



Law Council
OF AUSTRALIA

Office of the President

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Mr Dave Sharma MP
Chair of Joint Standing Committee on Treaties
c/o Committee Secretary
Joint Standing Committee on Treaties
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By email: jsct@aph.gov.au

Dear Chair

SUBMISSION TO THE JOINT STANDING COMMITTEE ON TREATIES INQUIRY INTO AUSTRALIA-JAPAN RECIPROCAL ACCESS AGREEMENT

1. The Law Council of Australia (**the Law Council**) thanks the Joint Standing Committee on Treaties (**the Treaties Committee**) for the opportunity to respond to its inquiry into 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* (Canberra and Tokyo, 6 January 2022) (**the Agreement**).¹
2. As it has not had the opportunity in the timeframe available to carefully consider all potential legal and human rights issues arising under the Agreement, the Law Council confines its submission to the following key comments relating to Australia's commitment to abolition of the death penalty.
3. The Law Council recognises the assistance of its expert advisory National Human Rights Committee in the preparation of this submission.

Overview to the Issue

4. Broadly, the purpose of the Agreement is to facilitate cooperative activities between the Australian Defence Force and the Self-Defense Forces of Japan, for example, by allowing each nation's military personnel to train within the other's respective territory.

¹ See Parliament of Australia, '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' (online, March 2022) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/ReciprocalAccess-Japan>; Ministry of Foreign Affairs of Japan, 'Japan-Australia Reciprocal Access Agreement' (online, January 2022) <https://www.mofa.go.jp/a_o/ocn/au/page4e_001195.html>.

5. Throughout the negotiation process leading to the drafting of the Agreement, a guarantee that Australian military personnel would not be subject to the death penalty, if convicted of crimes while operating under the Agreement in Japan, arose as a significant issue of public concern.
6. The Law Council previously urged the Australian Government, in a letter addressed to the Minister for Foreign Affairs and the Minister for Defence on 9 January 2021, to enter into the Agreement 'only if there is a clear legally binding commitment that Australian Defence Force members will not face the death penalty in Japan'. It further advised that, 'given the significance of the issue, any assurance cannot rest on a commitment to exercise discretion in order to ensure that the death penalty is not applied'.
7. The Agreement was signed by the Prime Ministers of Australia and Japan on 6 January 2022.

Provisions of the Agreement Relevant to the Issue

8. Article XXI of the Agreement deals with legal jurisdiction. Paragraph 2(b) confers on the Receiving State criminal jurisdiction over the members of the Visiting Force and the Civilian Component with respect to offences committed within the Receiving State and punishable by the law of the Receiving State.
9. Essentially, this means that Australian military personnel present in Japan's territory in connection with cooperative activities can be subject to the criminal law of Japan, and vice versa.
10. This exercise of criminal jurisdiction is, however, subject to the double-jeopardy protection in paragraph 7 of Article XXI. The Law Council also notes that the primary right to exercise jurisdiction resides with the Sending State in relation to certain offences under paragraph 4(a) – including 'offences arising out of any act or omission done in the performance of official duties' (paragraph 4(a)(ii) of Article XXI).
11. Paragraphs 5 and 6 impose obligations on the authorities of Japan and Australia to assist each other in arrests, investigations, and the collection and production of evidence, relating to offences under Article XXI.
12. The rights of persons prosecuted in accordance with a Receiving State's exercise of criminal jurisdiction are listed in paragraph 8 of Article XXI. These include that a person shall be entitled:
 - a. to a prompt and speedy trial;
 - b. to be informed in advance of the trial of the specific charge or charges made against the person in order to have reasonable time to prepare a defence;
 - c. to be confronted with the witnesses against the person;
 - d. to present evidence in his or her own defence and to have a compulsory process for obtaining witnesses if the witnesses are within the jurisdiction of the Receiving State;
 - e. to have legal representation of his or her own choice for his or her defence or to have free or assisted legal representation under the conditions prevailing in the Receiving State;
 - f. to communicate with a representative of the Sending State and, when the rules of the court permit, to have such a representative present at his or her trial;

