

“The Joint Standing Committee on Foreign Affairs, Defence and Trade invites submissions by 2 October 2015 on its terms of reference relating to Australia’s efforts to advocate for worldwide abolition of the death penalty.”

The authors of this submission have worked for many years as lawyers on the cases of Andrew Chan and Myuran Sukumaran. In addition, between us we have worked on other death penalty cases involving Australian defendants in foreign jurisdictions, including Sudan, Singapore and Vietnam, and on similarly serious cases not involving execution, such as Jock Palfreeman in Bulgaria, and at the ICTY.

We thank the JSC for the invitation to make submissions. We address our submissions to the specific terms of reference.

1. HOW DOES AUSTRALIA CURRENTLY ENGAGE INTERNATIONALLY TO PROMOTE ABOLITION OF THE DEATH PENALTY?

No need for us to comment on this.

2. WHAT FURTHER STEPS COULD AUSTRALIA TAKE FOR WORLDWIDE ABOLITION?

Consider:

2.1 International institutions and like minded countries

2.1.1. The critical step for Australia at the international level is to take a leadership role and encourage other countries to do the same. We were very pleased to note the comments of the Foreign Minister this week at the United Nations committing Australia to unrelenting efforts to secure the abolition of the death penalty.

2.1.2. To be effective, Australia must speak consistently at all levels of government in a principled manner. Its opposition must be without qualification.

2.1.3. In future, as in 2015, our opposition to the death penalty should be consistent and principled, in easy cases and hard. Our opposition must be international, not only concerned for our own. It is clear the Foreign Minister has taken that step for the country in her recent comments.

2.1.4. An example of such leadership would be to work extensively to encourage more countries to vote for the now regular moratorium vote at the UN, first passed in 2007.

2.1.5. A further example would be striving to achieve a similar resolution at CHOGM.

2.1.6. We should also take steps to strongly encourage other countries who have not yet done so, to sign the Second Optional Protocol to the ICCPR. Many countries in our region can be encouraged to do this.

2.2 Cooperation with NGOs

2.2.1. In assuming a leadership role, Australia can proactively search out the multiple regional human rights bodies and draw them together on this issue.

2.2.2. In June 2015, there was an Asian Regional Congress on the death penalty, as part of the preparation for the 6th World Congress against the Death Penalty, to be hosted in Norway 21 – 23 June 2016. The Norwegians sponsored the conference, organised by Ensemble contre la peine de mort (ECPM), and Anti Death Penalty Asia Network (ADPAN). Partners and supporters on the brochures included The Human Rights Commission of Malaysia (Suhakam), the Bar Council Malaysia, The Delegation of the European Union to Malaysia, and the Australian Government through DFAT.

2.2.3. It was very pleasing to see Australia's quiet support for this excellent conference. It has to be said that the regional organisations present were, on the whole, small. There can be no doubt that well targeted assistance would be very valuable to them. Julian McMahon spoke at the conference. It was a valuable way to meet advocates and professionals from around the world with a willingness to share resources and ideas.

2.2.4. The question of how public our nation's role should be is a fine one, and may vary from place to place. But this is no reason not to be proactive.

2.2.5. We discuss capacity building below. But for here, may we suggest a practical example of what could be done. There will be dozens of NGOs, journalists, health professionals, perhaps lawyers, in the region who would greatly benefit from attending the World Congress in June 2016. For a small sum, Australia could work through easily accessible networks and offer sponsorship to multiple organisations in the region, for say two people from many such organisations to attend the World Congress. If we funded, say, 100 people taken from numerous fields - activists, journalists, health and law workers - and perhaps from about 10 countries, the likely flow on effect may be invaluable, with a huge return in regional knowledge, linkage and capacity for a tiny investment.

2.2.6. The JSC will be aware that the European community is becoming more focussed on the death penalty in the region. Experienced and well-resourced parties are taking a much more active interest, with a view no doubt to more involvement.

2.2.7. It is undoubtedly an opportune time for Australia to make its willingness to work in this area well known and felt. This should include reaching out to NGOs, the European Commission and others who are focussing on the issue in the region.

