

Joint Standing Committee on Treaties

Inquiry into the Agreement between Australia and Japan concerning the Facilitation of Reciprocal Access and Cooperation between the Australian Defence Force and the Self-Defense Forces of Japan

QUESTION ON NOTICE / Spoken

QoN 001 – 05 September 2022

Topic: Mutual assistance and Australians facing the death penalty

Senator Deborah O'Neill

Question

Senator O'NEILL: I understand the bit about 'we're not going to assist'. But how do we assist our person when we're not assisting them? Where does the assistance for our citizen fit in the midst of 'we will not assist'?

Air Cdre Keane: I might defer to DFAT colleagues in a moment. But, really, Senator, **is the nature of your question about the assistance provided by the Australian government to any Australian citizen who finds themselves in custody, where they are facing a death penalty matter?** I'll defer to my DFAT colleagues in relation to those matters and processes.

Dr Mitchell: In terms of Australia's obligations around mutual criminal assistance and extradition and the like, they're actually led by the Attorney-General's Department, so they may be best placed to answer those specific questions. What I can say from a general perspective in terms of Australia's international law obligations relating to the death penalty is that, under our obligations under the second optional protocol, we as Australia have an obligation not to remove a person to another state, such as Japan, if they're in Australia, where there's a real risk that, as a necessary and foreseeable consequence of that removal, they would be subject to irreparable harm, and that would include, for us, the death penalty.

Senator O'NEILL: But that's if they're in Australia when the charge is brought. That's not if they're in the country when the charge is brought.

Dr Mitchell: Indeed. What I can also say more generally is that this treaty doesn't alter the scope of the international obligation that we have. Unfortunately, I'm not in a position to go into more information about those mutual criminal assistance and that government-to-government assistance. It may be something we have to take on notice for our colleagues at the Attorney General's Department to assist with. But those obligations exist independently and separately from this treaty, and the approach to negotiations, which our colleagues from Defence have outlined, was underpinned by that longstanding commitment from a policy perspective, but also those obligations being front of mind in the course of negotiations—those international and those domestic obligations.

Senator O'NEILL: If you could take on notice the intersectionality there, that would be good.

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Answer

Article XXI(6)(a) of the Agreement requires Australia and Japan to assist each other, to the extent possible, in carrying out investigations into offences allegedly committed by a member of the Visiting Force or the Civilian Component, which may include the collection and production of evidence, as well as seizure and handing over of objects. The Agreement, read together with the Annex and the Record of Discussion, acknowledges that Australia may refuse to provide assistance where Australia considers there is sufficient likelihood that the person under investigation could be subject to the death penalty. By choosing not to assist an investigation, Australia would not contribute to a situation in which an Australian citizen may face the death penalty.

This is consistent with Australian domestic legislation pertaining to international criminal cooperation. Under the *Mutual Assistance in Criminal Matters Act 1987*, the Attorney-General *must* refuse a request to provide assistance to a foreign country that relates to the investigation, prosecution or punishment of a person for an offence which may carry the death penalty in the foreign country, unless special circumstances exist; for example, the foreign country has provided an undertaking that the death penalty will not be imposed or carried out.

Further, where Australia receives a formal mutual assistance request, Australia *may* refuse to provide assistance where the Attorney-General believes that Australia's provision of assistance may result in the death penalty being imposed on a person. This ground of refusal is intended to apply in circumstances where charges have not yet been made against a person in the relevant foreign country.

If an ADF or civilian component member were already in custody for an offence that might attract the death penalty, Australia would consult with Japan, in line with the Agreement provisions, on the legal process and safeguards applying to the case. Safeguards have been included in the Agreement to ensure support for members of the Visiting Force and Civilian Component should they be prosecuted under the jurisdiction of the Receiving State, including consular and legal assistance (see Article XXI(8)). In line with our longstanding practice when any Australian is faced with the death penalty abroad, we would advocate strongly against the application of the death penalty, as we do to all retentionist states.