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Representing Australian Citizens Charged With Criminal Offences Overseas

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1. INTRODUCTION

1.1 Australians are inveterate travellers

Up to 1 million Australians live and work overseas. According to the Department of Foreign Affairs and Trade (**DFAT**)[1] in 2014 – 2015 Australians made 9.7 million trips overseas. This represents an increase, year on year over a 5 year period from 7.6 million overseas trips in 2010 – 2011.

Australians travel for a variety of reasons. They travel for work and they travel for play. Australians travel to visit family and friends or to make new acquaintances. Our relative wealth as a nation and the decline in cost of global travel has enabled Australians to travel further and further afield on a regular basis. Travel enriches our country and has a positive benefit upon our economy. It facilitates the exchange of ideas, language, people and culture.

For many young Australians, travel is a rite of passage. It is seen almost as a compulsory undertaking completed at the end of high school or university.

Unfortunately, Australians devote little attention to forming an understanding of the sensibilities of travel and the implications of leaving our shores. When Australians leave Australia, they leave behind a world class justice system underpinned by fundamental legal concepts such as the presumption of innocence, the right to a fair trial and the right to have your case overseen by an independent judiciary.

1.2 Australians inevitably fall foul of foreign legal systems

With so many Australians travelling overseas, it is inevitable that Australians will transgress the laws of the countries through which they pass. Sometimes they do so knowingly and foolishly and on other occasions, Australians break the law of foreign countries innocuously and without intent. Regrettably, this means that many Australians end up being arrested, charged and imprisoned in foreign lands.

In 2014 – 2015, 1,256 Australians sought consular assistance from DFAT as a result of being arrested in a foreign country.[2] That year, there were 371 Australians languishing in foreign jails, up from 313 in 2010 – 2011.

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[1] Consular state of play 2014 – 2015 – Department of Foreign Affairs and Trade

[2] Consular State of Play 2014 – 2015 Department of Foreign Affairs and Trade

Although media reports may lead one to conclude that Bali is where the majority of Australians are incarcerated, only 14 Australians remained in Indonesian jails in February 2016. The countries in which Australians are most likely to be imprisoned are China, the United States of America and Vietnam.

Regrettably, in spite of several recent high profile convictions and executions of Australian citizens for drug related offences, drugs account for the majority of arrests and imprisonment of Australians overseas (41%).[3]

Many Australians are surprised to learn that they can be arrested, charged and imprisoned for offences in foreign countries which may seem ridiculous in Australia. In 2015, an Australian woman was arrested in Abu Dhabi after posting an image of a car parked across disabled parking spaces to a social media website. She was subsequently jailed, fined and deported from the country.

Another Australian woman who was raped in the United Arab Emirates was charged with having sexual intercourse outside of marriage. Other Australians have been surprised to learn that in some countries, having a cheque dishonoured or failing to meet a contractual obligation can result in their imprisonment.

When this occurs, Australians, who enjoy a world class criminal justice system at home can find themselves in confusing and terrifying circumstances facing legal proceedings which proceed at a glacial pace in a foreign and unfamiliar legal environment. The punishments they face can be Draconian and the prison conditions they endure can be barbaric.

Given the number of Australians overseas, Australian legal practitioners will often be approached by existing and long-standing clients, to help a loved one or a friend in a foreign prison. These people will often be confused, under immense stress and floundering in an alien legal system, in a foreign culture with proceedings being conducted in a language which they do not understand.

1.3 Is there a role to played by Australian lawyers in foreign criminal cases?

It may be temping, when approached by an existing or new client to think that a lack of familiarity with the laws of the country in which the accused is located automatically precludes an Australian lawyer from being able to provide any form of valuable assistance. However this paper will demonstrate how important it is for every

[3] Consular State of Play 2014 – 2015 Department of Foreign Affairs and Trade

Australian facing criminal charges in a foreign country to have legal representation back home in Australia.

Australian lawyers, through their understanding of fundamental legal processes and systems of Government are ideally placed to assist clients and their families to negotiate the myriad complexities of the foreign legal process. This is not to say that Australians should seek to intervene and conduct the criminal defence in the country in which their client has been charged. That is an undertaking which falls within the province of local lawyers who have an understanding of the cultural nuances and technicalities of the local legal system. However Australian lawyers have an important role to play in the defence of an Australian charged with criminal offences when abroad and there are few other occupations which can make such a valuable contribution towards an accused person's quest for justice.

