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The Parliament of the Commonwealth of Australia

# A world without the death penalty

**Australia's Advocacy for the Abolition of the Death Penalty**

Joint Standing Committee on Foreign Affairs, Defence and Trade

May 2016  
Canberra

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## Foreword

There is no place for the death penalty in the modern world. State execution is a barbaric act that demeans the State that carries it out. The death penalty is cruel and inhumane, and is inevitably associated with miscarriages of justice, the inadvertent execution of innocents, and the disproportionate execution of the poor and ethnic and religious minorities. Not only does an eye for an eye leave the world blind, but the deliberate destruction of human life as a response to crime is an affront to the 'right to life', enshrined under international human rights law.

The world has come a long way towards ceasing the practice of capital punishment. Amnesty International tells us that in 1977 only 16 countries had abolished the death penalty. Since that year, Amnesty and many others have campaigned vigorously for an end to capital punishment, and by 2015 140 countries had abolished it law or in practice.

However, there is no room for complacency. There are still 56 countries that actively retain the death penalty, including some that execute hundreds of people each year. Disturbingly, the year 2015 saw the highest number of executions recorded worldwide since 1989. It also saw the appalling executions of Australians Andrew Chan and Myuran Sukumaran in Indonesia for drug trafficking, despite impassioned appeals from many Australians and sympathetic Indonesians.

Thankfully this spike in executions was counterbalanced by four countries abolishing the death penalty for all crimes. This was the highest number to join the abolitionist list in a single year for almost a decade. Half of the countries in the world have now abolished capital punishment completely.

Australia has long supported abolition, and is an active advocate on the world stage. As a nation, we can be proud of our advocacy and our support for the United Nations' work on abolition. But Australia can do more. Evidence received

in the course of this inquiry offered many ideas for invigorating Australia's advocacy; from multilateral and bilateral strategies, to an increase in funding for civil society organisations, especially those in retentionist countries. Witnesses also offered useful suggestions for improving Australia's messaging around our opposition to capital punishment.

In light of evidence received, this report makes recommendations that go towards focussing Australia's international advocacy and dedicating additional resources to this work. Specifically, the report recommends the Australian Government develop, fund and implement a whole-of-government strategy that focusses our efforts on retentionist countries in the Indo-Pacific region, as well as our ally the United States of America. The recommendations propose overarching goals for the strategy, as well as concrete actions to focus Australia's efforts.

The inquiry also facilitated an energetic discussion on the issue of drug trafficking and law enforcement, with many witnesses concerned about the number of people executed for drug-related crimes, particularly in Asia and the Middle East. As such, the report makes recommendations aimed at strengthening the safeguards currently in place to prevent exposing people to the death penalty as a result of police-to-police cooperation on transnational crime.

On behalf of the Committee I would like to thank the foreign governments, Australian government agencies, academics, legal professionals, non-government organisations and individuals who made submissions to the inquiry or appeared at public hearings and private briefings. Your ideas and expertise were invaluable to the Committee in the production of this report. As Chair of the Human Rights Sub-Committee I would also like to thank my Committee colleagues, who have engaged closely with the inquiry, many of whom are strong advocates against capital punishment in their own work.

This report comes at a critical juncture in the movement for abolition. As Australia campaigns for a seat on the United Nations Human Rights Council for the period 2018-2020, we have additional opportunities for advocating for abolition around the world. If we do not wish to see a further increase in executions, as we have in 2015, we must continue to campaign in a strong and consistent manner to rid the world of this cruel practice for all time.

The Hon Philip Ruddock MP  
Chair  
Human Rights Sub-Committee



# Membership of the Joint Standing Committee on Foreign Affairs, Defence and Trade

**Chair**            The Hon Teresa Gambaro MP

**Deputy Chair**   Mr Nick Champion MP

<b>Members</b>	The Hon Bob Baldwin MP (from 19 October 2015)	Senator Mark Bishop (until 30 June 2014)
	The Hon Michael Danby MP	Senator Sean Edwards (from 1 July 2014)
	The Hon David Feeney MP	Senator Alan Eggleston (until 30 June 2014)
	Mr Laurie Ferguson MP	Senator David Fawcett
	The Hon Alan Griffin MP (from 4 December 2013 until 3 September 2014 and from 10 February 2015)	Senator Mark Furner (until 30 June 2014)
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	Mr Craig Kelly MP	Senator Bridget McKenzie (from 7 July 2014)
	The Hon Richard Marles MP	Senator Deborah O'Neill (from 1 July 2014)

Mr Andrew Nikolic AM CSC MP    Senator Stephen Parry (until 30 June 2014)

The Hon Melissa Parke MP  
(from 3 September 2014 until 10 February 2015 and  
from 24 June 2015)

Senator Linda Reynolds CSC  
(from 1 July 2014)

Mr Keith Pitt MP  
(from 19 October 2015 to 2 March 2016)

Senator the Hon Lisa Singh

The Hon Tanya Plibersek MP  
(until 24 June 2015)

Senator the Hon Ursula Stephens  
(until 30 June 2014)

Mrs Jane Prentice MP  
(from 22 September 2014 until 2 March 2016)

Senator Peter Whish-Wilson

Mr Don Randall MP  
(until 21 July 2015)

Senator Nick Xenophon

Mr Wyatt Roy MP  
(until 12 October 2015)

