

Ensuring AFP information sharing abroad does not lead to the death penalty

Australian law does not currently prevent the Australian Federal Police (**AFP**) from sharing information that would lead to imposition of the death penalty.

Bali 9 arrests and executions based on AFP information sharing

In April 2005, the AFP provided the Indonesian National Police (**INP**) with information concerning an operation to import heroin from Bali to Australia. Using that information, the INP arrested nine Australian citizens. The leaders of the group, Andrew Chan and Myuran Sukumaran, were subsequently convicted. They were executed by firing squad in April 2015.

It was foreseeable that AFP's provision of information would lead to members of the Bali 9 facing the death penalty. It was also open to the AFP to arrest the Bali 9 in Australia and ensure that they were tried in Australian courts that would not impose the death penalty. Yet there is nothing to prevent AFP from doing the same thing again.

370 people a year are placed at risk

Recent media reports based on documents disclosed under FOI reveal that between December 2009 and December 2014, the AFP reported more than 370 people a year to authorities in death penalty jurisdictions, placing those people at risk of execution. More than 95 per cent of these referrals were reportedly for drug cases. Despite improvements to AFP guidelines in response to the Bali 9 case, police continue to grant about 93 per cent or more of requests for information from police forces in death penalty countries. (See Michael Bachelard, "Death Penalty: Australian Federal Police dubs 1847 suspects", *Sydney Morning Herald*, 7 September 2015).

***Mutual Assistance Act* and *Extradition Act* contain death penalty safeguards**

Other Australian laws contain safeguards against imposition of the death penalty. Both the *Extradition Act* 1988 (Cth) and the *Mutual Assistance in Criminal Matters Act* 1987 (Cth) have provisions that limit Australia acting in situations that might lead to the imposition of the death penalty.

Under the *Extradition Act* the Attorney General may not surrender a person to another country where the penalty of death might be imposed unless satisfied, on the basis of an undertaking from that country, that the person will not be tried, the death sentence will not be imposed or, if the death sentence is imposed that it won't be carried out (s 22(3)(c)).

The *Mutual Assistance Act* prohibits assistance to other countries in similar terms (s 8). Under that Act a request for assistance from a foreign country "must be refused" in circumstances in which the death penalty may be imposed, unless the Attorney-General is of the opinion that special circumstances require granting the request (s 8(1A)).

Amending the *Australian Federal Police Act* to prevent harmful disclosures

The Committee ought to consider whether the *Australian Federal Police Act* 1979 (Cth) (**AFP Act**) should be amended to prevent the sharing of information that would lead to imposition of the death penalty or at least limit the circumstances in which such disclosures can take place. One way to do that might be by amending s 60A of the AFP Act to expressly prevent the sharing of prescribed

information in circumstances that may lead to the imposition death penalty. Australia's fundamental opposition to the death penalty should be the principle underpinning the amendments. However, the amendments would need to be sufficiently flexible to enable the AFP to act in situations where sharing information is necessary to prevent the imminent and serious risk of death (for instance, a plot to commit a terrorist act overseas). That said, we note that 95 per cent of referrals reported between 2009 and 2014 related to drug offences.

A possible amendment to section 60A for discussion

Section 60A of the AFP Act, entitled "Secrecy", currently provides:

- (1) This section applies to a person who is, or was at any time:
 - (a) the [Commissioner](#); or
 - (b) a [Deputy Commissioner](#); or
 - (c) an [AFP employee](#); or
 - (d) a [special member](#); or
 - (da) a [special protective service officer](#); or
 - (e) a person engaged under section 35; or
 - (f) a person performing functions under an agreement under section 69D.
- (2) A person to whom this section applies must not, directly or indirectly:
 - (a) make a record of any [prescribed information](#); or
 - (b) divulge or communicate any [prescribed information](#) to any other person;except for:
 - (c) the purposes of this Act or the regulations; or
 - (d) the purposes of the [Law Enforcement Integrity Commissioner Act 2006](#) or regulations under that Act; or
 - (e) the purposes of the [Witness Protection Act 1994](#) or regulations under that Act; or
 - (ea) the purposes of the *Parliamentary Joint Committee on Law Enforcement Act 2010* or regulations under that Act; or
 - (f) the carrying out, performance or exercise of any of the person's [duties](#), functions or [powers](#) under Acts or regulations mentioned in paragraphs (c), (d), (e) and (ea).

One change to be considered, for the purpose of discussion, is to insert the following after 60A(2)(f):

'The exception contained in subparagraph (c) does not include the provision of information to any person where there is a reasonable prospect that the provision of that information will lead to the imposition of the death penalty on any person, unless the Chief Commissioner certifies in respect of particular information to be provided that by reason of the imminent and serious risk of death to any person, the provision of the information is nevertheless justified.'

Key issues for consideration

Some key issues to be considered in refining the scope of any such amendment are:

- How likely does the imposition of the death penalty need to be before the AFP is prohibited from sharing the information? ('reasonable prospect' is used in the suggestion above)

Submission to Joint Standing Committee on Foreign Affairs,
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- What should the threshold be for allowing disclosure of information notwithstanding the risk such disclosure will lead to the imposition of the death penalty? ('imminent and serious risk of death' is used in the suggestion above)
- Who should have the authority to allow such disclosure? (AFP's Chief Commissioner, Attorney-General, or someone else in the AFP?)
- Whether the decision-maker (the AFP commissioner in the current draft) could certify on a generic basis (e.g. all communications involving a particular terrorism investigation) or whether such certification should be on, for example, a communication by communication basis.

Human Rights Law Centre, 29 September 2015