

31 October 2008

The Hon. Robert McClelland MP
Attorney-General's Department
Central Office, Robert Garran Offices
National Circuit
Barton ACT 2600

Dear Attorney General

Re: Review of Australian Federal Police Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations

1. Introduction

The Public Interest Law Clearing House (**PILCH**) welcomes the Attorney-General's decision to review¹ the Australian Federal Police (**AFP**) *Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations* (**AFP Guidelines**), to ensure that they reflect Government policy on the death penalty.

In our view this is a crucial review as the implementation of the AFP Guidelines will impact on how Australia is seen to be complying with its international human rights obligations and can play a critical role in reinforcing Australia's opposition to the death penalty. Moreover, amendments to the AFP Guidelines are urgently required to prevent complicity by the AFP in the conviction and punishment by death of individuals overseas.

Set out below are PILCH's views and recommendations on the AFP Guidelines review. In summary, PILCH makes the following recommendations:

- **Recommendation 1:**

The review of the AFP Guidelines should be informed by, and any revised guidelines should be consistent with, Australia's obligations under human rights law, including the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*² (**Second Optional Protocol**).

- **Recommendation 2:**

To avoid uncertainty amongst members of the AFP and the broader public regarding the lawfulness of cooperating with foreign law enforcement agencies, the AFP Guidelines should ensure that, in cases where there is a risk that an individual will be charged with an offence that attracts the death penalty, cooperation with foreign law enforcement agencies may only be provided where: a guarantee has been obtained from a competent foreign body that no person will be subject to the death penalty; or, such cooperation is

¹ See Daniel Flitton, "Police Ties with Asia Reviewed" *The Age*, 3 October 2008, available at: <http://www.theage.com.au/national/police-ties-with-asia-reviewed-20081002-4sv7.html>.

² *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, opened for signature 15 December 1989, 1642 UNTS 85 (entered into force 11 July 1991).

exculpatory. The only exception should be where there is an imminent threat to human life and cooperation in such cases should proceed only with ministerial approval and a report to Parliament.

2. About PILCH

PILCH is a leading Victorian, not-for-profit organisation that is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education. PILCH coordinates the delivery of pro bono legal services through six schemes: the Public Interest Law Scheme; the Victorian Bar Legal Assistance Scheme; the Law Institute of Victoria Legal Assistance Scheme; PILCH Connect; the Homeless Persons' Legal Clinic; and, Seniors Rights Victoria.

3. The AFP Guidelines

3.1. Overview of the AFP Guidelines

The existing AFP Guidelines state:

Police-to-police assistance can be provided, without reference to the Attorney-General or Minister for Home Affairs, until charges are laid for the offence.

Information provided by the AFP to foreign law enforcement agencies must be in accordance with the *Australian Federal Police Act 1979*, and any other legislation, treaty, convention, Ministerial Direction, agreement, memorandum of understanding, policy, guideline, and practical guide or associated document relevant to the provision of information to foreign law enforcement agencies.

The AFP is thus free to share intelligence with foreign law enforcement agencies on a police-to-police basis, provided that the person, who is the subject of the intelligence, has not yet been charged with an offence that attracts the death penalty.

3.2. The Case of the 'Bali Nine'

The recent and much publicised 'Bali Nine' case provides a paradigmatic example of the practical effect of the AFP Guidelines. On 17 April 2005, nine Australian citizens were arrested in Bali, by the Indonesian National Police (*INP*), for their alleged involvement in the trafficking of heroin to Australia. The arrests occurred as a result of intelligence that the AFP provided to the INP. Three members of the 'Bali Nine' are currently on death row as a result of their respective convictions for drug trafficking offences. Although the AFP's decision to provide intelligence to the INP was lawful³ – that is to say, the AFP provided intelligence *prior to* any member of the 'Bali Nine' being charged with an offence that exposes them to the risk of the death penalty – the case highlights the serious and potentially irreparable harm that can arise from the sharing of such intelligence.

