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Committee Secretary

Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade

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Dear Committee Secretary,

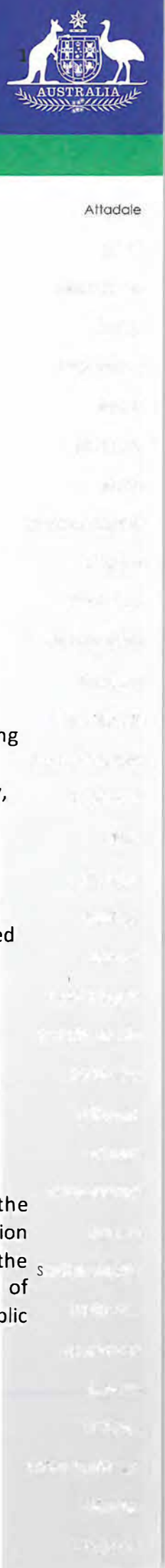
Submission on Australia's Advocacy for the Abolition of the Death Penalty

The Australian branch of Parliamentarians for Global Action (PGA) thanks the Joint Standing Committee on Foreign Affairs, Defence and Trade for the opportunity to make this submission on Australia's efforts to advocate for worldwide abolition of the death penalty, having particular regard to further steps Australia could take to advocate for worldwide abolition.

I write as the Chair of the Australian branch of Parliamentarians for Global Action (PGA), a network of more than 1100 Parliamentarians in 142 countries around the world committed to promote human rights, the rule of law, gender equality, non-discrimination, and peace and security.

PGA has led successful campaigns on the ratifications of the Rome Statute of the International Criminal Court, and in support of the newly adopted UN Arms Trade Treaty. In 2013, PGA also launched the Parliamentary Platform against the death penalty to support, maximise, and give visibility to individual parliamentary initiatives on this issue.

PGA believes that Parliamentarians have a crucial role to play in the promotion and the advancement of abolition of the death penalty. It is parliamentarians who draft legislation and national policies, and who therefore have a central role in the movement to restrict the use of the death penalty, and ultimately to abolish it. In addition, the involvement of parliamentarians in public debates can encourage, in the long run, a change in public opinion regarding the ineffectiveness of, and the alternatives to, the death penalty.



In 2015, PGA worked on a number of targeted campaigns in countries including Ghana, Malaysia, Tanzania and Uganda. It intends to expand its efforts to South Korea and Indonesia, subject to funding.

PGA's work has already led to promising results in Suriname and Cote d'Ivoire, among others, as both abolished the death penalty in March 2015. For more information on PGA's Platform and Campaigns please see: <http://www.pgaction.org/campaigns/abolition-of-the-death-penalty.html>.

PGA Roundtable in Malaysia

On 16 and 17 November 2015 I attended meetings and a parliamentary Roundtable in Kuala Lumpur, Malaysia, as part of a PGA delegation. The other international participants were Lord Jeremy Purvis of Tweed of the UK parliament and Philip Hadorn MP of the Swiss parliament, as well as Maia Trujillo, PGA Death Penalty campaign director.

The Roundtable was attended by 25 Malaysian MPs, including government Ministers H.E. Mohamed Nazri, Chair PGA National Group and Minister of Culture and Tourism; HE Minister Nancy Shukri, Vice-Chair PGA and Minister of Law; HE Minister Dato Sri Azalina Othman Said, Minister in Charge of the Malaysian parliament; and YB Datuk Mas Ermieyati binti Samsudin, the Deputy Minister of Culture and Tourism.

There was also in attendance a retired judge from the Malaysian Court of Appeal, a former Inspector General of Police, representatives from the Bar Council of Malaysia, the National Human Rights Commission of Malaysia, the ASEAN Inter-Governmental Commission on Human Rights, the Death Penalty Project and many Ambassadors and High Commissioners from countries including Australia, Austria, Denmark, Ireland, Italy, Mexico, Norway, Romania, Spain, Sweden, Switzerland, the Netherlands, and the UK.

