



Australia's Advocacy for the Abolition of the Death Penalty

**Submission to the Human Rights Sub-committee of the Joint Standing
Committee on Foreign Affairs, Defence and Trade**

September 2015

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Overview

The Castan Centre for Human Rights Law thanks the Human Rights Sub-committee for the opportunity to comment on Australia's international advocacy for the abolition of the death penalty.

We believe that, as a State party to the International Covenant on Civil and Political Rights (ICCPR) and its Second Optional Protocol, Australia has an obligation to work towards the universal abolition of capital punishment, as well as to refrain from acts which might detract from this goal (including cooperation which might expose people to the death penalty in other countries).

Capital punishment is, notwithstanding the exception for countries which have not yet abolished the death penalty in article 6(2) of the ICCPR, contrary to modern notions of the right to life and human dignity. More and more methods of execution are also being found to be contrary to the prohibition on cruel, inhuman and degrading punishment in article 7 of the ICCPR.¹

The Australian Government's advocacy against the death penalty in cases involving its citizens overseas is welcome, but needs to be more consistent so that claims of hypocrisy and self-interest do not undermine the Government's message. For the same reason, Australia must also address a lack of consistency in its approach to the issue of the death penalty at the United Nations, in its treaty negotiations, in Commonwealth law and in policy on police-to-police cooperation.

Current Position in International Human Rights Law

Clearly, with the exception in article 6(2) of the ICCPR, the death penalty remains lawful under international human rights law for those States which have not ratified the Second Optional Protocol (unless they have abolished the death penalty²). However, for States which have ratified, including Australia, there is an obligation to ensure that no one within their jurisdiction shall be executed.³ Consistently with a good faith interpretation of 'within jurisdiction,' and contemporary jurisprudence on that term as it relates to human rights obligations more broadly, States parties are also bound to refrain from action which would expose people to the death penalty in other countries, wherever such action is within their control.⁴

¹ See eg FIACAT, *The Death Penalty: Inhuman, Cruel and Degrading Treatment*, May 2007 (from proceedings of the Third World Congress against the Death Penalty): <<http://www.fiacat.org/the-death-penalty-inhuman-cruel-and-degrading-treatment>>.

² See *Judge v Canada*, Human Rights Committee Views of 5 August 2002 (UN Doc CCPR/C/78/D/829/1998).

³ 2nd OP to the ICCPR, article 1(1).

⁴ See eg Human Rights Committee, *General Comment 31* (UN Doc CCPR/C/21/Rev.1/Add.13), [12]; also *Concluding Observations on Australia*, UN Doc CCPR/C/AUS/CO/5, 7 May 2009, [20].

So far, the jurisprudence has addressed extradition, deportation and other forms of removal in this context, but we would argue that official cooperation foreseeably leading to the imposition of the death penalty should logically also be encompassed by this rule, particularly where it concerns people for whom a State has specific responsibility, such as citizens and permanent residents.

Australian Law and Practice

At the United Nations

Australia has generally been considered a world leader in seeking the abolition of the death penalty, having voted in favour of all five UN General Assembly Resolutions calling for a worldwide moratorium (in 2007, 2008, 2010, 2012 and 2014). However, for reasons not made public, Australia declined to co-sponsor the last of these resolutions (despite having co-sponsored the first four).⁵

In 2009, in the context of news about Australia's cooperation with Indonesia in the Bali Nine case, the UN Human Rights Committee expressed its concern about Australia's 'lack of a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state, in violation of the State party's obligation under the Second Optional Protocol.'⁶ The Committee recommended that:

The State party should take the necessary legislative and other steps to ensure that no person is extradited to a State where he or she may face the death penalty, as well as whereby it does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State, and revoke the residual power of the Attorney-General in this regard.⁷

This was a clear reference to the Ministerial powers in the *Extradition Act 1988* and the *Mutual Assistance in Criminal Matters Act 1987* to grant extradition or assistance despite a risk of the death penalty being imposed.⁸ In the case of the Extradition Act, the death penalty is excluded from the list of factors to be considered by a magistrate at first instance, even though other considerations such as discrimination or whether the crime is of a political nature are included.⁹ It may be politically and/or diplomatically expedient to have such matters remain at the discretion of the Executive, but a more principled and legally

⁵ Source: UNGA, Third Committee proceedings: <<http://www.un.org/en/ga/third/index.shtml>>.