2.3 Bilateral engagements and other diplomatic activities

2.3.1. Australia should regularly put this issue on the agenda in its bilateral engagements. Numerous countries which are friendly with and important to Australia continue to execute eg. USA, China, Japan, Singapore and others. It is of course not appropriate for the death penalty to be put forward as central to each and every bilateral discussion. However, we must recognise that in order to persuade our friends to move beyond executions, we must persuade them both of the seriousness of our intent and the reasons for it.

2.3.2. Accordingly we must regularly speak truth to our friends both powerful and less powerful on this matter. The realities which must be confronted include:

2.3.2.1 The numerous serious criticisms of the American death penalty regimes including procedural and outcome issues relating to poverty, race, methods of execution, botched and brutally cruel executions etc.

2.3.2.2 The extraordinarily large number of executions in China, a figure kept secret from the rest of the world. Estimates in the last decade range between 1 and 8000 executions per year.

2.3.2.3 The unacceptable conditions of incarceration for prisoners on death row in Japan.

2.3.3. Further, the reality is that for some countries with whom we share important and perhaps developing relationships, the number of executions are increasing. For instance Pakistan, Saudi Arabia and Iran are each accelerating the number of executions they perform. In combination, they have executed around 1,000 prisoners so far this year – far more than last year.

2.3.4. We should also acknowledge our friends, such as Singapore and Malaysia, who have in recent years done so few executions compared to some previous years. Steps in the right direction should be welcomed and encouraged, as steps towards total abolition. In Singapore, welcome changes to the mandatory death penalty laws have greatly reduced the number of executions. These countries should now be encouraged to take the next, final step.

2.4 Other appropriate means

In this section we take the liberty of providing some general observations, and specific comments on particular matters.

2.4.1 General observations:

2.4.1.1. In summarising our above comments: we need to provide consistent, principled advocacy at a UN, bilateral, regional and partnership level. We need to provide practical support to appropriate regional voices.

2.4.1.2. We need to speak the truth about this issue when it is both easy and difficult. This includes persistently requiring some of our closest international friends to take the step that so many other countries have taken. It is our view that the USA is central to the future of this debate in most countries.

2.4.1.3. Our national efforts should not of course be confined to a 'Government to Government' level.

2.4.1.4. For any particular country to change its attitude to the death penalty, both leadership and community support will be needed. Appropriate pressures should be directed to leaders, to call them to account on this issue, and to encourage them to lead their own countries into a better human rights regime.

2.4.1.5. We acknowledge that the death penalty is not the most pressing human rights issue in the region or the world. But it is an important issue for numerous reasons. By focussing on the death penalty, we immediately see the serious injustices that are occurring in legal systems and justice administrations in the relevant countries. These problems vary, from corruption, to procedural injustices, to torture, to inhuman incarceration conditions, to punishment regimes of excessive brutality or cruelty as examples. However, all these issues can have the spotlight shone upon them, hopefully with good results, by focusing on the most extreme injustice of all, state sanctioned killings.

2.4.1.6. By being seen as a nation which approaches this debate in a consistent, principled fashion, we also remove ourselves from a criticism currently levelled at us, that we only care about this issue when it involves Australians. The time is well and truly past for mere case by case advocacy, as our government of course understands.

2.4.2. Capacity building

2.4.2.1. Apart from Government to Government engagement, practically, when dealing with particular countries or regions, Australia should focus on capacity building. The debate concerning the death penalty needs to be won in each relevant country. This means important institutions such as the media and law societies need to conduct the debate with the best information available.

2.4.2.2. Our recent experience in Indonesia has emphasized the importance for us of capacity building. Although in some quality media there was well informed and strong debate, overall there was a serious shortage of informed commentators, journalists, lawyers, health professionals, criminologists or other likely voices with the knowledge or willingness to enter the debate.

2.4.2.3. There are many and complex reasons for this, but a significant part of the solution is capacity building – encouraging and enabling better, more informed and critical journalism, legal commentary, health commentary, political analysis and so on.

