

Joint Stakeholder Written Submission  
on the Death Penalty in Malaysia for  
the 45<sup>th</sup> Session of the Working Group  
on the Universal Periodic Review  
(January 2024)

Submitted by  
**The Anti-Death Penalty Asia Network**

**ANTI  
DEATH  
PENALTY  
ASIA  
NETWORK**

in collaboration with

**Capital Punishment Justice Project**  
**ECPM - Ensemble contre la peine de mort**  
**Eleos Justice, Monash University**

**EC  
PM**  
TOGETHER  
AGAINST  
THE DEATH  
PENALTY

**CAPITAL PUNISHMENT  
JUSTICE PROJECT**

 **MONASH**  
University

**ELEOS  
JUSTICE**



# Contents

- Stakeholder Contacts 3
- Executive Summary 4
- General Context 4
  - Drug Trafficking and the Death Penalty in Malaysia** 6
  - Detention Conditions on Death Row in Malaysia** 7
- Issues on Abolishing the Death Penalty 9
  - Restricting the Use of the Death Penalty** 9
  - Recommendations** 9
- Issues on Rights of Women on Death Row 11
  - Women, Drug Trafficking, and the Death Penalty** 12
  - Gender-based Violence and the Death Penalty** 13
  - Recommendations** 14
- Issues on Rights of Children Charged With Death-Eligible Offences 15
  - Recommendations** 16
- Issues on Mental Health, Disabilities, and Persons on Death Row 17
  - Recommendations** 18

# Stakeholder Contacts



A regional network of organisations and individuals committed to working towards abolition of the death penalty in the Asia Pacific. Our role is to create wider societal support for abolition of the death penalty in the Asia Pacific region through advocacy, education, and network building.

Contact: Jia Vern THAM, [iecoordinator@adpan.org](mailto:iecoordinator@adpan.org)



Capital Punishment Justice Project (CPJP) stands for a world without the death penalty — in all circumstances for all people. Based in Australia, we work with our partner organisations, volunteers, the Australian public and key stakeholders to develop legal and policy solutions that help save lives.

Contact: Elizabeth WOOD, [elizabeth.wood@cpjp.org.au](mailto:elizabeth.wood@cpjp.org.au)



Eleos Justice is a collaboration between the Capital Punishment Justice Project, an NGO working to end the death penalty, and the Faculty of Law at Monash University. Eleos Justice is committed to producing evidence-based research, advocacy and teaching concerning the international abolition of the death penalty.

Contact: Dr Mai SATO, [mai.sato@monash.edu](mailto:mai.sato@monash.edu)



ECPM (Ensemble contre la peine de mort/Together Against the Death Penalty) is a French non-governmental organisation that fights against the death penalty worldwide and in all circumstances by uniting and rallying abolitionist forces across the world. The organisation advocates with international bodies and encourages universal abolition through education, information, local partnerships, and public awareness campaigns. ECPM is the organiser of the World Congresses against the death penalty and a founding member of the World Coalition Against the Death Penalty. In 2016, ECPM was granted consultative status with ECOSOC.

Contact: Marie-Lina PÉREZ, [mperez@ecpm.org](mailto:mperez@ecpm.org)

## Executive Summary

- I. ADPAN lauds the Government of Malaysia for supporting 12 of the 19 recommendations related to abolishing the death penalty from the previous reporting cycle. It also supported recommendations related to ensuring the rights of women, children, and persons with disabilities.
- II. However, this report demonstrates that on multiple accounts, Malaysia failed to uphold its obligations under the Conventions on (i) the Elimination of All Forms of Discrimination Against Women, (ii) the Rights of the Child, and (iii) the Rights of Persons with Disabilities in relation to issues surrounding death-eligible offences in the country.
- III. This report also makes recommendations to reviewing states for the upcoming UPR review of Malaysia.

## General Context

1. A moratorium on executions was introduced in May 2018 by the Malaysian Government. In October 2018, the government announced its intention to abolish the death penalty in its entirety.<sup>i</sup> This was followed by Malaysia's first vote in favour of the UN General Assembly Resolution on a global moratorium in December 2018, and subsequently 2020 and 2022.<sup>ii</sup>
2. After several delays, the Parliament voted in favour of the Abolition of Mandatory Death Penalty Act in April 2023.<sup>iii</sup> This removes the mandatory nature of the death penalty by giving discretion to the courts to decide on an appropriate punishment based on the facts of the case and mitigation factors.<sup>iv</sup> The Act came into force on 4 July 2023.
3. While there have been no executions since March 2018<sup>v</sup>, the moratorium did not include a moratorium on sentencing individuals to death and as a result, the death row population has continued to grow — with most offenders convicted for the crimes of murder<sup>vi</sup> and drug trafficking<sup>vii</sup>. According to data from the Malaysian Prison Department, 112 persons and 123 persons were sentenced to death in 2021 and 2022 respectively for the offences of murder and drug trafficking. Cases from these two years make up about 18% of the country's death row population.

