



UNIVERSITY OF
BIRMINGHAM

Australia's Advocacy for the Abolition of the Death Penalty

Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade

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1. The inquiry into Australia's role in promoting the abolition of the death penalty worldwide is welcomed. With respect to the Terms of Reference, this Submission sets out the steps that Australia could take to advocate for worldwide abolition. This Note supports the suggestions made by several organisations in the document "Australian Government and the Death Penalty: A Way Forward", issued in May 2015,¹ and nothing in this present Submission should be read to contradict this document.
2. This Submission is made in my capacity as a researcher in the field of capital punishment. I have published several academic articles and other pieces on the subject of the death penalty, with a particular focus on the issue of complicity and the death penalty.²
3. The main point that I make in this Submission is that, in addition to undertaking positive actions to promote abolition elsewhere, it is imperative that Australia does not inadvertently act in such a way that facilitates the use of capital punishment elsewhere. If Australia is complicit in the use of the death penalty abroad, this will inevitably limit the extent to which Australia can be effective in advocating for abolition. Complicity will render Australia open to charges of hypocrisy, and it is important that the practice of Australian authorities matches its rhetoric. This is explained after a brief overview of the positive steps that Australia can take to promote abolition abroad.

Promoting the abolition of the death penalty abroad

4. Australia can learn a great deal from the United Kingdom, which implemented an official "Strategy for Abolition of the Death Penalty" from 2010-2015.³ The Strategy identified priority countries to target, and various channels through which to promote abolition. The Foreign and Commonwealth Office of the UK Government achieved some success through the Strategy. For example, Parliamentarians from the UK travelled to Suriname to encourage abolition, and the Government of Suriname abolished the death penalty on 3rd March 2015.

¹ Submitted by Amnesty International, Human Rights Watch, the Human Rights Law Centre, Reprieve Australia, Australians Detained Abroad, Civil Liberties Australia, the NSW Council Civil Liberties and UnitingJustice Australia. See http://www.amnesty.org.au/resources/activist/Death_Penalty_-_A_Way_Forward.pdf

² See Bharat Malkani, 'The Obligation to Refrain from Assisting the Use of the Death Penalty' (2013) 62(3) International and Comparative Law Quarterly 523-556

³ See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35448/death-penalty-strategy-oct-11-15.pdf

5. In light of the UK's Strategy, there are at least four ways in which Australia does, and can, promote abolition abroad. First, it can support civil society in Australia and in retentionist countries which specialise in protecting people who are facing the death penalty, and which specialise in advocating for abolition. Second, Australia can engage in bilateral efforts with other countries. Third, Australia can engage in regional efforts to promote abolition. Fourth, Australia can engage in international efforts, usually through the United Nations. These are considered in turn.
6. Support civil society.
In Australia, groups including Reprieve Australia and the NSW Council for Civil Liberties have proven adept at helping those on death row abroad, and in advocating for the abolition of capital punishment. The Government should continue to fund such specialist organisations. The Government can also provide financial and other support to organisations in retentionist countries. For practical reasons, not every organisation abroad can be supported, and the Government should work closely with Reprieve Australia in order to identify groups that are sustainable, and effective in their work.
7. Bilateral efforts
Australia has relationships with a number of countries, and can engage in bilateral discussions about abolition. Many states retain the death penalty primarily because they are afraid of the consequences of abolition. In particular, they are worried about losing popular support, they are afraid of rising crime rates, and they do not want to look 'soft' on crime. Through bilateral discussions, Australia can use its own experiences of abolition in order to show these countries that they need not be worried about these issues. In this sense, Australia can educate other countries about appropriate paths to abolition, and about the consequences of abolition.
8. Regional efforts
The European Union has played an incredibly important and effective role in promoting abolition of the death penalty worldwide,⁴ but there is no equivalent in the Pacific region. Australia has the opportunity to build and develop a regional coalition of abolitionist states, taking on board the experiences of the European Union.
9. International efforts
Australia should continue to co-sponsor, and encourage other states to co-sponsor, resolutions and declarations at the United Nations which are aimed at limiting and eliminating capital punishment. In 2016, the UN General Assembly will once again consider a resolution calling for a moratorium on the death penalty, and Australia should take a lead in promoting this resolution.

Complicity and the death penalty: a barrier to effective advocacy for abolition

10. Just as Australia can learn from the UK about what it can do to promote abolition, it can also learn from the UK about what it *should not* do. Put simply, there is little point advocating for the abolition of the death penalty in other countries if Australia, like the UK, simultaneously assists the implementation of the death penalty elsewhere.
11. The UK has contributed to death sentences through three principal means. First, it has on occasion provided assistance to foreign authorities in the investigation and prosecution of

⁴ See Christian Behrmann and Jon Yorke, 'The European Union and Abolition of the Death Penalty', 4 Pace Int'l L. Rev. Online Companion 1 (2013), <http://digitalcommons.pace.edu/pilronline/39/>

specific individuals and offences, leading to the imposition of the death penalty.⁵ Second, it has provided on-going financial and technical assistance to combat transnational crimes such as drug-trafficking, even though this assistance leads to the apprehension and executions of individuals.⁶ Third, it has not always provided full support for its nationals facing death sentences elsewhere, thus increasing the chances of that person being sentenced to death and executed.⁷

