

Australia and the Death Penalty

A guide to confidential government documents obtained under FOI

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The confidential government documents released in late December 2007 under Freedom of Information legislation are available at: www.nswccl.org.au/docs/pdf/dpfoi.pdf. Each page has been stamped with a unique number by NSWCCCL at the bottom left-hand corner.

In the footnotes below, references to the FOI documents are in this form: “FOI n” (referring to a page number ‘n’ in the FOI documents) or “FOI n.[p]” (referring to a paragraph number ‘p’ on page number ‘n’ in the FOI documents).

1. Introduction

1. After years of failed attempts, the NSW Council for Civil Liberties ('CCL') has finally received, under Freedom of Information legislation, confidential government documents that tell (most of) the story behind how Australia's long-standing principled opposition to capital punishment was gradually undermined. The documents show how successive government decisions eroded Australia's position to such an extent that Australian police were authorised to assist in the prosecution and sentencing proceedings of death penalty cases like the Bali bombers.
2. The pace of change in Australia's position was fastest in the early months of 2003, immediately after the October 2002 Bali bombings.
3. The changes have had far-reaching consequences – especially for cases like the Bali Nine.
4. The legal advice used to justify this erosion in Australia's death penalty position is flawed. Sadly, the advice has not been released, which means that academics, lawyers and the public cannot examine it. Australians have a right to know how their government interprets its international human rights obligations.

2. Background: before the Bali bombings

5. Australian authorities cooperate and share information with foreign agencies in criminal law matters in three ways:¹
 - police-to-police assistance (informal non-court assistance)
 - extradition
 - mutual legal assistance (formal provision of evidence for court)

2.1 police-to-police assistance

6. Transnational police cooperation and information sharing ('police-to-police assistance') is not governed by statute. In death penalty cases, the AFP work under specific guidelines which grant them a discretion to cooperate prior to capital charges being laid and with the consent of the Attorney-General after capital charges are laid.²
7. As far back as 1998, federal Attorney-General Daryl Williams and Justice Minister Senator Amanda Vanstone began watering down Australia's long-standing principled opposition to the death penalty. In response to a foreign serial murder case,³ Williams and Vanstone decided that a guarantee that no one would be executed would no longer be required in every case of police-to-police assistance. Instead, the minister would retain a discretion whereby he or she *may* refuse assistance in the absence of such an assurance.⁴ Prior to this, Australia had always sought such an assurance.⁵

2.2 extradition proceedings

8. There is considerable resistance from the AFP to statutory changes requiring a death penalty guarantee in extradition cases. In 1997, the president of the AFP Association expressed concern to the *Daily Telegraph* that Australia would become a 'safe haven' for murderers and terrorists. He also expressed concern about the time it takes to obtain a death penalty guarantee:⁶

¹ for more information see: NSWCCCL, *Law Reform and the Death Penalty* (4 February 2008) 7, <<http://www.nswcccl.org.au/docs/pdf/dp%20law%20reform.pdf>>.

² *AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations* (2006), <http://www.afp.gov.au/_data/assets/pdf_file/21096/Guideline_for_international_death_penalty_situation.pdf>.

³ FOI 12.[32].

⁴ FOI 68.[7].

⁵ FOI 68.[8].

⁶ Les Kennedy, 'Loophole left three to rot in jail', *Daily Telegraph* (Sydney), 19 April 1997, 19.

If the Government wants to take a moral position on capital punishment that is up to them. However, our members are not happy with the delays now experienced in taking out provisional arrest warrants on people wanted overseas.

9. These comments from 1997 came about the same time as leaks to the *Daily Telegraph* about the extradition of a Philippines-born US citizen living in Australia and wanted in the US for murder-related charges.⁷
10. There is also considerable pressure on Australia from US law enforcement officials to do away with death penalty guarantees in extradition cases.⁸

2.3 mutual legal assistance

11. Under mutual assistance legislation, the Minister can authorise assistance in death penalty prosecutions in 'special circumstances',⁹ which are not defined in the Act but which traditionally include only two categories: exculpatory evidence; or when a guarantee is provided that the death penalty will not be imposed or carried out.¹⁰
12. In 1999, the Justice Minister Senator Amanda Vanstone further diluted Australia's opposition to the death penalty by broadening the definition of what constitutes 'special circumstances' in mutual assistance cases. Australia would no longer require a death penalty undertaking. Instead, it would be sufficient for the foreign government to provide 'cogent advice not amounting to a death penalty undertaking but making it clear that there is no reason to expect that the death penalty would be carried out'.¹¹
13. Further dents were made in Australia's death penalty policy in the aftermath of the Bali bombings.