4. As of March 2023, Malaysia has 1,318 persons on death row, with about 63% being Malaysians and 37% being foreign nationals. Nigeria and Indonesia are the countries with the most nationals on Malaysia's death row (86 persons each). 870 persons were convicted of drug trafficking, 418 persons of murder, while 30 people were convicted of other offences<sup>viii</sup>. Women make up about 9% of the population; however, gender-based data disaggregated by nationality remain unavailable.
5. Lack of data continues to obstruct local human rights groups' efforts to monitor changes in Malaysia's death row population as well as executions. With limited data, human rights groups are often unable to verify both the occurrence of an execution and the identity of individuals who were executed unless the family of the person on death row reaches out for assistance; or when there is an announcement post-execution<sup>ix</sup>. There is only partial disaggregated data provided upon request by Members of Parliament through Parliament Questions and data requested are often not provided in full. With data limitations, it is often difficult if not impossible to ascertain the gender, ethnicity, nationality, or other identifying information of those executed.
6. Limited information is provided by the government, but this information is not disaggregated by variables such as gender. According to official data as of 2018, 5 people on death row have been incarcerated for more than 15 years – with 2 having been incarcerated for over two decades. For example, C.Y.F., a person on death row in Simpang Renggam, was sentenced to death in 1987 for drug trafficking. He is 61 years old and had been in prison for almost 36 years before being granted clemency in April 2023.
7. Article 42 of the Federal Constitution provides for two forms of clemency. Under Article 42(1), the heads of states have the power to grant pardons through a Pardon Board (comprising of the Attorney General, the Chief Minister or the Minister in charge of Federal Territories and three individuals appointed by the ruler) whereas Article 42(2) provides for power to remit, suspend, or commute sentences for any offence. While Section 42 of the Constitution and Sections 300 and 301 of the Malaysian Criminal Procedure Code provide some information on the composition of the Pardons Board and the power to suspend or commute sentences, the clemency process is very opaque.
8. Clemency procedures remain opaque as there are no clear rules and criteria regulating them.<sup>x</sup> Furthermore, each state has its own unique aspect to the clemency law as they are given further clarity or procedure through state constitutions. Although the power of clemency is processed through the Pardons Board in all states<sup>xi</sup>, past jurisprudence and determined clemency to be a royal prerogative and beyond any form of judicial intervention<sup>xii</sup>.

9. Despite the opacity, the clemency rate is relatively high (above 55%).<sup>xiii</sup> As of March 2023, 653 persons on death row have submitted their request for clemency. However, people sentenced to death reported that they were not given information on the progress of their request. People sometimes spend ten years in detention before knowing the outcome of their request for clemency.<sup>xiv</sup> In addition, some family members, and lawyers state that people under death sentence hesitate to pursue an update for their clemency for fear that a rejection may expedite their execution, worsen their mental health, and might also be taken as an admission of guilt.<sup>xv</sup>
10. The evidence shows that the level and strength of support among the Malaysian public for the death penalty for murder is lower than presumed<sup>xvi</sup>, suggesting that public opinion in Malaysia is not necessarily a barrier to full abolition of the death penalty. This indicates that public sentiment is malleable, and there needs to be a government effort, informed by prevailing public opinion, to educate and drive the conversation towards abolition.

## **Drug Trafficking and the Death Penalty in Malaysia**

11. 66% of persons on death row in Malaysia were convicted under the Dangerous Drug Act of 1952 (“DDA52”), which imposes the death penalty on those found guilty of drug trafficking. The recent abolition of the mandatory death penalty included the removal of limitations to judicial discretion in sentencing individuals convicted of drug trafficking<sup>xvii</sup>.
12. However, the definition of “trafficking” still depends on the weight of drugs found in the accused’s possession — a measure which varies by the type of drugs involved. Meanwhile, for amounts smaller than what constitutes “trafficking”, DDA52 provides for both prison terms and corporal punishment.
13. By design, DDA52 undermines the presumption of innocence and violates the right to a fair trial. Two presumptions may be imposed against a person detained with drugs more than the prescribed weightage in the law. First, there is a presumption that the person is in possession of said drugs, and the second presumption is that the person intended to traffic them. This is often referred to as the double presumption.
14. Although the courts have consistently found the application of the double presumptions for drug trafficking unconstitutional<sup>xviii</sup>, the Parliament has yet to repeal or amend this section of the statute. There are instances where an accused is convicted of drug trafficking through the operation of the double

presumption. Fortunately, these convictions can and have been dismissed on the ground that it is a miscarriage of justice<sup>xix xx</sup>.

15. After the 2017 amendments, when the quantity of drugs in an individual's possession is sufficient for the presumption of trafficking, Section 39(B)(2) of DDA52 provides that the offender shall receive "death or imprisonment for life and shall, if he is not sentenced to death, be punished with whipping of not less than twelve strokes."<sup>xxi</sup>
16. Although judges are now free to exercise full discretion over whether to mete out death sentences, there continues to be a risk that they will still favour the death penalty over imprisonment. Previous judicial responses — back when DDA52 contained constraining circumstances for alternative punishment<sup>xxii</sup> under Section 39(B)(2A)— revealed that only five out of 41 cases documented were known to have been successful with securing reduced sentences as a drug mule. Parliament data on the efficacy of the section was far grimmer, with only two successful applications out of 71 cases. While the sentencing trend does not necessarily indicate judicial preference for the death penalty in general, it indicates a leaning towards conservative interpretation of vague or uncertain sections that permits discretion in sentencing.

