

## Defence Portfolio

# INQUIRY QUESTION

(Question No. 1)

Mr Phillip Thompson MP asked the Department of Defence the following question, upon notice, on 05 September 2022:

Mr Thompson MP: So if the death sentence is off the table, a heinous crime has been committed, what's life prison in Japan?

Mr Jeffrey: you mean, in terms of the sentence?

Mr Thompson: Yeah, so a bad crime has been committed, punishable by death under their law; they've agreed to not do that, what's life?

Mr Jeffrey: I'll need to take that on notice, I think it varies, but to give you an informed answer I'll need to take that on notice.

Mr Phillip Thompson MP – The Department of Defence provides the following answer to the Member's question:

The Japanese Penal Code provides for a maximum sentence of imprisonment for the remainder of a person's life, with parole possible after ten years.

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# INQUIRY QUESTION

(Question No. 2)

Senator Deborah O'Neill asked the Department of Defence the following question, upon notice, on 05 September 2022:

Senator O'Neill: Where in the package of the RAA documents does it outline that we can/ will support Australians facing the death penalty.

Mr Hugh Jeffrey: Article 21 – The point around the death penalty is that it is covered in different parts of the treaty text and it needs to be read together, so the three pieces really are central. It's the treaty text, Article 21; the annex; and the record of discussion

Senator O'Neill: So where in the annex?

Mr Jeffrey: I'll have to take on notice exactly where in the annex, but the article 21 includes obligations on the parties to assist each other in the arrest and handing over of members of the visiting force or the civilian component of the receiving state, obligations on the party to assist each other in carrying out investigations and collections. The Annex sets out the binding understandings of the parties in relation to article 25 and 16 of the treaty, and Air Commodore Keane has the details of the annex.

Air Commodore Keane: the purpose of the annex is to go into further detail about some of the matters relating to the application of criminal jurisdiction and in relation to assistance. The annex makes it clear that not assisting in cases where it would be contrary to Australia's international criminal obligations will not constitute obstruction for the purpose of...

Senator O'Neill: so we're not breaking the treaty

Air Commodore Keane: so if I can take you then to the discussions, which is the non-treaty level part of the package...

Senator O'Neill: so you're going to have to clarify that for me. So we've got the reciprocal access agreement, which is the main treaty text, then you've got the annex which we've discussed, which is the additional bits and pieces, I'll call it the pressure valve release; the next thing, the agreed minutes; and record of discussion, is that something else?

Air Commodore Keane: and the final element which is attached to the treaty package, and it's not a treaty level document but a recording of the parties mutual understanding in relation to the application of certain provisions, was the record of discussions on article 21

Senator O'Neill: but this that it's not legally binding and doesn't alter the scope of the parties domestic laws and regulations and international obligations.

Air Commodore Keane: it's a non-treaty level document but outlines the parties understandings

Senator O'Neill: so on notice, if you can give me the whole package every bit of the package that deals with the relevant bit of the discussion what we've been talking about the death penalty that would be helpful.

Senator Deborah O'Neill – The Department of Defence provides the following answer to the Senator's question:

The death penalty issue was a significant point of discussion in negotiating the treaty and the way the Parties have approached it is comprised in the combined operation of the C); the Annex and the Record of Discussion. These three pieces of the treaty package work together.

Article 21 of the treaty concerns criminal jurisdiction and disciplinary matters. Among other things, it includes:

- obligations on the parties to assist each other in the arrest and handing-over of members of the visiting force or the civilian component in the receiving state, including the obligation to notify each other promptly of any arrest that has occurred (Article 21(5)); and
- obligations on the parties to assist each other in carrying out investigations and collection and production of evidence, regarding offences allegedly committed by a member of the visiting force or civilian component (Article 21(6)).

The Annex sets out the binding understandings of the parties in relation to Article 21(5) and Article 21(6) of the treaty.

The Record of Discussion reflects some important understandings about how the parties interpret certain aspects of Article 21 and the Annex. Australia and Japan considered it important to ensure that such understandings were clearly reflected in writing, given the differences between Australia and Japan's international and domestic legal obligations regarding the death penalty.

In effect, the way the three pieces operate together is:

- to oblige Australia to not obstruct Japan's exercise of criminal jurisdiction regarding Australian persons in Japan;
- and to assist Japan in carrying out certain activities (relating to arrest of persons, and investigation and collection of evidence);
- but to make clear that in certain circumstances, where the death penalty may result, Australia's international treaty obligations may prohibit providing assistance;
- and that such non-assistance by Australia would not constitute obstruction in violation of the treaty.

This means that Australia has committed generally to not obstruct the exercise by Japan of its domestic criminal jurisdiction over ADF persons/civilian personnel in Japan, but also to not assist Japan in certain circumstances where doing so would risk Australia violating our own obligations. This ensures consistency with Australia's legal obligations and policies, while also showing respect for Japan's domestic jurisdiction. This operates reciprocally, but it was negotiated primarily to accommodate the situation where Japan is the receiving state and Australia is the sending state.