⁷ Les Kennedy, 'Execution threat kept fugitive free', *Daily Telegraph* (Sydney), 15Apr1997, 4.

⁸ Morgan Ogg, 'Murder suspect extradited', *Daily Telegraph* (Sydney), 20 Sept. 1997, 15.

⁹ [Mutual Assistance in Criminal Matters Act 1987](#) (Cth) s.8(1A).

¹⁰ FOI 12.[30] & 84.

¹¹ FOI 12.[31].

3. The Bali bombings

3.1 investigation: Operation Alliance

14. Prior to the October 2002 Bali bombings, both Australia and the United States were placing considerable pressure on Indonesian President Megawati Sukarnoputri to introduce anti-terrorism laws. Within three days of the Bali bombings, Australian Ministers were in Jakarta increasing the pressure on Megawati. At those meetings a joint investigative task force was also set up, jointly headed by the Indonesian National Police (INP) and the AFP.¹² A few days later, with great fanfare, the official agreements were signed for the joint taskforce: Operation Alliance.¹³ The very next day President Megawati decreed new anti-terror laws, introducing the death penalty.¹⁴ Not long thereafter, Prime Minister John Howard was quoted in the Australian press saying that Australia would not protest the execution of the (as yet unidentified) Bali bombers.¹⁵
15. The new Indonesian laws caused some concern in Canberra, because AFP (and ASIO) officers were in Bali assisting in the joint investigation of what was now likely to become a death penalty case.¹⁶
16. Despite this, internal legal advice to government was that "from an international law perspective, the possible imposition of the death penalty for terrorist offence charges resulting from the joint AFP-Indonesian Police investigation will not directly affect the AFP's involvement in the joint investigation".¹⁷ The legal advice upon which this conclusion is based is not disclosed in the FOI material.¹⁸
17. With respect to mutual assistance legislation, the government's advice first pointed out that such assistance need only require the Indonesians to indicate that they did not expect any death sentences to be imposed.¹⁹ But at this stage, the Australian government was also considering many options in the immediate aftermath of the Bali bombings, including prosecution of the bombers in Australia or before the International Criminal Court.

¹² Kerry O'Brien, 'Indonesia, Aust join forces in Bali investigation', *7:30 Report* (ABC-TV), 16 October 2002, <<http://www.abc.net.au/7.30/content/2002/s703502.htm>>.

¹³ http://www.afp.gov.au/international/operations/previous_operations/bali_bombings_2002.

¹⁴ Agence France-Presse, 'Indonesia president signs anti-terror decrees after Bali blast' (19 October 2002).

¹⁵ Andrew Probyn, 'PM - no mercy for killers', *Herald-Sun* (Melbourne), 19 October 2002, 3.

¹⁶ e.g. Darren Goodsir, 'Death penalty restriction creates quandary for police', *Sydney Morning Herald* (Sydney), 28 October 2002, 7.

¹⁷ FOI 8.[7].

¹⁸ see FOI 124-5 for the undisclosed advice of the Office of International Law (14 November 2002).

¹⁹ FOI 12.[31].

3.2 prosecution

18. As the investigation progressed, it became obvious that two new dilemmas would arise once the Bali bombers were caught and charged: could the AFP continue to assist the INP once capital charges were laid and could Australia provide mutual legal assistance?
19. On 5 November 2002, the INP made its first arrest in the case: Amrozi, who was officially charged on 30 April 2003.²⁰
20. In the first week of December 2002, the AFP wrote to the Attorney-General's Department informing them that the INP had made an 'informal request' to the AFP to locate eye-witnesses (presumably now in Australia).²¹ The AFP also alerted the department to the likelihood of an Indonesian request for AFP forensic experts to give evidence in the prosecution of the Bali bombers.²²
21. The AFP asked specifically for advice on whether Australian civilian witnesses and/or AFP officers could attend to give evidence at the trial of the Bali bombers.²³
22. In relation to police-to-police assistance, the question was one for the Attorney-General. Under the AFP's death penalty guidelines, officers could only cooperate if the Attorney-General authorised it. So a policy decision was required.
23. In relation to mutual legal assistance, assistance could only be provided if 'special circumstances' existed.
24. At the same time, the Attorney-General's Department also sought legal advice on whether Australia could send 'legal specialists' (presumably government lawyers) to assist in the Indonesian prosecutions.²⁴
25. The AFP also prepared further submissions, which remain undisclosed.²⁵
26. In February 2003, in response to the official request from the AFP,²⁶ a departmental submission was sent to the Attorney-General Daryl Williams and Justice Minister Senator Chris Ellison.²⁷ The submission recommended authorising continued police-to-police assistance. The submission expanded previous advice and concluded that, not only could the AFP assist in the Indonesian investigation, the AFP could assist with

²⁰ Wahyoe Boediwardhana, 'First Bali bombing suspect formally charged', *The Jakarta Post* (Jakarta), 1 May 2003, 1.