## **Detention Conditions on Death Row in Malaysia**

17. Beyond drug trafficking, Malaysia's criminal statutes now provide for judges to exercise discretion in the handing down of death sentences in all cases. Death penalty eligible offences include murder; certain types of possession(s) and/or discharging(s) of firearms in a "scheduled offence" (i.e., assisted suicide); treason, and kidnapping.
18. Persons on death row are often subjected to long trial periods that can take up to 7 years for proceedings at the court of first instance, with appeal processes further extending the period to decades. It is not uncommon for people under sentence of death to be imprisoned for more than 20 years on death row, awaiting their fates. Data from 2018 indicates that the majority of those on death row are still in the trial process and have been in detention for less than 5 years (77%). A substantial number had been detained for between 5 and 10 years (20%), with the rest having been in detention for more than 10 years.
19. At least two persons were identified to have served a prison sentence of more than 20 years. One of the cases was identified in 2022 and the person had served more than 34 years in prison, spending at least 29 years on death row for the offence of drug trafficking<sup>xxiii</sup>.

20. People on death row are usually kept in solitary confinement for 23 hours a day with an hour of 'yard time' per day<sup>xxiv</sup> in disregard of international human rights standards.<sup>xxv</sup> More recent information obtained from death row prisoners indicate that the conditions of solitary confinement and yard time differs significantly depending on the prison they are incarcerated in, with some describing being able to exercise outdoors and converse with other death row inmates, while others are kept completely segregated from other prisoners during their time on death row.
21. The distinction seems to be attributable to the age and period in which the prison was constructed. Testimony from people on death row in newer prisons revealed that their prison cells are structured in a way where the death row prisoners can hear and converse with one another.
22. In contrast, older prisons are often designed with isolation through solitary confinement in mind. Many of these prisons were also notoriously used for holding political detainees under the Internal Security Act 1960 or the Emergency Ordinance 1969 prior to their abolition. Currently, some prisons have reallocated cells used for solitary confinement under the Prevention of Crime Act 1959 for the purpose of incarcerating death row inmates, resulting in harsher detention conditions.
23. Problems affecting the general prison population also affect those on death row, including limitations in amenities such as toothpaste, additional food, and access to phone calls without financial support by family members outside. It should be noted that there have been anecdotal reports from people on death row that some prisons occasionally allow for some personal items to be kept in their cells.
24. The situation is usually much worse when compared to the general population as those on death row are not granted any opportunities for work in prison, denying them all opportunities for side income to supplement their expenses in detention.<sup>xxvi</sup> In addition, they do not have access to any education or rehabilitation programs.<sup>xxvii</sup> This renders them extremely vulnerable if they are released after a successful appeal or a successful clemency application.



## Issues on Abolishing the Death Penalty

25. Malaysia supported 12 out of 19 recommendations related to the abolition of the death penalty in the previous reporting cycle. With a de facto moratorium since 2018 on all executions<sup>xxviii</sup> and the abolition of the mandatory death penalty for all capital offences in April 2023, the State has mostly complied with the 12 recommendations<sup>xxix</sup>.
26. ADPAN notes that the Deputy Minister of Law and Institutional Reform intended for the recent development to return “confidence in the judiciary in deciding [cases] based on their discretion”<sup>xxx</sup>. About 800 persons on death row who have exhausted their avenues of appeal will become eligible for a review of their death sentences under the new legislation<sup>xxxi</sup>.
27. However, Malaysia falls short of pledging support for recommendations regarding total abolition of the death penalty, possibly due to past and current reservations about the issue, including public backlash and political opposition.<sup>xxxii</sup>

### **Restricting the Use of the Death Penalty**

28. The government has indicated that it intends to move towards total abolition of the death penalty in Malaysia over time. For this to occur, institutional mechanisms to gradually restrict the use of the death penalty are critical. In line with this aim, closed-door consultations have been done on forming a Sentencing Council — a mechanism which would serve as guidelines to the judiciary when sentencing offences including capital crimes were considered in 2022<sup>xxxiii</sup>. However, there has not been significant development on this front since then.

### **Recommendations**

29. Enact a Sentencing Reform Act which ensures the establishment of a Sentencing Council to review sentencing practices for all offences, including capital crimes, in line with the accepted recommendations in the 2018 UPR cycle.
30. Ratify the International Covenant on Civil and Political Rights and the Second Optional Protocol of the Covenant.

31. Align the national legal framework with international law and standards on sentencing death-eligible offences, and ultimately abolish the death penalty totally.

