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Joint Standing Committee on Foreign Affairs Defence and Trade

Human Rights Sub-
Committee on the Inquiry
into Australia's Advocacy
for the Abolition of the
Death Penalty

January 2016

Supplementary Submission by the
Australian Federal Police

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1. Introduction

The Australian Federal Police (AFP) appreciates the opportunity to provide a supplementary submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) as part of its inquiry into Australia's advocacy for the abolition of the Death Penalty. This supplementary submission clarifies questions raised during the AFP's appearance before the JSCFADT Sub-Committee and subsequently the JSCFADT Secretariat in December 2015. This submission should be read in conjunction with the submission by the AFP dated September 2015. This supplementary submission is **UNCLASSIFIED** however the AFP requests that the Committee seeks permission prior to the release of either part or the entire submission.

2. Issues raised in the 27 November 2015 hearing

Specific questions raised by Sub-Committee Members

a) AFP liaison with the Australian Crime Commission (ACC) for the purpose of information sharing

The AFP and ACC have a Memorandum of Understanding which provides a framework for the cooperation and provision of services between the Parties in relation to the sharing of intelligence, investigation of offences and related matters.

The AFP has a productive working relationship with the ACC which includes both AFP and ACC officers embedded into corresponding agencies as liaison officers as well as through a variety of crime type specific operations and areas. This assists in the real time passing of intelligence between agencies.

b) Number of Australians potentially facing the death penalty overseas for drug-related crimes

The Department of Foreign Affairs and Trade have confirmed that as of 20 January 2016, 12 Australians could face the death penalty overseas on drug-related charges. These individuals are either awaiting trial or verdict, or are on bail pending further investigation of their cases. A further two Australians received a suspended death sentence in China in 2015. Below highlights the number of Australians facing the death penalty offshore for drug related crimes:

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- Nine in China (including two Australians who have received a suspended death sentence)
- Four in Vietnam
- One in Malaysia

The AFP was not involved in the passing of information prior to the arrest of any of these individuals.

c) Codification of the AFP's National Guideline

The AFP has numerous National Guidelines which provide operational guidance. The AFP is not aware of any AFP National Guideline previously being codified. National Guidelines are generally drafted to establish internal guidance and procedures in achieving the AFP's legislative obligations.

While not specific to death penalty situations, certain elements of cooperation with foreign counterparts in death penalty situations is already codified in Commonwealth legislation including the *Mutual Assistance in Criminal Matters Act 1987* (Cth) and the *Privacy Act 1988* (Cth).

There may be risks associated with the codification of the AFP's National Guidelines including:

- National Guidelines and governance instrument amendments are based on AFP internal reviews as part of a measured process over a period of time, providing greater flexibility than legislative reform.
- The processes within governance instruments may be departed from in some circumstances, so long as the decision maker has had regard to the instrument and the departure is reasonable and lawful in the circumstances. The reason for the departure is also fully recorded. Depending on the drafting of the provisions, the departure from legislative instruments may amount to the commission of a criminal offence or attract criminal or civil penalties.
- Codification of the National Guideline may inhibit flexibility between the AFP and foreign law enforcement agencies (FLEAs) which could lead to inferior outcomes and harm AFP partnerships.

Importantly since 2009, any amendments sought to the National Guideline require both the Minister for Justice and Attorney-General's endorsement. This provided a

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further safeguard and acknowledgement of both the sensitivities and public interest associated with AFP investigations that may result in Australian citizens subject to death penalties in foreign countries.

3. The AFP's role in sharing information offshore

The AFP is authorised to provide assistance and cooperate with FLEA in accordance with the *Australian Federal Police Act 1979* (Cth) ('the Act') and the Ministerial Direction issued under sub-section 37(2) of the Act.

The AFP shares information and provides assistance on a police-to-police basis daily with FLEA. Police-to-police assistance may be requested by a FLEA where it relates to an investigation they are undertaking. The AFP shares information with FLEAs on behalf of all state and territory law enforcement agencies. An example of this includes the Australian National Child Offender Register (ANCOR) travel notifications.

As at 20 January 2016, of the 1,313 AFP investigations that are currently ongoing 70% have a direct link or association with international law enforcement or transnational crime. This figure encompasses a broad spectrum of transnational crime including narcotics, child sex tourism, child protection, human trafficking, fraud and money laundering, organised crime and counter terrorism. Importantly all large scale, complex and organised crime investigations have an overseas nexus.