2. THE LAWYER - CLIENT RELATIONSHIP

2.1 Who is your client and what is their situation?

When an Australian is accused of criminal activity in a foreign country, it is extremely rare for an Australian lawyer to be retained immediately. In many cases, the client is arrested and subjected to questioning, often without the benefit of a lawyer and in a language they do not understand.

It is not uncommon for documents to be placed before the Australian with instructions that they sign those documents, regardless of whether they understand the language the document is written in or contents of the documents themselves.

It is therefore not uncommon for Australian lawyers to be retained days or even weeks later at the request of a concerned family member or friend when their client or potential client is incarcerated in a foreign country.

In those circumstances, it is important that practitioners immediately seek to identify who their client is and what they are accused of. If there are several Australians who have been accused of the same alleged offence, it is not uncommon for families to get together and seek to retain one lawyer to represent all of the Australians who have been caught up in the legal ordeal. However if there is a conflict between the interests of each of the co-accused, even if they have separate legal representation on the ground in the country in which they are charged, practitioners should not be tempted to act for several co-accused from Australia.

When first approached to represent someone in those circumstances, it is important from the outset to ascertain the following:

(a) where is your client located and what is their legal status? The earlier you are retained, the greater the impact you can have on the case. In the initial telephone call you should try to understand whether your client has been arrested, charged, tried or even convicted. Try to gain an understanding of what they have been accused of. Often family members will seek to underplay the allegations against them or have a complete misunderstanding of the significance of the case.

(b) does your client already have local legal representation? If so, obtain the name and contact details of that lawyer.

(c) have they admitted to anything or signed any documents? Even though in some countries, an initial refusal to speak to the authorities can be interpreted as a sign of guilt, when first approached or retained, it is advisable to recommend that clients politely and repeatedly request access to a local lawyer before answering any questions.

(d) what is the accused's visa status and where is their passport?

(e) how is their health? Are they taking prescription medication and do they have access to it?

(f) do they have access to an interpreter (whether an official interpreter or someone in the prison who can act on an informal basis)?

(g) what sort of prison conditions are they enduring? If they are being subjected to inhumane or violent prison conditions it may be necessary to try to resolve this issue at the earliest opportunity. You should ascertain whether they have access to food, clean water and toilet facilities. In the initial conversation you should try to understand as much as you can about their present circumstances because this will inform the manner in which you begin representing them from the outset.

(h) are they receiving consular assistance from the Australian Government? Sometimes DFAT will be completely unaware of their plight because no-one within the Government of the host country has informed the Australian

Embassy or Consular Office. If DFAT is involved you should obtain the name and contact details of the Consular Officer with the oversight of the case.

(i) are the media aware of the case? If so, is anyone communicating with the media on behalf of your client? Until you have made a determination as to whether media attention is helpful or not, you should insist that all media communications cease immediately.

2.2 Obtaining instructions

It should come as no surprise that one of the fundamental difficulties faced by Australian lawyers representing clients overseas relates to the ability to obtain instructions from their client. In some cases clients will have access to a telephone or even email facilities and will be free to communicate with you as often as they want, at any time of the day or night. However more often than not, it will be difficult for you to communicate directly with the client because they are in prison and they are in another country and time zone.

Try to ascertain whether your client will have access to a telephone and an ability to receive visitors. If it is not possible for you to communicate with them directly it is very important that you satisfy yourself that the family members of friends who are purporting to provide you with instructions are doing so with the imprimatur of the accused. If you cannot obtain instructions directly from the accused, you must ascertain who you are dealing with and whether they are authorised to speak on the accused person's behalf.

Unfortunately, when an Australian is imprisoned in a foreign country it is not uncommon for several different concerned family members to act independently of each other. Sometimes families are divided by opinion as to the best way of approaching the situation. You may find that you have been appointed by one family group and there is another lawyer acting on behalf of another equally-concerned and committed group of relatives. In those circumstances, you need to decide who your client is and who is instructing you. If you cannot be sure that you have clear instructions to act on behalf of the accused you should not take any step which will have a direct impact upon their prospects of receiving a fair trial.

2.3 Retainer

If your client is able to sign a client agreement, you should arrange for this to be done without delay. If they have clearly authorised a relative to retain your services on their

behalf and you are satisfied that that relative or friend has that authority, you should enter into a client agreement with that person. You need to clearly set out who is liable for your fees and, to the greatest extent possible, the services you will provide and the fees you propose to charge.