3.3. Review of the AFP Guidelines

As demonstrated in the 'Bali Nine' case, there is an urgent need to clarify the nature and scope of the AFP Guidelines, and ensure their compliance with human rights law. In *Rush v. Commissioner of Police*, [2006] FCA 12, at [1], Justice Finn stressed that:

there is a need for the Minister administering the *Australian Federal Police Act 1979* (Cth) ... and the Commissioner of Police to address the procedures and protocols followed by members of the Australian Federal Police ... when providing information to the police forces of another country in circumstances which predictably could result in the charging of a person with an offence that would expose that person

³ *Rush v. Commissioner of Police*, [2006] FCA 12.

to the risk of the death penalty in that country. Especially is this so where the person concerned is an Australian citizen and the information is provided in the course of a request being made by the AFP for assistance from that other country's police force.

The AFP Guidelines were amended in 2006, following Justice Finn's decision in this case. Notwithstanding those amendments, the AFP Guidelines still permit the sharing of intelligence in cases that could result in the charging of an individual with an offence that attracts the death penalty.

The current review of the AFP Guidelines provides an important opportunity to clarify their nature and scope and to ensure their compliance with human rights law.

4. Guidelines must be consistent with Australia's human rights obligations

4.1. Australia's human rights obligations with respect to the death penalty

All Australian jurisdictions have abolished the death penalty,⁴ with Victoria performing the last execution in Australia in 1967. In 1990, Australia acceded to the *Second Optional Protocol*. In so doing, Australia undertook to ensure that no one within its jurisdiction will be executed.⁵ It also undertook to "take all necessary measures to abolish the death penalty within its jurisdiction."⁶ Arguably this extends to taking all necessary measures within its control (including the refusal to provide intelligence in matters where the death penalty is a possible or foreseeable outcome) to prevent the death penalty being applied by a foreign country. On 18 December 2007, Australia affirmed its opposition to the death penalty, voting in favour of UN General Assembly Resolution No. 62/149, which called upon States Parties to "establish a moratorium on executions with a view to abolishing the death penalty."⁷ In addition, Australia has ratified a number of other international treaties that condemn the death penalty.⁸

In addition to Australia's commitment to abolishing the death penalty, as a State Party to the *International Covenant on Civil and Political Rights (ICCPR)*, Australia has undertaken to ensure the inherent right to life of every human being.⁹ The Human Rights Committee, the UN treaty body charged with monitoring States Parties' compliance with the ICCPR, has interpreted the right to life as requiring States Parties that have abolished the death penalty to protect the right to life *in all circumstances*. Accordingly, States Parties should not expose a person to the real risk of the application of the death penalty, including by a third country.¹⁰ In our view this obligation extends to not cooperating with foreign law enforcement agencies in circumstances where an individual may be charged with an offence that attracts the death penalty.¹¹

⁴ *Death Penalty Abolition Act 1973* (Cth); *Criminal Code Amendment Act 1922* (Qld); *Criminal Code Act 1968* (Tas); *Crimes (Capital Offences) Act 1975* (Vic); *Statutes Amendment (Capital Punishment Abolition) Act 1976* (SA); *Acts Amendment (Abolition of Capital Punishment) Act 1984* (WA); *Crimes (Amendment) Act 1955* (NSW), *Crimes (Death Penalty Abolition) Amendment Act 1985* (NSW), *Miscellaneous Acts (Death Penalty Abolition) Amendment Act 1985* (NSW).

⁵ *Second Optional Protocol*, *supra* note 2, art. 1(1).

⁶ *Ibid.*, art. 1(2).

⁷ UN General Assembly, Res. No. 62/149 *Moratorium on the use of the Death Penalty*, UN Doc. A/RES/62/149 (2008).

⁸ See, e.g., *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); and, *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art. 6. See also *Universal Declaration of Human Rights*, GA Res. 217A (III), UN Doc. A/810 at 71 (1948), art. 3.

¹⁰ *Judge v. Canada*, HRC, Communication No. 829/1998, UN Doc. CCPR/C/78/D/829/1998 (2003).

¹¹ Michael Walton, *Background Paper: Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, 3rd ed., (New South Wales Council for Civil Liberties, 2008), at para. 35, available at: <http://www.nswccl.org.au/docs/pdf/bp4%202005%20op%20paper.pdf>.

