Report on the changes to the Mandatory Death Penalty in the Penal Code (Amendment) Bill and the Misuse of Drugs Act (Amendment) Bill 2012

We Believe In Second Chances

secondchances.asia

November 2012

A Critique of the Government's Proposed changes to the Mandatory Death Penalty for Murder and Drug Trafficking

Introduction

We Believe in Second Chances is a youth-led advocacy group calling for a fairer and just criminal justice system through the abolition of the death penalty. We believe that the death penalty is an excessively harsh punishment that does not allow for repentance, remorse or rehabilitation and that it is an irreversible punishment at the end of a process that is prone to human error, which means that it is all too possible that innocent lives will be taken away. The experience of other jurisdictions has also shown that its use will inevitably be unfair and arbitrary. We accept however, that change can be effected through incremental steps rather than a revolution of the system, and that society may not be fully ready for this change. This is the reason why our group advocates for the full abolition of the mandatory aspect of the death penalty as a step towards an eventual moratorium on the use of the death sentence. This is also why we welcome the government's proposals as small steps in the right direction, and as an indication that their position on the issue is not set in stone. We do not think that the choice is a simple dichotomy between being tough on crime and striving for a fair and just criminal system, but that both can exist mutually. We are hopeful that should there be no adverse consequences after these laws have taken effect, the government would continue to make further changes to the system to reduce the use of capital punishment in Singapore.

Background

1. The government first announced its intentions to reform the current mandatory death penalty regime for murder and drug trafficking offences in two ministerial statements by the Home Affairs Minister and the Law Minister on the 9th of July 2012[1]. In their statements, it was expressed that the government intended to reform the current system of mandatory death through incremental changes as a result of studies carried out in 2010 and 2011 by the Ministry of Home Affairs.

[1] Hansard, Monday 9 July 2012, Statements by the Deputy Prime Minister and

2. After a period of consultation with various stakeholders, the government tabled the Penal Code (Amendment) Bill and the Misuse of Drugs Act (Amendment) Bill, which were first read in Parliament on the 15th of October 2012. The Bills will be read a second time and debated upon when Parliament reconvenes on the week of the 12th of November.

3. Having had the opportunity to study the proposed amendments to the law we now express our views in this brief. Although we have stated our position in relation to the use of capital punishment, we would strive to confine this brief to addressing the provisions of the Bills themselves to present the most constructive feedback in context.

Proportionality and Judicial Discretion

4. In announcing the above-mentioned reforms, the government has implicitly recognized that a punishment prescribed by law must not only fit the crime, it should also be proportionate to the culpability of the offender. This is the main reason why they have chosen to make the death penalty discretionary for murder offences under section 300 (b) to (d) of the Penal Code and for drug trafficking offences under section 5 of the Misuse of Drugs Act, if the offender is found to have been met the two strict requirements.

5. The government has also implicitly recognised that judges are best placed to decide the appropriate punishment for the offender, and that the mandatory death penalty goes against this principle because it ties the hands of judges. Unlike in a normal criminal trial, where judges are able to take into account aggravating and mitigating factors when deciding on the appropriate punishment, they cannot do likewise under the current mandatory death penalty regime where death is the only punishment they can impose.

6. It is therefore their view that the underlying philosophy of our criminal justice system should seek to provide judges with more discretion, not less.[2] This also means that the government has recognized that discretionary sentencing is to be preferred over mandatory sentencing unless there are convincing reasons otherwise.

The Mandatory Death Penalty and Deterrence

7. The deterrent effect of the death penalty and its mandatory nature has been often cited as a reason for its retention by both the government as well as a significant proportion of supporters of the punishment. The relatively low rate of capital crime in our city-state is alluded to as evidence that the system works.

8. Criminological studies however, point in a different direction. In a recent paper titled "*Executions, Deterrence and Homicide: A Tale of Two Cities*"[3], a comparative study between Hong Kong and Singapore's homicide rates was undertaken. The study found that homicide rates in Hong Kong achieved a steady decline in the 35 years since 1973, even though the death penalty was abolished in the state in 1993. What is of greater significance however is that the trend was *remarkably* similar in Singapore. The authors argue that the deterrent effect of the death penalty is placed in significant doubt with this finding. Although they concede that zero deterrence cannot be proved, and that there is the possibility of a few marginal cases where the deterrent effect is indeed present, the general decline of homicide rates and the corresponding trend between the two cities cannot be significantly attributed to the presence of the death penalty, and it would strongly suggest that the decline is due mainly to other factors. The authors have also argued that the same principles apply to drug trafficking, and they maintain the position that there is no scientific evidence to show that the death penalty is an effective deterrent for homicide or drug crimes.

