



China and Australia: Mutual assistance on criminal matters

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During 2005, at least 2,148 people were executed in 22 countries. At least 5,186 people were sentenced to death in 53 countries. These were only minimum figures; the true figures were certainly higher. As in previous years, the vast majority of executions worldwide were carried out in a tiny handful of countries. In 2005, 94 per cent of all known executions took place in China, Iran, Saudi Arabia and the USA.

The Peoples Republic of China (China) is numerically the world's largest executioner of people. China acknowledges executing 1770 people in 2005. The actual number is estimated by various civil rights organisations, such as Amnesty International, to be over 8000. The exact numbers will never be known, however, as statistics in China on the numbers of people executed are a state secret.¹

A Treaty between the Government of Australia and the People's Republic of China on Mutual Legal Assistance in Criminal Matters² was supported by the federal parliament's Joint Standing Committee on Treaties (JSCT) and a recommendation for binding treaty action was agreed and passed to the parliament on 19 October 2006. China's record on the death penalty surely meant examination of this treaty required great care and the closest scrutiny. The Committee appeared to proceed, however, with unnecessary haste.

The inclusion of safeguards against the provision of information to China that could lead to the death penalty was recommended in submissions from the ACT Government and human rights and civil liberties groups. However, none of the groups who criticised the lack of a clause on the death penalty were called to provide evidence to the Committee. The public servants who contributed to the drafting of the Treaty in the first place were the only witnesses to be called.

¹ Amnesty International, 'Death Sentences and Executions in 2005', <http://web.amnesty.org/pages/deathpenalty-sentences-eng>

² Treaty between the Government of Australia and the People's Republic of China on Mutual Legal Assistance in Criminal Matters (Canberra, 3 April 2006), http://www.aph.gov.au/house/committee/jsct/5_6_september2006/tor.htm

The Treaty, in the form recommended by the JSCT, contains no safeguards against the provision of data or intelligence to China that could lead to the imposition of the death penalty on an Australian citizen—or a citizen of any other country, China included.³

The negotiators of this Treaty have relegated all mention of capital punishment to a subsidiary document called the ‘Agreed Minutes’, which states briefly that the ‘Australian side, reinforcing its wish to undertake effective mutual legal assistance in accordance with the Treaty on Mutual Legal Assistance in Criminal Matters, notes that the imposition of the death penalty may be in conflict with the essential interests of Australia. The Chinese side acknowledges the above position of the Australian side’.⁴

The ‘Agreed Minutes’ statement by Australia says only that executions ‘*may* be in conflict with the essential interests of Australia’. It does not read ‘*is* in conflict with the essential interests of Australia’. This statement does not adequately reflect Australia as a nation’s position of long-standing principled opposition to the death penalty. It is not sufficient for a matter as fundamental as capital punishment to be relegated to a subsidiary document. These are literally matters of life and death and deserve mention in the Treaty text. (As an aside, this opposition to the death penalty seems to have been compromised somewhat by the refusal of the present Government to condemn the execution of Saddam Hussein, were he to be found guilty of genocide and other crimes, or those of the so-called Bali Bombers who were sentenced to death.)

This aside, one of the most forceful arguments for the inclusion of a clause on the death penalty is Australia’s obligations under international law. Australia has ratified a number of international treaties abolishing the death penalty including the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War and, the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment.

³ Joint Standing Committee on Treaties report 19 October 2006 Report 80, http://www.aph.gov.au/house/committee/jsct/5_6_september2006/report2.htm

⁴ National Interest Analysis, http://www.aph.gov.au/house/committee/jsct/5_6_september2006/treaties/mutual_nia.pdf

Importantly, Australia has also ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR)⁵. This protocol aims at abolishing the death penalty worldwide, and Australia was one of the first nations to ratify it, doing so in 1990. China is not a signatory to the Second Optional Protocol. The ICCPR is one of the five international human rights treaties which make up the International Bill of Human Rights. The most basic of all those rights listed is the right to life. Within Australia, federal law forbidding the death penalty was passed in 1973 and in all States by 1985.

