaties dealing with women's rights and trafficking,³¹ but, again, the problem comes at the stage of implementation and impact. The argument that tackling gender inequality 'costs too much' is demonstrably inaccurate.³² For all countries, corporate governance in this context is a powerful tool.

Industry standards are now common in economic decision making. In oil and gas, for example, guidelines for good governance are generally followed as a compliance issue in the context of health and safety, often at higher standards than national laws³³. There is a public expectation that oil and gas producers comply with high safety standards which has permeated board duties. Those standards have been driven by the cost of keeping people alive and not facing huge compensation claims for human injury and environmental damage. Here, the maintenance of high standards of corporate behaviour has been achieved through a culture of compensating victims of corporate misconduct and the risk of reputational damage.

In the context of criminal prosecutions, debate remains as to whether it is right for damages and compensation payments to go to the prosecuting state and whether deferred Prosecution Agreements are a sufficiently secure model for accountability as well as to what extent injured parties are properly represented in a compliance context but, the practical reality is that global corporate structures have developed in a fashion that reflects concern for human rights and it is capable of doing so in the context of modern slavery.

Criminal liability is a mechanism which can be used to improve corporate respect for human rights. Moving towards global corporate criminal liability has already started. Effective prosecutions have occurred. The reach of the UK Bribery Act has set an example as to how one country can impose extra territorial jurisdiction on corporates. In the context of Modern Slavery a similar process is underway under the UK Modern Slavery Act 2015, albeit with more limited effect.

³¹ See, eg, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 2237 UNTS 319 Doc A/55/383 (signed 15 November 2000, entered into force 15 November 2003); *Declaration on Preventing and Combating Trafficking in Human Beings*, EU Res 14981/02 (Brussels, 2002).

³² Matthew Morton et al, *Gender at work : a companion to the world development report on jobs* (World Bank Group, Washington DC, 2014) <<http://documents.worldbank.org/curated/en/2014/02/19790446/gender-work-companion-world-development-report-jobs>>.

³³ Valerie Marcel (ed), *Guidelines for Good Governance in Emerging Oil and Gas Producers* Chatham House, The Royal Institute of International Affairs September (2013) <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy,%20Environment%20and%20Development/0913pp_marcel.pdf>.

Communities are much more mixed and economies are inextricably integrated. There can be no trade without migration and no governance without cooperation. It is however important to recognize that it is the top down approach that has been unsuccessful, because it is too far removed from behavior on the ground. Domestic solutions to global problems have to be achievable as such structures are generally more acceptable to citizens. Globally there are now common histories relating to these global challenges that mean a shared program to find stability through harmonisation of legal structures is possible.

Globalization has brought successes in terms of economic development for formerly unproductive countries, globally improved health and significant innovation such that we can conclude that it is not altogether negative. In the past, risk was managed by rules made by national governments and regional solutions were designed to deal with national clashes. However, achieving cooperative responses for global problems has been attempted post-WW2 by way of collective problem solving from all those who operate across borders and globally. This has included governments, corporates, NGOs and individuals. Some attempts are more successful than others and none are without their lack of popularity.

To date it is the larger nations as producers who have taken the burden of governance but, as development improves, other nations begin to assert their authority, often through regional arrangements. National identity remains a dominant force. Challenges arise due to the perceived or actual influence of Western traditions. Perceptions of over-regulation are challenged by failures to manage crises. Enforcement of international commitments is therefore irregular and global responses are often incoherent or impossibly slow. Partnerships have become bilateral and piecemeal and the potential for information sharing, achieving best practice and effective admonishment have been lost in the confusing array of hard and soft law responses.

Australia is in a unique position to link and lead the efforts to combat Modern Slavery in the EU and UK to those in ASEAN.

These are not merely political questions: In the context of outsourcing and supply chains, bribery, money laundering, human exploitation – traditionally the province of domestic criminal justice systems – become global concerns where governments and corporates are inextricably linked but domestic responses are inadequate. The victims of such instability and delay are people and environments.

Production has become increasingly organised within global value chains (GVCs) which focus on mass customisation, not economic development, prioritising the increase in shareholder value, not human interests. The financialisation of globalisation has led to negative effects on labour markets with shares of value through outsourcing increasing poverty amongst workers in developed countries and turning people in less developed countries into a global service industry. Money and power is concentrated not in nations but in investment strategies of global financiers. Trade is measured in comparative figures for imports and exports.

