

Submission of the

NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

to the

Joint Standing Committee on Treaties'

Inquiry into the

Mutual Legal Assistance Treaty between

Australia and China

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All references to 'the Treaty' refer to the *Treaty between the Government of Australia and the Government of the People's Republic of China on Mutual Legal Assistance in Criminal Matters* [2006] ATNIF 9.

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1. Executive Summary

1. The People's Republic of China ('China') is the world's largest executor of human beings. Alarming reports of human organs being 'harvested' for profit from executed prisoners in China are increasing. Nevertheless, the Commonwealth government asks the Committee to endorse a mutual legal assistance treaty ('the Treaty') with China that does not contain any explicit mention of Australia's opposition to the death penalty.

The New South Wales Council for Civil Liberties ('CCL') encourages the Parliament, through the Committee, to recommend that express reference be made in the text of the Treaty to capital punishment and torture as grounds to refuse assistance.

2. CCL encourages the Committee to seek advice on criminal procedure in China. This will establish when the human rights safeguards of this Treaty will kick in. One of the lessons of the Bali Nine case was that people can languish in foreign prisons for months before being charged and before mutual legal assistance (and its human rights safeguards) are engaged. It is simply not clear, with the evidence currently before the Committee, whether this is also the case in China.
3. CCL also encourages the Committee to seek access to legal advice provided to the Attorney-General on Australia's obligations with respect to the death penalty. That advice appears to conclude that Australia's human rights obligations with respect to the death penalty stop at our borders, which means that Australian officials working overseas are not bound by these obligations. This advice is clearly wrong and will have a significant impact on the operation of this Treaty with a country that executes as many people as China.
4. CCL recommends that a European-style clause governing the provision of *voluntary* mutual assistance, as opposed to *requests* for assistance, be inserted into the proposed mutual assistance Treaty with China. This will provide Australia with a mechanism to preserve its sovereign right to ensure that its resources are not used to execute or torture anyone.
5. CCL also recommends that the proposed Treaty with China should be modified to allow for the referral of intractable disputes to the International Court of Justice ('ICJ'). This would provide to both parties an impartial way to solve disputes that cannot be resolved diplomatically.

2. the Treaty needs to explicitly mention the death penalty and torture

6. 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.

7. The National Interest Analysis ('NIA') notes that this document can be used to interpret the Treaty, presumably through article 31(2) of the Vienna Treaties Convention.¹ However, CCL notes that there is no provision in the Treaty for any impartial judicial body, such as the ICJ, to adjudicate disputes on interpretation.
8. The 'Agreed Minutes' statement by Australia only states that executions '*may be* in conflict with the essential interests of Australia'. Surely this should read '*is* in conflict with the essential interests of Australia'. Australia has ratified the *Second Optional Protocol* to the ICCPR and has a long-standing principled opposition to the death penalty. CCL believes that this statement does not adequately reflect Australia's position.
9. CCL encourages the Committee to acknowledge that 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. The appropriate wording for such a clause can be found in the mutual assistance treaty with Indonesia:²

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.

10. If China will not agree to an explicit reference to capital punishment in the proposed Treaty, then perhaps there should be no treaty. Australia's sovereignty and principled opposition to capital punishment should not be compromised in this way. It beggars belief that China, or any retentionist nation, would refuse to sign a treaty that acknowledges Australia's obligations in international law. It also beggars belief that China, or any retentionist nation, would refuse to cooperate in the investigation and prosecution of serious transnational crime simply because Australia wishes to have its international legal obligations mentioned in a mutual assistance treaty.

¹ *Vienna Convention on the Law of Treaties* [1974] ATS 2, article 31(2),

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

11. Australia's obligations under the *Convention Against Torture*³ should also be explicitly mentioned in the Treaty. Australia's resources should not be used to assist an investigation or prosecution in which the defendant has been or is likely to be tortured.

3. human rights record of China – NIA inadequate

12. CCL notes with disapproval the poor quality of the National Interest Analyses ('NIA') accompanying this Treaty.⁴ While the 'Political Brief' mentions the annual Australia-China Human Rights Dialogue, it fails to assess China's human rights record. Specifically, there is no assessment of the use of capital punishment, the fairness of criminal trials, the use of torture and compliance with other international human rights standards. This lack of analysis means that the NIA is seriously flawed. CCL recommends that the Committee requests and reviews such information before proceeding to endorse this Treaty.
13. Significantly, the NIA does not provide the Committee with information about criminal procedure in China. One of the problems highlighted by the 'Bali Nine' case is that in some foreign jurisdictions a person can be arrested but not charged until months later. The Bali Nine were arrested on 17 April 2005 and charged on 27 September 2005 – spending over five months in detention without charge. During that five month period, Australia's mutual assistance framework, along with its human rights safeguards, was not engaged and all assistance was on a police-to-police basis. This is because the mutual assistance framework only kicks in when someone is *charged* with an offence. **It is, therefore, extremely important for the Committee to understand when the human rights protections of this Treaty with China will kick in.**
14. China executes more human beings than any other nation on Earth. Amnesty International notes that, in 2005 alone, China executed between 1700 and 8000 people.⁵ China has not ratified the *International Covenant on Civil and Political Rights* or the *Second Optional Protocol* attached thereto.⁶ The NIA makes no mention of these issues.
15. 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".⁷ The NIA makes no mention of this.