The Hon Philip Ruddock MP

The Hon Bruce Scott MP

Mr Luke Simpkins MP  
(until 22 September 2014)

The Hon Dr Sharman Stone MP

Ms Maria Vamvakinou MP

Mr Nickolas Varvaris MP  
(from 9 September 2015)


Mr Matt Williams MP  
(from 2 March 2016)

## Membership of the Human Rights Sub-Committee

Chair	The Hon Philip Ruddock MP (from 24 September 2014)	
	Mr Luke Simpkins MP (from 12 December 2013 until 22 September 2014)	
Deputy Chair	Senator Anne McEwen	
Members	Mr Nick Champion MP <i>ex officio</i>	Senator the Hon Lisa Singh
	The Hon Michael Danby MP	
	Mr Laurie Ferguson MP	
	The Hon Teresa Gambaro MP <i>ex officio</i>	
	The Hon Alan Griffin MP (from 4 December 2013 until 3 September 2014 and from 11 February 2015)	
	Mr Ewen Jones MP (from 23 June 2015 until 11 November 2015)	
	The Hon Melissa Parke MP (from 24 September 2014 until 10 February 2015 and from 12 August 2015)	
	Mrs Jane Prentice MP	
	The Hon Dr Sharman Stone MP (from 5 March 2014 until 9 September 2015)	
	Ms Maria Vamvakinou MP	

## Committee Secretariat

Secretary	Mr Jerome Brown
Inquiry Secretary	Ms Vikki Darrough
Senior Research Officer	Dr Emma Banyer
Acting Senior Research Officer	Mr Nathan Fewkes
Administrative Officers	Mrs Dorota Cooley
	Ms Kathy Blunden



## Terms of reference

The Joint Standing Committee on Foreign Affairs, Defence and Trade shall inquire into and report on Australia's efforts to advocate for worldwide abolition of the death penalty, having particular regard to:

1. reviewing how Australia currently engages internationally to promote abolition of the death penalty; and
2. further steps Australia could take to advocate for worldwide abolition, including by:
  - i. engaging with international institutions and likeminded countries;
  - ii. cooperating with non-government organisations;
  - iii. bilateral engagements and other diplomatic activities; and
  - iv. other appropriate means.





## List of abbreviations

ABA	Australian Bar Association
ACLU	American Civil Liberties Union
ACP-EU	Africa Caribbean Pacific - European Union Joint Parliamentary Assembly
ACU	Australian Catholic University
ADPAN	Anti-Death Penalty Asia Network
AFP	Australian Federal Police
AGD's	Attorney General's Department
AICHR	ASEAN Intergovernmental Commission on Human Rights
ALHR	Australian Lawyers For Human Rights
AMA	American Medical Association
ANU	Australian National University
APF	Asia Pacific Forum of National Human Rights Institutions
ASEAN	The Association of Southeast Asian Nations
CHOGM	Commonwealth Heads of Government Meeting
CLA	Civil Liberties Australia
CND	Commission on Narcotic Drugs

DFAT	Department of Foreign Affairs and Trade
DIBP	Department of Immigration and Border Protection
EC	European Commission
ECHR	European Convention on Human Rights
ECPM	<i>Ensemble Contre la Peine de Mort</i> - Together Against the Death Penalty
EJUSA	Equal Justice USA
EU	European Union
FCO	Foreign & Commonwealth Office - UK Government
FLEAs	Foreign Law Enforcement Agencies
HMG	Her Majesty's Government - UK
HRC	Human Rights Council
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
IDPC	International Drug Policy Consortium
LCA	Law Council of Australia
LCAC	Louisiana Capital Assistance Center
MCAM	Mutual Assistance in Criminal Matters Act 1987 (Cth)
NADP	Nebraskans for Alternatives to the Death Penalty
OHCHR	Office of the High Commissioner for Human Rights
PGA	Parliamentarians for Global Action
QoN	Questions on Notice
UDHR	Universal Declaration of Human Rights
UN	United Nations



UNGA	United Nations General Assembly
UNGASS	UN General Assembly Special Session
UNODC	United Nations Office on Drug and Crime
UPR	Universal Periodic Review - at the United Nations Human Rights Council
WCADP	World Coalition Against the Death Penalty





# List of recommendations

## 3 Australia and the death penalty

### Recommendation 1

The Committee recommends that the Attorney-General's Department conduct a review of the current legislative arrangements for extradition and mutual assistance to ensure that they uphold Australia's obligations as a signatory to the Second Optional Protocol to the International Covenant on Civil and Political Rights.

## 4 Law enforcement and the death penalty

### Recommendation 2

The Committee recommends the *Australian Federal Police (AFP) National Guideline on International Police-to-Police Assistance in Death Penalty Situations* (the Guideline) be amended to include a stronger focus on preventing exposure of all persons to the risk of the death penalty, by:

- articulating as its primary aim preventing the exposure of persons to arrest or charge in retentionist countries for crimes that are likely to attract the death penalty;
- explicitly applying the Guideline to all persons, not just Australian citizens;
- including a requirement that the AFP seek assurances from foreign law enforcement bodies that the death penalty will not be sought or applied if information is provided;
- including a provision that, in cases where the AFP deems that there is a 'high risk' of exposure to the death penalty, such cases be directed to the Minister for decision; and
- articulating the criteria used by the AFP to determine whether requests are ranked 'high', 'medium' or 'low' risk.