- g. to be present at his or her trial, which shall be public. However, without prejudice to the minimum standards listed in this paragraph, any other person may be excluded if the court so decides for reasons of public order, security or morality;
 - h. to bail, subject to the laws and regulations of the Receiving State;
 - i. not to be compelled to testify against himself or herself; and
 - j. not to be held guilty of a criminal offence on account of any act or omission which did not constitute a criminal offence under the law of the Receiving State at the time it was committed.
13. In addition to these provisions, the Law Council draws the attention of the Treaties Committee to the *Annex relating to Article XXI (the Annex)*, which is attached to the end of the Agreement.
14. The general rule of interpretation of treaties is contained in Article 31 of the *Vienna Convention on the Law of Treaties*.² Paragraph 2 of Article 31 provides that the text of a treaty includes its annexes, and that these and other agreements made in connection with the conclusion of a treaty must form part of the context of interpretation.
15. The *Annex relating to Article XXI* therefore forms a legally binding part of Australia's obligations under the Agreement. Among other things, it affirms in paragraph 7 the following procedural safeguards for persons arrested, detained, charged or prosecuted under the jurisdiction of the Receiving State, in addition to those set out in paragraph 8 of Article XXI:
- a. he or she shall not be arrested or detained without being at once informed of the charge against him or her nor without the immediate privilege of counsel; nor shall he or she be detained without adequate cause;
 - b. no cruel punishments shall be imposed upon him or her, consistent with the law of the Receiving State;
 - c. he or she shall have the right to challenge the legality of pre-trial detention;
 - d. he or she shall be entitled to cross-examine the witnesses against him or her; and
 - e. he or she shall, if he or she considers it necessary, have the services of a competent interpreter, consistent with the law of the Receiving State.
16. The Law Council notes that these procedural safeguards affirmed under the Agreement are not insubstantial. Nevertheless, it maintains the following key concerns.

Key Concerns

17. The key issue, in agreeing to the exercise of criminal jurisdiction outlined above, is that Japan maintains the death penalty, with the most recent publicly reported executions being the hanging of three people on 21 December 2021.³ There have

² *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

³ See Amnesty International, 'Japan: Abhorrent executions crush hopes of progress under new prime minister' (21 December 2021) <<https://www.amnesty.org/en/latest/news/2021/12/japan-abhorrent-executions-crush-hopes-of-progress-under-new-prime-minister/>>. For information on the history and context in Japan, see also International Federation for Human Rights, *The Death Penalty in Japan: The Law of Silence* (2008) 6 <https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/JPN/INT_CCPR_NGO_JPN_94_9324_E.pdf>: 'Historically, Japan has a long-held practice of the death penalty ... aside from a brief de facto hiatus between 1989 and 1993. Executions require authorisation from the Minister for Justice; the refusal of the then

been repeated calls on Japan to establish an immediate official moratorium on all executions, as a first step towards total abolition, but no commitment has come to pass.⁴

Exercises of Jurisdiction Not Requiring Australian Assistance

18. The Law Council holds grave concerns that there is no provision in the Agreement to constrain the exercise of Japanese criminal jurisdiction, including the imposition of the death penalty, in situations where Japan already has custody of – or otherwise does not require Australian assistance to arrest and successfully prosecute – a member of the Australian Defence Force or its Civilian Component. It considers it unlikely that paragraph 7 of the Annex, in providing that ‘no cruel punishments shall be imposed upon him or her, consistent with the law of the Receiving State’, would offer protection in practice, given that Japan has no moratorium on the use of capital punishment. The Law Council is not aware of any decisions of Japanese courts recognising that the imposition and carrying out of the death penalty constitutes cruel, inhuman or degrading punishment.
19. It is the position of the Law Council that no person should be subjected to the death penalty, irrespective of their nationality, personal characteristics, the nature of the crime they are alleged to have committed, the circumstances of its alleged commission, or the identity of any victims of the crime alleged.⁵ The Law Council opposes the imposition or execution of the death penalty in all circumstances for all people, the nature of its opposition being absolute, as set out in its relevant Policy Statement.⁶ This opposition is on the basis that the death penalty is fundamentally incompatible with the realisation or fulfilment of the right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment.⁷
20. The Law Council considers the omission of an express protection in the Agreement to be a missed opportunity to give effect to Australia’s Strategy for Abolition of the Death Penalty, as released by the Australian Government in 2018.⁸ This Strategy is unequivocal in its opposition to the death penalty, noting that it ‘has no place in the modern world’.⁹ It highlights, in particular, the effects on Australians when Australian citizens and long-term residents face the death penalty in overseas jurisdictions.¹⁰
21. The Agreement is not unique in failing to guarantee protection from the death penalty for Australians serving overseas.¹¹ However, in the opinion of the Law Council, the