It is not uncommon for people languishing in foreign jails to have insufficient funds available to them to retain your services. They often will provide the majority of their available cash to a local lawyer and will depend upon the support and assistance of friends and relatives. If they are completely impecunious and have limited access to money, the Commonwealth Attorney-General's Department maintains a scheme designed to assist Australians facing serious criminal charges in an overseas country with the cost of their defence.

The Serious Overseas Criminal Matters Scheme is only available where the accused person is at risk of being punished by imprisonment for 20 years or more or the death penalty.

Under the Scheme, assistance will not generally be granted to people who:

(a) can meet the cost of their defence without incurring serious financial difficulty;

(b) are eligible for legal assistance in the overseas country; and

(c) do not have a continuing connection with Australia.

The assistance may cover legal fees related to the defence and other related expenses. It is important to make the application quickly because the Scheme is not designed to cover the cost of any legal fees or expenses incurred before an application is made. Completed applications can be submitted to the Attorney-General's Department and will be determined within 28 days.

3. WHAT KIND OF LEGAL SYSTEM IS YOUR CLIENT EXPOSED TO?

At the risk of gross over-simplification, the contemporary legal systems of the world can be divided into four basic classes. Obviously, the legal system of each country will have been shaped by its history and cultural idiosyncrasies. For the purpose of this paper, the legal systems can be divided as follows:

3.1 Common law systems

Common law systems are obviously most familiar to Australian lawyers. A key feature of most common law systems is the adversarial nature of criminal (and civil) trials. An

adversarial trial process usually involves a decision being made by an independent judge or jury after hearing evidence from the prosecution and defence (the adversaries). In common law countries, trials tend to commence on a particular day and continue each day until the trial is concluded.

3.2 Civil law

A principal feature of civil law systems is the codification in a constitutional statute of the central source of law. Civil law is occasionally divided into sub groups revolving around French civil law, German civil law, Scandinavian civil law and Chinese civil law. Another feature of many civil law countries is the inquisitorial trial system. Under an inquisitorial system, the Court is actively involved in investigating the facts of the case (unlike the adversarial system where the Court is involved as an impartial referee or decision maker).

It is not uncommon for a trial in an inquisitorial system country to proceed over many months or even years with the trial being convened on a regular basis every few weeks or months to examine discrete and defined aspects of the case. This can be particularly frustrating for clients who are forced to remain in prison throughout the trial process.

3.3 Religious law

Religious law revolves around the idea of a religious system or document being used as a legal source. A common example of religious law countries can be found in countries which administer Islamic Sharia law such as Saudi Arabia, Egypt and Nigeria.

3.4 Pluralistic systems

A pluralistic system involves aspects drawn from a number of different legal sources such as the system employed in India which draws upon civil law, common law and customary or religious law traditions.

4. THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

Although the legal systems which operate in each country will vary greatly, it is important to have an understanding of the overriding international human rights framework which may provide the foundation of the legal system your client finds themselves in. Not all countries have signed up to the international human rights framework and many which have, appear to honour that framework more in the breach than the observance. However it is helpful for Australian lawyers representing

citizens charged with criminal offences in foreign countries to have an understanding of that human rights framework so that it may inform the manner in which they conduct the defence of their client.

4.1 The International Bill of Human Rights

The International Bill of Human Rights is made up of the:

- Universal Declaration of Human Rights (1948)
- International Covenant on Civil and Political Rights (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
- Optional Protocol to the International Covenant on Civil and Political Rights
- Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights (**UDHR**). The UDHR is not a treaty and therefore does not create legal obligations for member states. However the UDHR has had a significant impact and influence on the development of international human rights law for almost 70 years. It represents the first time the nations of the world agreed on a comprehensive statement of inalienable human rights.

The articles of the UDHR include the following:

(a) Article 5 – no-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment;

(b) Article 9 – no-one shall be subjected to arbitrary arrest, detention or exile;

(c) Article 10 – everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him;

(d) Article 11(1) – everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence;

(e) Article 11(2) – no-one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

On the day that the United Nations General Assembly adopted the UDHR, it asked the UN Commission on Human Rights to draft a covenant on human rights which would become a binding treaty. In 1966, the International Covenant on Civil and Political Rights (**ICCPR**) was finalised. Some countries have agreed to be bound by the ICCPR but many have not. For example Australia only agreed to be bound by the ICCPR on 13 August 1980 subject to certain reservations. A full list of which countries have agreed to be bound by the ICCPR can be found on the UN website. The ICCPR contains many protections similar to or comparable with the statements of intent in the UDHR. These include:

(a) prohibitions upon torture or the imposition of cruel, inhuman or degrading treatment or punishment (Article 7);

(b) the right to liberty and security of person and the right not to be subjected to arbitrary arrest or detention (Article 9);

(c) the right of anyone arrested to be informed at the time of their arrest of the reasons for the arrest and charges against them (Article 9);

(d) the right to be brought promptly before a judge and to be entitled to a trial within a reasonable time or to release (Article 9);

(e) an enforceable right to compensation for anyone who has been the victim of unlawful arrest of detention (Article 9); and

(f) the right to not be imprisoned merely on the ground of inability to fulfil a contractual obligation.

4.2 Which states are signatories?

It is helpful, having been retained to represent an Australian citizen charged with crimes in a foreign country, to identify whether the country in which your client is situated is a signatory to the ICCPR. However this statement should be tempered by the fact that many states which are synonymous with human rights abuse are signatories to the ICCPR and appear to display a cavalier disregard for its sentiments. The benefit of knowing whether your client is being subjected to the legal system of an ICCPR signatory can often lie in the pressure you can apply to politicians or diplomats to prevail upon those nations to have greater regard for the commitments their nation signed up to when adopting the ICCPR with a view to facilitating some benefit for your client.

5. DFAT ASSISTANCE

5.1 What is consular assistance?

Many Australians have a fundamental misunderstanding of the nature and extent of assistance they can receive from Australian consular representatives in the country in which they are charged. Some naively believe that the Australian Government will facilitate their release from prison, conduct their defence and return them home. In reality, Australian consular officials are able to provide limited assistance to Australians caught up in legal proceedings in foreign lands.

The nature and extent of consular assistance which the Australian Government can provide is primarily dictated by the Vienna Convention on Consular Relations (1963). This Convention, which has been signed by 179 nations, including most UN member states, the Holy See and state of Palestine provides for a "*sending State*" providing consular functions in a "*receiving State*" which include:

(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate within the limits permitted by international law;

(b) helping and assisting nationals, both individuals and bodies corporate, of the sending State;

(c) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interest of these nationals, where, because of absence of any other reason, such nationals are unable at the proper time to assume the defence of their rights and interest.

DFAT attempts to define the nature and extent of the consular services it can provide in its consular services charter. That document, which can be found at www.smarttraveller.gov.au lists the help consular staff can provide in great detail. That help includes:

> "*If you are arrested, visit or contact you to check on your welfare, provide details of local lawyers and details of interpreters if required and do what we*

can to see you are treated fairly under the laws of the country in which you have been arrested".

The charter specifically lists those tasks which consular staff cannot perform. These include:

> "• *Give you legal advice, interpret or translate documents, though we may provide details of local lawyers and translators;*
> • *Intervene in another country's Court proceedings or legal matters including employment disputes, commercial disputes, criminal cases and family law matters or child custody disputes;*
> • *Get you out of prison or prevent you from being deported;*
> • *Get you better treatment in prison than local prisoners, although we may raise welfare concerns with local authorities;*
> • *Post bail or pay your fines or legal expenses*".

In a practical sense, there is not much that consular staff can do to assist an Australian charged with criminal offences when overseas. However, the assistance they provide is invaluable and it has been my experience that they are able to provide far greater assistance than they will indicate in their public representations about particular cases.

5.2 Do Australians have a right to consular assistance?

The first page of all Australian passports contains the following request:

> "*The Governor-General of the Commonwealth of Australia, being the representative in Australia of Her Majesty Queen Elizabeth II, requests all those whom it may concern to allow the bearer, an Australian Citizen, to pass freely without let or hindrance and to afford him or her every assistance and protection of which he or she may stand in need*".

It is therefore not unreasonable to assume that if the Governor-General expects representatives of foreign governments to afford Australians "*every assistance and protection*" that they require, then the Australian Government would also afford Australians the same assistance and protection as well.

Similarly, one would expect that our government would regard Australian citizenship as a reciprocal relationship. It is not unreasonable to assume that because Australians owe allegiance and duties to Australia, the Australian Government would

regard similar duties owed to Australians as an enforceable right, inherent in their citizenship.

Regrettably, this is not the case. The DFAT consular services charter provides as follows:

> "*You do not have a legal right to consular assistance and you should not assume that assistance will be provided. We may limit the assistance we extend to you if we consider the circumstances warrant, for example where your actions were illegal, or you have deliberately or repeatedly acted recklessly or negligently and put yourselves or others at risk, or you have a pattern of behaviour that has required multiple instances of consular assistance previously*".