²¹ FOI 126.

²² FOI 126; see also FOI 25.

²³ FOI 126.

²⁴ FOI 25; see also FOI 127 for an email from International Criminal Branch of AGDs to OIL.

²⁵ FOI 133.

²⁶ FOI 67 (26 February 2003) is a revised version of FOI 38 (11 February 2003). The revision mentions an AFP submission requesting continued cooperation with the INP.

²⁷ FOI 38 (Attorney-General) & 46 (Justice Minister). **Note:** FOI 67 is a revised version of FOI 38.

'potential prosecutions' in a capital punishment case without contravening Australia's international obligations with respect to the death penalty.²⁸

27. Significantly, the February 2003 submission also concluded that mutual assistance in a death penalty case 'would not violate Australia's international obligations in relation to the death penalty'.²⁹ However, it warned that any expansion upon the two well-understood 'special circumstances' (the no-execution guarantee or the provision of exculpatory evidence) would be watched closely by other retentionist nations like Singapore and Malaysia.³⁰
28. The submission notes that 'Indonesia has not requested formal mutual assistance in this case and the AFP has advised that such a request may have operational disadvantages, including time delays'.³¹ Presumably this refers to the AFP's long-standing opposition to the time it takes to obtain a death penalty guarantee.³²
29. The submission also notes that Australia could request an undertaking from Indonesia not to execute anyone.³³ The AG's advisors continued:³⁴

However, such a request is unlikely to be well-received by the Indonesian Government or significant sections of the Australian community.
30. With respect to police-to-police assistance, the advisors stated that 'the Department would not recommend pursuing an undertaking in relation to police to police co-operation'.³⁵ No reasons are given for this recommendation.
31. On the 19th or 20th of February 2003, the Justice Minister wrote to the AFP Commissioner Mick Keelty confirming that the AFP could continue to cooperate with the INP, even though the suspects might be executed after prosecution.³⁶ The Minister placed conditions on continued cooperation. In essence the conditions state that so long as the Indonesians prosecute non-Australian adults who are arrested outside of Australia, then the AFP can assist the INP.
32. The advice upon which these conditions are based has been removed from the FOI documents.

²⁸ FOI 39.[7] (expanding on FOI 8.[7]).

²⁹ FOI 42.[25].

³⁰ FOI 43.[31].

³¹ FOI 42.[23].

³² see [8].

³³ FOI 43.[32].

³⁴ FOI 43.[32].

³⁵ FOI 43.[33].

³⁶ FOI 57 (20 February 2003); FOI 135 (19 February 2003).

3.3 Australia changes its stance on the death penalty

33. On 16 February 2003, Prime Minister John Howard appeared on the *Sunday Sunrise* television program and announced that if the Bali bombers were sentenced to death under Indonesian law, then "there won't be any protest from Australia".³⁷
34. The February submission to the Attorney-General is revised a few weeks later.³⁸ The revision states that the 'Australian Government has given a clear indication that it will take all measures to assist in bringing the perpetrators of the bombings to justice'.³⁹ It also distinguishes the Bali bombing case from previous cases on the grounds of the 'heinous nature of this crime, the number of Australians killed and the provision of evidence being in Australia's national interest'.⁴⁰
35. The revised submission acknowledges that Prime Minister Howard 'has indicated publicly...that Australia would not seek [a death penalty] undertaking in this case'.⁴¹ As a consequence, the Department's recommendation that no undertaking be sought in police-to-police assistance is redundant and is removed.
36. Most significantly, the confidential submission notes the Foreign Minister's past statements confirming "Australia's 'universal and consistent' opposition to capital punishment". The submission states that DFAT and the Department of Prime Minister and Cabinet "are currently discussing a revision of this position in light of the Government's strong stance on terrorist offences".⁴² This revised submission is approved by Attorney-General Williams on 28 February 2003.⁴³
37. On 18 March 2003, a 'Talking Point' entitled "Has the Prime Minister in his recent comments, reversed Australia's long-standing opposition to the death penalty?" was prepared by departmental staff.⁴⁴ Familiar government rhetoric is invoked for the first time: "The Government decides how and when it will provide assistance..." and it has "always been a matter for the Government to decide how and when it chooses to make representations to other countries on the death penalty".⁴⁵