### Recommendation 3

In light of the United Nations' position that drug crimes, including drug trafficking, do not constitute 'most serious crimes' for which the death penalty may be applied under international law, the Committee recommends that the Australian Federal Police (AFP) obtain guarantees that prosecutors in partner countries will not seek to apply the death penalty before providing information in relation these crimes. In situations where such guarantees cannot be obtained, the AFP should withhold provision of information that may be relevant to the cases concerned.

## 5 Australia's international engagement

### Recommendation 4

The Committee recommends that the Australian Government revisit the 2011 decision to decline becoming a member of the international group the 'Friends of the Protocol'.

### Recommendation 5

The Committee recommends that the Department of Foreign Affairs and Trade develop guidelines for the Department's support for Australians at risk of facing the death penalty overseas. This document should guide the coordination of:

- consular assistance;
- diplomatic representations;
- legal support and funding assistance;
- communications and media strategies; and
- other forms of support offered by the Government.

### Recommendation 6

The Committee recommends that, where appropriate and especially in relation to public messaging, Australian approaches to advocacy for abolition of the death penalty be based on human rights arguments and include:

- references to human rights law, including highlighting the 'right to life' enshrined in the Universal Declaration of Human Rights;
- condemnation for the imposition of the death penalty on juveniles and pregnant women;
- opposition to its use on people with mental or intellectual disabilities;

- 
- highlighting the disproportionate use of capital punishment on the poor, and ethnic and religious minorities;
  - communicating the risks associated with miscarriages of justice, including the irreversibility of capital punishment;
  - emphasising the inherently cruel and torturous nature of the death penalty and executions; and
  - refer to the ineffectiveness of the death penalty as a deterrent.

#### Recommendation 7

The Committee recommends that the Attorney-General's Department amend the guidelines governing the Serious Overseas Criminal Matters Scheme and the Special Circumstances Scheme, and make necessary adjustments to the schemes' operation, to ensure that:

- legal representatives working pro-bono on death penalty cases can access funding from the schemes in a timely manner;
- where practical, legal representatives are able to communicate with a specific contact person for the duration of a case; and
- where necessary due to time restraints, legal representatives have the ability to apply for funding for reasonable expenses already incurred.

## 6 Improving Australia's advocacy

#### Recommendation 8

The Committee recommends that the Department of Foreign Affairs and Trade coordinate the development of a whole-of-government Strategy for Abolition of the Death Penalty which has as its focus countries of the Indo-Pacific and the United States of America.

#### Recommendation 9

The Committee recommends that the goals of the Strategy for Abolition of the Death Penalty include:

- an increase in the number of abolitionist countries;
- an increase in the number of countries with a moratorium on the use of the death penalty;
- a reduction in the number of executions;
- a reduction in the number of crimes that attract the death penalty;
- further restrictions on the use of the death penalty in retentionist countries of the Indo-Pacific region; and

- greater transparency of states' reporting the numbers of prisoners sentenced to death and executions carried out.

#### Recommendation 10

The Committee recommends that the specific aims of the Strategy for Abolition of the Death Penalty include:

- acknowledging the positive steps taken by countries in the region, for example where countries reduce the number of crimes that attract the death penalty or remove mandatory death sentences;
- promoting greater transparency in the number of executions carried out in China, Vietnam, Syria, North Korea and Malaysia, the crimes for which death sentences were imposed and the number of people under sentence of death in each country;
- promoting a reduction in the number of crimes that attract the death penalty in China, Vietnam, Thailand, Taiwan and India;
- promoting an end to mandatory sentencing in death penalty cases in Malaysia and Singapore, especially in relation to drug crimes;
- advocating for Pakistan and Indonesia to resume their moratoria;
- advocating for an improvement in the conditions and treatment of prisoners on death row in Japan;
- encouraging Papua New Guinea not to reinstate capital punishment;
- assisting Nauru, Tonga, Republic of Korea and Myanmar to move from abolitionist in practice to abolitionist in law;
- promoting abolition of the death penalty at the federal level in the United States and encouraging state-level moratoria and eventual abolition; and
- forming a coalition of like-minded countries who can work in concert to promote abolition of the death penalty in the Indo-Pacific region.

#### Recommendation 11

The Committee recommends that the following techniques, among others, be utilised to achieve the aims of the Strategy for Abolition of the Death Penalty:

- intervening to oppose death sentences and executions of foreign nationals, especially in cases where there are particular human rights concerns, such as unfair trials, or when juveniles or the mentally ill are exposed to the death penalty;

- 
- commissioning research and analysis to inform the specific actions and advocacy approaches which may be most effective in each priority country;
  - provision of modest annual grants funding to support projects which seek to advance the cause of abolition within the region, such as efforts to influence public opinion, promoting alternatives to the death penalty, engaging with the media, political representatives, religious leaders, the legal profession and policy makers;
  - provision of funding to support the Anti-Death Penalty Asia Network and abolitionist civil society groups within the region, including to assist with advice and representation in individual cases;
  - provision of training and networking opportunities in Australia and elsewhere for representatives of abolitionist civil society groups within the region;
  - where their involvement would help achieve specific objectives under the Strategy, utilising the Australian Parliamentarians Against the Death Penalty group, Parliamentarians for Global Action, and experts such as Australian jurists;
  - engaging with the private sector and supportive high-profile or influential individuals in priority countries, where this may be effective;
  - supporting the continued participation by Australian delegations at the 6<sup>th</sup> World Congress Against the Death Penalty and subsequent congresses; and
  - Australia to continue to co-sponsor resolutions on abolition of the death penalty at the United Nations.