The PGA received support and collaboration in co-hosting the Roundtable from Australia, the United Kingdom, Switzerland, and the European Union delegation to Malaysia.

Australia's stance on death penalty

Australia has long been a strong voice in the international arena against the use of the death penalty, having ratified the Second Optional Protocol to the ICCPR in 1990, and having co-sponsored biennial resolutions in the UN General Assembly calling for an immediate moratorium on executions as a first step towards the universal abolition of the death penalty. Last year, the resolution was passed with a record 117 votes in favour.

The executions in Indonesia earlier this year of Australians Andrew Chan and Myuran Sukumaran for drug trafficking offences served to strengthen Australia's focus on the issue of the death penalty, and reinforced the resolve of Australian leaders across the political spectrum to seek the universal abolition of the death penalty.

Recently, Foreign Minister Julie Bishop in launching Australia's bid for a seat on the UN human rights council flagged that the issue of the death penalty would be a priority focus for Australia. The Human Rights subcommittee of the foreign affairs committee is currently conducting an inquiry into the death penalty and there is, in addition to the PGA national group, an all-party group within the Australian parliament that is dedicated to advocating for the end of capital punishment. This group has already met with Ambassadors from US, China, Vietnam, and Iran to discuss the imposition of the death penalty in those countries.

In addition, Australia supports the work of the PGA in advocating abolition of the death penalty in the Asia-Pacific region.

Global trend away from capital punishment

More than two-thirds of the world's countries have abolished the death penalty or put a moratorium on its use, and – while acknowledging that some countries have gone in the other direction - the international trend is overwhelmingly away from capital punishment and towards the imposition of lengthy prison sentences for serious crimes.

International law

In international human rights jurisprudence the death penalty may only be imposed for the most serious crimes – this has been interpreted to mean intentional killing. The UN Special Rapporteur on torture has stated that drug offences do not meet the threshold of the most serious crimes.

This interpretation is contested by a number of countries. Indonesia, for instance, considers drug-related offences as among the most serious of offences.

Yet it must be noted, crimes against humanity, war crimes and genocide – undoubtedly the most serious crimes of all – do not attract the death penalty in international tribunals. In Rwanda, over 800,000 people were killed in the genocide of 1994; in the Srebrenica Massacre of 1995, which was just one incident in the course of war in the Balkans, 8,000 men and boys were killed; and in the Sudan, it is estimated that hundreds of thousands of people have been killed since 2003; yet the international tribunals that are responsible for ensuring that the perpetrators of these massive atrocities are brought to justice do not apply the death penalty.

Mandatory death penalty in Malaysia

In some countries, including Malaysia, the death penalty is mandatory for certain offences. International human rights bodies have found the mandatory death penalty to be contrary to the right of a convicted person to have mitigating circumstances taken into account, as well as compromising the fundamental principle of judicial independence, as it arbitrarily denies judges the discretion to adjudicate the most appropriate penalty in the light of the circumstances of the convicted person and their crime.

In 2012, Singapore amended its law to restrict the imposition of the mandatory death penalty for murder only to cases where there is an intention to kill. It also abolished the mandatory death penalty for drug trafficking where the accused can show they were acting under a mental illness or were a mere courier and where they satisfy the Public Prosecutor that they have assisted the state in disrupting trafficking activities. Under the new Act, three Malaysians have since been resentenced to life imprisonment including Yong Vui Kong, whose case raised considerable interest in Malaysia. However, PGA does not advocate the limited discretion introduced by Singapore as the appropriate model for Malaysia to follow. It is far better to abolish the unconstitutional mandatory death penalty altogether.

In Malaysia's response to the Human Rights Council's Universal Periodic Review in 2009 and 2013, Malaysia stated that it is reviewing the mandatory death penalty with a view to restoring discretionary power to courts, and that it is reconsidering the death penalty for drug offences to reduce the maximum sentence to life imprisonment.