⁶ See *Concluding Observations on Australia*, above n 4.

⁷ *Ibid.*

⁸ See *Mutual Assistance in Criminal Matters Act 1987* (Cth), sections 8(1A)(b) & 8(1B) and *Extradition Act 1988* (Cth), section 22(3)(e)(iv).

⁹ *Extradition Act 1988* (Cth), section 7.

sound approach to the issue would be to implement the Human Rights Committee's recommendations.¹⁰

In the Human Rights Committee communication *Kwok v Australia*,¹¹ Australia argued that seeking assurances that the death penalty would not be carried out sufficed to fulfil its relevant obligations in cases of extradition or removal to a retentionist State.¹² Ms Kwok had had a warrant issued for her arrest on charges which potentially carried the death penalty. Nevertheless, Australia defended its right to deport her, arguing that the penalty was not mandatory, and in any case it was not certain that she would be convicted.¹³ The Human Rights Committee was highly critical of Australia's arguments, finding that they set the threshold for refusal of extradition unacceptably high.¹⁴ Australia also argued that its *non-refoulement* obligations do not extend to potential article 14 (fair trial) violations.¹⁵ Whilst possibly legally correct in isolation, using this argument in a case involving a person at risk of execution (especially in the context of her spouse having been executed on similar charges) was, once again, inconsistent with a robust approach to advocacy against the death penalty.

Mutual Assistance and Information Sharing Arrangements

Australia's bilateral treaties regarding mutual assistance in criminal matters generally contain some internationally accepted safeguards, such as the right of refusal to cooperate where the request relates to a political or military offence. Most also allow for the possibility of refusal if the request 'would prejudice the safety of any person' or 'relates to the prosecution of a person for an offence in respect of which the punishment which might be imposed on the person may prevent the Requested State from complying under its domestic laws.'¹⁶

However, in the two most recent of these treaties (with India and the UAE), the death penalty is mentioned specifically only in one (with the UAE), which seems inconsistent given both countries retain capital punishment for a range of crimes. Australia made clear in agreed minutes of negotiations for the equivalent treaty with China that 'imposition of the death penalty may be in conflict with the essential interests of Australia,'¹⁷ but the actual words 'death penalty' do not appear in the text of the treaty. In the relevant treaty with Malaysia, which was concluded the preceding year (2005), there is once again an oblique

¹⁰ See also associated Human Rights Council UPR Recommendation 34 (2011). Australia responded that it considered the *Extradition Act 1988* to be compatible, without addressing the thrust of the recommendation.

¹¹ UN Doc CCPR/C/97/D/1442/2005, Views of 23 November 2009.

¹² *Ibid*, [7.4].

¹³ *Ibid*, [9.5].

¹⁴ *Ibid*, [9.6].

¹⁵ *Ibid*, [9.7].

¹⁶ See eg *Treaty between Australia and the Republic of India on Mutual Legal Assistance in Criminal Matters* [2011] ATS 10, article 5(3)(d).

¹⁷ See *Treaty Between Australia and the People's Republic of China on Mutual Legal Assistance in Criminal Matters* [2007] ATS 21, Agreed Minutes.

reference to the 'essential interests of the Requested Party,'¹⁸ but this time it is not accompanied by agreed minutes specifying that essential interests include avoiding the death penalty. It should also be noted that potential imposition of the death penalty is not among the *mandatory* grounds for refusal in any of these treaties.

