

Submission to the High Commissioner for Human Rights: Capital Punishment

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The following submission will focus primarily on relevant developments in Australia and the South-East Asian region.

1. Developments in Australia

Australia's capital punishment regime came to an end on 3 February 1967. However, since this date six Australians have been executed abroad. Most recently in 2015, Andrew Chan and Myuran Sukumaran were among 14 prisoners executed by firing squad in Indonesia.¹ Australia has taken a strong opposition towards the death penalty in the Indo-Pacific region and worldwide, and has sought to play a leading role in advocating for the abolition of the death penalty worldwide.

A number of important developments have occurred since April 2016. In May 2016, the Australian Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade released the results of its inquiry into Australia's Advocacy for the Abolition of the Death Penalty.² Its report entitled 'A World Without the Death Penalty' ("AWWTDP") contained a number of recommendations designed to strengthen Australia's international advocacy, including:

- calling on Australian government officials to develop a consistent, principled and whole-government Strategy for Abolition of the Death Penalty in the Indo-Pacific region and the USA;³
- recommending that Australian approaches to advocacy for abolition of the death penalty be based on human rights arguments and include: references to human rights law; condemnation for the imposition of the death penalty on juveniles and pregnant women; and opposition to its use on people with mental or intellectual disabilities;⁴ and
- calling on the Australian Government to provide adequate funding and resources for the implementation of the Strategy for Abolition of the Death Penalty and other projects aimed at the abolition of the death penalty.⁵

The Australian Government has accepted these recommendations,⁶ although we note that its stated intention to develop and publicly release a Strategy for Abolition of the Death Penalty by mid-2017 has not yet occurred.

Despite these positive developments, the Australian Government continues to resist calls for stronger protections for Australians against exposure to the risk of the death penalty abroad,

¹ Ibid.

² Ibid, 781.

³ Joint Standing Committee on Foreign Affairs, Defence and Trade, *A World Without the Death Penalty: Australia's Advocacy for the Abolition of the Death Penalty (AWWTDP)* (2016) xx, 161.

⁴ Ibid xx, xxi.

⁵ Ibid xxiii.

⁶ Australian Government, *Response to the Joint Standing Committee on Foreign Affairs, Defence and Trade Report: A World Without the Death Penalty: Australia's Advocacy for the Abolition of the Death Penalty (Response to AWWTDP)* (March 2017).

particularly where Australian law enforcement agencies are involved. In recognition of these risks, the AWWTDP recommended that the Australian Federal Police National Guideline on International Police-to-Police Assistance in Death Penalty Situations be amended to include a stronger focus on preventing exposure of all persons to the risk of the death penalty,⁷ and recommended that the AFP be required to seek assurances from foreign law enforcement bodies that the death penalty will not be sought in drug trafficking cases before providing information.⁸ Unfortunately, these recommendations have not been accepted by the Australian Government.⁹

The Australian executive and judiciary have both also demonstrated a broader commitment to challenge the use of the death penalty worldwide. In 2016 Australia joined Norway and France as a co-sponsor of the 2016 International Conference Against the Death Penalty.¹⁰ Further, in 2017 the Australian Turnbull Government decided not to ratify the Australia-China Extradition Treaty partially as a result of concerns about capital punishment in criminal proceedings in China.¹¹ Thus, the Australian executive has assumed an important leadership role in the continuing debate.¹²

The Australian judiciary has also adopted a strong anti-death penalty stance. In the 2018 case of *BTW17 v Minister for Immigration and Border Protection*,¹³ a Sri Lankan man sought a Safe Haven Enterprise Visa in Australia. The Minister's delegate initially rejected the application on the basis that the man was not facing a real risk of significant harm. The Sri Lankan man successfully appealed the decision on the basis that he risked facing the death penalty if returned to Sri Lanka.

2. Developments in South-East Asia

The South-East Asian region continues to be a hot spot for capital punishment.¹⁴ Over the past 18 months a number of Southeast Asian countries have taken retrogressive steps in relation to the death penalty, particularly in its application to drug-related offences. The use of the death penalty for drug-related offences is in breach of the International Covenant on Civil and Political Rights ("ICCPR"), since these offences do not constitute a "serious crime" for the purposes of Article 6(2) of that treaty.¹⁵ Nevertheless, a number of countries continue to apply

⁷ Ibid xix.

⁸ Joint Standing Committee on Foreign Affairs, Defence and Trade, *AWWTDP* (2016) xix.

⁹ Australian Government, *Response to AWWTDP* (2016).

¹⁰ McMahon, above n 3, 781.

¹¹ Kevin Boreham, 'Why the Government Pulled Australia's Extradition Treaty with China' *The Conversation* (28 March 2017), <<https://theconversation.com/explainer-why-the-government-pulled-australias-extradition-treaty-with-china-74984>>.

¹² McMahon, above n 3, 781.

¹³ *BTW17 v Minister for Immigration and Border Protection* [2018] FCAFC 10.

