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## Submission to the Joint Standing Committee on Treaties

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Mr Peter Khalil MP (Deputy  
Chair)  
Senator Tim Ayres  
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Mr Russell Broadbent MP  
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Senator Kimberly Kitching  
Mr Ted O'Brian MP  
Senator Gerard Rennick  
Mr Kate Thwaites MP  
Senator David Van

23 March 2022

### **RE: Agreement between Australia and Japan concerning the Facilitation of Reciprocal Access and Cooperation between the Australian Defence Force and the Self-Defense Forces of Japan**

We write to express our deep concern about a conflict between the Australian government's principled position against the death penalty<sup>1</sup> and the Agreement between Australia and Japan concerning the Facilitation of Reciprocal Access and Cooperation between the Australian Defence Force and the Self-Defense Forces of Japan ('the Agreement').

We ask the Joint Standing Committee on Treaties to advise the Australian government to enter the Agreement into force only if there is a clear blanket assurance that members of the Australian Defence Force will not face the death penalty in Japan, and if Australia's principled position against the death penalty is reinforced in the Agreement.

### **The Agreement**

The Agreement provides a legal framework for the Australian Defence Force and the Japanese Self-Defense Forces to operate in each other's territories. A significant stumbling block, since negotiations started in 2014, has been Japan's use of the death penalty and the Australian government's opposition to it. However, under the 'in-principle agreement' announced in November 2020, the Japanese government refused to fully commit to ensuring that no visiting Australian Defence Force member would face the death penalty. In December 2020, we submitted an open letter urging the Australian government to enter into the Agreement only if there is a clear legally binding commitment that members of the Australian Defence Force will not face the death penalty in Japan.

The Agreement signed by the Prime Ministers of Australia and Japan on 6 January 2022, however, does not provide such assurance. According to the Agreement, where a member of the Visiting Force or Civilian Component commits an offence within the Receiving State and punishable under the law of the Receiving State, the authorities of the Receiving State have criminal jurisdiction to deal with the matter (Article XXI(2)(b)). This leaves scope for a

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<sup>1</sup> Australia's Strategy for Abolition of the Death Penalty (2018), Department of Foreign Affairs and Trade. Available from: <https://www.dfat.gov.au/international-relations/themes/human-rights/Pages/australias-strategy-for-abolition-of-the-death-penalty> (last accessed on 9 March 2022).



member of the Australian Defence Force or Civilian Component to be sentenced to death for being convicted of a capital crime under Japanese law.<sup>2</sup>

### Positions on the death penalty in Japan and Australia

Despite the global trend of countries moving away from the death penalty, and despite the growing number of ‘*de facto* abolitionist’ countries,<sup>3</sup> Japan remains an active retentionist state. Japan retains the death penalty for 19 crimes, and 97 prisoners have been executed by hanging since 2000. As of March 2022, there are 108 individuals on death row who have exhausted or abandoned their avenues of appeal. The UN Human Rights Committee<sup>4</sup> has repeatedly raised concerns with the Japanese government concerning its death penalty in law and in practice:

- several of the 19 capital offences do not comply with the requirement of limiting capital punishment to the ‘most serious crimes’ under the International Covenant on Civil and Political Rights, to which Japan is a party;
- individuals sentenced to death are kept in solitary confinement for periods of up to 40 years before execution;
- individuals sentenced to death are given notice only in the morning of their execution;
- families of individuals sentenced to death are notified after the execution has taken place;
- the confidentiality of meetings between death row inmates and their lawyers is not guaranteed; and
- requests for a retrial or pardon do not have the effect of staying the execution and are not effective.

In contrast, Australia is not only an abolitionist nation; the Australian government took a bold step in 2018 of launching Australia’s Strategy for Abolition of the Death Penalty (‘the Strategy’). This 2018 Strategy sets Australia apart from other countries that have abolished the death penalty because of its outward looking policy of pursuing abolition in other countries. It takes a principled stance against the death penalty ‘in all circumstances for all people’. It is not limited to advocating the restricted use of the death penalty in instances where Australian nationals are sentenced to death.

We note with disappointment that the Department of Foreign Affairs and Trade—the very department responsible for drafting and upholding the 2018 Strategy—identified ‘no

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<sup>2</sup> According to Article XXI(4)(b) of the Agreement, the Receiving State (e.g. Japan) has primary jurisdiction should a member of the Visiting Force (e.g. Australian Defence Force) or the accompanying Civilian Component commit an offence in Japanese territory, outside the performance of their official duties, against something other than the property or security of Australia, and against someone other than another member of the Australian Defence Force.

<sup>3</sup> Countries that have not carried out any executions for over 10 years, despite retaining death penalty as a form of criminal punishment under law

<sup>4</sup> See for example, Concluding Observations by the UN Human Rights Committee in 2014. Available from: <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx> (last accessed on 9 March 2022).



concerns' with the Agreement when consulted by the Department of Defence (National Interest Analysis, para. 25).