As a State Party to the ICCPR¹² and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*,¹³ Australia has further undertaken to ensure that no one is subjected to cruel, inhuman or degrading treatment or punishment. The Human Rights Committee has determined that certain methods of execution may violate the freedom from cruel, inhuman or degrading treatment or punishment.¹⁴ In addition, the Constitutional Court of South Africa has found that the imposition of the death penalty, in all circumstances, constitutes a form of cruel, inhuman and degrading treatment or punishment, in violation of the South African constitution.¹⁵ Therefore, it is submitted that Australia's obligations under the ICCPR and CAT extend to not cooperating with foreign law enforcement agencies in circumstances where an individual may be charged with an offence that attracts the death penalty and that could result in cruel, inhuman and degrading treatment or punishment.

4.2. Australia's obligation to respect, protect and fulfil human rights and fundamental freedoms

Australia is under a general obligation to respect, protect and fulfil human rights and fundamental freedoms.¹⁶ The obligation to **respect** requires Australia to refrain from interfering, either directly or indirectly, with the exercise or enjoyment of human rights and fundamental freedoms, including the right to life and/or the freedom from cruel, inhuman or degrading treatment. The obligation to **protect** requires Australia to take measures that prevent third parties, including foreign governments, from interfering with the exercise or enjoyment of human rights and fundamental freedoms, including the right to life and/or the freedom from cruel, inhuman or degrading treatment. The obligation to **fulfil** requires that Australia take positive steps to achieve the full realization of human rights and fundamental freedoms, including the right to life and the freedom from cruel, inhuman or degrading treatment.

The obligation to protect human rights has particular relevance to the determination of when it is lawful to share intelligence with foreign law enforcement agencies, where the sharing of that information might contribute to an individual being charged with an offence that attracts the death penalty. The obligation to protect requires states to adopt positive measures to regulate and oversee the conduct of third parties. Commentators suggest that such measures should include comprehensive policies, coherent action plans and ongoing monitoring and awareness-raising.¹⁷ In the context of the death penalty, Australia therefore has an obligation to adopt policies and guidelines that 'protect' human rights and fundamental freedoms, including the right to life and the freedom from cruel, inhuman and degrading treatment, of individuals subject to the jurisdiction of foreign countries.

The 'Bali Nine' case represents a significant failure on the part of the Australian Government to satisfy its obligations under human rights law. By providing intelligence to the INP, the AFP exposed the 'Bali Nine' to a real risk that the death penalty will be imposed on them, in violation of Australia's human rights obligations. Tragically, that risk has eventuated.

¹² ICCPR, *supra* note 9, art. 7.

¹³ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 25 June 1987).

¹⁴ See Human Rights Committee, *General Comment No. 20: Prohibition of Torture and Cruel Treatment or Punishment*, UN Doc. HRI/GEN/1/Rev.1 at 30 (1994), at para. 6. See also Andrew Byrnes, "The Right to Life, the Death Penalty and Human Rights Law: An International and Australian Perspective", University of New South Wales Faculty of Law Research Series, Paper 66 (2007), 34-35, available at: <http://law.bepress.com/unswllrps/art66/>.

¹⁵ See, e.g., *State v. Makwanyane* 1995 (3) SA 391, 1995 (6) BCLR 665 (Constitutional Court of South Africa), at paras. 265, 270-272 (citations omitted). See also Byrnes, *ibid*.

¹⁶ Andrew Byrnes, María Herminia Graterol and Renée Chartres, *IWRAW Asia Pacific Expert Group Meeting on CEDAW Article 2: National and International Dimensions of State Obligation*; State Obligation and the Convention on the Elimination of Discrimination against All Forms of Discrimination against Women (revised May 2007), at paras. 22-28, available at: <http://www.iwraw-ap.org/aboutus/pdf/Background%20paper.pdf>.

¹⁷ *Ibid.*, at para. 59.

4.3. Cooperation with foreign law enforcement agencies

PILCH recognises that, in the interests of regional peace and security, it is necessary and desirable for Australia to cooperate with foreign law enforcement agencies. However, such cooperation should never be permitted to jeopardise Australia's compliance with human rights and fundamental freedoms, and expose individuals to the real risk of the death penalty.

