

Capital Punishment Justice Project

Media release:

Risks to life posed by information sharing: the Telecommunications Legislation (International Production Orders) Bill 2020

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Following [Capital Punishment Justice Project \(CPJP\)'s submission](#) on 12 May 2020, and other parties' submissions to the Parliamentary Joint Committee on Intelligence and Security in relation to the first reading of the [Telecommunications Legislation Amendment \(International Production Orders\) Bill 2020 \('the Bill'\)](#), an [amended Bill](#) was passed in both houses at the end of June 2021.

The amendment passed both the House of Representatives and the Senate on the 24th June 2021. The stated objective of the Bill was to 'amend the *Telecommunications (Interception and Access) Act 1979* to establish a new framework to assist Australia's international crime cooperation efforts by improving Australian agencies' access to overseas communications data for law enforcement and national security purposes.'¹ Specifically, the Bill was said to provide 'the legislative framework for Australia to give effect to future bilateral and multilateral agreements for cross-border access to electronic information and communications data.'² As the Bill underwent revisions, its objective was tightened to focus on creating a new framework for international crime cooperation cross-border access *to data agreements to assist Australian law enforcement and national security agencies' access to overseas communications data* for law enforcement and national security purposes.³

As part of the process of review of the Bill by both Houses, the Parliamentary Joint Committee on Intelligence and Security undertook its own review of the Bill and made

¹ See the General Outline section of the First Explanatory Memorandum, available at https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6511_ems_0ac5ae09-3e3e-400b-ae5e-680a68af4e45/upload_pdf/733176.pdf;fileType=application%2Fpdf

² *Ibid*

³ See Supplementary Explanatory Memorandum, available at https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6511_ems_68b3d794-a914-4fa4-9965-db74d716ffaa/upload_pdf/JC002672.pdf;fileType=application%2Fpdf

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several recommendations. Among those was Recommendation 8, which took on board CPJP's submission, and would have prevented the Australian Government from reaching a designated international agreement with a foreign country without that country's government's written assurance 'relating to the **non-use** of Australian-sourced information obtained by virtue of the agreement in connection with any proceeding for a death penalty offence in the country or territory.'⁴

Unfortunately, Recommendation 8 was not fully adopted in the final version of the Bill.

Some positive amendments were made to the Bill prior to it passing into law, which included inserting a new clause 3 to 'further reflect Australia's long standing bipartisan opposition to the death penalty', but there is still ambiguity inherent in the new law which may put individual lives at risk. Clause 3 is said to ensure 'that the Minister must require governments of foreign countries that have the death penalty to provide a written assurance in relation to the **use or non-use** of Australian-sourced information in a prosecution for an offence punishable by death before an agreement with that country can be a designated international agreement'. However, this clause is too broad to ensure that sufficient parameters are in place to safeguard against the possible use of the death penalty following the sharing of Australian-sourced information.

The door therefore remains open to the possibility, however perverse, that the clause's requirement would be satisfied even where an undertaking was obtained that Australian sourced information **will or may** be used to **inculpate** a person in proceedings where the alleged offence is death eligible. This amendment does not go as far as the Parliamentary Joint Committee on Intelligence and Security recommended, in that the written assurance from the government of a foreign country ought to relate to the 'non-use of Australian-sourced information' in such instances. It continues to be CPJP's position that the amendments ought to have contained an unequivocal legal prohibition. We remain concerned that even were there to have been a clear prohibition – which the current legislation fails to contain - governments change, and written assurances, particularly where they may be contained 'a number of documents, such as the text of the agreement, a letter or exchange of letters, or a record of understanding or memorandum of understanding'⁵ are open to differing interpretations.

One example of a local well-known case that brings to light the real implications of an information-sharing framework that does not contain adequate safeguards – even prior to the Bill - was the arrest of the Bali Nine in April 2005. The father of Bali Nine member, Scott Rush, learned of his son's possible involvement in the commission of a crime and shared

⁴ Parliamentary Joint Committee on Intelligence and Security, List of Recommendations, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/IPOBill2020/Report/section?id=committees%2freportjnt%2f024471%2f73023

⁵ See paragraph 48 of the Subsequent Explanatory Memorandum, available at https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6511_ems_68b3d794-a914-4fa4-9965-db74d716ffaa/upload_pdf/JC002672.pdf;fileType=application%2Fpdf

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information with the AFP with the objective of preventing his son from leaving Australia and being exposed to risk of prosecution in Indonesia. The AFP notified Indonesian authorities, which led to the arrest of the group and on 29 April 2015, two Bali Nine members, Myuran Sukumaran and Andrew Chan were executed. This is an example of the risks associated with permissive frameworks for information sharing with retentionist countries.

There are currently 56 countries that retain the death penalty. Although Australia abolished the death penalty in 1973, committed to protecting the inherent right to life enshrined in Article 6(1) of the International Covenant on Civil and Political Rights, and committed to abolition by ratifying the Second Optional Protocol to the ICCPR in 1990, the risk is live of misuse of Australian-sourced information and unintended complicity in the use of the death penalty abroad.

CPJP will continue to monitor the practical implications of this new legislation, as well as the overall legislative and policy framework that may have death penalty implications, and to ensure that in practice any actions or omissions in accordance with this framework do not erode Australia's principled commitment to oppose the death penalty in all circumstances for all people.