Financial assets take precedence over investment in manufacturing and job creation and trade practices that recognise human rights not to be modern slaves.

It is here that the Ruggie principles on business corporate responsibility are now being seen as “more than just a bolt-on”. Importantly, the UN Framework recognises States and places the duty on them to ensure the human rights responsibilities of businesses whilst simultaneously placing the responsibility on business enterprises to respect human rights wherever they operate and in all their operations, whatever their size or industry. The duties on States include ensuring people affected can access an effective remedy. There is therefore a balance between governing and trading with effective enforcement using national transparent mechanisms.

The Ruggie principles move away from concepts of globalisation and towards national powers to regulate global concerns. This creates a level of accountability which has the potential to be effective.

In their book “Enron and World Finance: A Case Study in Ethics, Paul H. Dembinski, Carole Lager, Andrew Cornford and Jean-Michel Bonvin cover the different aspects of corporate practice and governance, law and ethics involved in the Enron case, and of the policy responses to the recent corporate scandals in the USA and internationally.

Broadly, they classify corporate responsibility under the following headings:

- (i) Transactions and institutional structure and the need for transparency of operations.
- (ii) High-quality Accounting and auditing conforming with regulations
- (iii) Corporate governance and the need for good corporate governance with Boards of Directors, regulators, banks and investors, credit rating agencies and investment analysts all having essential roles as ‘gatekeepers’
- (iv) Ethical corporate culture. A firm’s organisation and functioning which is conducive to the observance of fundamental values and moral principles (including in relations with those external to the firm, that assure, or are significantly affected by, its functioning)

For all countries, particularly those developing at a rapid rate, this requires attention as, if the corporate responsibility concept grows, cooperation follows through a refusal to trade with those implicated in human exploitation. In this, the popular sanction for poorly performing corporates comes through reputational damage which has a knock on effect to financial status.

The market effectively controls the acceptability or otherwise of business conduct and thus global governance and global value chains become inextricably linked by both opportunities and regulation. Australia’s businesses risk harmful damage if reporting mechanisms are not effective and transparent with powers of enforcement.

Women in the workforce

The impact on Australian organisations doing business with the UK of reporting obligations set out in section 54 of the *Modern Slavery Act* (UK) add to those imposed by the UK Bribery Act and provide a focus for Australian responses to human exploitation and how a gender equality workforce participation target might be met. From year end 30 June, every organisation (wherever incorporated) with a demonstrable business presence in the UK and which supplies goods or services with a turnover of more than £36 million will be required to sign and publish a statement each year on action taken in respect of slavery. At this stage there are no requirements to audit or fully investigate suppliers but the requirement to make a public statement will cause businesses to carry out better enquiries in order to avoid reputational damage.

Australia does not currently have similar legislation in relation to slavery although soft law corporate governance plans have expanded directors' duties on gender equality. A Modern Slavery corporate reporting requirement is an integral part of Australia's shared responsibility as a G20 country committed to a goal of reducing the gap in participation rates between men and women [in the G20 countries] by 25% by 2025.³⁴

The role of criminal law in this corporate context is increasingly visible not just in relation to organised crime but in the context of corporate conduct. Increasingly there are cooperative transnational agreements to tackle exploitation by mandatory reporting, financial reporting in the context of money laundering, funded policing, effective prosecutions and support for survivors. This is part of the UN drive for transformative change.³⁵

Modern slavery has also been linked to the need to tackle corruption, another criminal issue that corporates face: Corruption is an endemic feature of human trafficking enabling traffickers to evade justice through state and corporate systemic failure.³⁶ The UN Convention against Corruption (UNCAC) defines corruption as a force 'undermining the institutions and values of democracy, ethical values and justice and jeopardising sustainable development and the rule of law.'³⁷ Transparency International has defined corruption simply as the 'abuse of entrusted power for private gain.'³⁸ State parties to UNCAC are required to

³⁴ *The G20 Leaders' Communiqué*, Brisbane Summit 15-16 June 2014, <https://g20.org/wp-content/uploads/2014/12/brisbane_g20_leaders_summit_communique.pdf>.