Ensuring compliance with obligations under human rights law does not mean that the AFP needs to cease all cooperation with foreign law enforcement agencies. However, it does require that the AFP not assist in the investigation, prosecution or punishment of an offence in respect of which the death penalty may be imposed, or which may result in a person being subject to cruel, inhuman or degrading treatment or punishment. This should be the case regardless of whether or not charges have been laid. Assistance should not be provided where it exposes individuals to a real risk that the death penalty might be applied to them. Where cooperation is deemed to be essential, such as in cases where there is an imminent threat to human life, safeguards should be put in place to ensure, to the maximum extent possible, that no individual is put at real risk of the death penalty (see Section 5).

Recommendation 1:

PILCH submits that the AFP Guidelines should be informed by, and any revised guidelines should be consistent with, Australia's obligations under human rights law, including, in particular, the *Second Optional Protocol*.

5. Clear opposition to the death penalty in Australian Government policy and the AFP Guidelines

5.1. Labor Government policy on the death penalty

The Australian Government remains officially opposed to the death penalty.¹⁸ In addition, the *ALP National Platform and Constitution 2007* provides that "Labor opposes the death penalty and believes that death by hanging, beheading, electrocution, firing squad, or stoning is inhumane, no matter what the crime. *Labor in government will strongly and clearly state opposition to the death penalty, whenever and wherever it arises and will use its position internationally and in the region to advocate for the universal abolition of the death penalty*"¹⁹ (emphasis added).

However, statements made by senior members of the Executive have signalled a shift away from the Government's principled opposition to the death penalty. For example, in the lead up to the five year anniversary of the Bali bombings, Kevin Rudd (then Opposition leader) stated publicly that "no government that he led would ever make a diplomatic intervention to save the life of a terrorist facing capital punishment."²⁰ More recently, Prime Minister Rudd stated that the 'Bali Bombers' "deserve the justice that will be delivered to them. They are murderers, they are mass murderers, and they are also cowards."²¹ In your role as Attorney-General you have said that the Australian Government "will be advocates in respect to those Australians who are sentenced to capital punishment. We won't be advocates in respect to other individuals."²² These comments are in contrast to: Australia's official position of opposition to the death

¹⁸ See, e.g., *Second Optional Protocol*, *supra* note 2.

¹⁹ Australian Labor Party, "Strengthening Australia's Place in the World", in *ALP National Platform and Constitution 2007*, p. 240 [para. 97], available at: http://www.alp.org.au/download/now/2007_national_platform.pdf.

²⁰ Dan Harrison, "PM Slams Rudd over Death Penalty" *The Age* (Oct. 9, 2007), available at: <http://www.theage.com.au/news/national/pm-slams-rudd-over-death-penalty/2007/10/09/1191695867280.html>.

²¹ Editorial, "An Issue that Needs Diplomacy, not Jingoism" *The Age* (Oct. 4, 2008), available at: <http://www.theage.com.au/opinion/editorial/an-issue-that-needs-diplomacy-not-jingoism-20081003-4tg7.html?page=-1>.

²² Karen Kissane, "Death Penalty Stand Limited to Our Own" *The Age* (Oct. 4, 2008), available at: <http://www.theage.com.au/national/death-penalty-stand-limited-to-our-own-20081003-4tkh.html>.

penalty; the *ALP National Platform and Constitution 2007*; and, Kevin Rudd's earlier assertion that "Labor has a universal position of opposition to the death penalty both at home and abroad It is not possible, in our view, to be selective in the application of this policy."²³ They are also in contrast to the Prime Minister's statement yesterday that the Government is "universally opposed to the death penalty. We make no exception to that."²⁴

Thus, notwithstanding the Government's 'official' opposition to the death penalty, it has endorsed use of the death penalty in cases involving terrorists and has been indifferent to its application in respect of drug traffickers. Further, the Government's opposition to the death penalty appears limited to the execution of Australian citizens. PILCH considers that these inconsistencies send a damaging message about Australia's position on the death penalty, and suggest that Australia is not committed to fulfilling its international human rights law obligations. Importantly, they may also jeopardise Australia's ability to advocate on behalf of Australians facing the death penalty overseas.²⁵ As you have recently said in your role as Attorney-General, Australia "can't expect others to lift their standards if we are not prepared to set an example"²⁶ on human rights. If Australia is to "be at the forefront of upholding human rights on the international stage," it must ensure that its position on the death penalty is clear and unambiguous, and is consistent with Australia's human rights obligations.²⁷