³ *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* [1989] ATS 21.

⁴ *NIA with attachment on consultation* [2006] ATNIA 38.

⁵ Amnesty International, 'Death Sentences and Executions in 2005', <<http://web.amnesty.org/pages/deathpenalty-sentences-eng>>.

⁶ China signed the ICCPR in October 1998, but is yet to ratify the Covenant.

⁷ British Broadcasting Corporation, "Organ sales 'thriving' in China" (27 September 2006) *BBC News Online*, <<http://news.bbc.co.uk/2/hi/asia-pacific/5386720.stm>>.

16. Nor does the NIA mention that China continues to hold public executions⁸ – a practice condemned by the United Nations.⁹

17. The NIA does not discuss the vast range of *non-violent* offences to which capital punishment might apply. According to the international abolitionist campaigner, Hands Off Cain, these offences include:¹⁰

- tax evasion
- drug-trafficking
- embezzlement
- forgery
- fraud
- 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 treasures
- financial fraud
- sale of the pelts of two giant pandas
- stealing cows, camels or horses
- sale of false birth certificates
- sale of false invoices
- sale of false sterility certificates
- sale of counterfeit money
- killing giant pandas and golden monkeys
- hacking and other cyber crimes

⁸ e.g. Hamish McDonald, "Chinese try mobile death vans", *The Age* (Melbourne), 13 March 2003, <<http://www.theage.com.au/articles/2003/03/12/1047431092598.html>>.

⁹ UN Commission on Human Rights, *The question of the death penalty* (20 April 2005) UN Doc E/CN.4/RES/2005/59, [7.i].

¹⁰ Hands Off Cain, "China", <<http://www.handsoffcain.info/bancadati/schedastato.php?idcontinente=23&nome=china>>.

4. legal advice on the death penalty from the Attorney-General's Department

18. CCL is becoming increasingly concerned by the poor quality of legal advice emanating from the federal Attorney-General's Department with respect to death penalty issues. Such advice will impact on the operation of this mutual assistance Treaty.
19. CCL has been seeking through Freedom of Information to obtain the legal advice the Attorney-General has received on Australia's obligations with respect to capital punishment under the *International Covenant on Civil and Political Rights* and the *Second Optional Protocol* attached thereto.¹¹ To date we have been unsuccessful.
20. However it appears, from those documents we have been able to obtain,¹² that government lawyers from the Office of International Law ('OIL') within the AG's Department, have advised the Attorney-General that Australia's legal obligations only apply, in the words of Article 2(1) of the ICCPR, to "individuals within [Australia's] territory and subject to its jurisdiction". In other words, that as far as the death penalty goes, Australia's international human rights obligations end at our borders – that Australian officials overseas do not need to comply with those obligations. Such legal advice is clearly flawed.
21. **The legal advice should be released publicly so that members of the Committee and distinguished legal experts can examine it.** The advice, ultimately, amounts to Australia's understanding of its international human rights obligations. The release of such advice cannot in any way be said to threaten national security. Surely the Committee, and the Australian public at large, have a right to know what our government understands to be our international human right obligations. What can there be to hide?
22. As an aside, another example of poor legal advice given to the Attorney-General concerns the Guantanamo Bay military commissions. Indeed, as a result of this inadequate advice, Australia finds itself in the rather embarrassing position of still recognising those US military commissions in Australian law – long after they have ceased to exist in the United States itself.¹³ CCL is concerned that departmental legal advice on the death penalty is equally deficient.

¹¹ specifically: advices dated 12 November 2002 and 14 November 2002, provided to the Criminal Justice Division ('CJD') by the Office of International Law ('OIL'); and another advice from 1991 provided by the Australian Government Solicitor.

¹² see <<http://www.nswccl.org.au/docs/pdf/dbfoi.pdf>>.

¹³ See for example section 102.8 of the *Criminal Code Act 1995* (Cth) and section 337A of the *Proceeds of Crime Act 2002* (Cth), both of which recognise in Australian law 'a military commission of the United States of America established under a Military Order of 13 November 2001 made by the President of the United States of America and entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism"'.

5. police-to-police assistance

23. For the record, CCL notes the evidence of Federal Agent Morris to the Committee concerning bi-partisan support for the AFP death penalty guidelines:¹⁴

It is important to note that these guidelines have been in place since the early 1990s and have been supported by successive governments. The Australian government through the Minister for Justice and Customs have endorsed these guidelines, stating that from a government point of view they are quite happy with the arrangements which are in place and the guidelines which have operated under the prior government and this one.