2.4.3 Law and order, or health?

2.4.3.1. Much of the death penalty debate in some countries revolves around the problem of illegal drugs in society. Australia can take the lead in the region to investigate and critique the status quo on drug control. Without condoning or encouraging drug use or abuse, governments in the region, including our own, need to grapple with the reality that the law and order approach to drug use and abuse has proven inadequate over recent decades.

2.4.3.2. The ever increasing size and reach of organised crime, corruption, prisoner numbers and drug abuse leads to the conclusion that other and more agile responses than tougher law and order responses are also needed. The evidence is plain that law and order responses are essential but inadequate.

2.4.3.3. The region needs to work on recognising that drug use and abuse may be reduced, with many measurable societal gains, by placing a much greater emphasis on health outcomes. This part of the debate is perhaps for another discussion, but should be seen as necessary.

2.4.3.4. It is our understanding that these kinds of questions may become the subject of discussion at the UNGASS in April 2016. Australia should be ready to contribute creatively to this debate.

2.4.4. Funding international anti-narcotics police work

2.4.4.1. We note, again mostly for a different discussion, that there is an increasing international concern that non-executing countries are funding anti-narcotics police work in countries which execute, with the apparent outcome that such funding is leading to arrests and ultimately executions. The UNODC is coming under increasing scrutiny in this regard. This JSC should enquire in a similar vein into our own anti-narcotics funding and work in countries, such as Pakistan, where executions are common.

2.4.5 Overall objective

2.4.5.1. The overall objective in advocating against the death penalty is to remove the option from the statute books, rather than settle for a de facto moratorium. When the option remains on the statute books, the option becomes political. Just as we in Australia saw this with the Ronald Ryan execution nearly fifty years ago, we have seen recent executions in the region which are purely political. We refer the JSC to the six prisoners executed in Taiwan in June 2015, apparently in response to the unrelated case of a terrible murder of a girl a week earlier. Similarly, when fully analysed, it is our opinion that the execution of Mr Sukumaran and Mr Chan, and others this year in Indonesia, can mostly be reduced to an example of a domestic vote grabbing exercise.

2.4.5.2 If left sitting on the statute books, execution remains a convenient political option for unscrupulous politicians.

3. Particular matters:

We take this opportunity to list in short form a number of practical matters, where we hope our own experience can be converted into useful comments for those working in this area, whether at a government or private level.

3.1. Lawyers on embassy lists:

3.1.1.1. Pursuant to the Vienna Convention on Consular Relations, a detained Australian citizen is entitled to speak to a Consular officer. The long established practice is that although no legal advice would be provided by the Consular Officer, a list of local lawyers would be provided to assist the detained person. It is important that regular due diligence as to the names on the list occurs. It is important that only the most appropriate lawyers be on such lists.

3.2 AFP co-operation and oversight – a monitor needed:

3.2.1. The ultimate effect of the relevant legislation and AFP guidelines concerning the circumstances in which the AFP will provide information to law enforcement officials in death penalty countries, is that a significant number

of persons continue to be placed at risk of execution. Much has been said and written about how to resolve the tensions of these realities.

- 3.2.2. We readily acknowledge the desirability of the AFP being able to work effectively. However, currently it appears that too much discretion resides with the AFP on this matter. In our view, it would be appropriate to consider the appointment of a Monitor, independent of the AFP and Government, with the responsibility of overseeing the provision of information overseas.
- 3.2.3. This structure would ultimately serve the interests of Government, the AFP and the community. The reality is there will often be very difficult judgment calls, and a person or persons outside the pressures of a particular investigation, and outside of the Minister's office, are better suited to make the final decision.
- 3.2.4. For example in the case of the Bali 9, a different oversight structure may have prevented the relevant letters of April 2005 being sent from the AFP to Indonesian police.
- 3.2.5. We acknowledge the importance of inter-agency co-operation. The AFP are at the front line on a daily basis, and their inter agency police work is essential. It has also become increasingly voluminous and complicated. This needs to be balanced with the importance of giving practical effect to our national policy. A dispassionate decision maker - a Monitor - may be the best way to ensure that for this very particular decision, apparently having to be made more and more often, a suitably experienced, educated, trained and informed decision maker needs to be in a position to see the whole picture, consistently.