It is therefore surprising for many Australians to learn that there is no fundamental right to consular services, nor is there any legislative requirement for the Government to provide those services to Australians.

This principle is not confined to Australia. In the English Court of Appeal decision of *Abbasi v Secretary of State*[4], the English Court of Appeal considered an application for relief by an English citizen detained at Guantanamo Bay Naval Base. Mr Abbasi was transported to that detention centre in January 2002 and by the time of the appeal hearing had been in detention for 8 months. He sought judicial review and an order to require the Foreign Office to make representations on his behalf to the United States.

Although their Lordships twice expressed concern that in the contravention of fundamental principles of law, Mr Abbasi may be subject to indefinite detention by the United States authorities with no opportunity to challenge the legitimacy of his detention before any recognised Court or Tribunal, the Court found (in the unanimous judgment delivered by Lord Phillips MR) as follows:

> "*It is clear that international law has not yet recognised that a State is under a duty to intervene by diplomatic or other means to protect a citizen who is suffering or threatened with injury in a foreign state*".

[4] [2002] EWCA Civ 1598

The issue of the right to consular assistance has not been determined under Australian law. It was however raised in the Federal Court decision of *Hicks v Ruddock*[5].

In that case, Mr David Hicks asserted that the Australian Government had a duty to consider whether to exercise diplomatic protection in relation to his imprisonment and trial at Guantanamo Bay. The Australian Government opposed Mr Hicks on the basis that its discretion was broad and unfettered and its exercise was not subject to constraints.

The Government applied to have Mr Hicks' claim struck out but its application for summary judgment was rejected by Tamberlin J.

Tamberlin J found that the Government had not been able to demonstrate that Mr Hicks' claim had no reasonable prospect of success and when doing so, noted that the Abbasi decision provided some support to Mr Hicks' case.

The issue may ultimately be academic. The Australian Government, although not legally obliged to provide consular assistance, has adopted a practice of providing assistance when requested. Most Australians can rest assured that, subject to the constraints imposed by the Vienna Convention, their government will provide consular assistance in one form or another.

6. THE OVERRIDING APPROACH TO THE DEFENCE

It can be tempting for Australian lawyers, who have had the benefit of training and experience in a transparent and independent legal system to snipe and complain about the inadequacies of the legal system their client is exposed to. This is a dangerous practice to employ and one which ultimately can only be of disservice to the client. It matters not where your client is charged. You have no control over that situation. You can only control the way you respond to that situation and the best means of responding is to work within the confines of the legal system your client is charged in. In my opinion, the fundamental principles which must be adopted by any lawyer seeking to improve the plight of a client charged with criminal offences in a foreign country are as follows:

(a) always view the case through the prism of local laws, local cultural practices and local sensibilities;

[5] [2007] FCA 299

(b) never compare the legal system, the Courts and processes in that country to the Australian legal system;

(c) never insist upon adherence to Australian legal standards;

(d) accept that there will be differences between the judicial system in Australia and the judicial system in the country your client resides in. Don't fight the foreign system but work within it;

(e) never criticise the country your client is located in or its legal system – this is disrespectful, unprofessional and ultimately unhelpful; and

(f) your client's best chance of success lies in adapting to and working within the local system using local lawyers in accordance with local practices.

7. THE ELEMENTS OF A DEFENCE STRATEGY

Overseeing the defence of an Australian citizen charged with criminal offences in a foreign country can sometimes feel like operating a large piece of machinery. I like to imagine that the defence "*machine*" is operated through the implementation of four levers. Those levers comprise the elements of the defence strategy and they are the legal strategy, media strategy, diplomatic strategy and political strategy.

Sometimes it is necessary to employ all four strategies simultaneously. But other times only one strategy need be employed and at other times none at all. Each case turns on its own facts and will have its own particular theme or flavour. A lawyer overseeing that strategy should consult widely but should assume control of the implementation of the strategy themselves.

It has been my melancholy experience that lawyers will believe the only means of freeing a client is through the implementation of a legal strategy and media professionals will believe freedom is solely able to be obtained through publicity of the client's plight. Politicians and diplomats will also have a similarly nuanced view of their own importance. The reality is that it is only by tactfully and carefully employing all four strategies that the client's prospects of a favourable outcome are best able to be realised.