#### Recommendation 12

The Committee recommends the Australian Government provide dedicated and appropriate funding to the Department of Foreign Affairs and Trade to fund grants to civil society organisations, scholarships, training, research and/or capacity building projects aimed at the abolition of the death penalty.

#### Recommendation 13

The Committee recommends that the Australian Government make available to the Department of Foreign Affairs and Trade ongoing operational funds to resource the preparation and implementation of the Strategy for Abolition of the Death Penalty, including a budget for adequate staffing.





## Introduction and background

### Context of the inquiry

- 1.1 The inquiry of the Joint Standing Committee on Foreign Affairs, Defence and Trade into Australia's Advocacy for the Abolition of the Death Penalty arose at a critical juncture in the history of capital punishment and Australia's engagement with the issue.
- 1.2 While the trend over the last few decades has seen a reduction in executions and an increase in the number of countries which do not execute,<sup>1</sup> 2015 saw a significant rise in executions worldwide, driven largely by Iran, Pakistan and Saudi Arabia.<sup>2</sup>
- 1.3 On 17 December 2014, as a response to terrorism, Pakistan lifted a moratorium on executions that had stood since 2008,<sup>3</sup> and Indonesia executed 14 convicted drug traffickers in 2015, after having executed no one from 2009 to 2012, and no one in 2014.<sup>4</sup>
- 1.4 The year 2015 also saw the executions of Australian citizens Andrew Chan and Myuran Sukumaran, who were sentenced to death in Bali, Indonesia for smuggling heroin in 2005, and were eventually executed on 29 April

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1 Amnesty International, *Death Sentences and Executions in 2015*, pp. 33-34, at <[www.amnesty.org/en/latest/research/2016/04/death-sentences-executions-2015/](http://www.amnesty.org/en/latest/research/2016/04/death-sentences-executions-2015/)> viewed 12 April 2016.

2 Note: China is likely to have executed more individuals than these countries, but figures are not available for China, as the number of executions is a state secret. Amnesty International, *Death Sentences and Executions 2015*, pp. 5-6.

3 Human Rights Watch, *Submission 23*, p. [5].

4 Amnesty International, *Death Sentences and Executions 2015*, p.6.

2015, despite strong and impassioned pleas by numerous Australians, including this Committee, and many friends in Indonesia.<sup>5</sup>

- 1.5 In 2016 Australia is mounting a campaign for a seat on the United Nations Human Rights Council (HRC) for the period 2018-2020. If elected, Australia intends to make advocacy for abolition of the death penalty a priority for its term on the HRC.<sup>6</sup>
- 1.6 Australia holds a politically bipartisan position against the death penalty and continues to support campaigns for worldwide abolition. This report offers an analysis of Australia's recent efforts and provides concrete steps Australia can take to invigorate its advocacy at this critical time.

## Conduct of the inquiry

- 1.7 The inquiry was referred to the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) on 21 July 2015 by the Minister for Foreign Affairs, the Honourable Julie Bishop MP. The JSCFADT then referred the inquiry to its Human Rights Sub-Committee on 12 August 2015.
- 1.8 The Committee received 62 submissions and an additional number of supplementary submissions and responses to questions on notice. A list of all submissions, exhibits and answers to questions on notice are listed at Appendices A, B and C respectively and are available on the Committee's website.
- 1.9 A number of Governments were invited to respond to the inquiry terms of reference and submissions or other information were received from:
  - the UK Foreign and Commonwealth Office;
  - the Iraqi High Commission for Human Rights;
  - the European Commission;
  - the Turkish Embassy to Australia;
  - the Irish Republic Minister for Foreign Affairs and Trade; and
  - the Norwegian Embassy to Australia.The Committee is grateful for these contributions to the inquiry.
- 1.10 Public hearings were conducted in Melbourne, Sydney and Canberra. Some witnesses gave evidence remotely from overseas locations. Details of

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5 Amnesty International, *Death Sentences and Executions 2015*, p. 32.

6 Department of Foreign Affairs and Trade (DFAT), *Submission 35*, p. 6.

the hearings and the names of witnesses who appeared before the Committee are at Appendix D.

- 1.11 The Committee has not sought to examine or debate in any detail the arguments in favour or against the death penalty. Rather, the Committee has focussed the inquiry on considering how Australia's advocacy efforts may be improved.
- 1.12 The terms 'capital punishment' and 'the death penalty' are used interchangeably throughout the report.

## **Structure of the report**

- 1.13 This chapter outlines the context for the inquiry and how the inquiry was conducted, as well as briefly noting perspectives from the evidence highlighting the reasons why the death penalty should be abolished.
- 1.14 Chapter two contains information regarding execution trends and the position of international law on the death penalty.
- 1.15 Chapter three lays out Australia's domestic position in relation to the death penalty, including looking at extradition, mutual assistance, and Australia's international obligations.
- 1.16 Chapter four reviews the role of law enforcement in capital punishment, including the Australian Federal Police's information sharing practices in preventing international crime. It also looks at the issue of drug crime and the death penalty.
- 1.17 Chapter five outlines Australia's recent international engagement on capital punishment, government support for Australian's facing the death penalty overseas, and methods and approaches to advocating for an end to capital punishment.
- 1.18 Chapter six discusses further steps Australia can take to invigorate its advocacy, including through the development of a formal whole-of-government strategy.