# Issues on Rights of Women on Death Row

32. In the previous reporting cycle, Malaysia supported recommendations related to combating discrimination and violence against women, as well as improving their access to healthcare, among others.<sup>xxxiv</sup> As of May 2022, however, Malaysia maintains reservations on Articles 9(2), 16(1)(a), 16(1)(c), 16(1)(f), and 16(1)(g) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) – articles that grant women equal rights with men in respect to the nationality of their children and address matters related to marriage and family relations respectively.<sup>xxxv</sup>
33. The proportion of women on Malaysia’s death row is alarming. As of 2020, the figure (about 9%) is almost twice that of the global average (less than 5%)<sup>xxxvi</sup>. Further, data from 2019 indicated that the death penalty for drug offences in Malaysia disproportionately impacts women, with as many as 95% of all women on death row that year convicted of such offences compared to 70% of men<sup>xxxvii</sup>.
34. Furthermore, foreign nationals make up about 86% of women (accurate as of 2019) sentenced to death in the country. A report by Amnesty International shows that language is a barrier for foreign women facing trials involving the death penalty, with a lack of access to language interpretation in court proceedings<sup>xxxviii</sup>. Although Malaysia provides the defendants the right to assistance by an interpreter in the court, there is not much access for the accused to an interpreter outside of the courtroom - particularly during interrogation or preparing for trial defence. This contrasts with International Fair Trial Standards, which requires foreign nationals to be provided the same equality as nationals and be given fair treatment before the court<sup>xxxix</sup>. Article 14(3) of the International Covenant on Civil and Political Rights also states that in the determination of any criminal charge, a person is entitled to minimum guarantees such as being informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.
35. Relative to this, the negative impact of the lack of interpretation can be seen in a trial involving a foreign woman who was sentenced to death due to her minimal proficiency in English, whilst her boyfriend, who could speak English, was free from the sentence as he answered all the questions for her during the interrogation and her trial testimony<sup>xl</sup>.
36. Within the death row, there is no access to gender-specific health care services, such as access to a gynaecologist or sufficient sanitary pads. This is contrary to

the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, also known as the Bangkok Rules<sup>xli</sup>.

37. It should also be noted that gender segregation of prisons in Malaysia is problematic, especially when it involves transgender or intersex persons. Generally, the Prison Department designates the detention place of such persons based on the person's sexual organs or the gender they were assigned at birth, resulting in a situation where trans women who have not had gender confirmation surgery are being detained in men's prisons.

## **Women, Drug Trafficking, and the Death Penalty**

38. Recent case studies on women sentenced to death for drug trafficking highlight how economic insecurity drives vulnerable women to participate in the drug trade to gain quick money – a fact rarely recognised by judges at trial.<sup>xlii</sup> Researchers have found many cases of “vulnerable” defendants that are “misinformed” about the nature of what they are carrying while travelling into and out of Malaysia.<sup>xliii</sup>
39. Meanwhile, other studies have revealed that women who intentionally traffic drugs — especially those who were single, divorced, or pregnant — decided to do so due to familial needs.<sup>xliv</sup> A prominent case to illustrate this in Malaysia is the case of H.J., a single mother of nine children who was sentenced to death in October 2021 for possessing 114 grams of methamphetamine.<sup>xlv</sup>
40. Despite documented circumstances of women charged for drug trafficking, Malaysian courts have been found to be enforcing gender stereotypes on them. Research from the Cornell Centre illustrates “the alarming extent to which women sentenced to death for drug offences experienced gender bias in criminal proceedings and violations of their right to a fair trial.”<sup>xlvi</sup> In jurisdictions such as Malaysia, the “presumption” shortcuts described above in paragraphs 13 & 14 - “dramatically increase the number of women who are sentenced to death while ignoring women's position in the drug trade's gender-stratified and predominantly masculine system. Women are disproportionately likely to be low-level drug couriers—and therefore ignorant of the type, quantity, and value of the drugs they are carrying.”<sup>xlvii</sup>
41. Yet Malaysian courts rarely accept, or even fully consider, the “innocent courier” defence. The Cornell Centre has uncovered many cases (not specific to Malaysia) in which judges “relied on gender stereotypes to interpret women's circumstances and motivations” and were “reluctant to accept that a female defendant was tricked or pressured into transporting drugs unless she matches the profile of a helpless female victim.”<sup>xlviii</sup>

42. In Malaysia, defendants — particularly vulnerable women who are foreign nationals — often assert that they did not know that they were transporting drugs.<sup>xlix</sup> Courts have treated this defence as a “mere afterthought” and accuse the defendant of “wilful blindness.”<sup>l</sup> A 2019 court ruling denied an accused, a Ukrainian woman, the “innocent courier” defence for the court deemed her to be illicit in the operation of drug trafficking — despite adhering to the fact that the accused was not the mastermind of the operation.<sup>li</sup>
43. Women charged for the offence of drug trafficking in Malaysia also face the likelihood of gender bias in court decisions. A 2018 study on incidence of judicial errors in capital punishment cases between 2013 and 2018 revealed that women are less likely to be acquitted in cases of drug trafficking compared to men on Malaysia’s death row,<sup>lii</sup> particularly if they are foreign nationals.