24. This evidence is misleading because it suggests that the interpretation of these guidelines has not changed over time. CCL points to the recent parliamentary speech of a former Justice Minister to demonstrate that a radical shift in the interpretation of these guidelines has occurred over the last few years:¹⁵

...I was in fact the minister who introduced the mutual assistance legislation imposing the prohibition on the provision of assistance in death penalty cases. What we did provide was that, where pre-arrest information exchange was occurring between police, assistance could be provided irrespective of whether there might be a later charge involving the death penalty. However, that was intended to be facilitative, not mandatory. It was meant to be facilitative because, on advice from the police, we recognised that there may be some, hopefully quite rare, circumstances where the cost to the lives of others and the communities involved may be so much greater if that assistance were not provided. A simple example might be that we have come into information that a bomb is going to be placed on a plane within China. We know that if that information is passed on and an arrest is made the likely outcome will be that the person undertaking that conduct will be subject to the death penalty and shot. But to fail to pass that information on would be completely irresponsible. So it is facilitative that the information could be passed on.

However, surely it cannot be the case, as is being proposed, that in all circumstances common sense flies out the window and we do not exercise judgement regarding circumstances in which assistance will be provided. ...There are many countries which have the death penalty for offences that even the most draconian of lawmakers here would not recognise as appropriate, and for our police to say repeatedly and for our ministers to repeat that they are obliged in all instances to pass on information without any regard to the consequences to those who

¹⁴ Hansard, JSCOT, 4 September 2006, 2.

¹⁵ Hansard, House of Representatives, 16 August 2006, 146 (Mr Duncan Kerr).

might be affected by it is simply shutting their eyes to the real consequences of that conduct.

25. While it makes sense to disregard whether the death penalty might apply when providing information about an imminent act of extreme violence, Mr Kerr's speech demonstrates that *it was never the intention of Parliament* that information would be routinely provided on a police-to-police basis in death penalty situations. However, Federal Agent Morris gave evidence to the Committee that this is what routinely now happens.¹⁶ The Committee needs to be aware of this shift in policy, which has had such tragic consequences.

6. voluntary assistance

26. CCL believes that there needs to be an explicit mechanism for the provision of voluntary assistance, that is in situations where a formal request has not been received. CCL commends to the Committee the European treaty mechanism for the spontaneous provision of information and assistance:¹⁷

Article 11 – Spontaneous information

1 Without prejudice to their own investigations or proceedings, the competent authorities of a Party may, without prior request, forward to the competent authorities of another Party information obtained within the framework of their own investigations, when they consider that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings, or might lead to a request by that Party under the Convention or its Protocols.

2 The providing Party may, pursuant to its national law, impose conditions on the use of such information by the receiving Party.

3 The receiving Party shall be bound by those conditions.

4 However, any Contracting State may, at any time, by means of a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to be bound by the conditions imposed by the providing Party under paragraph 2 above, unless it receives prior notice of the nature of the information to be provided and agrees to its transmission.

¹⁶ Hansard, JSCOT, 4 September 2006, 8: "...generally speaking, we would not refuse a police-to-police request because there was a potential that one of the persons subject to the investigation may be subject to a charge that could attract the death penalty some time at a later date".

¹⁷ *Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters* (2001) ETS No. 182, <<http://conventions.coe.int/Treaty/EN/Treaties/Html/182.htm>>.

27. CCL notes the evidence of Ms Blackburn before the Committee that the AFP can never voluntarily provide any information obtained coercively.¹⁸ It remains unclear, however, which domestic law prohibits this. Perhaps the AFP can answer this question: which law or guidelines prohibit the AFP from volunteering, for example, evidence obtained under a search warrant for a domestic investigation in a situation where there has been no request for that information from overseas?
28. CCL also notes that the clauses in the Treaty that permit conditions to be applied to assistance and provided information are piecemeal and only apply when a request has been made, not when information is *voluntarily* provided.

7. dispute resolution

29. Article 25 of the Treaty does not include an effective dispute resolution clause. Any disputes are to be resolved “through consultation by diplomatic channels”.
30. Given the potential for disputes to arise in mutual legal assistance matters, CCL recommends that intractable disputes should be made referable to the International Court of Justice for resolution. All members of the United Nations are automatically parties to the *Statute of the International Court of Justice* ('ICJ Statute').¹⁹ Both Australia and China are members of the United Nations. Furthermore, Australia has made a declaration under the ICJ Statute to the effect that it recognises the compulsory jurisdiction of the ICJ in all disputes including the interpretation of treaties.²⁰
31. CCL recommends that a 'compromissory clause' replace the existing clause. Such a clause could preserve the spirit of the existing clause by preserving diplomatic consultations as the primary mechanism for dispute resolution, but permitting a treaty party to remove the dispute to the ICJ if an intractable problem arises.

CCL recommends that a 'compromissory clause' be added to the dispute resolution provision to provide for referral of intractable disputes to the International Court of Justice.

¹⁸ Hansard, JSCOT, 4 September 2006, 6.

¹⁹ [Charter of the United Nations](#) [1945] ATS 1, Article 93(1). See also: [Statute of the International Court of Justice](#) [1975] ATS 50.

²⁰ [Declaration under the Statute of the International Court of Justice concerning Australia's acceptance of the jurisdiction of the International Court of Justice](#) [2002] ATS 5 (22 March 2002).