³⁷ ATV Channel 7, "Interview with John Howard (Part 2)", *Sunday Sunrise* (16 February 2003) <http://seven.com.au/sundaysunrise/politics_030216_two>. Similar comments soon followed in relation to Osama bin Laden (FoxNews, "John Howard, Australian Prime Minister", *Your World with Neil Cavuto*, 6 March 2003, <<http://www.foxnews.com/story/0,2933,80534,00.html>>) and Saddam Hussein (Maria Hawthorne, "Saddam can die: Labor", *AAP Bulletins*, 1 July 2004).

³⁸ see nn 26 & 27.

³⁹ FOI 68.[6].

⁴⁰ FOI 68.[8].

⁴¹ FOI 72.[35].

⁴² FOI 74.[44].

⁴³ FOI 74.

⁴⁴ FOI 80.

⁴⁵ FOI 80.

38. In this Talking Point, probably by mistake, the government's legal advice is finally revealed.⁴⁶

The obligations under the ICCPR (and therefore also the OP) apply to "...individuals within [Australia's] territory and subject to its jurisdiction". This Department has previously advised that, in its view, the ICCPR and OP do not apply to individuals outside of Australia's territory or not subject to Australia's jurisdiction. In the Bali attacks, the issue of Australia's obligations under the ICCPR and OP do not arise.

39. This legal advice is flawed. It cannot be reconciled with the UN Human Rights Committee's observation that, under the ICCPR and Second Optional Protocol, Australia is obliged to ensure that it exposes no one in any circumstances to the real risk of execution.⁴⁷ Furthermore, if the flawed legal advice is followed to its logical conclusion, then it authorises Australian police and security agents to assist their foreign counterparts in violating fundamental human rights – so long as they do it overseas and their counterparts are the ones detaining the victim.

3.4 expanding 'special circumstances'

40. By April 2003 the AFP had received and complied with 'informal requests' from the INP for the compilation of 20 witness statements to be used as evidence in court against the Bali bombers.⁴⁸ The AFP also provided several forensic statements to Indonesia 'through diplomatic channels'. The AFP also prepared 20 victim impact statements to be used in the death penalty sentencing proceedings of the Bali bombers.⁴⁹
41. All of this assistance is clearly in violation of mutual assistance law. Section 5 of the Mutual Assistance Act clearly states that the purpose of the Act is *inter alia* 'to regulate the provision by Australia of international assistance in criminal matters when a request is made by a foreign country for...the taking of evidence, or the production of any document or other article, for the purposes of a proceeding in the foreign country...'.⁵⁰ Presumably, the requests for assistance are falsely characterised as 'informal', so as to avoid the human rights safeguards of mutual assistance law. But even those safeguards were soon to be undermined.
42. On 11 June 2003, Indonesia requested that Australia serve subpoenas on three Australian citizens to give evidence at Amrozi's trial.⁵¹ The

⁴⁶ FOI 82.

⁴⁷ *GT v Australia* (1997) UN Doc CCPR/C/61/D/706/1996; and *Judge v Canada* (2003) UN Doc CCPR/C/78/D/829/1998. See also: New South Wales Council for Civil Liberties, *Second Optional Protocol*, Background Paper 2005/4 (3rd edition, 2 January 2008), [29]-[35], <http://www.nswccl.org.au/docs/pdf/bp4_2005_2op_paper.pdf>.

⁴⁸ FOI 84.

⁴⁹ FOI 84.

⁵⁰ *Mutual Assistance in Criminal Matters Act 1987* (Cth) s.5.

⁵¹ FOI 87.

Australian government acknowledged this as a formal request for mutual assistance. The three witnesses were Australian victims of the terrorist blasts.⁵² Their oral evidence in court gave eye witness accounts of the blasts and also covered the impact the crime had had on their lives.