3.3 Funding arrangements:

- 3.3.1. The practical experience of these cases is that the lawyers are usually acting pro-bono. This increases the time pressures on the lawyers involved. It is important that the decision making processes for the provision of any disbursement assistance - often of critical importance be responsive, agile and speedy.
- 3.3.2. In our experience the best way is consistent dealing with the same person. This may be an area that we could speak to if invited to do so.

3.4 To what degree should Government be involved in a case, while it is running in the Courts?

- 3.4.1. This may be an area that we could speak to if invited to do so.

3.5 Some obvious political lessons:

- 3.5.1. It would seem that some of the mistakes from the past have been learnt. Regrettably, in this century, too many of our political leaders have, even if only rarely and briefly, failed to oppose particular executions. Our national voice and credibility suffered in the region as a

result. On the other hand, the strong bipartisanship this year, led by the Foreign Minister and Shadow Foreign Minister, gave much strength and credibility to our arm.

3.5.2. We would encourage the JSC to identify the successes of this bipartisanship to set a model for future cases. We were immensely supported by it. But it was only good fortune that put the right Minister and counterpart in the job at the right time. It is important that a framework be clearly set out for all such future cases.

3.6. Further recommendations

3.6.1. We recommend that DFAT put together and lead a response team for future cases. In our cases, we have been fortunate to be able to bring together a variety of talents – barristers, solicitors, academics. We have been most fortunate to be able to benefit from talking with government.

3.6.2. However, ideally, there would be a slightly more coherent structure for future cases. This loose committee could be immediately available for an Australian facing execution. It could provide a list of names of people who may be ready to assist, from lawyers, to linguists, to government officials, NGOs such as Reprieve or Australians Detained Abroad. It could provide previously done research on the relevant country and its laws. As a resource, it may enable a team to be quickly brought together, whether from its own ranks or elsewhere, to minimise the prospect of execution, and to allow a full array of legal options to be very quickly available. It may enable immediate identification of lawyers with the necessary bilingual skills and appropriate cultural knowledge. It is of course essential that any team have such bilingual and culturally informed members.

3.6.3. Such an asset can also be used to assist defendants and their families to recognise quickly the magnitude of the problems they face, and the dangers of making certain strategic decisions eg answering every question from every media outlet on every issue. No one strategy fits all cases, but readily available advice may prove invaluable in future cases.

3.6.5. We acknowledge that DFAT or government cannot play a non-governmental role in such cases. However we now have a community of professionals and officials who should remain connected in a way which enables DFAT to provide, or make available, immediate and valuable assistance, of this unusual nature, and then to step back.

3.6.6. It is true that some clients prove impossibly hard to help, so such a resource is only an option to be taken if wanted. But if government did maintain a supportive role in connecting a large group of interested parties, it may prove invaluable were there to be a run of death penalty cases.

3.7. An international response strategy:

3.7.1. Without repeating the comments already made, we would recommend that Australia proactively identify and draw together leading professionals from around the world to further discuss how each and all can contribute to this international issue. A privately held roundtable of leading players would be a rare event, and an excellent opportunity to allow fertile discussion and ideas to be generated. Again, the cost is not great, but the ideas and strategies which could evolve may be invaluable. This JSC enquiry is a wonderful and welcomed initiative. However we must recognise that there are perhaps one or two dozen eminent intellectuals, lawyers, politicians and advocates who have much more experience than probably anyone in Australia on these matters. The combined efforts of the JSC and such a roundtable may be able to identify the very best ways forward from here.

4. CONCLUDING REMARKS

4.1. We take this opportunity of noting for the record the assistance and cooperation we have received in cases from DFAT in the past 13 years. We would like to say much more but convention prevents us.

Julian McMahon, barrister

Alex Wilson, partner, Lethbridges Barristers & Solicitors

Veronica Haccou, partner, Nevin Lenne Gross

Michael O'Connell SC, barrister

Peter Morrissey SC, barrister