## Views on the death penalty

- 1.19 The Committee received a range of evidence outlining how the death penalty breaches human rights and why it should be abolished. A selection of these views is contained within this section.
- 1.20 In summary, the main objections raised in evidence were that the death penalty:
- violates the fundamental right to life and other recognised human rights;
  - has no unique deterrent effect;
  - is irreversible and admits no possibility of redemption or rehabilitation;
  - the death penalty and executions are cruel, torturous and degrading;
  - may be applied following miscarriages of justice; and
  - impedes a country's ability to advocate for leniency for one's own citizens.

The Committee agrees with these views and believes the death penalty has no place in the modern world.

- 1.21 Amnesty International Australia submitted:

It is the ultimate cruel and inhuman punishment. It strips a person of their most fundamental right – the right to life – and must become a relic of the past.<sup>7</sup>

- 1.22 Mr Chris Hayes MP (Australian Parliamentarians Against the Death Penalty) repeated the words of the former Chief Justice of the South African Constitutional Court, Ismail Mahomed:

The death penalty sanctions the deliberate annihilation of life. It is the ultimate and the most incomparable extreme form of punishment. It is the last, most devastating and most irreversible course of criminal law involving, as it necessarily does, the planned and calculated termination of life, itself. The destruction of the greatest and most precious gift, which has been bestowed on all humankind.<sup>8</sup>

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7 Amnesty International Australia, *Submission 34*, p. 3.

8 Mr Chris Hayes MP, Australian Parliamentarians Against the Death Penalty, *Committee Hansard*, Sydney, 20 November 2015, p. 26.

- 1.23 The Honourable Justice Lex Lasry argued that the death penalty is often used for reasons associated with a ‘perceived political benefit that flows to the government of the country concerned’.<sup>9</sup>
- 1.24 Ms Fiona McLeod (Treasurer, Law Council of Australia; President, Australian Bar Association) said:
- Capital punishment is a barbaric affront to the fundamental right to life. It carries an unacceptable and irreversible risk that an innocent person or a person suffering a cognitive or mental impairment may be executed. The death penalty has been observed to serve political agendas and judicial campaigns for re-election in some countries. There is no proof that it is a substantial deterrent to criminal offending... The cost of detention of death row prisoners and the execution process, including exhausting all available legal and executive appeal processes, is high. Put frankly, there is no humane way to execute a human being.<sup>10</sup>
- 1.25 The United Kingdom Foreign and Commonwealth Office submitted:
- Application of the death penalty is prone to error, yet irreversible. Since 1967, more than a hundred people have been convicted of murder in the UK, but later exonerated. Those people might have been hanged had we not introduced a moratorium.<sup>11</sup>
- 1.26 Professor Andrew Byrnes (Diplomacy Training Program, University of NSW) said:
- I think we all know the grounds for objection to the death penalty: moral or religious commitment to not violating the sanctity of human life; political morality of intentional killing by the state brutalises and demeans the political collective; the fact that the death penalty has not been clearly shown to have any unique deterrent effect by any reputable social science studies; the fallibility of criminal justice systems and the irreversibility of death sentences; its discriminatory impact – racially and socially; and, finally, international legal obligations.<sup>12</sup>

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9 The Honourable Justice Lex Lasry AM QC (Private capacity), *Committee Hansard*, Melbourne, 17 November 2015, p. 3.

10 Ms Fiona McLeod, Treasurer, Law Council of Australia; President, Australian Bar Association, *Committee Hansard*, Melbourne, 17 November 2015, p. 49.

11 UK Foreign and Commonwealth Office, *Submission 15*, p. 1.

12 Professor Byrnes, Diplomacy Training Program, *Committee Hansard*, Sydney, 9 December 2015, p. 11.

- 1.27 Some witnesses and submissions noted that the death penalty is contrary to Christian values, particularly in relation to the sanctity of life.<sup>13</sup> The Holy See submitted:
- The Holy See ... has long taken a very strong position against the death penalty and has advocated for its abolition, at regional and international forums.<sup>14</sup>
- 1.28 When addressing the United States Congress in September 2015, Pope Francis said he would 'advocate at different levels for the global abolition of the death penalty' and said that 'since every life is sacred ... society can only benefit from the rehabilitation of those convicted of crimes.'<sup>15</sup>
- 1.29 Mr Jeremy Stuparich (Public Policy Director, Australian Catholic Bishop's Conference) said that Pope Francis' views were the 'strongest ever rejection of the death penalty' from the Catholic Church's leadership.<sup>16</sup>
- 1.30 DFAT's submission confirmed Australia's view:
- Australia's opposition to the death penalty is based on the view that the death penalty is an inhumane form of punishment that violates the inherent human right to life.<sup>17</sup>

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13 See for instance: Mr Melville Miranda, *Submission 43*, p. 1; UnitingJustice Australia, *Submission 25*, p. 1; Professor Gregory Joseph Craven, Vice-Chancellor, Australian Catholic University, *Committee Hansard*, Sydney, 9 December 2015, p. 18.

14 Secretary for the Holy See's Relations with States, *Submission 57*, p. 1.

15 Australian Catholic Bishops Conference, *Submission 20*, pp. 1-2; see also [w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco\\_20150924\\_usa-us-congress.html](http://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150924_usa-us-congress.html) viewed 14 April 2016.