¹⁴ Julian McMahon, 'A Snapshot of Australia and the death penalty in 2016' (2016) 90(11) *Australian Law Journal* 781; M Ravi, 'The Abolition of the Death Penalty in Southeast Asia: The Arduous March Forward' in J Gomez and R Ramcharan (eds) *The Universal Periodic Review of Southeast Asia* (Palgrave Macmillan, Singapore, 2017).

¹⁵ M Ravi, above n 15; International Federation for Human Rights, *The Death Penalty For Drug Crimes in Asia Report* (2015), 3. Note - these include the International Covenant on Civil and Political Rights, the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and the Convention Against Torture.

their own domestic standard to the term “most serious” crime and sentence people to death for drug-related offences.¹⁶ These include Indonesia, Malaysia, Singapore, Thailand, Myanmar and Vietnam. Of these countries, Indonesia, Thailand and Vietnam are parties to the ICCPR.

Despite direction from the UN that basic safeguards should guarantee special protections for vulnerable persons such as juveniles, pregnant women and mothers with dependent infants and persons with mental or intellectual disabilities, these safeguards are reportedly not respected in many Asian countries that impose the death penalty.¹⁷

a) Philippines

The Philippines abolished the death penalty in 2006, which was championed as the success of human rights framing and legislative lobbying by NGOs.¹⁸ However, legislation seeking to re-establish the death penalty for drug-related crimes was passed by its House of Representatives in March 2017.¹⁹ The legislation is yet to pass Congress. The proposed death penalty law is not mandatory, and could not be imposed where an offender is below 18 years old at the time of the offence. In 2016, the Philippines abstained in voting on the UN General Assembly’s sixth resolution on a moratorium on the use of the death penalty.²⁰ This represented a shift from its position in favour of the preceding resolutions on the subject. These recent legal developments suggest that the Philippines is close to reinstating the death penalty, in breach of international human rights law: reintroduction of the death penalty is a breach of the ICCPR, and, as noted, the death penalty is not permitted thereunder for drug crimes.

b) Malaysia

The Penal Code of Malaysia sets out 20 offences that are punishable by death, and the death penalty is mandatory for 12 of the 20 offences.²¹ In November 2017 Malaysian lawmakers voted to remove the mandatory death penalty for drug offences, giving judges full discretion to decide on sentences.²² As of February 2018, the change had yet to come into force.

c) Indonesia

More than 60 people were sentenced to death in 2016 in Indonesia. However there are proposed changes that will allow death sentences to be commuted to imprisonment if offenders can show that they have reformed.²³ President Joko Widodo made a statement in

¹⁶ Eugenia Levine, ‘In Conversation with Cristof Heyns: UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions’ (2015) 158 *Victorian Bar News* 69.

¹⁷ International Federation for Human Rights, *The Death Penalty For Drug Crimes in Asia Report* (2015), 8.

¹⁸ Dongwook Kim, ‘International Non-governmental Organizations and the Abolition of the Death Penalty’ (2016) 22(3) *European Journal of International Relations* 596, 597-598.

¹⁹ Mena Report, ‘*Philippines: House overwhelmingly passes death penalty bill*’, (2017).

²⁰ UN G.A. Res. 71/187, U.N. Doc. A/RES/71/187 (19 Dec. 2016).

²¹ M Ravi, above no.15, 86.

²² ‘Malaysia parliament removes mandatory death penalty for drug offenders’, *Channel News Asia* (online), 1 Dec 2017 <<https://www.channelnewsasia.com/news/asia/malaysia-parliament-removes-mandatory-death-penalty-for-drug-9456748>>.

²³ Jewel Topsfield and Karuni Rompies, ‘Hope for Death Penalty Changes’, *The Age* (Melbourne, Australia) 11 April 2017, 13.

late 2016 that Indonesia is seeking to progress towards abolition.²⁴ Moreover, Widodo told Agence France-Presse in early 2017 that he would consider a moratorium on the death penalty if his people agreed to it.²⁵

Despite these positive gestures, credible information indicates that as recently as 2016, Indonesia has kept on death row people with disabilities, and people who were below the age of 18 at the time they offended.²⁶

d) Brunei

Brunei proposes to have a full Shariah Penal Code by 2018, which would provide for executions for various offences,²⁷ including extramarital sexual relations for Muslims and declaring oneself a prophet or non-muslim.²⁸ Death by stoning will be allowed for sodomy and adultery. Whilst Brunei has maintained the death penalty in theory, the last execution occurred in 1957. The new proposals are clearly retrogressive. While Brunei is not a party to the ICCPR, it is submitted that these new capital crimes would breach customary international law.

²⁴ SBS, *Indonesia moving towards abolishing death penalty: Widodo*, (5 November 2016), <www.sbs.com.au/news/article/2016/11/05/indonesia-movingtowards-abolishing-death-penalty-widodo>.

²⁵ J Topsfield, above n 25, 13.

²⁶ Amnesty International, above n 16, 7 and 18.

²⁷ McMahon, above n 3, 782.

²⁸ M Ravi, above no. 14.