Minister – personally opposed to the death penalty – to sign such an authorisation between November 1989 and March 1993 resulted in this de facto moratorium.’

⁴ Ibid.

⁵ Law Council of Australia, *Policy Statement on the Death Penalty* (October 2021)

<<https://www.lawcouncil.asn.au/resources/policies-and-guidelines/policy-statement-the-death-penalty>>.

⁶ Ibid.

⁷ Ibid. See *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 5; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UTS 171 (entered into force 23 March 1976) art 6; art 7; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 16.

⁸ Australian Government, Department of Foreign Affairs and Trade, *Australia’s Strategy for Abolition of the Death Penalty* (June 2018) <<https://www.dfat.gov.au/sites/default/files/australias-strategy-for-abolition-of-the-death-penalty.pdf>>.

⁹ Ibid, 2.

¹⁰ Ibid.

¹¹ See eg, *Agreement between the Government of Australia and the Government of Malaysia concerning the Status of Forces*, opened for signature 3 February 1997, [1999] ATS 14 (entered into force 22 July 1999).

fact Australia has entered similar agreements before does not lessen the current cause for concern.

22. The Agreement offers no protection against the imposition of the death penalty on a member of the Australian Defence Force or its Civilian Component, except in the unusual circumstance, discussed below, that Japan may require Australian assistance to arrest and successfully prosecute an accused. The Law Council considers that before Australia sends the diplomatic note envisaged under paragraph 1 of Article XXIX that will bring the Agreement into force, it should negotiate a written amendment to the Agreement to the effect that no member of a Visiting Force (including its Civilian Component) will be subject to the death penalty. The Law Council suggests that the Treaties Committee should consider recommending that binding treaty action be withheld pending the conclusion of such an amendment.

Situations of Australian Assistance

23. In addition to this primary concern, the Law Council raises, for further consideration and confirmation, the interpretation of paragraphs 5 and 6 of Article XXI of the Agreement. As noted above, these paragraphs impose obligations on the authorities of Japan and Australia to assist each other in arrests, investigations, and the collection and production of evidence, relating to criminal offences under the law of the Receiving State.
24. The Annex provides in paragraph 2 the following qualification of Article XXI of the Agreement:

With regard to paragraph 5(a) of Article XXI, the Parties mutually determine that the authorities of a Party shall not be obliged to provide such assistance in cases where that Party considers that such assistance would be inconsistent with its obligations under applicable international agreements existing at the time of entry into force of this agreement.

25. The *Record of Discussion on Article XXI*, which records matters discussed between the Parties to the Agreement, and may be taken into account in interpreting the Agreement but is not itself legally binding,¹² explains that paragraph 2 of the Annex 'is intended to apply to situations where the Party seeking to refuse assistance considers there is a sufficient likelihood that as a result of such assistance, the person could be subject to the death penalty'.¹³ The document goes on to provide examples of relevant available information the Party may have regard to in this consideration, including representations made by the accused person and sentencing trends in the Receiving State.¹⁴ These may be weighed in consideration with 'relevant assurances' provided by the other Party such as that it would not seek the death penalty in relation to the accused person.¹⁵
26. Paragraph 4(b) of the *Record of Discussion on Article XXI*, while not as strong in its expression as a hypothetical exception, lends a similar interpretation to paragraph

¹² *Vienna Convention on the Law of Treaties*, art 31(3).