7.1 Legal strategy

The most important aspect of the legal strategy is the recruitment of the best local lawyer you can find to oversee the client's defence. It doesn't matter how highly you

value your own personal legal abilities, without a good local lawyer, your client's prospects are significantly diminished.

Local lawyers know how to operate within the local legal system. By definition, they understand the local laws and will understand how the legal system and trial process works.

DFAT is able to recommend English speaking lawyers but you should not take this as an exhaustive list. Consult widely in order to ensure that your client has been able to retain the best lawyer they can afford in the jurisdiction in which they find themselves.

It is important that the lawyer is able to speak English so that they can communicate directly with the client, their family and with you. Similarly, you need to find a lawyer who is sufficiently familiar with western interpersonal behaviour to make themselves accessible and understandable to your client and their loved ones.

Over the last 25 years the Australian legal profession has transformed itself into an accessible and engaged profession. Australians are accustomed to being able to telephone their lawyer directly and visit their lawyer on short notice. They are accustomed to enjoying a close personal relationship with their lawyers and are often surprised to discover that this is not always the case overseas. In many foreign countries lawyers are regarded as being aloof or above their clients. They seek to limit interaction with their clients and this can be disconcerting and alarming to Australians. If you can find a highly regarded lawyer who will make themselves accessible (within reason) to your client and you, this will be of immense assistance during the conduct of the case.

Your first interaction as an Australian lawyer with the local lawyer is vitally important. You have to put yourself in their shoes. To be informed by their client's family that an Australian lawyer has also been retained in the case may be disconcerting to them. They may believe you are going to take control of the case and start telling them what to do. You therefore need to ensure that your first communication with them is respectful and deferential. You should remember that you do not understand the legal system in which your client finds themselves. It should be clear that in terms of the local legal strategy, they are in control and your role is to provide assistance to them. Unless you have a right of appearance in the local Court, you need that lawyer to be firmly in your client's corner.

I have found that once local lawyers understand that you do not intend to control them, they are often more free with their time and open to suggestion and assistance.

If you have the opportunity you should attempt to visit that lawyer. When doing so, take them a small gift which is synonymous with Australia. Try to build a rapport with them because they are your client's best means of obtaining an acquittal.

Obviously a critical aspect of the legal strategy is to identify the allegations which have been made against your client and determine the nature of the charges which have been laid. You should attempt to understand what particular laws have been infringed and attempt to obtain an English language copy of those laws. You may be surprised to discover that many laws can be obtained in English over the internet. Some foreign law firms are able to supply you with their own personal English translations of domestic laws. You should also attempt to obtain the prosecution brief of evidence and all other documents relating to the case.

Attempt to have those documents translated into English. If your client cannot afford to do this, there are even software programs which you can use to obtain a rudimentary translation from the local language into English. You should never rely upon these but they can give you an indication of what the nature or intent of a document may be.

You need to find out what the legal process your client will be subjected to is. This information is best gleaned from the local lawyer - which is an indication as to precisely how important it is that you build a strong rapport with them. You should attempt to satisfy yourself as to whether there will be a trial and if so, whether it will be before a judge or jury. Try to find out how long the trial will be and whether the legal system is one which adopts an inquisitorial or adversarial trial process. Try to find out what the potential penalties are and try to get an interpreter on site at the earliest opportunity. Sit back from the case and look at all the evidence and try to understand what positive impact you can have and ask the local lawyer what you can do to assist. In many respects they face the same impediments you face due to the fact that their client is a foreigner in their country. Many documents, witnesses and supporters may be too far away from the local lawyer to be able to permit them to prepare a cohesive defence. By interviewing those witnesses in Australia and submitting summaries and statements to the lawyer on the ground in the local jurisdiction, you can have a significant impact upon the outcome of the case.

7.2 The media strategy

One of the biggest frustrations with representing an Australian facing trial overseas lies in maintaining concern or an interest in your client's plight if you believe they are at risk of being "*swallowed up*" by a brutal and uncharitable legal process.

Sometimes, there is benefit to be gained by keeping your client's case in the public eye if you are concerned that the case has dragged on far too long and is being treated dismissively in the local jurisdiction.

As a general rule, media attention is not helpful. There is too much scope for sensationalist reporting which can be misinterpreted as patronising or racist in the country your client resides in.

However, media attention can be helpful if it encourages Australian politicians or diplomats to continue to advocate for your client's matter to be dealt with expeditiously and fairly.

