



3 September 2009

By letter and by email

Mr Steven Marshall
Assistant Secretary
International Assistance and Treaties Branch
Australian Government
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

Dear Mr Marshall

PROPOSED REFORMS TO EXTRADITION AND MUTUAL ASSISTANCE LAWS

I refer to your letter dated 7 July 2009.

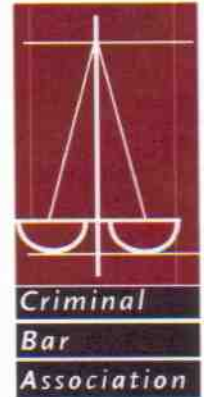
The Bar Council has had the opportunity of reviewing the attached response prepared by the Criminal Bar Association. The Bar Council endorses the Criminal Bar Association's submission.

Yours sincerely

A handwritten signature in black ink, appearing to read "G John Digby". The signature is fluid and cursive, with a long horizontal stroke at the end.

G JOHN DIGBY QC
Chairman
Victorian Bar Council

cc John Champion SC
Chairman, Criminal Bar Association



CRIMINAL BAR ASSOCIATION

SUBMISSION IN RESPONSE TO THE AUSTRALIAN GOVERNMENT'S PROPOSED REFORMS TO EXTRADITION AND MUTUAL ASSISTANCE LAWS

The Criminal Bar Association ("CBA") is the peak professional body of Victorian advocates working in criminal courts in Victoria, around Australia and overseas. All CBA members are barristers of the Victorian Bar specialising in criminal law. The CBA has around 400 members.

The Criminal Bar Association endorses and supports the Law Council policy on the death penalty.

Members of the Criminal Bar Association oppose the imposition or execution of the death penalty on any person irrespective of their nationality, the nature of the crime they are alleged to have committed or the time and place of its alleged commission on the grounds that the death penalty violates two fundamental human rights, namely:

1. the right to life; and
2. the right not to be subjected to cruel, inhumane or degrading punishment.

These human rights are enshrined respectively in articles 3 and 5 of the Universal Declaration of Human Rights and articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR).

As a signatory to the ICCPR, Australia has agreed to protect the right to life of every human being in all circumstances.

The Criminal Bar Association is committed to the abolition of the death penalty worldwide and, in the meantime, to an international moratorium on executions and to the commutation of existing death sentences.

The Criminal Bar Association is of the view:

1. Australia must maintain its prohibition on extraditing or transferring any person to a foreign country in circumstances where the person may face the death penalty unless an explicit, official undertaking is provided to Australia that the death penalty will not be imposed or carried out on the person to be extradited; and
2. Australia must maintain its prohibition on providing mutual assistance to foreign states in criminal matters where such assistance may lead to the arrest, prosecution or conviction of a person for an offence carrying the death penalty.

It follows, legislative reform should deny Australian law enforcement agencies any opportunity to offer to a foreign country assistance which might expose a person to risk of the death penalty in that country.

The Criminal Bar Association endorses the Law Council's concerns with the proposed reforms.

Primarily, the concerns are:

1. While the Attorney General may only authorise the extradition of someone to a foreign country to face trial for an offence punishable by death if that country has given undertakings the death penalty will not be imposed or, if imposed, will not be carried out on the person, the undertakings are not effective to prevent the execution of a convicted offender.
2. The mutual assistance legislation permits inconsistent application of the government's policy of not providing assistance to foreign states in cases which might expose a person to risk of the death penalty. The possibility of Australian Government agency giving assistance which might do so must be legislatively removed.
3. The *Australian Federal Police Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations* provides the AFP can assist foreign countries, by sharing criminal intelligence, on a police-to-police basis where no charges have been laid, regardless of whether the foreign country may be investigating an offence which attracts the death penalty. Statutory guidelines are needed to prevent the provision of such assistance to a foreign country in circumstances where a person might, in that country, be charged with, and convicted of, an offence which carries the death penalty unless the foreign state can guarantee the person will not be exposed to the death penalty, or the assistance is exculpatory.

A sad and regrettable illustration of the need for proper safeguards is the case of Scott Rush, one of the Bali Nine, where the Australian Federal Police passed on information, which Rush's father had provided them, to the Indonesian police. Consequently, Indonesian police arrested Rush and 8 other Australians who were all convicted of heroin trafficking in Indonesia. The Indonesian courts sentenced Rush and 2 others, Andrew Chan and Myuran Sukumaran, to death. They are imprisoned and remain on 'death row' awaiting execution.

Notwithstanding the desire for international cooperation in the investigation of crime around the world, the Criminal Bar Association is of the opinion the Australian Government must not pass laws which could:

1. permit the extradition of a person to a foreign state where he or she may face the death penalty; and
2. permit provision of police-to-police assistance which could expose a person to risk of being charged with an offence which carries the death penalty.

To do otherwise would be inconsistent with Australia's human rights law obligations.