---

[2] Hansard, 9 July 2012, Minister for Law and Foreign Affairs, Mr K Shanmugam
[3] Journal of Empirical Legal Studies, Vol. 7, No. 1., pp. 1-29

9. As against this, no evidence has not been put forward by the government to support its stand that the death penalty regime gives rise to a significant deterrent effect. We respectfully submit that, on the available evidence, the supposed causal connection between our low capital crime rates and the presence of the death sentence is inadequately demonstrated, and cannot be employed to justify either the continued use of the death penalty, or at the very least, the mandatory application thereof.

10. We also urge the government to publish such data and information as would be necessary for satisfactory studies to be made of the deterrent effect of the death penalty and of its mandatory application, as well as to make available any study that it has conducted in relation to the mandatory death penalty. This is consistent with the government's support of the recommendation made by the United Nations Human Rights Council during the Universal Periodic Review, to make available statistics and other factual information on the use of the death penalty. Our government assured the UNHRC that the provision of such data has already been implemented, or was in the process of being done[4].

Amendments to the Mandatory Death Penalty for Murder

11. The offence of culpable homicide amounting to Murder is covered under section 300(a) to (d) of the Penal Code.

---

[4] Report of the Working Group on the Universal Periodic Review A/HRC/18/11, presented to the UN General Assembly on 11 July 2011 at para 95, where it is stated that:

> *95. The recommendations formulated during the interactive dialogue and listed below have been examined and enjoy the support of Singapore, which considers that they are already implemented or in the process of implementation:*
>
> > *95.15. Make available statistics and other factual information on the use of the death penalty (Finland);*

12. Under the Penal Code (Amendment) Bill, for culpable homicides amounting to murder, the mandatory death penalty will only apply for an offence under section 300(a) of the Penal Code. For offences under section 300(b) to (d) judges will have full discretion to decide on whether the punishment of the offender should be death, or life imprisonment with caning.

13. As the Law Minister explained in his ministerial statement, only section 300(a) deals with murder with a clear intent to cause the death of the victim. For sections 300(b) to (d) however, the intent to cause death does not need to be proven for the accused person to be found guilty. All that it requires is for the prosecution to show that there was an intention to cause the injury that led to the death of the victim, with the knowledge that death was a likely or highly probable result.

14. As such, we would propose that offences under section 300(b) to (d) should not be liable for the death penalty. In the context of these reforms, it is our stance that the punishment of death should be reserved only for offences which a person's intent to cause the death of the victim is proven beyond reasonable doubt. An offence committed with the intention to cause an injury that led to death is of a lower culpability than one committed with an outright intention to kill, and as a result, should not attract the ultimate punishment of death. The appropriate punishment for such offences would be that of life imprisonment with caning or a minimum prison term of 10 years which may extend to 20 years, with caning.

15. For murder offences committed under section 300(a), we propose that the death penalty be made discretionary, with the alternate being life imprisonment. This is because we believe that a mandatory death penalty does not allow the judges to consider strongly mitigating factors which may militate against the imposition of the death sentence on an offender, even in cases where an intent to cause death is shown. There are any number of reasons why even an offender who killed intentionally ought not to be punished with death. For example, under the Penal Code, the defence of duress does not apply to the offence of murder. However, if one commits an act of murder with the

intent to kill under s300(a), but with a reasonable apprehension that instant death to himself or any person might result, a convincing case can be made out that while the offender should not be entirely exonerated, he or she ought not to suffer death. Another example stems from the current position in the Evidence Act that it is the accused who must prove general or special exceptions. For example, in a situation where the trial judge encounters conflicting but equally plausible expert testimony on diminished responsibility, under our current law, if the accused fails, he or she must suffer death. A discretionary system would be able to fine-tune the sentence here to avoid the imposition of the death penalty. This will not be possible however, if the death penalty is made mandatory for s300(a) offences.

Amendments to the Mandatory Death Penalty for Drug Trafficking

Defining Drug 'Mules'

16. Under section 33B(1)(a) of the Misuse of Drugs Act (Amendment) Bill, the government has proposed to make the death penalty discretionary for offenders who satisfy two strictly defined requirements.

17. The first requirement is that accused persons prove, on a balance of probabilities that their involvement is restricted to the acts defined in s33B(2)(a) in order to achieve a more proportionate sentencing system. We would argue with respect however, that s33B(2)(a) may be under inclusive and might give rise to instances where offenders with similar levels of culpability are given vastly different sentences.