There are few consistencies in the application of the death penalty in China and sentences often depend greatly on the political climate and timing. For example, crimes which would ordinarily bring a lesser sentence are often punished by death during a so called 'Strike Hard' campaign. White-collar criminal cases may be given the death sentence to make an example or highlight anti-corruption efforts. Executions also tend to cluster around national holidays, including National Day or the Chinese New Year. Chinese officials have even commemorated International Children's Day by holding grim rallies around the execution of several prisoners.⁶

Australian businessmen and women wishing to become partners with China in the economic boom of that country could be caught in situations where they could be accused of white collar crime. It is entirely possible, in such circumstances, that an Australian will face execution in China for a 'crime' which would attract no more than several years' jail in Australia.

China has the death penalty for over 60 offences including a vast range of non-violent offences. According to the international abolitionist campaign, Hands Off Cain, torture is routinely used to extract confessions for these offences, which include: tax evasion; drug trafficking; embezzlement; forgery; fraud; gambling; gambling; bigamy; running a brothel; habitual theft; corruption; disturbing the peace; cigarette smuggling; organizing pornographic clubs; car smuggling; exploitation of prostitutes; speculation; publication of pornographic material; stealing or trafficking in national treasure; financial fraud; sale of pelts of two giant pandas; stealing cows, camels or horses; sale of false birth certificates; sale of false invoices; sale of false sterility

⁵ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989

⁶ Amnesty International USA, <http://www.amnestyusa.org/abolish/world/china/>

certificates; sale of counterfeit currency; killing giant pandas and golden monkeys; and hacking or other cyber-crimes.⁷

In late September 2006, the BBC reported that organ harvesting of prisoners on death row in China continues. The BBC reported a Chinese official saying that the prisoners volunteered to give their organs as a 'present to society' and that there is 'currently an organ surplus because of an increase in executions ahead of the 1 October National Day'.⁸ Such reports are routinely denied by the Chinese. Despite such denials, a detailed investigation by David Matas and David Kilgour concludes that organ harvesting is occurring.⁹

Amnesty International has also reported that: 'Since the late 1990's ... there have been reports from medical personnel of being present in "mobile execution vans" in which they would harvest organs as quickly after death as possible'.¹⁰

Australia currently has treaties on mutual legal assistance in criminal matters with 24 other countries.¹¹ On the 19 October 2006, the JSCT finalized another with Malaysia plus this one with China.¹² In an earlier Treaty with Indonesia signed in 1999, there is a clause which deals with the death penalty: 'Assistance may be refused if...the request relates to the prosecution or punishment of a person for an offence in respect of which the death penalty may be imposed or carried out'.¹³ While it can be argued that the word 'may' should be changed to 'will', at least there is mention of the death penalty, which is missing altogether from the proposed Treaties with Malaysia and China – both of which use the death penalty for prescribed offences.

However, this provision in the Indonesian Treaty was not enough to save the six members of the so-called Bali Nine who have been sentenced to death. That came about because information was

⁷ Hands Off Cain, 'China', www.handsoffcain

⁸ BBC, 2006, 'Organ sales thriving' in China, 27 September, <http://news.bbc.co.uk/2/hi/asia-pacific/5386720.stm>

⁹ Report into Allegations of Organ Harvesting of Falun Gong Practitioners in China, Matas and Kilgour, 6 June 2006

¹⁰ Hamish McDonald, 2003, 'Chinese try mobile death vans', *The Age*, 13 March
<http://www.theage.com.au/articles/2003/03/12/1047431092598.html>

¹¹ National Interest Analysis, Para 3

¹² JSCT Report 19 October 2006, Report 79

http://www.aph.gov.au/house/committee/jsct/5_6_september2006/report.htm

¹³ Treaty between Australia and the Republic of Indonesia on Mutual Assistance in Criminal Matters [1999] ATS 10, article 4(2) (d).

passed to the Indonesian police by the Australian Federal Police (AFP) under AFP guidelines which, although recently revised, still do not prevent the passage of such information even though the death penalty may result.¹⁴

The Australian government sees a need for a formal treaty between Australia and China, and it is difficult to argue with that. However, such a treaty should comprise a partnership based on the highest achievable mutual standards of rights and liberties. It should represent ‘best practice’ in terms of both Australian—and world—treaty regimes. Any treaty should not effectively diminish Australia’s standards and values, and fly in the face of our law and our policies. China’s appalling justice system and its record of executions mean we need iron-clad guarantees included in this Treaty to prevent any information we supply being used to impose this ultimate denial of human rights—the death penalty.

¹⁴ AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations.
http://www.afp.gov.au/_data/assets/pdf_file/21096/Guideline_for_international_death_penalty_situation.pdf