43. The Justice Minister Senator Chris Ellison found 'special circumstances' and authorised the AFP to serve the subpoenas.
44. The 'special circumstances' were that: "the evidence given by the witnesses did not implicate Amrozi in the bombing but related to the impact and consequences of the bombing".⁵³ In later evidence before a Senate Committee, a departmental secretary articulated this new category of special circumstances as 'where the information to be provided goes to the impact of a crime on the victims'.⁵⁴
45. This is a disingenuous category because it seeks to avoid the reality that such evidence assists in the conviction and sentencing of an individual facing the death penalty. In other words, it exposes an individual to the real risk of execution. This is a clear violation of Australia's international obligations under the ICCPR and the Second Optional Protocol.⁵⁵
46. The terrorist bombings of October 2002 in Bali killed 202 people and injured a further 209. International terrorism is a gross violation of human rights and should be strongly condemned. The victims of terrorism and their families deserve deepest sympathy and condolences.
47. However, Australia is opposed to the death penalty. Capital punishment has been abolished across Australia. Australia consistently opposes the death penalty at the United Nations.⁵⁶ Australia has ratified the Second Optional Protocol to the ICCPR. Australia respects the right to life of all individuals – no matter their crime. This brings with it responsibilities which are sometimes hard to bear, but to which a principled nation adheres. Australia has an obligation not to expose anyone in any circumstances to execution. This new category of 'special circumstances' breaches that obligation because it assists in conviction and sentencing in a death penalty case.
48. Over the months following Amrozi's trial and pronouncement of his death sentence (on 7 August 2003), government documents chart the public discussion on the death penalty; noting voices for and against it.
49. A further (undated) briefing discusses the meaning of 'special circumstances' in the context of the trial of Ali Imron, Amrozi's younger

⁵² Sian Powell, "McCartney wipes smile off Amrozi's face", *The Australian* (Sydney), 17 June 2003, 1.

⁵³ FOI 88.

⁵⁴ Joint Standing Committee on Treaties, *Hansard* (19 June 2006), 34 (evidence of Joanne Blackburn, First Assistant Secretary, Criminal Justice Division, Attorney-Generals Department).

⁵⁵ see n.47.

⁵⁶ e.g. UN General Assembly, Resolution A/RES/62/149 (18 December 2007), 104 votes for, 54 against and 29 abstentions: <<http://www.un.org/ga/62/resolutions.shtml>> (calling for a global moratorium on the death penalty).

brother who was also involved in the Bali bombings.⁵⁷ Though undated, the brief was written after June 2003 because it refers to the Justice Minister's decision in the advice in Amrozi's trial.⁵⁸

50. This brief clearly states that this new request for witnesses goes beyond the request made in Amrozi's case.⁵⁹ The requested witnesses are AFP officers.⁶⁰ Their evidence goes 'directly to the culpability of the accused for death penalty offences',⁶¹ not just the impact on the victims.
51. The FOI documents do not disclose what happened to this request. What is significant is that the briefing seeks to extend the definition of 'special circumstances' to include the *nature and consequences* of a crime. In the Ali Imron case the special circumstances are said to be "the heinous nature of the crime, the number of Australians killed and the provision of evidence being in Australia's national interest".⁶² Provision of mutual assistance is also considered desirable because it is 'the outcome of assisting with the Bali bombing investigations'.⁶³ The briefing also notes that so long as subpoenas are not served and the witnesses travel to Indonesia voluntarily, then no coercive powers are involved and mutual legal assistance laws can be bypassed.⁶⁴ Other reasons for providing assistance in the prosecution of the Bali bombers are also given, including:⁶⁵
- the Indonesian and Australian public expect Australia to cooperate
 - Indonesia would seek assistance from other countries, so Australia might as well cooperate
 - "failure to provide assistance could damage Australia's relationship with Indonesia, undermine the Bali bombing prosecutions and promote outrage [in Australia]".
52. Throughout the FOI documents there is no acknowledgement of Australia's international obligations to ensure it exposes no one to the real risk of execution. Nor is there any discussion of why human rights only apply to Australian citizens and not to everyone.

⁵⁷ FOI 136-139.

⁵⁸ see [42]-[43].

⁵⁹ FOI 136.[6].

⁶⁰ FOI 137.[10].

⁶¹ FOI 136.[5]

⁶² FOI 137.[9].

⁶³ FOI 137.[10].

⁶⁴ FOI 137.[11].

⁶⁵ FOI 138.

4. Postscript: after the Bali bombings

53. It should be noted that, consistent with the government's legal advice that there could be no assistance to foreign agencies in cases that placed Australian citizens at real risk of execution, the government sought and obtained from the United States a guarantee that the Guantanamo Bay detainees Mamdouh Habib and David Hicks would not be executed.
54. However, it should also be noted that the later drug trafficking case of the Bali Nine breaches this particular advice because the cooperation exposed Australian citizens to the death penalty. The Australian government's subsequent backing of AFP cooperation in that case demonstrates that Australia's death penalty policy has continued to deteriorate.