While acknowledging the probable difficulties faced in negotiating such treaties with retentionist nations whose Governments may be sensitive to criticism, these recent treaties highlight an ongoing lack of consistency in Australia's public record on the death penalty.

Police-to-Police Cooperation

The exchange of intelligence between, for example, the Australian Federal Police (AFP) and foreign police in criminal investigations has been the subject of considerable controversy, given the AFP's well-documented involvement in the Bali Nine case in Indonesia. Such assistance is mentioned on the website of the Attorney-General's Department,¹⁹ but little information is otherwise publicly available on it (for example, Memoranda of Understanding between the AFP and other police forces do not appear to be hosted on any Australian Government website, despite media releases confirming their existence).²⁰ At least one media request to access such treaties has been denied on the grounds that they 'were developed in confidence with a foreign government and their publication would disclose police methodology.'²¹

After criticism of the AFP's involvement in the Bali Nine case, which apparently involved no request for assistance from Indonesia (and was therefore not subject to any of the safeguards associated with such requests),²² the agency made public its Guideline on assistance in death penalty cases.²³ The Guideline requires Ministerial approval to provide assistance if a person has been detained, arrested or charged in a death penalty case but not otherwise. In pre-arrest situations, an AFP manager has to consider 'the potential risks to the person,' including the likelihood that the death penalty will be imposed, in providing the information, but also 'Australia's interest in promoting and securing cooperation from

¹⁸ See *Treaty Between Australia and the Government of Malaysia on Mutual Legal Assistance in Criminal Matters* [2006] ATS 21, article 4(1)(e).

¹⁹ See Attorney-General's Department, *Mutual Assistance*:

<<http://www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/MutualAssistance/Pages/default.aspx>>.

²⁰ See eg Australian Federal Police, *Media Release: AFP and Indonesian National Police sign new agreement to combat transnational crime*, 23 November 2011: <<http://www.afp.gov.au/media-centre/news/afp/2011/november/afp-and-indonesian-national-police-sign-new-agreement-to-combat-transnational-crime>>.

²¹ See Graham, 'Blood On Their Hands: The Secret Government Treaties That Helped Kill Chan And Sukumaran,' *New Matilda*, 29 April 2015: <<https://newmatilda.com/2015/04/29/blood-their-hands-secret-government-treaties-helped-kill-chan-and-sukumaran>>.

²² *Ibid.*

²³ *AFP National Guideline on international police-to-police assistance in death penalty situations*, January 2009: <<http://www.afp.gov.au/~media/afp/pdf/ips-foi-documents/ips/publication-list/afp%20national%20guideline%20on%20international%20police-to-police%20assistance%20in%20death%20penalty%20situations.pdf>>.

overseas agencies in combatting crime.’ No indication is given in the Guideline of how these potentially conflicting interests are to be weighed. In addition, despite the evident shortcomings of the Guideline in terms of safeguards, the Government and the AFP have maintained that they are satisfied of its appropriateness.²⁴

There was also a relevant 2010 Ministerial Direction for the AFP, which ‘expected’ the AFP to ‘take account of the Government’s long-standing opposition to the application of the death penalty, in performing its international liaison functions,’ and to report biannually on assistance provided in death penalty cases.²⁵ Given that these ‘expectations’ were not listed under the ‘key strategic priorities’ in this Direction, it would be understandable if AFP officers treated them as lower-order concerns. As if to reinforce this impression, a new Ministerial Direction issued in 2014 (replacing the 2010 Direction) omits all mention of the death penalty.²⁶ It should also be noted that the Chair of the present inquiry publicly criticised the 2010 Direction, stating that it could interfere with cooperation between Australian and Indonesian police on terrorism cases.²⁷

According to the AFP Biannual Statistic Reports provided under the 2010 Directive, most requests for assistance in death penalty cases were accepted: between December 2009 and June 2010, only 3 requests of 58 were rejected; between July 2010 and December 2010, only 10 requests of 62 were rejected; and between January 2011 and July 2011, all 40 requests were granted.²⁸

Information about specific situations in which AFP has shared information in death penalty situations made available pursuant to FOI requests indicates that the AFP places a high priority on sharing information with counterparts overseas in order to maintain good relations with them, even where this may lead to the death penalty.²⁹ The AFP makes assertions about the possible exculpatory value of the information if shared – for example ‘X has no prior narcotics-related criminal convictions, so sharing X’s criminal history may even have an exculpatory effect’ – without providing any supporting evidence, such as statistics regarding numbers and circumstances of death penalty sentences.

