

FFDLR views on Australia's mutual assistance arrangements

Please find attached Families and Friends for Drug Law Reform's submission on Australia's mutual assistance arrangements.

FFDLR's submission finds serious deficiencies in the arrangements and recommends:

The Mutual Assistance Act needs to be amended to broaden the scope of assistance to which the safeguards of the Act apply. In particular, Australia should not provide assistance where a person may be convicted for an offence carrying the death penalty unless the requesting State gives an undertaking that the death penalty will not be imposed or if imposed will not be carried out:

1. In civil law countries where evidence is being gathered or may be provided that could result in the death penalty.
2. Where assistance may be provided on an officer level or any other level, irrespective of whether a request is or is not made.

B McConnell
President

Submission

Thank you for the opportunity to provide views on Australia's mutual assistance arrangements. This brief response will concentrate on the inadequacy of those arrangements where the death penalty may be applicable and where the criminal justice system in foreign countries does not follow the system that applies in a common law country.

The discussion paper has this to say when the death penalty applies:

The Mutual Assistance in Criminal Matters Act sets clear limits on Australia's cooperation on mutual assistance in death penalty matters.

If a foreign country requests mutual assistance where a person has been charged with, or convicted of, an offence which carries the death penalty, the Minister must refuse assistance unless there are special circumstances.

And the relevant section of the Act states:

8 Refusal of assistance

.....

(1A) A request by a foreign country for assistance under this Act must be refused if it relates to the prosecution or punishment of a person charged with, or convicted of, an offence in respect of which the death penalty may be imposed in the foreign country, unless the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.

(1B) A request by a foreign country for assistance under this Act may be refused if the Attorney-General:

(a) believes that the provision of the assistance may result in the death penalty being imposed on a person; and

(b) after taking into consideration the interests of international criminal co-operation, is of the opinion that in the circumstances of the case the request should not be granted.

.....

The deficiency of the Act is fourfold:

1. the refusal to provide assistance relies on a request by a foreign country,
2. the Act depends on the person being charged or convicted of an offence,
3. the Act does not prohibit the provision of assistance at an officer level prior to charges being made, and
4. the Act does not prohibit assistance being provided when a request has not been made.

These deficiencies are self-evident and are limitations on the Australia's opposition to the death penalty. Indeed Australia is a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights [of 19 December 1966], Aiming at the Abolition of the Death Penalty. The preamble includes statements such as "abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights" and "that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life". The operative article (No 1) states:

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.
2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Australia fails its obligation under the Covenant to oppose the death penalty. Indeed the Mutual Assistance in Criminal Matters Act should carry forward that obligation but it does not. The failure is particularly significant in respect of civil law countries. In those countries a

person is apprehended, a dossier is prepared and only after all the evidence has been gathered is a charge made.

The case of the Bali 9 illustrated the failures clearly:

Australian Federal Police officers, without being requested and on an officer level, advised the Indonesian police about Australian citizens that were intending to smuggle heroin to Australia. Indonesian police arrested the Australians and proceeded to gather evidence, presumably also with the assistance of AFP officers.

Once the dossier was completed and all the evidence had been gathered the nine Australians were charged. A likely outcome of those charges was the application of the death penalty. In the event two Australians were given the death penalty and following appeals a further four were given the death penalty.

The AFP did not act contrary to any Australian law (Finn, J on 23 January 2006). There was no Australian law applicable to that circumstance that implemented the obligation of the Covenant to respect human life that would have prevented the AFP from taking action leading to the death sentence for six Australian citizens. If there is an obligation on the Australian government to respect human life then that obligation should also extend to the employees and servants of the government.

The points to be made are:

1. information and assistance was given freely without thought of the consequences of that assistance, thus the Mutual Assistance Act did not apply,
2. no charge was made until all the evidence was gathered, thus the Mutual Assistance Act did not apply,
3. no request was made for assistance, thus the Mutual Assistance Act did not apply.

The Mutual Assistance Act needs to be amended to broaden the scope of assistance to which the safeguards of the Act apply. In particular, Australia should not provide assistance where a person may be convicted for an offence carrying the death penalty unless the requesting State gives an undertaking that the death penalty will not be imposed or if imposed will not be carried out:

1. In civil law countries where evidence is being gathered or may be provided that could result in the death penalty.
2. Where assistance may be provided on an officer level or any other level, irrespective of whether a request is or is not made.

B McConnell
President
Families and Friends for Drug Law Reform
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