### **Gender-based Violence and the Death Penalty**

44. Gender inequality and discrimination are key factors behind women on death row, particularly in the conviction of murder. In a 2018 study, the Cornell Centre found that, in the global context, women are more vulnerable and most likely to be sentenced to death for criminal offences committed within the context of gender-based violence<sup>liii</sup> and manipulative or coercive relationships with male co-defendants<sup>liv</sup>.
45. Malaysia has not formalised any legislative provisions providing explicit defence or mitigation for persons charged with murder who themselves are victim-survivors of domestic violence and persons with possible Post-Traumatic Stress Disorder (PTSD) arising out of a history of domestic violence can still be prosecuted for murder. By retaining the death penalty for murder and sentencing these women to death, Malaysian authorities compel these women to pay for the price of the authorities’ failures to i) address discrimination and ii) acknowledge their trauma and the realities and dynamics of domestic violence.
46. It is notable that certain cases of murder by victims of domestic violence do get prosecuted more leniently. In August 2020, a woman — who suffered from domestic violence — was sentenced to 42 months’ imprisonment and a fine of RM10,000 after the murder charges against her was amended<sup>lv</sup>. She served a prison term of 20-months before her charges were amended. But there is no evidence to suggest that this case represents a systematic approach to consideration of a defendant’s history as a victim of domestic violence at the time of sentencing.

## **Recommendations**

47. Establish prosecution and sentencing guidelines to recognise the vulnerability and culpability of a person who is a victim-survivor of domestic abuse and is charged with murder.
48. Establish policies to protect the rights and interests of pregnant persons and their physical and mental health when facing prosecution for death-eligible offences.
49. Establish policies to ensure any person charged with a capital offence, including foreign nationals, has access to qualified legal counsel with prior experience in capital cases.
50. Implement systems for defendants to have access to trained interpreters and ensure that they are available at all stages of a criminal case.
51. Establish training programmes for capital defence counsel representing women, regarding gender-specific defences and mitigation in capital trials, encompassing trauma, gender-based violence, economic pressures, and family caretaking responsibilities.

## Issues on Rights of Children Charged with Death-Eligible Offences

52. Malaysia supported recommendations related to combating violence against children, ensuring the physical and emotional welfare of children, and legal protection from all forms of ill-treatment and violence among others in the previous reporting cycle.<sup>1</sup> Malaysia has also ratified the Convention on the Rights of the Child (CRC).
53. In the Child Act 2001, the death penalty cannot be meted out to persons who, at the time of offending, is under the age of 18. Juveniles in detention for death-eligible offences are detained indefinitely through detention under His Majesty's pleasure (*Tahan Limpahan Sultan* - TLS). The Working Group on Arbitrary Detention (UNWGAD), in its Opinion No. 90/2018, acknowledged that this practice is in violation of Article 37 of the CRC.
54. For juveniles detained indefinitely under Section 97, they are permitted to participate in approved prison school if they are still underage but will be moved into prison as a 'long-term' detainee once they have completed their studies. Section 97(4)(a) provides for an annual review by the Board of Visiting Justices where recommendation may be made to the King or the Governor of the state for an early release or further detention.
55. In the complaint received by UNWGAD, the complainant served almost 20 years in detention before his release. He was only afforded three reviews under Section 97(4)(a), and there were no indications that his condition of detention as a juvenile was given due consideration. Other cases discovered by ADPAN were similar; with the juvenile offender being afforded a review under the law, but its implementation was inconsistent and failed to consider the best interest of the child in providing recommendations for early release.
56. One of such cases is a juvenile offender who was convicted of murdering his girlfriend while he was 17 years old. He has since been under indefinite detention in the state of Melaka, Malaysia. He was unrepresented during his trial and pleaded guilty to the charges prior to the conclusion of his trial. In another case, a juvenile offender has spent upwards of 23 years under detention and is

---

<sup>1</sup> Malaysia, Recommendations 151.244, 151.231, 151.226, 151.229. 3rd UPR Cycle. UPR Info.

reportedly undertaking postgraduate studies. He was first imprisoned at the age of 14 for murder<sup>2</sup>.

## **Recommendations**

57. Establish formal enforcement for the annual review of sentences on persons under detention at His Majesty's pleasure, who, at the time of offending, were under the age of 18.
58. Establish formal standards whereby judges are required to lower the criminal responsibility of persons, who at the time of offending were under the age of 18, in cases of death-eligible offences.