5.2. The importance of a clear policy on cooperation with foreign law enforcement agencies

Given the gravity of the potential consequences of cooperation with foreign law enforcement agencies in potential death penalty cases, it is critical that the AFP Guidelines are clear and unambiguous. Decisions about when, and to what extent, to cooperate with foreign law enforcement agencies in such cases (particularly pre-charge situations) should not be left to the discretion of individual members of the AFP, operating in the context of an ambiguous Australian Government position on the death penalty.

In this regard, PILCH supports the recommendation of the New South Wales Council for Civil Liberties that

[t]he AFP death penalty guidelines should be modified to ensure ... that information may only be provided in all death penalty situations (both pre- and post- charge) when either: there is a guarantee from a competent foreign body that no one will be executed; or, when such cooperation is exculpatory. The only exception should be when there is an imminent threat to human life, and then only with ministerial approval and a report to Parliament.²⁸

²³ Paul Maley, "Kevin Rudd Dismisses Threat from Bali Bombers", *The Australian* (Oct. 3, 2008), available at: <http://www.theaustralian.news.com.au/story/0,25197,24438885-5013871,00.html>.

²⁴ Prime Minister Kevin Rudd, Interview with Neil Mitchell, Radio 3AW (Oct. 30, 2008), available at: http://www.pm.gov.au/media/interview/2008/interview_0575.cfm. See also Joe Kelly and Stephen Fitzpatrick, "Hypocrisy Claim Over Bali Bombers" *The Australian* (Oct. 31, 2008), available at: <http://www.theaustralian.news.com.au/story/0,25197,24579351-2702,00.html>.

²⁵ Cynthia Banham, "ALP Split on Death Penalty Stance" *The Sydney Morning Herald* (Oct. 21, 2008), available at: <http://www.smh.com.au/news/national/alp-split-on-death-penalty-stance/2008/10/20/1224351155171.html>.

²⁶ The Hon. Robert McClelland, Speech to the NSW Young Lawyers Forum, NSW Law Society (Oct. 29, 2008), at para. 21, available at: http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches_2008_29October2008-NSWYoungLawyersForum.

²⁷ Ibid.

²⁸ Michael Walton, *Law Reform and the Death Penalty: Consolidating Australia's Commitment to the Abolition of Capital Punishment* (New South Wales Council for Civil Liberties, 2008), at para. 49 available at: <http://www.nswccl.org.au/docs/pdf/dp%20law%20reform.pdf>.

Recommendation 2:

To avoid uncertainty amongst members of the AFP and the broader public regarding the lawfulness of cooperating with foreign law enforcement agencies, the AFP Guidelines should ensure that, in cases where there is a risk that an individual will be charged with an offence that attracts the death penalty, cooperation with foreign law enforcement agencies may only be provided where: a guarantee has been obtained from a competent foreign body that no person will be subject to the death penalty; or, such cooperation is exculpatory. The only exception should be where there is an imminent threat to human life and cooperation in such cases should proceed only with ministerial approval and a report to Parliament.

6. Conclusion

In PILCH's view, it is imperative that the Attorney-General's review is informed by, and any revised AFP Guidelines are consistent with, Australia's human rights obligations. In particular, the AFP Guidelines should be modified to ensure that cooperation with foreign law enforcement agencies does not expose individuals to the real risk of the death penalty. It is also imperative that any revised guidelines stipulate that cooperation with foreign law enforcement agencies is permissible only where: a competent foreign body has provided an assurance that no person will be subject to the death penalty; or, such cooperation is exculpatory. The revised guidelines should further stipulate that the only exception to this rule is cases that involve an imminent threat to human life, and that have been subject to ministerial approval and a report to Parliament. These measures are necessary in order to prevent complicity by the AFP in the conviction and punishment by death of individuals overseas.

We would appreciate the opportunity to discuss this further with you in person or with your staff.

Yours sincerely



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