16 Mr Jeremy Stuparich, Public Policy Director, Australian Catholic Bishops Conference, *Committee Hansard*, Canberra, 27 November 2015, p. 18.

17 DFAT, *Submission 35*, p. 5.

## The movement towards abolition

- 2.1 There has been a gradual process to abolish the death penalty, beginning with international recognition of the right to life, leading to aspirations to abolish the death penalty for all but the most serious crimes and, more recently, a determination to abolish for all crimes.
- 2.2 This chapter provides an overview of current trends in relation to executions and summarises the key international legal and normative developments, in particular:
- the status of capital punishment around the world and numbers of executions;
  - international law and the death penalty, including relevant treaties;
  - actions taken at the United Nations (UN); and
  - the European experience of transitioning from permitting the death penalty towards almost complete abolition in the region.

## Status of capital punishment around the world

### Executing countries and numbers of executions

- 2.3 Countries may be broadly categorised according to whether the death penalty continues to be applied within their jurisdiction. The Department of Foreign Affairs and Trade's (DFAT) submission suggested the following terminology to describe individual country contexts:

*Retentionist*: countries/jurisdictions that retain the death penalty for ordinary crimes (those defined in criminal codes or by the common law, such as aggravated murder or rape, as opposed to crimes occurring under extraordinary circumstances, such as treason, war crimes or crimes against humanity);

*Abolitionist*: countries whose laws do not provide for the death penalty for any crime;

*Abolitionist for ordinary crimes only*; and

*Abolitionist in practice*: countries which retain the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice in that they have not executed anyone during the last ten years and are believed to have a policy or established practice of not carrying out executions.<sup>1</sup>

2.4 DFAT's submission contained details of the status of individual countries<sup>2</sup> and advised that most countries are in the abolitionist categories:

More than two-thirds of the countries in the world have now abolished the death penalty in law or practice. As at 1 October 2015, the numbers are as follows:

- Abolitionist for all crimes: 101
- Abolitionist for ordinary crimes only: 6
- Abolitionist in practice: 33
- Total abolitionist in law or practice: 140
- Retentionist: 56 (plus the Palestinian Territories and Taiwan).<sup>3</sup>

2.5 The Committee was informed that the number of countries imposing the death penalty around the world continues to decrease over time. Amnesty International Australia's submission stated:

When Amnesty International began campaigning actively against the death penalty in 1977, only 16 countries had abolished capital punishment. At September 2015, 140 countries had done so in law or practice.<sup>4</sup>

2.6 Nevertheless, Amnesty International has reported that worldwide executions in 2015 sharply increased above the 1061 executions in 2014:

Amnesty International recorded a stark 54% increase in the number of executions carried out globally in 2015.<sup>5</sup> At least 1,634

1 Department of Foreign Affairs and Trade (DFAT), *Submission 35*, p. 2. The United Nations categorises countries along similar lines. See: United Nations Economic and Social Council, 'Report of the Secretary-General: Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty', April 2015, document E/2015/49, p. 5.

2 Refer to DFAT, *Submission 35*, pp. 16-17.

3 DFAT, *Submission 35*, pp. 14-15.

4 Amnesty International Australia, *Submission 34*, p. 7.

5 Amnesty International changed its method of calculating executions in Iran, which means the 54 per cent increase does not directly correlate with execution figures cited for 2014. Amnesty wrote: 'The aggregated figure of executions in Iran for 2014 is 743, which brings the number of global executions that Amnesty International recorded for the same year to 1061.' Amnesty International, *Death Sentences and Executions 2015*, p. 5.



people were executed, 573 more than in 2014. These numbers do not include the executions carried out in China, where data on the use of the death penalty remained classified as a state secret. Of all recorded executions, 89% were carried out in just three countries: Iran, Pakistan and Saudi Arabia.<sup>6</sup>

2.7 The report stated that this figure 'constituted the highest total that Amnesty International has reported since 1989, excluding China'.<sup>7</sup>

2.8 Amnesty International and DFAT submitted that there were at least 607 executions reported in 2014, not including an unknown number of executions that were carried out in China and North Korea.<sup>8</sup>

Table 2.1 Estimated judicial executions by country in 2015

China (unknown)	Malaysia: 1 (unverified)
North Korea (unknown)	Oman: 2
Syria (unknown)	Pakistan: 326
Vietnam (unknown)	Saudi Arabia: 158+
Afghanistan: 1	Singapore: 4
Bangladesh: 4	Somalia: 25+
Chad: 10	- Federal Government of Somalia: 17+
Egypt 22+	Somaliland: 6+
India: 1	- Jubaland: 2+
Indonesia: 14	Sudan: 3
Iran: 977+	Taiwan: 6
Iraq: 26+	United Arab Emirates: 1
Japan: 3	United States: 28 <sup>9</sup>
Jordan: 2	Yemen: 8+

Source Amnesty International, *Death Sentences and Executions 2015*

2.9 Whilst the number of executions in China is not definitively known, Amnesty International Australia's submission estimated that 'the number of executions and death sentences each year in China is in the thousands'.<sup>10</sup>

2.10 Amnesty International Australia also estimated that in 2015, around 20 000 individuals were on death row around the world.<sup>11</sup>

6 Amnesty International, *Death Sentences and Executions 2015*, pp. 5-6.

7 Amnesty International, *Death Sentences and Executions 2015*, p. 6.

8 Amnesty International, *Exhibit 17: Death Sentences and Executions 2014*, April 2015, p. 5; see also Amnesty International Australia, *Submission 34*, p. 7; DFAT, *Submission 35*, p. 14.