---

<sup>2</sup> <https://www.freemalaysiatoday.com/category/nation/2023/02/27/23-years-behind-bars-and-heading-for-a-phd/>



# Issues on Mental Health, Disabilities, and Persons on Death Row

59. Malaysia is a signatory to the Convention on the Rights of Persons with Disabilities (CRPD). It also supported recommendations related to respecting, supporting, and protecting the rights of persons with disabilities and/or mental health conditions among others in the previous reporting cycle.<sup>lvi</sup> The Government has nonetheless taken reservations to Article 3 on general principles, Article 5 on equality and non-discrimination, Article 15 on freedom from torture or cruel, inhuman or degrading treatment or punishment, Article 18 on liberty of movement and nationality, and Article 30 on participation in cultural life, recreation, leisure and sport in the CRPD. Despite that, Malaysia's criminal justice system still lacks appropriate safeguards and protection for persons with intellectual, psychosocial, or physical disabilities.
60. Section 84 of the Penal Code states that “[n]othing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law”. This duty to refrain from imposing the death penalty on persons with intellectual or psychosocial disability is grounded on the disproportionate and discriminatory denial of fair trial guarantees and procedural accommodations to them — aspects mandated by Articles 5, 12, and 13 of the CRPD.
61. However, there is no formal prohibition on the imposition of the death penalty on those with mental health conditions. Malaysian jurisprudence indicates that courts may find that an accused is of unsound mind without any clinical evidence in support of that fact.<sup>lvii</sup> Nonetheless, success seems to depend on judicial discretion.
62. In post-trial, the ‘death row phenomenon’ sees prisoners subjected to a “unique psychological impact” due to “long periods under the harsh conditions of death row, with the ever-present shadow of execution hanging over them.”<sup>lviii</sup> The case of K. I., a Pakistani national convicted of drug trafficking currently on death row in Malaysia, paints the impact of the ‘death row phenomenon’. In 2022, prison wardens had reportedly confiscated K. I.’s pencil and paper — which drove him towards a suicide attempt. He was to face punishment for his conduct upon his discharge back to solitary confinement on death row.

63. Beyond that, physical disabilities developed after being put on death row remains an unaddressed issue. In the case of a Thai transgender woman convicted of drug trafficking, T. S., she suffers from hemiplegia while being on death row in a male prison in Perlis, Malaysia. She is also unable to eat on her own and requires assistance from other prisoners.

## **Recommendations**

64. Remove all reservations to the CRPD and sign the optional protocol to allow disabled persons who have exhausted their domestic legal remedies to submit their complaint to the CRPD Committee.
65. Establish formal prohibition on the imposition of the death penalty on those with physical and mental health conditions.
66. Provide reasonable procedural accommodations and access to equitable legal aid, access to disabled-inclusive detention facilities, in accordance with Article 10 (right to life) of the CRPD Human Rights indicators.
67. Establish formal standards whereby judges are required to lower the criminal responsibility of persons with physical and mental health conditions in cases of death-eligible offences, in accordance with Articles 12 (equal recognition before the law) and 13 (access to justice) of the CRPD Human Rights indicators.
68. Establish mechanisms to overturn sentences of detained persons who develop disabilities while being in detention.

- 
- <sup>i</sup> Malay Mail, “Minister: Putrajaya to abolish death penalty”, 10 October 2018, <[www.malaymail.com/news/malaysia/2018/10/10/ministerputrajaya-to-abolish-death-penalty/1681448](http://www.malaymail.com/news/malaysia/2018/10/10/ministerputrajaya-to-abolish-death-penalty/1681448)>
- <sup>ii</sup> UN General Assembly Resolution 73/175 of 17 December 2018
- <sup>iii</sup> Al Jazeera, “Malaysian Parliament moves to end mandatory death penalty”, 3 April 2023 <<https://www.aljazeera.com/news/2023/4/3/malaysias-parliament-votes-to-abolish-the-death-penalty>>, accessed 28 June 2023
- <sup>iv</sup> The Star, “Azalina: Cabinet agrees to continue reviewing laws related to mandatory death penalty”, 22 December 2022, <<https://www.thestar.com.my/news/nation/2022/12/22/azalina-cabinet-agrees-to-continue-reviewing-laws-related-to-mandatory-death-penalty>>
- <sup>v</sup> SUARAM Human Rights Report 2018 <<https://www.suaram.net/human-rights-reports?pgid=kvex92wb-16a603da-9bd2-4c3d-9be5-3afea14ea5b0>>
- <sup>vi</sup> Section 302 of the Penal Code
- <sup>vii</sup> Section 39B of the Dangerous Drugs Act 1952
- <sup>viii</sup> Data provided to ADPAN by the Malaysian Prison Department on 24 March 2023.
- <sup>ix</sup> Malay Mail (2016). Canny Ong rapist-killer finally hanged. <https://www.malaymail.com/news/malaysia/2016/09/24/canny-ong-rapist-killer-finally-hanged/1212597>
- <sup>x</sup> *Id.* at 61-62.
- <sup>xi</sup> *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385
- <sup>xii</sup> *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64
- <sup>xiii</sup> Prison-Insider, “Malaysia: detention conditions of people sentenced to death”, 18 January 2022, <https://www.prison-insider.com/en/articles/malaysia-conditions-de-detention-des-condamnes-a-mort> accessed 16 January 2023; Berrih & Ngeow, *supra* note 49, at 62.
- <sup>xiv</sup> Berrih & Ngeow, *supra* note 49, at 58.
- <sup>xv</sup> Prison-Insider, *supra* note 98.
- <sup>xvi</sup> *ibid.*
- <sup>xvii</sup> For more details see Antolak-Saper, N., Kowal, S., Lindsey S., Ngeow, C.Y. & Kananatu, T. (2020) Drug Offences and the Death Penalty in Malaysia: Fair Trial Rights and Ramifications. Clayton, Victoria: Monash University [https://www.hri.global/files/2020/05/29/Malaysia\\_Death\\_Penalty\\_-\\_Fair\\_Trial\\_-\\_Monash\\_ADPAN.pdf](https://www.hri.global/files/2020/05/29/Malaysia_Death_Penalty_-_Fair_Trial_-_Monash_ADPAN.pdf)
- <sup>xviii</sup> See Benjamin Kho Jia Yuan, *Double Trouble No More: The Striking Down of Double Presumptions for Drug Trafficking by The Federal Court*, University of Malaya Law Review (July 14, 2019) available at <https://www.umlawreview.com/lex-in-breve/double-trouble-no-more-the-striking-down-of-double-presumptions-for-drug-trafficking-by-the-federal-court> (discussing *PP v Alma Nudo Atenza* [2019] 3 MLRA 1; [2019] MLJU 280).
- <sup>xix</sup> <https://www.freemalaysiatoday.com/category/nation/2023/02/17/contractor-freed-from-drug-possession-conviction-after-legal-mistake/>
- <sup>xx</sup> Antolak-Saper et al..
- <sup>xxi</sup> *Id.* 39B(2).
- <sup>xxii</sup> Antolak-Saper et al..
- <sup>xxiii</sup> Annmira Joseph, ‘Rights group seeks pardon for man on death row for 29 years’ (Free Malaysia Today, 24 November 2021) <<https://www.freemalaysiatoday.com/category/nation/2021/11/24/rights-group-seeks-pardon-for-man-on-death-row-for-29-years/>> accessed 21 December 2022.
- <sup>xxiv</sup> Berrih & Ngeow, *supra* note 49, at 78.
- <sup>xxv</sup> Nelson Mandela Rules, Rule 43.1(a)/(b).
- <sup>xxvi</sup> Prisons Regulations 2000, Regulation 181.
- <sup>xxvii</sup> Berrih & Ngeow, *supra* note 49, at 78.
- <sup>xxviii</sup> Amnesty International (2018). Malaysia: Parliament must consign the death penalty to the history books. <https://www.amnesty.org/en/latest/press-release/2018/10/malaysia-death-penalty-abolition/>
- <sup>xxix</sup> Malaysia, Recommendations 151.1, 151.104, 151.106, 151.107, 151.108, 151.91, 151.92, 151.93, 151.95, 151.97, 151.98, 151.99. 3rd UPR Cycle. UPR Info.