18. What is obvious from the wording of the Bill and the government's statements is that the exceptions to the mandatory death penalty are meant to cover those who perform a lesser role in the drug syndicate, what we would usually term as the 'mules'. It is our position that these offenders should be defined according to their relative roles or responsibilities in the drug syndicate, rather

than by an exhaustive and strictly defined list of acts. For example, it is unclear whether an offender who performs a limited role of packing the drugs[5] under instruction can come under the provisions of s33B(2)(a) even though his/her culpability may be similar to that of a person who transports a consignment of drugs, all things being equal. Even though a reasonable case can be made for both offenders to be given a similar sentence, this may not be possible because of the strict wording of the Bill, and would thus give rise to a situation which may be said to be unfair or unjust.

19. We would therefore argue for a more flexible definition of s33B(2)(a), where the identification of 'mules' is made with reference to the culpability of offenders as demonstrated by their relative roles and responsibilities in the drug syndicate. This is the approach taken by the Sentencing Council of England and Wales, where a 'mule' is identified for sentencing purposes on the basis of, inter alia, their limited function in the syndicate, the manner in which they were engaged, their influence on the operation and if they were involved through[6]. This, we would submit, is the more appropriate approach to take and is one that is more in line with the governments' objective of sifting out those with a significantly less culpable role in trafficking.

Offence of abetting drug trafficking/importation not covered

20. It is also pertinent for us to point out that the offence of abetment in relation to an offence of drug trafficking or importation is excluded from the two qualifying requirements. This would mean that should a person with the culpability of a 'mule' be charged and found guilty of abetting a drug trafficking offence, he/she would not qualify for alleviation of the death penalty. Under the Misuse of Drugs Act and the Penal Code (where the act abetted is actually committed), a person found guilty of abetting an offence will be liable to the same punishment prescribed for the principal offence.

---

[5] See for eg, *Public Prosecutor v Phutita Somchit and another* [2011] SGHC 67 3 SLR 719

[6] Sentencing Council of England and Wales, Definitive Guidelines for Drug Offences pages 3-15; http://sentencingcouncil.judiciary.gov.uk/guidelines/guidelines-to-download.htm

Abetment comes in many forms and with varying degrees of culpability. An abettor, whose only role is to aid the principal offender in one isolated instance of trafficking, say by driving a vehicle across the border, cannot qualify although the culpability of the principal offender is greater than that of the abettor. We propose that the courts be given the same discretion in sentencing abettors for these offences.

Substantive Assistance – Its actual meaning

21. Having passed the hurdle of section 33B(2)(a), in order to secure the mere chance of escaping the death sentence, a mule would also have to pass the strict requirements of section 33B(2)(b). Under this provision, substantive assistance would have to be rendered to the CNB in disrupting drug trafficking activities within or outside Singapore, and this must be done to the satisfaction of the Public Prosecutor.

22. It must be pointed out however, that a clear and unambiguous meaning of the term 'substantive assistance' is far from present in the wording of the Bill or from the statements by the Ministers. It is unclear as to whether 'substantive assistance' refers to the good faith of the offender who offers cooperation, or the actual outcome of the cooperation in disrupting illegal narcotic activities.

23. Should it be decided based on the outcome of the assistance rendered, we would think that this is a standard that is too high for mules to meet. This is a concern shared by Members of Parliament and Academics alike[7]. The focus on the outcome of the assistance also gives rise to a contradiction in the objectives of the law. Given that the government intends only to extend these provisions to 'mules' it follows that it is this group of offenders who are least likely to possess information that can lead to the disruption of illegal drug trafficking activities. Because these 'mules' operate at the lowest levels of the drug syndicate, their involvement or interaction with the upper levels of the

[7] The Straits Times, 20 October 2012, A Matter of Life and Death: Mandatory Death Sentence

syndicate is rather limited and it follows that they would possess very little information, awareness or understanding regarding the specifics of the operation. Furthermore, the leaders of the syndicate can be expected to take deliberate steps to prevent these 'mules' from possessing information which may incriminate them.

24. We would also like to add that there may be situations where threats of violence or death to the offenders or their families are made by syndicate leaders to offenders should they give incriminating evidence or information leading to their arrests or conviction[8]. In such circumstances, the offenders would literally be put in a position where they are faced with an impossible dilemma of choosing between their lives or the safety of their loved ones and it would be unfair to place them in such a position. The problem is especially pressing where the offender's family is not in Singapore and therefore outside of the protection of the Singapore police or Narcotics Bureau. We propose that where there is evidence that this is indeed the case, it ought to be taken into account in assessing offender cooperation.