The RAA package also builds in important procedural safeguards to ensure support for members of the ADF and Japan Self-Defense Forces, and members of the civilian component, should they be arrested and/or prosecuted for a crime under the jurisdiction of the other country. These safeguards are set out in the main treaty text, Article 21(7), 21(8)(a)-(j) and Article 21(9), and the Annex, paragraph 7(a)-(e) and paragraph 8.

These safeguards include, among other things, the right to an interpreter and consular and legal assistance. Pursuant to Article 21(9), a member of the visiting force or the civilian component taken into custody, detained or otherwise confined in the receiving state shall have the right to consular visits subject to the laws and regulations of the receiving state. Pursuant to the Annex, paragraph 8, Australia has the right upon request to have access at any time to a member of the ADF or the civilian component who may be confined or detained by Japan.

The Australian Government negotiated these safeguards with a view to ensuring consistency with Australia's international human rights obligations in relation to fair trial and due process. This includes those arising under the International Covenant on Civil and Political Rights, to which both Australia and Japan are parties.

The negotiation of these safeguards reflects the Australian Government's strong opposition to the death penalty in all circumstances for all people. The Australian Government will always advocate on behalf of any Australian who is in a situation where they might face the death penalty.

## Defence Portfolio

# INQUIRY QUESTION

(Question No. 3)

Senator Dorinda Cox asked the Department of Defence the following question, upon notice, on 05 September 2022:

Senator Dorinda Cox: This is just a point of clarification; my understanding is that the other four agreements that we have mention that there's no requirement to give sympathetic consideration to the request of the sending state trusted with the custody of the person pending the conclusion of judicial proceedings. Can you just talk me through the implications of that? Because it doesn't actually appear in the other... this is in the brief that we got... it doesn't appear in the other four agreements.

Mr Jeffrey: can you please clarify which texts that is coming from?

Senator Cox: we got it in the briefing that we received in... around highlighting the key difference is between this agreement with Japan and the other agreements that you've listed and we talk about the requirement of not having sympathetic consideration. So further to the question Senator O'Neill was asking, everyday Australians will be asking us that, having pending judicial proceedings and keeping someone in custody is not something that consistent with Australian law so why is it that this only appears in this Japanese agreement and not in the other four agreements? Is this something they are pushing from their end rather than from ours?

Mr Jeffrey: The concept of sympathetic consideration is not something that we dealt with in the course of the negotiations, so the distinction that you're drawing between this agreement and our previous agreements is not one that I've addressed, or had to deal with in the context of the negotiations, so we'll take it on notice so we can provide you a more considered answer.

Senator Dorinda Cox – The Department of Defence provides the following answer to the Senator's question:

Article 21(4)(d) provides that in a situation of concurrent jurisdiction, 'the authorities of the party having the primary right to exercise jurisdiction shall give sympathetic consideration to a request from the authorities of the other party for a waiver of its right in cases where that other party considers such waiver to be of particular importance.'

If a member of the visiting force or civilian component was in pre-trial custody in the receiving state, the treaty package does not contain an explicit requirement for the sending state to give sympathetic consideration to particular requests from the state related to custody. However, any such situation would be handled through close coordination and consultation between Australian and Japanese authorities, drawing also on our existing diplomatic channels and communication mechanisms. This is consistent with the strong principle of consultation and coordination between the Parties that underpins the whole treaty package.

Consistent with the positive nature of our close bilateral relationship and special strategic partnership, we would generally expect Japan to give sympathetic consideration to requests made by Australia, and vice versa. Any request made by the sending state to the receiving state under Article 21 in relation to jurisdictional issues could also encompass issues that flow from jurisdiction such as pre-trial custody.

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# INQUIRY QUESTION

(Question No. 4)

Ms Lisa Chesters MP asked the Department of Defence the following question, upon notice, on 05 September 2022:

Air Commodore Keane: The treaty provides for the importation and exportation of equipment, the treaty provides that shall be subject to the applicable laws administered by the relevant authorities of the receiving state; so what that would mean is that it would be subject to the normal Defence export and import controls, those normal regulatory arrangement, which would mean that a weapon that could not be imported into Australia under our law could not be brought here by Japan and vice versa

Ms Chesters: Are there any examples of that, that we know of?

Air Commodore Keane: I'd have to take that on notice...

Ms Lisa Chesters MP – The Department of Defence provides the following answer to the Member's question:

The Reciprocal Access Agreement will not affect existing domestic and international legal mechanisms to regulate the import and export of military equipment. Assessments as to the ability to import and export various types of military equipment between Australia and Japan are made on a case-by-case basis.

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# INQUIRY QUESTION

(Question No. 5)

The Committee asked the Department of Defence the following question, upon notice, on 06 September 2022:

What impact will Japan's custody laws, in which only one parent retains legal responsibility for the child, have on Australian service men and women, civilian staff and their dependents, under this new agreement?

The Committee – The Department of Defence provides the following answer to the Committee question:

The focus of the Reciprocal Access Agreement is on the administration of and jurisdiction over visiting forces while on mutually determined cooperative activities. It will not change Japan's existing child custody laws to the extent that they have any application to foreign citizens, including Australians. Pursuant to Article III of the treaty, members of the visiting force and civilian component are obliged to respect the laws and regulations of the receiving state. The extent to which Japan's child custody laws would apply to members of the visiting force and civilian component would depend on the specific circumstances.