12. Australia is susceptible to replicating the mistakes of the UK. On the first point, the role of the Australian Federal Police in the “the Bali Nine” case is well known, and there have been recent reports suggesting that the AFP has assisted hundreds of other potential death penalty cases without receiving assurances that the death penalty will not be imposed.⁸ Not only does this contradict Australia’s stated policy of promoting abolition, but it also hinders Australia’s attempts to effectively advocate for abolition.
13. I understand that legislation has been put forward to prevent a repeat of the Bali Nine case. However, the Foreign Death Penalty Offences (Preventing Information Disclosure) Bill 2015 is problematic. Under Section 7(2), the Attorney-General can still authorise assistance without assurances in cases involving terrorism; homicide; or violence that does not even result in death but merely endangers a person’s life. If it passes as it is, the Bill could entrench, or normalize, the provision of assistance without assurances in homicide and other cases. The Bill should be amended to remove all exceptions. After all, the death penalty is not imposed in Australia for terrorism, homicide, or other violent offences, and so it makes little sense to suggest that it is permissible for Australia to be complicit in the imposition of the death penalty in such cases. In order to effectively advocate for abolition elsewhere, Australia must be seen to oppose the death penalty in all circumstances.
14. As with the UK, Australia should also ensure that the provision of on-going assistance to combat transnational crimes is only made when assurances have been received that death sentences will not be imposed in any cases stemming from the provision of such assistance.

⁵ Mike Pflanz, ‘British officials ‘acted unlawfully’ over death sentence for Kenyan linked to Judith Tebbutt kidnap’, *The Daily Telegraph*, 13 July 2014, available at <http://www.telegraph.co.uk/news/worldnews/piracy/10964557/British-officials-acted-unlawfully-over-death-sentence-for-Kenyan-linked-to-Judith-Tebbutt-kidnap.html>

⁶ It should be noted that the UK is not alone in this regard, and several European countries and the United Nations Office on Drugs and Crime have been implicated in assisting the use of the death penalty elsewhere. See Reprieve, ‘European Aid for Executions’ November 2014, available at <http://www.reprieve.org.uk/wp-content/uploads/2014/12/European-Aid-for-Executions-A-Report-by-Reprieve.pdf>; Jamie Doward, ‘Has Britain’s war on drugs led to more executions in Iran?’ *The Observer*, 15 September 2012, available at <http://www.theguardian.com/world/2012/sep/15/britain-drugs-war-executions-iran>; Jamie Doward, ‘UK warned that aid to Vietnam inadvertently supports death penalty’, *The Observer*, 16 February 2014 available at <http://www.theguardian.com/world/2014/feb/16/uk-aid-vietnam-death-penalty>

⁷ Bharat Malkani, ‘The Government’s shameful treatment of Lindsay Sandiford’ *The Huffington Post*, 23 May 2013, available at http://www.huffingtonpost.co.uk/dr-bharat-malkani/lindsay-sandiford-shameful-treatment_b_3324817.html

⁸ See Sarah Gill, ‘AFP exposes Australians to the risk of execution in foreign countries more often than you think’ *The Age*, 8 September 2015, available at <http://www.theage.com.au/comment/the-afp-peddles-injustice-by-helping-asian-death-penalty-states-20150902-gjdvu3.html>; Michael Bachelard, ‘Death penalty: Australian Federal Police dubs 1847 suspects’, *The Age*, 7 September 2015, available at <http://www.smh.com.au/national/death-penalty-australian-federal-police-dubs-1847-suspects-20150901-gjcsar.html>

15. Australia should also ensure that it provides full consular and diplomatic assistance to its nationals facing the death penalty abroad, preferably at the time of arrest and before a death sentence is handed down. Several countries, such as Mexico and the Netherlands, provide examples of good practice in this regard.⁹

Conclusions

16. Not only do states that have abolished the death penalty have political and moral obligations to refrain from aiding and assisting the use of the death penalty elsewhere,¹⁰ they may also have legal obligations in some circumstances.¹¹ This is not the place to set out the potential legal consequences of complicity, and for present purpose it is sufficient to note that if Australia is serious about advocating for abolition, then it must ensure that its actions match its rhetoric. This involves taking steps to ensure that Australia is no longer complicit in the use of capital punishment elsewhere.

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⁹ See, for example, the Mexican Capital Legal Assistance program (<http://sunlightfoundation.com/blog/2011/05/12/mexican-government-hires-lobbyists-lawyer-defend-nationals-facin/>)

¹⁰ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 9th August 2012 (pp.14-19) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/457/80/PDF/N1245780.pdf?OpenElement>

¹¹ Bharat Malkani, 'The Obligation to Refrain from Assisting the Use of the Death Penalty' (2013) 62(3) International and Comparative Law Quarterly 523-556; United Nations Office on Drugs and Crime, 'UNODC and the promotion and protection of human rights', p.10, available at http://www.unodc.org/documents/justice-and-prison-reform/UNODC_HR_position_paper.pdf. Also see the European Parliament's position on complicity and the death penalty for drug offences: 'European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter', paragraph 65, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0489&language=EN>