25. Viewed in this context, the requirement for them to produce information or assistance, which has a 'substantive' effect, would place on them a very heavy burden, one which may not even depend on their willingness to cooperate, but on their ability to produce information useful to the CNB. It also means that two offenders of similar culpability may receive a manifestly different sentence as a result of the difference in the quality of the information that they happen to posses.

26. Should the definition of 'substantive assistance' be one determined by the intent to cooperate however, this means that each offender would be given a fairer opportunity to secure a chance of escaping the death sentence. We would like to point out however; in this case, the Court is the appropriate and best judge of intent. Whether an intention to assist is present should be judged in a fair and objective manner, based on the facts and circumstances of the

[8] *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872, page 9, para 8

case. This should be done by the Courts, who are required to give reasons for their decision, all the more necessary when it determines whether a person receives a life sentence or one of death. The Bill makes the Public Prosecutor the ultimate judge of substantive cooperation. This is not satisfactory and it should be a matter adjudicated by a judge whose independence is constitutionally guaranteed and who decides after full argument, giving reasons which are susceptible to appeal.

27. We would therefore expect clarifications by the Ministers on this important issue when the Bill is debated in Parliament.

Lack of Transparency from the Public Prosecutor

28. Section 33B(4) acts to preclude offenders from challenging the decisions of the Public Prosecutor in certifying that an offender has substantively assisted the CNB, except where one can prove that it was done in bad faith or with malice.

29. It is trite law that a person who seeks judicial review has to adduce evidence to establish a case against the decision maker. In this context, it would be close to impossible for aggrieved persons to prove a case against the Public Prosecutor should they not be entitled to the reasons for the grounds of that decision. Furthermore, these decisions are frequently made based on confidential information that is not disclosed to the offender.

30. While we understand the rationale in being cautious about the amount of litigation that may result from allowing the Public Prosecutor's decisions to be challenged, we would submit that this is not an adequate justification because it removes transparency from the decision making process. We would like to reiterate the fact that the decision of the Public Prosecutor to certify that an offender has assisted is **critical** in determining whether the offender has a chance to escape the death sentence. The nature of the consequences of this decision would militate strongly in favour of reasons being given, and for the offender to be given a fair chance to know if they have been deprived of their

right to life in accordance with the law under Article 9(1) of the Constitution.

31. It is therefore our position that the Public Prosecutor should not be the sole judge of whether 'substantive assistance' has been rendered by an accused. If 'substantive assistance' should be required at all, it should be judged in an objective manner by a judge who is obliged to give reasons. While the Public Prosecutor should be entitled to be heard on the matter, his/her decision should not be the critical decision that determines if a person gets a sentence of life or death. This is especially so given that their decision cannot be challenged by an offender.

32. As such, we would submit that the Court may take into account the Public Prosecutor's position on the matter, but should make the final decision the issue based on the facts and circumstances of the case.

<u>Requirement of 'Substantive Assistance' inappropriate</u>

33. Having elaborated on the problems of the 'substantive assistance' clause in practical terms, we would like to put forward our position on the principles and the ethics of the provision.

34. It has been made clear by the Minister for Home Affairs and the Minister for Law that the objective of the 'substantive assistance' requirement is to provide the authorities with another tool to enhance their enforcement operations.

35. However, what this means in effect, is that the **decisive** factor that determines whether an offender receives an automatic sentence of death or gets a chance to argue for a sentence of life imprisonment, **is based on how useful they are to the state in achieving certain ends**. Even though we appreciate the legitimacy and justification of those ends, the life and death of offenders should not be decided based solely on their utility to the state. This goes completely against the purpose and principles of a criminal justice system, especially in a modern democratic society.

36. What this means is that two offenders who have committed a crime under similar circumstances, but happen to posses information of contrasting utility to the authorities will receive *vastly* and *categorically* different sentences even though they share a similar degree of culpability. This is notwithstanding the fact that the offenders who possess "inferior" information may have strong mitigating factors of another kind. This would be manifestly unfair and unjust.

37. Again we would reiterate our belief that the punishment imposed on offenders should be decided mainly in relation to their culpability. This is the case with murder and it should be the same for offenders who are found to be mere 'mules'. This is even more significant in the context of the death penalty. The punishment of death is the ultimate punishment afforded by the law. By its nature, it is extremely harsh and it does not afford the chance for a person to be rehabilitated and once carried out. It is irreversible. The difference between a sentence of death and life imprisonment therefore, cannot be reduced to one of relative degree or extent. It is of a wholly different category of punishment altogether.