## Problems with the Agreement

The Agreement provides that both countries must 'assist each other in the arrest of members of the Visiting Force or the Civilian Component in the Receiving State and in handing them over to the authority which is to exercise jurisdiction' (Article XXI(5)(a)). The Annex relating to Article XXI of the Agreement provides that the obligation to render assistance is lifted where such assistance would be inconsistent with a country's obligations under 'international agreements' (para. 2). The Record of Discussion on Article XXI confirms that this refers to cases in which there is 'sufficient likelihood that as a result of such assistance, the person could be subject to the death penalty' (para. 1).

We have identified five reasons why the Agreement and associated documents<sup>5</sup> fall short of a clear assurance that members of the Australia Defence Force will not face the death penalty in Japan.

1. Legally binding instruments—treaty texts, the Annex relating to Article XXI, and the Agreed Minutes—are silent on the death penalty (National Interest Analysis, para. 3). All references to the death penalty are contained within the Record of Discussion on Article XXI, which is a non-legally binding document referred to as a 'less-than-treaty-status instrument'.
2. Australia may avoid its obligation to assist Japanese authorities in instances where there is a 'sufficient likelihood' of the members of the Australian Defence Force facing the death penalty. However, the withholding of assistance does not necessarily protect members of the Australia Defence Force. For example, where the accused is on Japanese territory and the Japanese authorities have sufficient evidence to convict the accused, the lack of assistance by the Australian government is irrelevant. Furthermore, the standard of 'sufficient likelihood' is inadequate because it leaves open the possibility that assistance may take place where the death penalty is a possible outcome of such assistance, and we submit that it is not feasible or realistic for the Australian government to properly assess the level of likelihood of a death sentence being imposed in a foreign legal system.
3. Australia is party to the Second Optional Protocol to the International Covenant on Civil and Political Rights. Being a party to the Second Optional Protocol means the Australian government promises that 'no one within the jurisdiction of a State Party to the present Protocol shall be executed.' However, Japan is *not* a party to this Protocol. Therefore, the Annex relating to Article XXI which confirms Australia being able to refuse assistance where such assistance would be inconsistent with the country's 'international

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<sup>5</sup> Associated documents refer to: the Annex relating to Article XXI, the Agreed Minutes, the Record of Discussion on Article XXI, and the National Interest Analysis document.



agreements' carries little weight if Japan has custody of Australians who have committed a capital crime. The Australian government would not necessarily be in breach of those obligations by simply standing by while an Australian was executed within the jurisdiction of Japan. That is one reason why adopting the 2018 Strategy was so welcomed as a principled bipartisan statement.

4. The Australian government is optimistic about both countries' 'close coordination and cooperation to resolve any issues that might arise' (National Interest Analysis, para. 16) and emphasises the shared beliefs of Australia and Japan, such as both countries placing 'importance on ensuring the good order and discipline of their defence forces at all times' (National Interest Analysis, para. 16). The fact that both countries have opposing stances on the death penalty is underplayed: the Record of Discussion on Article XXI simply notes that whether to refuse assistance will be assessed on 'a case-by-case basis' (para. 1). It is entirely possible that in some cases, members of the Australian Defence Force could be executed even if there was some kind of implicit understanding that this will not transpire. Such 'case-by-case' approach is hard to enforce in circumstances where governments change over time and the goodwill that ensued at the time of the Agreement has dissipated for some reason. What is more, a reliance on implicit understandings directly undermines the 2018 Strategy because a consistency of approach by the Australian government is essential if the 2018 Strategy is to be meaningfully implemented. There is a risk that if Australia is willing to enter into an agreement of this nature with Japan, albeit on the basis of so-called shared beliefs, then other countries with even less congruity of values may seek to enter into similar agreements with Australia, and will also insist that they will not provide anti-death penalty safeguards. In short, the Agreement is an uncomfortable precedent.
5. Finally, entering into an agreement with the full knowledge that the death penalty may be applied to its citizens would be a clear breach of its 2018 Strategy and is fundamentally inconsistent with Australia's ratification of the Second Optional Protocol. The memory of two Australian citizens, Andrew Chan and Myuran Sukumaran, executed in Indonesia in 2015—despite the Australian government's efforts to prevent it—continues to linger in the minds of all Australians.

### **Our request for an assurance**

We ask the Joint Standing Committee on Treaties to advise the Australian government to enter the Agreement into force only if there is a clear blanket assurance that members of the Australian Defence Force will not face the death penalty in Japan. This can be done by amending the treaty text, annex or agreed minutes of the Agreement (Article XXIX of the Agreement). A less ideal—but perhaps a more realistic—alternative is to amend less-than-treaty-status instruments such as the Record of Discussion on Article XXI (National Interest Analysis, para. 10), though we would of course advocate a stronger approach by a purportedly proudly abolitionist state.



ELEOS  
JUSTICE



The Australian government's 2018 Strategy is unequivocal in its principled stance against the death penalty. A policy of this kind needs to be repeatedly reinforced and acted upon, whenever relevant, for it to be truly effective rather than a collection of platitudes. We appreciate that much of the negotiations between governments, including this Agreement with Japan, could not have been disclosed. What little is made public then becomes key in reinforcing Australia's principled stance against the death penalty to its own citizens and to the international community. Based on the current wording of the Agreement and associated documents, the Australian government has not fully assured its public of its commitment to the 2018 Strategy.

Yours sincerely,

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