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Dear Secretary,

Australia's Advocacy for the Abolition of the Death Penalty

1. The most important component for the effectiveness of Australia's advocacy against the death penalty is consistency, on our part. Writing in August 2006, the Lowy Institute found a number of then recent comments by political leaders that undermined the perception of Australia as an honest broker in this field.¹
2. There have been others since.²
3. A selective or inconsistent approach (involving support for the death penalty when such an approach is attractive for domestic political reasons) will undermine Australia's ability to campaign for abolition, generally. It will also hamper Australia's ability to seek clemency for Australians who find themselves on death row.

¹ The Lowy Institute, *Capital Punishment and Australian Foreign Policy*, August 1996 ("Lowy"), page 6: Howard in February 2003, Howard in March 2003, Latham in August 2003 and Latham and Howard on *The World Today*, 15 December 2003

² Party leaders tried to outdo themselves in distancing themselves from opposition to the death penalty in the lead up to the 2007 election: <http://www.theage.com.au/news/national/pm-slams-rudd-over-death-penalty/2007/10/09/1191695867280.html>.

4. Inconsistency can flow from practices engaged in by other parts of the same government. Australia's ability to project a consistent opposition to capital punishment will be hampered if its law enforcement agencies are allowed and encouraged to provide information that may put either Australians or nationals of other countries on death row.³
5. Australia's laws, law enforcement instructions and memoranda of understanding must be changed to ensure that any law enforcement cooperation is conditioned upon iron clad guarantees that no information may be used, directly or indirectly, to place a person in danger of being executed. Unless Australia does this, its commitment to opposing the death penalty will be unconvincing.
6. The campaign to abolish the death penalty is properly a field for optimism. Many countries have moved away from using the death penalty in recent decades.⁴ In the United States, the movement for abolition has gained momentum and many States have banned capital punishment.⁵
7. It remains the case that a relatively few countries execute a large number of prisoners. Amnesty recorded over 607 executions, worldwide, in 2014 and almost 20,000 people on death row.⁶
8. Advocacy against the death penalty faces different challenges in respect of different countries. Different opportunities to influence government attitudes and actions in respect of the death penalty also vary according to the individual country and region.
9. International human rights law offers an opportunity to influence countries towards using capital punishment less, hopefully, as a first step to persuading those countries to eschew the penalty, altogether.
10. Apart from its application to countries who have adopted the Optional Second Protocol ("the Second Protocol") to the International Covenant on Civil and

³ <https://newmatilda.com/2015/05/05/afp-chan-and-sukumaran-it-was-legal-we-might-do-it-again>

⁴ Amnesty International et alia, May 2015, *Australian Government and the Death Penalty: A Way Forward* ("Way Forward"), page 2: since 1977, the number of abolitionist countries (in law or practice) has moved from 16 to 140.

⁵ Nebraska became the nineteenth State to abolish in 2015

⁶ Way Forward, page 2: the number of people executed in secret in China is not included. Also, Saudi Arabia has executed significantly more people in 2015 than it did in all of 2014:

<http://www.theguardian.com/world/2015/aug/25/saudi-arabia-executed-175-people-amnesty-international>.

Political Rights ("ICCPR"), human rights instruments do not outlaw capital punishment. It does, however, place stringent conditions on use of the punishment.⁷

11. Countries like Saudi Arabia, Iraq, Iran and, more recently, Pakistan, who execute large numbers of people, do not comply with the stringent conditions imposed by human rights law. By using the mores of human rights law to persuade such countries to improve their criminal justice systems, generally, and to only use the death penalty for what are in fact the most serious crimes, and, otherwise, to comply with human rights guarantees, would result in substantial lessening of the use of capital punishment.
12. Opportunities to advocate arise at the other end of the spectrum. Countries who have not used the death penalty for several years may be encouraged to abolish its use by law. Countries who have abolished its use may be encouraged to adopt the Second Protocol so that reimposition, if it took place in those countries, would be in breach of international law. And countries, like Indonesia, Papua New Guinea or Brunei Darussalam, who have showed signs of embracing capital punishment after a period of moving away, may be the object of specific advocacy urging them to think again.
13. Both *Moving Away*⁸ and Lowy⁹ urge Australia to use regional initiatives. Australia is more likely to be persuasive with countries with whom it shares interests and challenges. Regional approaches are used in many other areas of international cooperation and the relationships built up, thereby, if used sensitively, create opportunities for advocacy in favour of abolition.
14. *Moving Away* also discusses the question of public opinion.¹⁰ It is not surprising that capital punishment is perceived as being a means of gaining popularity. Both politicians and the public have an instinct that favours simple solutions. Capital punishment offers the simplest solution of all. Remove the perceived cause of your problems, by killing that cause, and your problems will go away.

⁷ The restrictions placed on member States by human rights law are set out in detail in Office of the High Commissioner for Human Rights, *Moving Away from the Death Penalty* ("Moving Away"), page 9 and following. Restrictions include death penalty may only be imposed for the most serious crimes (article 6 ICCPR); due process guarantees associated with the right to a fair trial (Article 14, para 1 ICCPR); and the right of persons sentenced to death to seek clemency (article 6(4) ICCPR).

⁸ Commencing at page 19

⁹ Page 8

¹⁰ Page 18

15. Moving Away also points out that public attitudes are often formed in the absence of a coherent and principled debate and they will often change when issues are explained and politicians, themselves, refuse to peddle simplistic notions.
16. One factor that can affect public opinion is the explanation of what international law, especially, international human rights law, has to say about a particular policy or practice.
17. The paradox of public opinion is another reason for using regional initiatives. Leaders are more likely to take the chance to move to abolish capital punishment if they know that they will be supported by respected leaders from their own region. The local public are also likely to be influenced by sensibly put arguments from the country's regional neighbours and allies. What seems daunting or wrong when we do it alone can become the obviously correct course if the journey is shared.
18. Australia has an efficient and well-resourced collection of law enforcement agencies. Countries in our region gain great benefit from cooperation and training and other assistance from Australia in law enforcement. The need to gain that assistance would, itself, be a major factor convincing countries in our region to move away from the death penalty. Law enforcement is not a reason to drag our feet. It is a key means of achieving success.
19. Many of Australia's greatest allies in opposing the death penalty are those NGOs who campaign for clemency and for abolition in those countries which still have the death penalty. Part of Australia's strategy should be to support those NGOs.
20. Australia should also cooperate with and support the work of local (Australian) NGOs who campaign against the death penalty such as local chapters of Amnesty and Reprieve.
21. I have no doubt that the report of the Committee as a result of this Inquiry will provide many worthwhile initiatives to be pursued.¹¹

¹¹ I particularly recommend the suggestions for action in the submission of the Law Council of Australia which I have read in draft.

22. Not every initiative can, however, be catalogued at a particular point in time. Opportunities will present themselves from time to time because of events happening here and abroad.
23. The Australian government should dedicate personnel and resources, particularly, in the Attorney-General's and Foreign Affairs Departments, to develop and prosecute a strategy of opposition to the death penalty, at all times, in all places and in every conceivable set of circumstances. Those resources will be needed to translate the Committee's recommendations into policies and initiatives. They will also be needed to take advantage of opportunities as they arise.
24. It is only if resources and personnel are devoted to the task that good intentions are likely to be translated into effective initiatives and achievement.

Best regards,

Stephen Keim SC
Chambers
2 October 2015

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