¹³ *Record of Discussion on Article XXI*, [1].

¹⁴ *Ibid*, [2].

¹⁵ *Ibid*, [2], [3].

6(a) of Article XXI, that, in cases involving the possible imposition of the death penalty, the obligation on Australia under the Agreement is limited.

27. The Law Council notes that it would have been preferable to state these protections clearly in the text of the Agreement.
28. It considers it likely, however, that Australia has secured the ability to refuse to assist to arrest and hand over accused individuals, or to provide assistance in the investigation and collection and production of evidence in such cases, where it considers there is a sufficient likelihood that the person could be subject to the death penalty.
29. The Law Council notes the relevance of this to Australia's Strategy for Abolition of the Death Penalty, which states that:

*The death penalty affects our cooperation with foreign law enforcement agencies and our provision of police or other justice and security assistance in countries that retain the death penalty. For example, we cannot extradite an individual to a country where the offence concerned is punishable by death. An exception may apply when the foreign government requesting assistance gives a credible and reliable diplomatic assurance stating that the death penalty will not be imposed or, if it is imposed, that it will not be carried out.*¹⁶

30. While the Strategy is focused primarily on the role of the Department of Foreign Affairs and Trade, it also notes that:

*Other government agencies which have an international presence or maintain relationships with international government partners must also be cognisant of Australia's opposition to the death penalty and should take all relevant opportunities to raise Australia's opposition to the death penalty. ... Australia may also discourage countries from using the death penalty by refusing to provide or placing conditions around the provision of information, assistance, goods or services in situations where the death penalty may be applied.*¹⁷

31. The Law Council continues to call on the Australian Government to clarify, strengthen and extend its prohibition on providing mutual assistance to foreign jurisdictions in criminal matters where such assistance may lead to the arrest, prosecution or conviction of a person for an offence carrying the death penalty.¹⁸
32. In practice, however, it is much more likely that members of the Australian Defence Force or its Civilian Component who are investigated in connection with capital crimes

¹⁶ Australian Government, Department of Foreign Affairs and Trade, *Australia's Strategy for Abolition of the Death Penalty* (June 2018) 2 <<https://www.dfat.gov.au/sites/default/files/australias-strategy-for-abolition-of-the-death-penalty.pdf>>.

¹⁷ *Ibid*, 11.

¹⁸ Law Council of Australia, *Policy Statement on the Death Penalty* (October 2021) <<https://www.lawcouncil.asn.au/resources/policies-and-guidelines/policy-statement-the-death-penalty>>.

in Japan could be arrested and tried without the need for any Australian assistance, as discussed above. This severely limits the significance of this protection.

Significance of Procedural Safeguards

33. Finally, the Law Council notes that understanding the significance of the protections afforded under paragraph 8 of Article XXI and paragraph 7 of the Annex ultimately requires an analysis of Japanese criminal law and procedure, including whether such procedural safeguards were already guaranteed by virtue of the domestic law, or conversely whether any warranted protections have been omitted from the Agreement. The Law Council is not in a position to provide such analysis.

Recommendations

34. The Law Council recommends careful consideration of the Agreement in the Final Report of the Treaties Committee, including as to whether it is in breach of any international obligation assumed by Australia in respect of its opposition to the death penalty.
35. It suggests that the Treaties Committee should consider recommending that binding treaty action in respect of the Agreement be withheld until a written amendment is agreed to the effect that no member of a Visiting Force (including its Civilian Component) will be subject to the death penalty.
36. Further, the Law Council takes this opportunity to urge that, across the whole sphere of government, greater regard be given to the Australian Government implementing in practice in all areas the statements of intent outlined in Australia's Strategy for Abolition of the Death Penalty and expressly strengthening this strategy as it relates to mutual assistance and the negotiation of bilateral agreements.

Contact

37. Please contact Alex Kershaw, Policy Lawyer, [REDACTED] in the first instance, should you require additional information or clarification.

Yours sincerely

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President