- 
- <sup>xxx</sup> Tan, T., Rahim R., and Carvalho, M. (2023) Dewan passes amendments to abolish mandatory death penalty. <https://www.thestar.com.my/news/nation/2023/04/03/dewan-passes-amendments-to-abolish-mandatory-death-penalty>
- <sup>xxx1</sup> Yatim, H. (2023). Some 800 prisoners facing capital punishment can apply for review after discretion given to courts, says Ramkarpal. <https://theedgemaalaysia.com/node/660561>
- <sup>xxxii</sup> Hazlan, R. (2023). No to total abolition of capital punishment. <https://www.malaysiakini.com/letters/660999>
- <sup>xxxiii</sup> Bernama (2022). Govt considering sentencing council in push for criminal justice reforms. <https://www.malaysianow.com/news/2022/10/06/govt-considering-sentencing-council-in-push-for-criminal-justice-reforms>
- <sup>xxxiv</sup> Malaysia, Recommendations 151.68, 151.216, 151.21, 151,203, 151.207, 151.16, 151.18, 151.214. 3rd UPR Cycle. UPR Info.
- <sup>xxxv</sup> Ministry of Women, Family and Community Development. (2022, May 9). *Sixth periodic report submitted by Malaysia under article 18 of the Convention, due in 2022*. Penerbitan Instrumen Antarabangsa KPWK. Retrieved January 11, 2023, from [https://www.kpwkm.gov.my/kpwkm/uploads/files/Penerbitan/instrumen\\_antarabangsa/Discrimination%20against%20women%20CEDAW/CEDAW\\_C\\_MYS\\_6\\_8667\\_E.pdf](https://www.kpwkm.gov.my/kpwkm/uploads/files/Penerbitan/instrumen_antarabangsa/Discrimination%20against%20women%20CEDAW/CEDAW_C_MYS_6_8667_E.pdf) [hereinafter Sixth Periodic Report].
- <sup>xxxvi</sup> Question 20, Parliament Reply, 3rd meeting, 3rd Term, 14th Parliament <https://pardocs.sinarproject.org/documents/2020-november-december-parliamentary-session/oral-questions-soalan-lisan/2020-11-26-parliamentary-replies/20201126-p14m3p2-soalan-lisan-20.pdf/view>
- <sup>xxxvii</sup> Berrih C. & Ngeow, C. Y. (2020) Isolation and Desolation: Conditions of Detention of People Sentenced to Death <https://www.ecpm.org/app/uploads/2022/08/OK-mission-enquete-Malaisie-GB-2019-280420-WEB.pdf>
- <sup>xxxviii</sup> Amnesty International (2019) Fatally flawed: Why Malaysia must abolish the death penalty <https://www.amnesty.org/en/documents/act50/1078/2019/en/>
- <sup>xxxix</sup> Office of the High Commission Human Rights (1990) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers>
- <sup>xl</sup> Amnesty International (2019) Fatally flawed: Why Malaysia must abolish the death penalty <https://www.amnesty.org/en/documents/act50/1078/2019/en/> at 32
- <sup>xli</sup> United Nations Office on Drugs and Crime (2010) United Nations Rules for the Treatment of Women Prisoners [https://www.unodc.org/documents/justice-and-prison-reform/Bangkok\\_Rules\\_ENG\\_22032015.pdf](https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf)
- <sup>xlii</sup> Harry, L. (2022). Gender, globalisation, and the gallows: women sentenced to death for drug trafficking in Malaysia [PhD thesis]. University of Oxford. <https://ora.ox.ac.uk/objects/uuid:d709b2c1-8ce4-4fc6-8e8d-8c4d1dee19ac>
- <sup>xliii</sup> Antolak-Saper, N. & Kowal, S. (2020) ‘Drug trafficking, the death penalty and the vulnerable defendant’, Monash University Lens, 21 July <https://lens.monash.edu/@politics-society/2020/07/21/1380816/drugtrafficking-the-death-penalty-and-the-vulnerable-defendant>
- <sup>xliv</sup> Cornell Center on the Death Penalty Worldwide, (2021), “No One Believed Me”: A Global Overview of Women Facing the Death Penalty for Drug Offenses, at 21 <https://deathpenaltyworldwide.org/publication/no-one-believed-me-a-global-overview-of-women-facing-the-death-penalty-for-drug-offenses/>
- <sup>xliv</sup> Koh Ewe, *A Single Mother With 9 Children Sentenced to Death for 114 Grams of Meth*, VICE (2021) <https://www.vice.com/en/article/epnjek/a-single-mother-with-nine-children-was-sentenced-to-death-for-114-grams-of-meth>
- <sup>xlvi</sup> Cornell Center on the Death Penalty Worldwide, (2021), “No One Believed Me”: A Global Overview of Women Facing the Death Penalty for Drug Offenses, page 7 <https://deathpenaltyworldwide.org/publication/no-one-believed-me-a-global-overview-of-women-facing-the-death-penalty-for-drug-offenses/>
- <sup>xlvii</sup> Cornell Center on the Death Penalty Worldwide, (2021), “No One Believed Me”: A Global Overview of Women Facing the Death Penalty for Drug Offenses, at 7 <https://deathpenaltyworldwide.org/publication/no-one-believed-me-a-global-overview-of-women-facing-the-death-penalty-for-drug-offenses/>
- <sup>xlviii</sup> *Id to 28*