38. While the fact that an offender has cooperated or assisted the authorities in disrupting illegal drug activities can and should be considered a mitigating factor in deciding the extent of the punishment, this should not be the sole (practically) decisive factor in determining whether a person receives the death penalty. The difference between a decision on a 20 or 18-year prison sentence is **qualitatively and categorically** different from a decision on the life or death of a person.

39. As such, we would strongly urge the government to do away with substantive assistance as practically the sole ground of avoiding the death penalty.

The Appropriate Punishment for Drug 'Mules'

40. Given that drug mules possess a relatively lower level of culpability and the grave difficulties they will encounter in qualifying under one of the two conditions, we would submit that for those who do succeed it is appropriate to abolish even the discretionary death penalty, and to replace it with life imprisonment instead.

41. The mandatory death penalty was originally designed to deter drug syndicates from operating in and into Singapore. However, as the Home Affairs Minister indicated in his ministerial statement, syndicates have responded to this by moving their illegal operations offshore, making use of the 'mules' to carry out day-to-day operations within Singapore whilst the leaders maintain control remotely. The leaders always try to avoid direct contact with the drugs or avoid being involved in activities which may give rise to their arrests. They therefore actively target and exploit vulnerable groups for their purposes and it is therefore mainly the mules that therefore take the bulk of the risk burden[9].

42. This is also the reason why it is often the mules who are the ones caught, whilst we find that the syndicate leaders escape arrest. Even if the syndicate leaders are arrested, direct evidence admissible in Court may be hard to obtain due to the manner in which they conduct the illegal operations[10].

43. However, while these mules have indeed committed a grave crime, given their circumstances, we would strongly argue that the sentence of death should not apply in their case. This is because mules are often those who are from marginalized groups of society, who are often exploited by the leaders due to their vulnerable positions that result from their financial debts[11], drug addiction[12] or family circumstance[13]. They are often relatively uneducated,

---

[9] Hansard, 9 July 2012, Statement by the Deputy Prime Minister and Minister for Home Affairs, Mr Teo Chee Hean
[10] *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872, SGCA 23 paras 9, 13 and 14
[11] *Pang Siew Fum & another v Public Prosecutor* [2011] SGCA 5, at paras 20-22
[12] *Public Prosecutor v Ng Pen Tine and Another* [2009] SGHC 230, para 78

poor, or are recruited as a result of coercion[14] or intimidation[15]. These, indeed, are not excuses or justification for the crimes that they commit. They are, however, strong reasons why it is inappropriate for the sentence of death to be imposed on them. Coupled with the relatively lower level of culpability that they possess, imposing the ultimate punishment of death on these mules would be manifestly and excessively harsh.

Diminished Responsibility – Abnormality of Mind

44. We strongly endorse the removal of the death penalty for offenders who have fulfilled the requirements in s33B(3). We would urge however, that this provision be defined broadly to include people who may be suffering from mental impairment that is not recognized as a psychiatric illness.

45. The term 'abnormality of mind' has been interpreted as a requirement that the offender be suffering from a recognized psychiatric illness. This means however, that a person who may be intellectually challenged, but is not diagnosed with a mental condition for example[16], is not entitled to the defence of diminished responsibility as worded in the Bill, despite similar levels of mental responsibility or culpability.

---

[13] *Public Prosecutor v Lee Kwee Siong and Another* [2008] SGHC 117, at para 27
[14] *Public Prosecutor v Ng Pen Tine and Another* [2009] SGHC 230, paras 156 and 160
[15] *Public Prosecutor v Nagaenthran a/l K Dharmalingam* [2011] SGHC 15, 2 SLR 830, at paras 18-21. (While we note that the defence of duress was not made out by the defence, it does not necessarily mean that no intimidation existed, and it should not be precluded from being a mitigating factor in respect of the defendant's punishment.)
[16] *Public Prosecutor v Rosman bin Jusoh* [1995] 3 SLR 317

Conclusion

46. In conclusion, while we welcome the government's move towards greater judicial discretion and prescribing sentences which are more proportionate to the culpability of the offenders, we feel that there is room for further improvements in the law. Should there be no adverse consequences after the laws take effect, we would strongly urge the government to consider implementing further changes to reduce the use of capital punishment in Singapore.

Written by:

Damien Chng,
Co-founder
We Believe In Second Chances
damien@secondchances.asia
secondchances.asia

November 2012