In the 2013-14 financial year the AFP processed more than 72,000 Interpol and Europol communications, this is in addition to daily ongoing police to police interactions. This equates to some 200 messages sent or received from our international law enforcement partners every day. Importantly of these requests in 2013-14, 0% equated to death penalty offences.

This international cooperation is an essential part of the AFP's ability to combat the pervasive and borderless nature of transnational organised crime.

4. Capacity Development offshore

Collaboration with FLEAs to counter threats of terrorism, serious organised crime and conflict, and to support sustainable development, remains crucial to implementing Australia's foreign policy and development priorities.

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The effectiveness of this assistance is predicated on collaboration with foreign law enforcement, as well as Australian Government agencies, with a focus on law enforcement cooperation, intelligence gathering and exchange, and capacity enhancement.

Through a range of investigative, intelligence and capacity building activities, the AFP focuses on disrupting crime at its source, enhancing international law enforcement cooperation and strengthening the capacity of lesser developed law enforcement agencies.

Countries with a poor human rights record are often most in need of police-to-police assistance. Police-to-police assistance can be effective in building relationships with these countries and can form part of a wider strategy to address human rights concerns. The AFP engages in a manner that promotes, rather than undermines, human rights, both in its operational and capacity development activities. The AFP does not engage where the agency has an ethical objections and the AFP's involvement is guided by the AFP's National Guideline on Offshore Situations Involving Potential Torture or Cruel, Inhuman or Degrading Treatment or Punishment.

Collaboration with foreign law enforcement partners includes increasing cooperation and liaison, mentoring, training, equipment gifting and policy advice.

5. The AFP's role when an Australian is arrested offshore

Each year around 1,000 Australians are arrested overseas and more than 250 are incarcerated overseas at any one time.¹

The Vienna Convention on Consular Relations, signed by Australia, provides a framework that entitles a person who has been arrested, detained or jailed overseas to seek access to consular officers from their country of citizenship.

The Department of Foreign Affairs and Trade (DFAT) will offer consular assistance to Australians arrested or detained and provide such assistance where – as is usually the case – that offer is accepted. The Consular Services Charter provides details of what assistance can and cannot be provided.

¹ <http://smartraveller.gov.au/guide/all-travellers/when-things-go-wrong/arrested-or-in-prison.html>

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DFAT collects information regarding the overseas arrest or detention of Australian citizens for the purpose of providing consular assistance. DFAT, subject to the restrictions of the *Privacy Act 1988* and other Australian laws, may advise the AFP of the arrest or detention of Australians overseas in response to or support after a specific request for such advice from the AFP.

Alternatively, a FLEA may advise the AFP of the arrest or detention of a person where it relates to an AFP investigation or to Australia or when the FLEA requires further assistance from the AFP to further its investigation.

The AFP National Guideline on international police-to-police assistance in death penalty situations (the National Guideline) governs police-to-police assistance in possible death penalty cases. The requirements of the National Guideline differ depending on whether assistance is provided before or after detention, arrest, charge and/or conviction and requires consideration of a range of relevant factors to the decision making process in death penalty matters and ensures a structured and transparent process.

Since the 2009 review and implementation of that National Guideline the AFP has not passed any information that has resulted in the arrest or detention of an Australian offshore for a death penalty offence. A timeline of the development of the AFP Death Penalty Guideline is provided (see Attachment A).

6. The AFP's National Guideline on international police-to-police assistance in death penalty situations

a) Assistance before detention, arrest, charge or conviction

The AFP, as per the National Guideline, is required to consider relevant factors before providing information to FLEAs if it is aware the provision of information is likely to result in the prosecution of an identified person for an offence carrying the death penalty.

The National Guideline only applies where information is considered 'likely' to result in a prosecution. In practice the AFP takes a conservative approach and matters with an extremely low likelihood of prosecution are still cleared in accordance with the National Guideline and captured in AFP statistical reporting.

