

OFFICIAL

Defence Portfolio

INQUIRY QUESTION

(Question No. 6)

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

CHAIR: I'll just finish by coming back. I think it would be helpful for the community—because the next hearing is going to feature those who have an interest in the death penalty question in particular—if perhaps DFAT and the Attorney-General's Department could take it on notice to come back to us with something that, in as simple and practical terms as possible, looks at the kind of scenario that we're considering.

My understanding is that, if Australian personnel happen to be based in Japan, for example, and one were to steal the belongings of another, that would be an offence. It's interesting.

Presumably, that person would be tried for theft under Australian law, which we extend, even though that's an offence that's committed extraterritorially and not in Australia. It's an offence of theft. There would be mutual jurisdiction, but under this agreement, because it's committed by a member of the visiting force upon another member of the visiting force, that person would be charged with theft under Australian law. That would also be the case for other, even more serious offences against either the person or the property of a member of the visiting force or the civilian component or in the commission of a person's official duties.

We've been referred to an example involving US forces in Korea, where US forces were driving from somewhere to somewhere else in the course of their official duties and a traffic incident occurred, resulting in the deaths of South Korean civilians. The question, of course, was the culpability of the driver in those circumstances. If that were to happen to Australians driving from somewhere to somewhere else in the course of their official duties, they would be charged, or there would be consideration as to whether the driving causing death was criminally culpable, under Australian law. Presumably, if they were found to have driven culpably, they would be imprisoned in Australia, perhaps.

The situation we're trying to understand is the narrow window—however vanishingly small, perhaps—where an Australian commits an offence in Japan and it is not in the course of their official duties, or where there's some dispute as to whether it's in the course of their official duties, and they end up in the custody and in the criminal jurisdiction of Japan, and they're charged and are sentenced to death. That clearly is possible. The agreement has done an enormous amount to try to reduce that to the smallest possible circumstances, but it's still there. I think it would be useful if you could come back to us with something in writing that really makes it clear what that window of possibility is, because that's what the next hearing is going to be focused on, because those are the submissions and the evidence from other people. I think having the government side of it will be useful for us. Have I put that clearly enough?

Mr Jeffrey: Thank you, Chair. Just to clarify: you'd like something in writing?

CHAIR: I'm asking you to take it on notice.

Mr Jeffrey: Yes, we'll take it on notice. Thank you, Chair.

OFFICIAL

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

The RAA does not provide an exemption from the death penalty for Australian Defence Force members or civilian personnel while deployed to Japan. If a member of the Visiting Force or Civilian Component commits a criminal offence punishable by the law of Japan while in Japan, he or she will be subject to the criminal laws of Japan, subject to certain exceptions.

It is important to note that the specific application of the RAA, the legally binding Annex and the less-than-treaty-status Record of Discussion to any incident that may arise will depend on the particular circumstances. In general terms however, Japan would not have primary criminal jurisdiction over a member of the Australian Visiting Force if the offence occurred in the performance of official duties, or was solely against Australian personnel, property or security interests.

In Japan, the death penalty is reserved for the most heinous crimes, usually involving the murder of multiple people. Such crimes would also be criminal offences under Australian law. Accordingly, if a member of the Australian Visiting Force or Civilian Component committed in Japan, outside the performance of official duties, an offence that would attract the death penalty, this would most likely be a situation of concurrent jurisdiction. Article 21(4) of the RAA provides a framework for determining, in cases where the right to exercise jurisdiction is concurrent, which State will have primary jurisdiction to prosecute criminal or service offences committed by the military or civilian component of either Visiting Force while in the receiving State.

Applying this framework, if a member of the Australian Visiting Force or Civilian component committed in Japan an offence attracting the death penalty, outside the performance of official duties, or solely against Japanese personnel, property or security interests, this would likely be a situation of Japanese primary jurisdiction – however again, each situation would need to be assessed on the particular facts in question.

Article 21 (5)-(6) provides ancillary provisions addressing how the Parties will cooperate on the investigation, prosecution and punishment of such offences. The legally binding Annex and the less-than-treaty-status Record of Discussion elaborate further on the Parties' understanding about certain aspects of commitments contained in Article 21.

If a member of the Australian Visiting Force or Civilian Component were already in custody for an offence that might attract the death penalty, Australia would immediately consult with Japan, in line with the RAA provisions, on the legal process and safeguards applying to the case. Safeguards have been included in the agreement to ensure support for members of the Australian Visiting Force or Civilian Component should they be arrested, including the right to an interpreter (Annex relating to Article 21) and consular and legal assistance (Article 21(8)-(9)).

OFFICIAL

In line with our longstanding practice when any Australian is faced with the death penalty abroad, we would advocate strongly against the application of the death penalty, as we do to all retentionist states.

Authorising Officer
<p>Cleared by:</p> <p>Hugh Jeffrey Acting Deputy Secretary Strategy, Policy, and Industry Group</p> <p>Date: 13 October 2022 Ph: [REDACTED]</p>

Contact Officer Tom Menadue, Assistant Secretary, Global Partners Branch, [REDACTED]

Through: CDF

CC: Secretary, Assoc Sec, VCDF, FASMECC

OFFICIAL