You should look at the case and ask yourself whether your client's position is really improved as a result of media attention. Many clients believe that by focussing the media on their case, they will gain a benefit which will see them returned home as soon as possible. This is often a misguided belief based upon their frustration with their unfortunate circumstances.

For example, a prominent story in an Australian newspaper is primarily going to be read by people in Australia. It will therefore have limited impact upon the stakeholders who have control of the case in the local jurisdiction.

Similarly, local newspapers may be disinclined to report extensively on the case for the same reasons that Australian media have to be cautious about reporting on matters before the Australian Courts.

There is a time to use the media but when doing so, you have to have a clear objective in mind. Once you have opened yourself to media scrutiny, you cannot control the way journalists report your case.

You should also bear in mind that comments made by your client or by you can be received negatively in the local media. Therefore, if you do consider it necessary for a comment to be made, it can be better if it is published by a third party so that you can distance yourself from them if there is adverse fall-out as a result of the publication.

You may find that you are regularly approached by journalists who are working on a story. They will ask if you are prepared to comment on the record. If you are not, that does not mean you should conclude the conversation. There is a tendency amongst lawyers to "*clam up*" when speaking to journalists for fear that they will say something adverse to their client's interests.

If you bear in mind that most journalists who approach you will have read widely before doing so and may have spoken to many other people involved in the case, you should regard the journalist as a very valuable source of information. Journalists may reveal to you comments made on the record by other people involved in the case itself. They may also reveal to you background information which they do not intend to publish.

If you are dealing with a reputable journalist and you ask them at the outset whether they are prepared to engage in "*off the record discussions*", you can speak reasonably freely, but always subject to the limitations of your client's instructions and your professional obligations as a lawyer.

It is always advisable to come to an arrangement with your local legal counterpart about discussions with the media. In some countries, such as Indonesia (in particular Bali) local lawyers sometimes feel compelled to hold a press conference every time they step out of a prison or meeting with their client. This may be regarded as culturally acceptable but is ultimately unhelpful. A media strategy should apply to everyone, including the lawyer on the ground in the local jurisdiction.

Considerable thought must be put into which medium is used. Sensationalist current affairs shows will always be of limited utility. The same applies to notorious "*shock jocks*" who cannot be trusted to not say something sensationalist or critical of the country your client is charged in. Reputable print and broadcast media are always preferable to daily television shows with a short term impact and over-emphasis on ratings success.

Finally, it should be noted that speaking to the media in circumstances which do not carry the consent and instructions of your client must never be undertaken. Schapelle Corby's Australian lawyer was struck off after making comments to the media which were both dismissive and disparaging of his clients and made without their authority and consent.

7.3 Diplomatic strategy

In this paper I use the word "*diplomat*" to loosely describe the diplomatic and consular officials on the ground in the country your client is being charged in. These people are invariably employees of the Department of Foreign Affairs and Trade. They therefore perform a consular function but you should always bear in mind that the "*T"* in "*DFAT*" stands for Trade. They need to balance the interests of your client against Australian trade and political interests in the country in which they are located.

As public servants, they tend to be risk averse when it comes to dealing with lawyers. They will seek to avoid communicating with you directly and when doing so, will copy in numerous counterparts, often in Canberra. You should always assume that every email you send to a consular representative who is assisting your client will ultimately end up in Canberra and may go as far as the Office of the Foreign Affairs Minister.

The consular officials assigned to your case may be under resourced and your client may be one of many they are providing assistance to.

I have found over time that it is often best for your client to speak to the consular officials directly and for you to confirm matters with them by email. This creates an electronic record and tends to result in matters being responded to quickly. It can initially be frustrating to encounter the diplomat's overriding desire to always be "*diplomatic*" in their dealings with foreign officials. However some DFAT employees, particularly those with more experience will feel more comfortable speaking to their counterparts, usually in the local equivalent of our Department of Foreign Affairs and Trade in a more robust fashion.

Diplomats and consular officials will always publically state that there is very little they can do and they cannot interfere in the local judicial process as doing so would infringe that country's sovereignty. However, if requested by you forcefully, it has been my experience that they are indeed able to make very forceful representations at a senior level in relation to concerns you may have about the case.

It has been my personal experience that they are able to insist upon Court processes being expedited, medical attention being provided to your client and witnesses miraculously appearing at Court after initially refusing to attend.