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The National Guideline requires clearance by senior AFP Manager International Engagement (MIE) or National Manager International Operations (NMIO) (Manager/SES-level 1 and above) who must consider prescribed factors:

- The purpose of providing the information and the reliability of that information;
- The seriousness of the suspected criminal activity;
- The nationality, age and personal circumstances of the person involved;
- The potential risks to the person, and other persons, in providing or not providing the information;
- Australia's interest in promoting and securing cooperation from overseas agencies in combatting crime; and
- The degree of risk to the person in providing the information, including the likelihood the death penalty will be imposed.

The AFP's previous submission (September 2015) shows the internal clearance process and decisions by senior AFP management.

[b\) Assistance after detention, arrest, charge or conviction](#)

Ministerial approval is required before police-to-police assistance (including the sharing of information) can be given in any case in which a person has been arrested or detained for, charged with, or convicted of an offence which carries the death penalty.

The AFP's previous submission outlines the process for obtaining Ministerial approval for police-to-police assistance after detention, arrest, charge or conviction.

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Case Study One

The AFP received intelligence of an Australian, potentially an exploited courier, who had intended to travel offshore to collect drugs to courier back to Australia. Drug offences in the country of travel attract the death penalty. The AFP, through the process of the National Guideline, sought to pass the information to foreign law enforcement in that country in an effort to identify and arrest the syndicate responsible for the provision of drugs to the Australian courier. Through the consideration process, the AFP sought to gain assurances from the foreign country that if the information was to be passed the individual would not be arrested and face a death penalty charge. The AFP was not able to guarantee this would not occur. As such, the request to pass information was not granted. The Australian was searched on their return to Australia where further intelligence was obtained to assist in the investigation.

Risk ratings of Internally Approved Requests to provide assistance in Potential Death Penalty Situations				
Year	Total Approved Requests	Low	Medium	High
2013	47	39 (83%)	8 (17%)	0
2014	90	75 (83%)	12 (13.5%)	3 (3.5%)
2015	63	52 (82.5%)	6 (9.5%)	5 (8%)
TOTAL	200	166 (83%)	26 (13%)	8 (4%)

Often, a request will involve sharing information about multiple individuals (person entities). Not all of these people were at risk of being charged with a death penalty offence.

The 200 releases related to information on 835 persons of interest (POI), both Australian citizens and non-Australian citizens. Even where the AFP considers information to be unreliable or false, such as a false name listed as a consignee on a package, it is still captured as an entity for statistical purposes. Of these POIs, approximately 26% (221 POIs) are identified as Australian citizens.

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Year	Total Approved Requests	POI relating to the approved requests	POI that are Australian
2013	47	214	52 (24%)
2014	90	410	104 (25%)
2015	63	211	65 (30%)
TOTAL	200	835	221 (26%)

7. AFP's provision of exculpatory information

The AFP also passes exculpatory information to FLEA on a police-to-police basis. The information is passed within the context of the National Guideline. This information can often assist persons of interest, both Australian and other Nationalities, facing charges for offences that carry the death penalty.

Case Study Two

An Australian has been arrested offshore for the alleged murder of a relative. The offence of murder carries the death penalty in the country of arrest. The AFP was not involved in the pre arrest investigation nor was it aware of the arrest prior to receiving a request from the FLEA to provide a criminal history. Due to the request for information occurring post arrest the AFP sought approval from the Minister to release the information. Once approval was granted by the Minister, the information provided by the AFP to the FLEA was that the Australian does not hold a criminal history in Australia. If this information had not been released it would not have supported this individual on sentencing, with a potential assumption that a criminal history existed

8. United Kingdom (UK) policy

The AFP International Operations will continue to monitor the international environment to ensure contemporaneous frameworks are benchmarked and assessed against the AFP's existing death penalty framework. The importance of doing this is to ensure the AFP continues to be cognisant of public perceptions and public policy whilst fulfilling the Australian Government's law enforcement remit.

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The AFP has commenced a formal review of the UK Human Rights Guidance (UK Guidance). The UK Guidance articulates the human rights and international humanitarian law risks that should be considered by Her Majesty's Government (HMG) officials prior to providing justice or security sector assistance. The AFP's objective in undertaking this review is to benchmark and identify potential opportunities to inform the existing death penalty governance framework.

An initial analysis of the UK Guidance is that it is intended to be followed in a wide variety of situations in which human rights and international humanitarian law issues may arise.

As previously stated the UK model has further informed the AFP's deliberations and ongoing developments in the inclusion of a specific risk assessment. In acknowledging the merit of the UK model, the AFP's geographic location including its neighbours, and as a result our criminal environment, is different to that of the UK.