---

<sup>xlix</sup> Antolak-Saper, N. & Kowal, S. (2020) 'Drug trafficking, the death penalty and the vulnerable defendant', Monash University Lens. <https://lens.monash.edu/@politics-society/2020/07/21/1380816/drugtrafficking-the-death-penalty-and-the-vulnerable-defendant>

<sup>l</sup> *Id to 30*

<sup>li</sup> Lopatkina Klavdiia (N/Ukraine) v Public Prosecutor [2019] MLJU 974

<sup>lii</sup> Lim, C. H., Ngeow, C. Y., & Arivananthan, H. (2018). *High Incidence of Judicial Errors in Capital Punishment Cases in Malaysia*. Penang Institute. Retrieved January 10, 2023, from [https://penanginstitute.org/wp-content/uploads/2018/10/oct\\_30\\_2018\\_CHTeam\\_download.pdf](https://penanginstitute.org/wp-content/uploads/2018/10/oct_30_2018_CHTeam_download.pdf)

<sup>liii</sup> Cornell Center on the Death Penalty Worldwide, *Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty* (Sept. 4, 2018). Available online at <https://www.deathpenaltyworldwide.org/wp-content/uploads/2019/12/Judged-More-Than-Her-Crime.pdf> [hereinafter *Judged for More*].

<sup>liv</sup> *No One Believed*, *supra* note 47, at 6.

<sup>lv</sup> Gillespie, T., 'Samantha Jones: British woman who stabbed husband to death in Malaysia avoids death penalty' (Sky News, 3 August 2020) <<https://news.sky.com/story/samantha-jones-british-woman-who-stabbed-husband-to-death-in-malaysia-avoids-death-penalty-12041366>> accessed 21 December 2022

<sup>lvi</sup> Malaysia, Recommendations 151.245, 151.246, 151.74, 151.75. 3rd UPR Cycle. UPR Info.

<sup>lvii</sup> PP v Han John Han [2007] 1 SLR 1180 (Choo Han Teck J).

<sup>lviii</sup> 'Death Row Phenomenon: The Psychological Impact of Living in the Shadow of Execution', Reprieve (Web Page) <<https://reprieve.org.uk/death-row-phenomenonpsychological-impact-shadow-execution/>>.