This appears to reveal a troubling inconsistency in what the Government says publicly about its strong opposition to the death penalty and what it expects of the AFP (hence what the AFP actually does) when dealing with death penalty cases overseas.

²⁴ See ‘Bali Nine: Government defends AFP guidelines in wake of Chan, Sukumaran executions,’ *ABC News Online*, 30 April 2015: <<http://www.abc.net.au/news/2015-04-30/government-defends-afp-guidelines-after-bali-nine-executions/6433454>>.

²⁵ See: <http://www.afp.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/Annual_Reports/2012/report/e03>.

²⁶ See: <<http://www.afp.gov.au/about-the-afp/governance/ministerial-direction>>.

²⁷ See Knott, ‘Bali 9 executions: Abbott government backflipped on AFP death penalty directive,’ *Sydney Morning Herald*, 30 April 2015: <<http://www.smh.com.au/federal-politics/political-news/bali-9-executions-abbott-government-backflipped-on-afp-death-penalty-directive-20150429-1mwh1t>>.

²⁸ See: <<http://www.afp.gov.au/~media/afp/pdf/ips-foi-documents/foi/disclosure-log/2015/29-2015.pdf>>.

²⁹ See: <<http://www.afp.gov.au/~media/afp/pdf/ips-foi-documents/foi/disclosure-log/2015/6-2015.pdf>>.

Public Advocacy By the Australian Government

The Australian Government's advocacy for Myuran Sukumaran and Andrew Chan to be spared the death penalty in Indonesia was ultimately unsuccessful, as was the campaign for Singapore to spare the life of Van Tuong Nguyen in 2005. Quite apart from the legal debate over whether drug trafficking is among the 'most serious crimes' for which the death penalty may be imposed under international law, there was yet again the problem of inconsistency. In 2003, the Australian Government conspicuously failed to object to the imposition of the death penalty on the Bali bombers. While that failure may have seemed politically justified given the level of domestic resentment for the bombers, it clearly did not assist in the diligent (and at times even passionate) efforts of senior Government representatives in the subsequent cases involving Australian citizens.

Conclusion/Recommendations

The Terms of Reference for the present inquiry require it to have regard to further steps Australia could take in its advocacy for worldwide abolition of the death penalty. As identified above, there are significant and troubling inconsistencies in several relevant areas which need to be addressed. The Castan Centre suggests that the Sub-committee recommend:

1. That Australia co-sponsor all future UNGA Resolutions calling for a moratorium on the death penalty;
2. That Australia make potential imposition of the death penalty a mandatory ground of refusal in future bilateral treaties on mutual assistance in criminal matters, and
3. That, in line with UN Human Rights Committee recommendations, Australia amend relevant legislation and guidelines to:
 - a. Remove discretion to extradite or remove a person to a State even when he or she faces a real risk of being subjected to the death penalty (and make the determination of such a risk a task for the courts), and
 - b. make the default position a refusal for Australian officials to cooperate in death penalty cases.

In addition to these changes, specific reference to international human rights law should be included in the *Extradition Act 1988*, the *Mutual Assistance in Criminal Matters Act 1987*, the *AFP National Guideline on international police-to-police assistance in death penalty situations* and the 2014 Ministerial Direction to the AFP. This would help to make it clear that the Australian Government takes its international obligations with respect to abolition of the death penalty seriously, and that those obligations are not lower-order concerns to be overridden by the need for international cooperation in combatting crime.