As part of the current review of the National Guideline the intention is that the AFP will work towards a similar approach to that of the UK, but in the short term, adopt a risk assessment model modified to support death penalty deliberations in an Australian law enforcement context.

The AFP looks forward to formalising this review in order to potentially inform ongoing investigations, particularly those which may be subject to overseas death penalty considerations, and ensure these are in keeping with international best practice.

9. Closing Statement

The AFP would like to thank the Committee for a further opportunity to inform this Inquiry. The AFP remains committed to address any issues which may arise with regards to death penalty as they apply to our organisational offshore spheres of activity.

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Attachment A

Timeline of the AFP Death Penalty Guideline

This guideline applies only to the provision of assistance, including the sharing of information, which can be provided on a police-to-police basis. The current guideline was developed in consultation with the Attorney-General's Department through amendments in 2009, 2012 and 2014.

The principal points of difference between the death penalty Practical Guide existing at the time of the Bali 9 arrests and the current National Guideline are:

- The point at which Ministerial approval is required before assistance can be provided:
 - The 2005 Practical Guide only required Ministerial approval following a person being *charged* with a death penalty offence. The current National Guideline requires Ministerial approval in any instance where a person has been *arrested, detained, charged or convicted* of a death penalty offence.
- The decision making structure governing AFP assistance:
 - The current National Guideline provides for a more structured process for determining whether assistance is to be provided, including specific factors that must be considered by a member of the AFP Executive (Senior AFP management - Manager/SES-level1 and above) before approving assistance prior to arrest, charge, detention or conviction.

1998 - 2009

The Practical Guide permitted assistance to be provided pre-charge, irrespective of whether the assistance resulted in charges being laid for an offence attracting death penalty. Ministerial approval was required to provide assistance post-charge.

2009

In 2009, arrangements were reviewed by the then Attorney-General and the AFP. Amendments were made to the Practical Guide which incorporated a range of measures to strengthen the process governing international crime cooperation in death penalty matters. There is now a more structured process of consideration of specific issues as set out in the Guide:

- Procedures before arrest, detention, charge or conviction

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- Requires authorisation from Senior AFP Management (Manager/SES-level 1 and above) who must consider the following factors:
 - the purpose of providing the information and the reliability of that information
 - the seriousness of the suspected criminal activity
 - the nationality, age and personal circumstances of the individual(s) involved
 - the potential risks to the person, and other persons, in providing or not providing the information
 - Australia's interest in promoting and securing cooperation from overseas agencies in combating crime
 - The degree of risk to the individual(s) in providing the information, including the likelihood the death penalty will be imposed.
- Procedures after arrest, detention, charge or conviction:
 - Only the Attorney-General or Minister for Justice may approve exchange of information on a police-to-police basis.

The AFP Commissioner is required to report annually to the Minister about the number and nature of circumstances in which assistance is provided in potential death penalty cases.

2012

On 20 February 2012, following internal review, the AFP Practical Guide on International Police to Police Assistance in Death Penalty Situations was amended and became the AFP National Guideline on international police-to-police assistance in death penalty situations.

The main changes were introduction of the 'reasonable likelihood' test and the designation of Assistant Commissioner Serious & Organised Crime or Commander International Network as the only delegates authorised to approve release of information in cases where reasonable likelihood was assessed.

Previously, the Minister for Justice was only required to approve assistance in circumstances where a person had been charged with, or convicted of an offence which carries the death penalty. The guideline expanded approval to include the

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Commonwealth Attorney-General and to cover additional situations where a person is under arrest or detention for an offence which carries the death penalty.

This change recognised that under some legal systems, a suspect may be detained, or held under arrest for long periods of time before charges are laid.

2014

The Guideline was updated to reflect assistance by AFP appointees, in Papua New Guinea. Attachment A of the Guideline is a framework developed in consultation with the Attorney-General's Department that applies specifically to AFP International Deployment Group appointees in Papua New Guinea (PNG) and is a whole-of-government approach to managing death penalty issues in PNG.

2015

A review of the National Guideline is underway. The AFP Executive is currently considering potential amendments to the AFP death penalty policy listed in the submission, including consideration of the applicability of the UK model as it relates to death penalty deliberations in an Australian law enforcement context.