Malaysia has the lowest threshold in the region regarding the amount of drugs that raise a presumption of trafficking and thus attract the death penalty – for example it is 50g of methamphetamines in Malaysia while it is 250g in Singapore and 3000g in Laos.

In the entire region, only Malaysia applies the mandatory death penalty for possession of firearms in specific circumstances. Meanwhile the much more serious offence of trafficking in firearms attracts a discretionary death penalty. This inconsistency in sentencing could be dealt with by returning discretion to the courts, which would then be able to look at the circumstances of each case.

PGA has indicated that it would welcome the publication of the Attorney-General's review into the mandatory death penalty and that it stands ready to assist Malaysia in any way in its reform efforts.

Reasons to end capital punishment

I would like now briefly to address the major reasons why, in PGA's view, the death penalty should be abolished.

1. The death penalty is irreversible. Where the death penalty exists, there is the ever-present possibility of the most extreme injustice being applied to innocent people. PN Bhagwati, the former Chief Justice of India, famously wrote:

The death penalty is irrevocable; it cannot be recalled. It is destructive of the right to life. Howsoever careful may be the procedural safeguards erected by the law before the penalty is imposed, it is impossible to eliminate the chance of judicial error. One innocent man being hanged should be enough to wipe out the value of capital punishment forever.

Our legal systems are not infallible and history is littered with examples of people having been executed for crimes they did not commit. In my home state of Western Australia, there are a number of high-profile cases where murder convictions have been overturned decades later, where the convicted person has spent a good proportion of their life in prison. For example, the Button and Beamish cases. If we had implemented the death penalty, these innocent men would now be dead.

2. But even when the correct person is convicted of a serious offence it is contrary to our shared human values of respect for human life for the state to plan and calculate the termination of life, regardless of the nature of the crime or the nationality of the perpetrator. As US Supreme Court Justice William Brennan once said: *'The state does not honour the victim by emulating his murderer.'*
3. Increasingly, it is argued that the death penalty is torture. The execution by Indonesia of Andrew Chan and Myuran Sukumaran came after they spent 10 years on death row in an endless churn of dread, hope, and uncertainty. Renowned US anti-death penalty campaigner and author of *Dead Man Walking*, Sister Helen Prejean once said: *'The practice of the death penalty is the practice of torture. By the time people I have been with finally climb into the chair to be killed, they have died a thousand times already because of their anticipation of the final horror.'*
4. The death penalty admits no possibility of redemption, of rehabilitation. We are each of us more than the worst thing we have ever done. Ten years ago in 2005, young Melbourne man Nguyen Tuong Van was hanged in Singapore. Van had admitted carrying drugs in order to help his twin brother pay off debts. Van admitted guilt at the first opportunity, showed great remorse and fully cooperated with the police. Just before he died, his lawyer Lex Lasry said: *He is completely rehabilitated, completely reformed, completely focused on doing what is good, and now they are going to kill him.*

The then Australian Attorney-General, Philip Ruddock, branded Van's impending execution as abhorrent, especially because the sentence was mandatory and mitigating circumstances were ignored. He said: *It's a most unfortunate, barbaric act that is occurring.*

Australians Andrew Chan and Myuran Sukumaran were imprisoned in Indonesia for more than 10 years. They demonstrated genuine remorse and had become model prisoners, working constructively at Kerobokan not only on their own rehabilitation and reform, but also for that of other prisoners. Two governors of the prison gave evidence on their behalf.

Unfortunately, their executions were carried out in spite of this. Could anyone argue honestly that their executions achieved any useful purpose for society?

5. The death penalty impedes a country's ability to advocate leniency for one's own citizens.

The Australian government's ability to make representations on behalf of Australians on death row overseas, and to campaign generally for the country-by-country abolition of capital punishment, is enhanced by our clear and uncompromising position on this issue.