Never underestimate the power of consular officials to obtain an outcome in a case in spite of their public assertions as to their lack of power and influence. In my experience, diplomats tend to operate more slowly and with a longer (and perhaps

more practical) assessment of the time required to resolve the case but they do so diligently and with the best interests of the Australian citizen at heart.

7.4 Political strategy

The political strategy is the final element of the defence which should be employed regularly and judiciously by legal practitioners. Aspects of the political strategy should include the following:

(a) representations should be made to the Local, State and Federal representatives from the electorate your client resides in (or resided in) prior to their departure from Australia;

(b) bearing mind that there are hundreds of Australians languishing in foreign prisons at any given moment, all of whom want an audience with the Foreign Minister or Prime Minister, you should attempt to open some sort of communication directly with the Minister's office. Sometimes, the Local Member is the means of facilitating that. Equally, writing directly to the Minister creates a document which may be responded to. If you can build a rapport with the Minister's Chief of Staff that can in many respects be equally as valuable as a relationship with the Minister themselves. The advantage of speaking to a Minister is that the Minister will have the opportunity to communicate directly with their counterpart in your client's host country.

8. OTHER FORMS OF ASSISTANCE

There are other people who may be able to assist you in your representations both to the Australian Government or the Government your client resides in. These include lobbyists, local chambers of commerce and community groups, trade unions, industry groups, not for profit human rights organisations such as Amnesty International and Human Rights Watch, retired politicians and diplomats (who are often able to speak more candidly than serving politicians and diplomats) and foreign prisoner support services such as www.foreignprisoners.com.

Always be on the lookout for the inevitable approaches made to you by the phalanx of fixers and middle-men seeking to gain access to vulnerable families desperate to free their loved ones. These people will go to extreme lengths to convince you of their ability to arrange your client's freedom. Very few of them are able to deliver on their promises, and in my experience, none of them have your client's best interests at heart.

9. BRIBERY AND CORRUPTION

It is regrettably increasingly common for a foreigner who is charged with criminal offences in a developing nation to be approached by public officials seeking bribes as a means of facilitating their early release. Put simply, this is often the way things are done in those countries. Approaches may be made by police, public prosecutors and even members of the judiciary as well as a host of other people purporting to act on behalf of those public officials.

At no time should an Australian lawyer involve themselves in this process. This may be the way things are done in that local jurisdiction and it may be something the local lawyer wishes to participate in but it is a criminal offence for an Australian to engage in bribery of foreign officials. Bribing a foreign official is an offence under the Commonwealth Criminal Code, Chapter 4. The offence is contained in section 70.2 of the Criminal Code Act 1995. The offence contains a number of elements which can be divided into steps. All of the elements must be present for the offence to apply. By way of summary, a person is guilty of an offence if:

(a) the person provides a benefit to another person, offers or promises to provide a benefit to another person, or causes a benefit to be provided, offered or promised to another person; and

(b) the benefit is not legitimately due to the other person; and

(c) step one was carried out with the intention of influencing a foreign public official (who may or may not be the other person) in the exercise of their duties in order to obtain or retain business or obtain or retain a business advantage which is not legitimately due.

It does not matter whether the conduct constituting the offence occurs wholly or partly in Australia. The maximum penalties for the offence are 10 years imprisonment and/or $1.7 million fine.

The conduct can be defended if it is permitted or required by written local laws or the payment is a "*facilitation payment*" used to expedite or secure performance of a routine Government action of a minor nature.

It is difficult to foresee how paying a bribe in order to facilitate the release or acquittal of an Australian citizen charged with offences in a foreign country would be

defendable. It is equally easy to see how an Australian lawyer participating in this practice could commit such an offence.

10. CONCLUSION

There are few clients who are more vulnerable and desperate than an Australian citizen charged with criminal offences in a foreign country. Their vulnerability lies in their inability to understand the laws and processes in that foreign country and their desperation lies in the prospect that they may be imprisoned there, a long way from home, for an extended period of time. Representing a client in those circumstances is an honourable undertaking. A background in criminal law and procedure is not a prerequisite to providing that assistance because the criminal law expertise must be provided by a suitably qualified local lawyer on the ground in that country. However lawyers will invariably be qualified to provide assistance in Australia due to their experience of interacting with Government departments and agencies and their ability to facilitate communication between all of the stakeholders in the case. Clearly criminal lawyers are able to provide far more assistance than a person with expertise in another field of legal endeavour. However all lawyers should remain open to the possibility of assisting existing and new clients should they be so unfortunate as to face the prospect of a criminal trial in a foreign land.