³⁵ UN High Commissioner for Human Rights, *Violence against women – A pervasive human rights violation calls for a binding standard of accountability at the international level* (online news release) (3 December 2014) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15377&LangID=E#sthash.9MBsjCOX.dpuf>>.

³⁶ United Nations Office on Drugs and Crime, 'The Role of Corruption in Trafficking in persons' (Issue Paper, UNODC, 2011) <https://www.unodc.org/documents/human-trafficking/2011/Issue_Paper_-_The_Role_of_Corruption_in_Trafficking_in_Persons.pdf>; International Bar Association, 'Human Trafficking and Public Corruption', (Presidential Task Force Report, September 2016) <http://www.ibanet.org/Committees/task_force.aspx>.

³⁷ *United Nations Convention against Corruption*, GA Res 58/4 (31 October 2003); International Bar Association, above n 51.

³⁸ International Bar Association, above n 51 12.

establish criminal, civil or administrative offences within domestic law. In addition, the UN Convention on Transnational Organised Crime (UNTOC) requires state parties to criminalise bribery and the private sector to take preventative measures against corruption. Signatories to the Organisation for Economic Co-operation and Development (OECD) Anti-bribery convention are also subject to legally binding standards to investigate and prosecute incidents of suspected bribery including of foreign officials.

Responses to these commitments are not uniform. For example, Australia criminalises the offence of bribing a public official. The prosecution do not have to prove any business advantage was obtained or retained and there is no defence of local custom. However, there is a defence for a minor 'facilitation payment' which creates unnecessary complexity for corporates who need clear systems in place for their employees to comply. Australia's legislation applies to foreign bribery but it is rarely enforced in relation to either domestic or foreign transactions. In addition, it does not include an offence of failure by a commercial organisation to prevent bribery similar to those contained in the UK Bribery Act. Corporations in the UK have been the subject of prosecution. This has been widely publicised but, more importantly, the grace period allowed organisations to implement adequate procedures thus improving corporate compliance.

In the UK discussion is now around the implementation of further provisions to tackle corruption by way of a corporate offence of failure to prevent economic crime. If implemented as expected it will require companies to carry out relevant risk assessments in relation to any services provided by associated persons anywhere in the world and to put in place adequate procedures. As with the provisions of The Modern Slavery Act (UK), some companies in Australia will already be caught by the UK Bribery Act extraterritorial provisions and already there are calls for Australia to achieve harmonisation with the UK legislation

Australia's anti-human trafficking strategy was established in 2003. Since then, the Federal Government has provided more than \$150 million to support a range of domestic, regional and international anti-trafficking initiatives. However, what is important is the *inter-relationship* between legislation and community engagement.³⁹ Formal structures are required together with measures to equip criminal justice, border forces and corporate entities to deal with the complex problems which lead to and are caused by modern slavery.⁴⁰

In the UK discussion is now around the implementation of further provisions to tackle corruption by way of a corporate offence of failure to prevent economic crime. If implemented as expected it will require companies to carry out relevant risk assessments in relation to any services provided by associated persons anywhere in the world and to put in place adequate procedures. As with the provisions of the *Modern Slavery Act (UK)*, some

³⁹ World Health Organization, *Female Genital Mutilation: Programmes to Date: What works and What Doesn't* (Geneva, 1999) <http://www.who.int/reproductivehealth/publications/fgm/wmh_99_5/en/>.

⁴⁰ Rosy Kandathil, 'Global Sex Trafficking and the Trafficking Victims Protection Act of 2000: Legislative Responses to the Problem of Modern Slavery' (2005) 12 *Michigan Journal of Gender and Law*.

multinationals will already be caught by the UK Bribery Act extraterritorial provisions and here again there is scope to achieve harmonisation, not just to ensure there is greater certainty and compliance but also to mirror the procedures in relation to deferred prosecution agreements (DPA) which allow companies to confess and avoid prosecution, saving states the cost of investigation. DPAs were introduced in England and Wales after sustained pressure from the United States to deal with corporate fraud in a cheaper and more efficient way.

There is therefore an inevitable intersection between corruption, bribery and other economic crime that arises in the context of modern slavery which demonstrates that Australia needs a proactive and structured approach.

We suggest that a Modern Slavery Act in Australia is a sensible step towards protecting human trafficking victims in organised crime and corporate responsibility for slavery in supply chains.

ENDS 170911