

Capital Punishment Justice Project

(formerly Reprieve Australia)

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

12 May 2020

Dear Secretary,

**Capital Punishment Justice Project's submission to the Parliamentary Joint Committee on
Intelligence and Security inquiry on the *Telecommunications Legislation Amendment
(International Production Orders) Bill 2020***

Capital Punishment Justice Project™ (CPJP™) Incorporated (CPJP) is a registered charitable organisation (No. 39482549157) whose sole purpose is to work towards the abolition of the death penalty.

We appreciate the opportunity to provide a submission addressing aspects of the *Telecommunications Legislation Amendment (International Production Orders) Bill 2020 (the Bill)* that engage our mission. We have experience in issues concerning the risks posed by inter-governmental information sharing, to those who face death-eligible sentences abroad.

To mention a local and well-known case, fifteen years have passed since the Australian Federal Police's decision to provide information to Indonesian authorities that inevitably led to the arrest of the Bali Nine in April 2005. Myuran Sukumaran and Andrew Chan were later executed on 29 April 2015. CPJP, then known as Reprieve Australia, provided legal and advocacy support to Sukumaran and Chan.

The Bill is drafted, among other objectives, to 'amend the regulatory framework to allow Australian communications providers to intercept and disclose electronic information in response to an incoming order or request from a foreign country with which Australia has an agreement'.¹ The Bill is not prescriptive with respect to human rights safeguards, effectively deferring the consideration of those to the terms of standalone executive agreements referred to as Designated International Agreements (DIAs). These DIAs are to be designated by regulation (clause 3) of proposed Schedule 1 of the *Telecommunications (Interception and Access) Act 1979 (Cth) (TIA Act)*. The Minister for Home Affairs is required to gain an assurance from the foreign country 'relating to the use, or non-use, in connection with any proceeding by way of a prosecution for an offence against the law of the

¹ https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/IPOBill2020

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foreign country that is punishable by death, of Australian-sourced information obtained in accordance with such an order'.²

However, as the Law Council has outlined in its submission on the Bill, dated 5 May 2020:

These provisions use the broad ambulatory words 'relating to' to prescribe the requisite nexus between 'Australian-sourced information' and **either** its use or non-use by foreign countries in death penalty cases. There is no explicit requirement for the Minister to be reasonably satisfied that Australian sourced information will **only** be used in a manner that is compatible with international human rights obligations with respect to the right to life, and is consistent with Australia's bipartisan foreign policy position of opposing the death penalty in all countries'³.

Clause 3 of proposed Schedule 1 does not, for example, impose an obligation on the Minister to obtain in writing an absolute assurance from the foreign government in question that information provided from Australian sources will not, in any circumstances, be used in death penalty proceedings, or in investigations of crimes that may attract the death penalty in their jurisdiction. There is also no requirement that the Australian sourced information in such instances will only be used for exculpatory purposes. As such, these proposed provisions are in practice capable of permitting actions which are incompatible with Australia's stated foreign policy position, of being against the death penalty in all circumstances⁴.

Although it is clear from the Explanatory Memorandum that the Bill is intended to be compatible with human rights, including the right to life contained in Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR), without the use of more prescriptive wording in Clause 3 of proposed Schedule 1 to the Bill, there is a risk that DIAs will be entered into following what may be in hindsight an inadequate exercise of the regulation-making power, because the Bill itself does not impose with sufficient clarity appropriate limits in its delegation of the legislative power. Where the death penalty is concerned, Parliamentary scrutiny through the treaty-making process and regulation-making processes may fail to substitute for appropriate limitations and clarity in the

² Subclauses 3(2) and 3(5) of Schedule 1 of the Telecommunications Legislation Amendment (International Production No. , 2020 Orders) Bill 2020 at https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6511_first-reps/toc_pdf/20025b01.pdf;fileType=application%2Fpdf

³ Law Council of Australia, Telecommunications Legislation Amendment (International Production Orders) Bill 2020 Submission 28, paragraph 64, 5 May 2020, available at:

<https://www.aph.gov.au/DocumentStore.ashx?id=61219c25-4469-4c06-b528-fa44e2315d6c&subId=680455>

⁴ This position is reaffirmed in the Explanatory Memorandum for the Telecommunications Legislation Amendment (International Production Orders) Bill 2020, in paragraph 73, available at: https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6511_ems_0ac5ae09-3e3e-400b-ae5e-680a68af4e45/upload_pdf/733176.pdf;fileType=application%2Fpdf

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legislation itself, given the fundamental nature of the rights at stake for the affected individuals, and given the Australian government's categorical and unwavering opposition to the death penalty.⁵

Australia should be proud of its leadership role in being a strong voice against the death penalty. It is a position the nation and Parliament steadily and carefully moved towards over this century. We are now well known for our leadership on this issue. Accordingly, it is appropriate that, in enacting relevant legislation, our Parliament sets itself the goal of demonstrating practical, consistent, principled leadership.

The legislative and regulatory task is not easy. We must, as a responsible international citizen, co-operate in the global struggles against, inter alia, organised crime and terrorism. The practical realities of urgent investigation, rapid decision making, and the urgent assessment of complex scenarios means that the time for seeking relevant assurances is not at the moment of engagement in the field, or soon after when charges are being laid, but rather much earlier, at the time the DIAs are signed. There is no 'bargaining' to be done later, when court processes are engaged and independent prosecutors do their work before independent courts.

We can and must insist that a price of our partnership is a governmental commitment in the DIA to use any material provided subject to an overriding commitment that the death penalty cannot be sought or imposed or carried out (depending on the relevant legal system) if Australian-sourced information is relied upon.

As such, CPJP urges the Committee to recommend that Schedule 1 of the proposed Bill be amended to that effect.

CPJP appreciates the Parliamentary Joint Committee on Intelligence and Security's consideration of our comments as part of its review process for the Bill. Should the Committee have any queries please do not hesitate to contact Simone Abel, Executive Director, CPJP: [REDACTED]

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⁵ See, for example, <https://www.dfat.gov.au/international-relations/themes/human-rights/Pages/australias-strategy-for-abolition-of-the-death-penalty> (accessed 12 May 2020)