Prior to the executions of Chan and Sukumaran, one of the considerations that more than 100 Australian MPs asked Indonesia to bear in mind in its stance on the death penalty was that it regularly fights for mercy for its own citizens, often poor migrant workers, sentenced to the death penalty in other countries including Saudi Arabia. Australian MPs argued that it was therefore in Indonesia's own interest to consider mercy for people on death row in Indonesia.

Similarly, in Malaysia, in 2010, the then Minister of Law, Mohamed Nazri, suggested that the mandatory death sentence should be removed for drug offences as it is difficult for the government to appeal for a reprieve on behalf of Malaysians who are caught abroad as drug mules.

The current Malaysian Minister for Law, Nancy Shukri has recently stated that the government is shifting its policy regarding drug users towards treating them rather than prosecuting them, given that it is usually the drug couriers and not the kingpins who are arrested for drug offences. It is therefore the vulnerable, the poor, the mentally ill, and migrant workers who suffer disproportionately from a mandatory death penalty.

Reasons given to retain death penalty

Deterrence is one of the main justifications given by retentionist states such as Malaysia for retaining the death penalty.

But in the US, murder rates in non-death penalty states have remained lower than in death penalty states for the last 25 years.

- As Amnesty International says: "The threat of execution at some future date is unlikely to enter the minds of those acting under the influence of drugs, those who are in the grip of fear or rage, those who are panicking while committing another crime (such as a robbery), or those who suffer from mental illness and do not fully understand the gravity of their crime."

In Malaysia, there is very little public information on the number of people on death row and the number of executions each year. The lack of transparency indicates that deterrence cannot be the reason for the death penalty. Otherwise the fact of death sentences and executions would be made well-known.

Primarily, the imposition of the death penalty in Malaysia seems to be about retribution. PGA was informed that many Muslims in Malaysia believe that 'an eye for an eye' is a religious duty.

PGA's view is that while the putting to death of the worst criminal may give some satisfaction or closure to those who are aggrieved, quite understandably, by a terrible crime, it is not right that our systems of justice function as instruments of vengeance.

Public Opinion in Malaysia

The Death Penalty Project and the Malaysian Bar Council commissioned research by Professor Roger Hood of Oxford University to ascertain public opinion in Malaysia on the mandatory death penalty for drug trafficking, murder and firearms offences. This was considered important because of the statement in 2011 by then Minister for Law, Mohamed Nazri, that the abolition of the death penalty could not be achieved without support from the public.

While in PGA's view it is essential for governments and parliamentarians to uphold important matters of principle even if this is not supported by the majority of the public, it was nonetheless heartening to learn from Professor Hood's research that public opinion would not be opposed to the abolition of the death penalty for drug trafficking and firearms offences and the amendment of the death penalty for murder to make it a discretionary, not mandatory, sentencing option.

The research even indicated that if evidence were forthcoming that an innocent person had been executed, support for capital punishment would drop dramatically, meaning that even for murder offences public opinion might not be a barrier to abolition of the death penalty altogether.

Conclusion

During the Malaysian Roundtable, government ministers Mohamed Nazri and Nancy Shukri announced that the government will, early next year, introduce a law to abolish the mandatory death penalty—particularly in relation to drug offences, and perhaps more broadly.

This announcement was warmly welcomed by the Malaysian and international parliamentarians present, as well as by diplomatic representatives from many countries, the Malaysia Bar Council, the National Human Rights Commission and civil society groups.

The PGA will continue to work with the Malaysian parliament, government and other stakeholders towards this goal.

On behalf of PGA Australia, I thank the Australian government for its support of PGA's campaign for the abolition of the death penalty in the Asia-Pacific Region. It is clear that such support has the potential to bring about significant change for the global good and I would encourage Australia to maintain such support.

Yours sincerely,

Hon. Melissa Parke MP
Federal Member for Fremantle
Chair, PGA Australia