9 Executions occurred in Texas (13), Missouri (6), Georgia (5), Florida (2), Oklahoma (1) and Virginia (1).

10 Amnesty International Australia, *Submission 34*, p. 7.

11 Ms Stephanie Cousins, Government Relations Manager, Amnesty International, *Committee Hansard*, Sydney, 20 November 2015, p. 2.

## Methods of execution and due process

2.11 Amnesty International's report, *Death Sentences and Executions in 2015*, stated:

The following methods of executions were used: beheading (Saudi Arabia), hanging (Afghanistan, Bangladesh, Egypt, India, Iran, Iraq, Japan, Jordan, Malaysia, Pakistan, Singapore, South Sudan, Sudan), lethal injection (China, USA, Viet Nam) and shooting (Chad, China, Indonesia, North Korea, Saudi Arabia, Somalia, Taiwan, United Arab Emirates (UAE), Yemen).<sup>12</sup>

2.12 Human Rights Watch's submission contained detail of contemporary uses of the death penalty in questionable circumstances.<sup>13</sup> Human Rights Watch submitted that in some countries, the death penalty may be a punishment for crimes including:

- insulting the Prophet and blasphemy;
- consensual same-sex relations; and
- crimes deemed to be related to terrorism or national security, which in practice may only involve mere criticism of the state.<sup>14</sup>

2.13 In other cases, according to Human Rights Watch, people are sentenced to death in circumstances involving:

- confessions extracted by torture, which is then used as evidence against the accused;
- judicial decisions made contrary to basic procedural standards, such as access to legal counsel and a fair trial for the accused;
- judicial proceedings occurring when the accused is absent (proceedings in *absentia*);
- allowing the death penalty to be applied to juveniles; and
- accused civilians being tried before military courts.<sup>15</sup>

2.14 Additional issues of due process noted in other submissions included:

- applying the death penalty to people with mental illnesses;<sup>16</sup>
- denying accused persons a right of appeal;<sup>17</sup>

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12 Amnesty International, *Death Sentences and Executions 2015*, pp. 6-7. Amnesty could not determine whether hanging or shooting was used in Oman.

13 Human Rights Watch, *Submission 23*, pp. 3-4. Amnesty International's report, *Death Sentences and Executions 2015*, contains similar information.

14 Human Rights Watch, *Submission 23*, pp. 3-4.

15 Human Rights Watch, *Submission 23*, pp. 3-4.

16 Ms Felicity Gerry QC and Ms Narelle Sherwill, *Submission 31*, p. 4.

17 UnitingJustice Australia, *Submission 24*, p. 4.

- holding death row prisoners in squalid conditions;<sup>18</sup> and
  - keeping prisoners on death row for an indefinite period and then executing them without notice.<sup>19</sup>
- 2.15 Ms Stephanie Cousins (Government Relations Manager, Amnesty International Australia) said:
- Some of the world's most prolific executing states have deeply unfair legal systems. ... Many death sentences are issued after confessions that have been obtained through torture. Irrespective of the legal system, the risk of executing innocent people can never be completely eliminated. ... Finally, the death penalty is applied often in a discriminatory way. You are more likely to be sentenced to death if you are poor, if you belong to a minority group or if you cannot afford proper legal representation.<sup>20</sup>
- 2.16 Migrant workers on death row were also noted to have limited protections and be in a 'powerless situation'.<sup>21</sup>

## Political context of imposing the death penalty

- 2.17 Dr Daniel Pascoe (private capacity) said that political and economic factors can determine which countries are more likely to retain the death penalty. He said that the most important factor was 'democracy over authoritarian governance.' He also noted:
- Admittedly, there are some obvious exceptions to the findings of the studies. The United States, Japan and Taiwan are all wealthy democracies that still execute. Singapore is a rich country that still executes. Indonesia is a democracy that still executes. Most of the Caribbean nations are also democracies and they still retain the death penalty.<sup>22</sup>
- 2.18 Dr Pascoe contended the process towards abolition was generally characterised by three factors:
- First of all is strong political leadership – rather than the lead coming from public opinion. Second, abolition tends to have a regional contagion effect. Third, states have tended to abolish the death penalty in stages, rather than going from being active

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18 UnitingJustice Australia, *Submission 24*, p. 4.

19 Ms Gerry QC and Ms Sherwill, *Submission 31*, p. 4.

20 Ms Cousins, Amnesty International, *Committee Hansard*, Sydney, 20 November 2015, p. 2.

21 Professor Byrnes, Diplomacy Training Program, *Committee Hansard*, Sydney, 9 December 2015, p. 13.

22 Dr Daniel Charles Pascoe, Private capacity, *Committee Hansard*, Canberra, 27 November 2015, pp. 47. See also: Dr Daniel Pascoe, *Submission 19*, p. [2-3].

retentionists that use the death penalty to *de jure* abolitionists over a short period of time.<sup>23</sup>

2.19 Dr Catherine Renshaw (University of Western Australia) said:

One thing we know from research about how human rights change happens is that it is most effective when it comes from discourse and dialog by people within the state themselves.<sup>24</sup>

2.20 Amnesty International's report, *Death Sentences and Executions in 2015*, provided some historical analysis of the death penalty:

- At the end of 2015, 102 countries had abolished the death penalty in law for all crimes.
- 20 years ago, in 1996, this figure stood at 60.
- As of 31 December 2015, 140 countries had abolished the death penalty in law or practice.
- 20 years ago, in 1996, Amnesty International recorded executions in 39 countries.
- In 2015, this figure stood at 25.
- This reflects the continued overall decline in the use of the death penalty.<sup>25</sup>

## International law and the death penalty

2.21 International law on capital punishment is founded in a range of treaties, jurisprudence and customary practice relating to torture. International law does not expressly ban the death penalty in all circumstances;<sup>26</sup> rather, in several ways its use is regulated and limited.<sup>27</sup> For instance, the death penalty may not be imposed on juveniles.<sup>28</sup>

2.22 A number of submissions provided a useful overview of international human rights law in the context of the death penalty.<sup>29</sup>

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23 Dr Pascoe, Private capacity, *Committee Hansard*, Canberra, 27 November 2015, pp. 47. See also: Dr Pascoe, *Submission 19*, p. [3-5].

24 Dr Catherine Michelle Renshaw, Senior Lecturer, University of Western Sydney, *Committee Hansard*, Sydney, 20 November 2015, p. 15.

25 Amnesty International, *Death Sentences and Executions 2015*, pp. 33-34.

26 Law Council of Australia (LCA) and Australian Bar Association (ABA), *Submission 24*, p. 6.

27 Mr Stephen Keim, *Submission 17*, pp. 2-3.

28 'Convention on the Rights of the Child' (entered into force 2 September 1990), *United Nations Treaty Series*, vol. 1577, pp. 44-61; see also Ms Gerry QC and Ms Sherwill, *Submission 31*, p. 6; Dr Maguire, Ms Fitzsimmons and Mr Richards (Dr Maguire et al), *Submission 40*, p. 6.

29 See for example: ALHR, *Submission 18*, pp. 3-4; LCA and ABA, *Submission 24*, p. 6; UnitingJustice Australia, *Submission 25*, pp. 3-4; Office of the UN High Commissioner for Human Rights (OHCHR), *Submission 49*, pp. 1-3.

- 2.23 The most relevant international treaty regulating the death penalty is the International Covenant on Civil and Political Rights (ICCPR), which entered into force in 1976. In addition, the Second Optional Protocol to the ICCPR, which entered into force in 1991, contains a specific death penalty prohibition (discussed later in this Chapter). As of March 2016, there were 168 states party to the ICCPR<sup>30</sup> and 81 states party to the Second Optional Protocol.<sup>31</sup>
- 2.24 Depending on the circumstances, execution practices amounting to torture would be subject to the Convention Against Torture.<sup>32</sup>
- 2.25 Decisions by UN bodies have supplemented international law, such as UN General Assembly (UNGA) resolutions calling for a moratorium. Professor Donald Rothwell (Australian National University College of Law) said:
- Annual UNGA resolutions of this type are important in promoting such a moratorium, can be indicative of developing customary international law and are also an annual indicator of shifting state positions.<sup>33</sup>
- 2.26 Professor Andrew Byrnes (Diplomacy Training Program, University of NSW) said the UN's views were persuasive:
- While these do not amount to binding international interpretations of the treaty obligations, this output has provided a very important and persuasive resource for advocates seeking to limit the use or bring about the abolition of the death penalty.<sup>34</sup>
- 2.27 The death penalty has also been abolished or limited by treaties established at a regional level:
- The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR – European Convention on Human Rights) and Additional Protocols 6 and 13; and
  - The American Convention on Human Rights and related Protocol.<sup>35</sup>

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30 See <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-12&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-12&chapter=4&lang=en)> viewed 14 April 2016.

31 See <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-12&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-12&chapter=4&lang=en)> viewed 14 April 2016.

32 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (entered into force 26 June 1987), *United Nations Treaty Series*, vol. 1465, pp. 113-122.

33 Professor Donald Robert Rothwell, Private capacity, *Committee Hansard*, Canberra, 27 November 2015, p. 26.

34 Professor Byrnes, Diplomacy Training Program, *Committee Hansard*, Sydney, 9 December 2015, p. 13.

35 Ms Gerry QC and Ms Sherwill, *Submission 31*, p. 6.

- 2.28 Australian Lawyers for Human Rights (ALHR) noted in their submission that ‘the Asia-Pacific is the only region without a comprehensive inter-governmental human rights mechanism.’<sup>36</sup> Nevertheless, Amnesty International Australia submitted that there were ‘positive signs... with side events being held urging abolition’ at ASEAN conferences.<sup>37</sup>
- 2.29 The British Commonwealth of Nations has yet to agree on a common position in relation to the death penalty, notwithstanding internal discussion of the issue.<sup>38</sup> Some Commonwealth countries retain use of the death penalty.<sup>39</sup>
- 2.30 The Commonwealth Lawyers’ Association informed the Committee that this retention is possibly due to the ‘vested interests’ of some within the legal profession, whose business interests may coincide with cases being appealed from lower courts to the Privy Council.<sup>40</sup>
- 2.31 There is no regional agreement or treaty in Africa that prohibits the death penalty generally, except in relation to children and pregnant women.<sup>41</sup>
- 2.32 The Law Council of Australia (LCA) and Australian Bar Association (ABA) noted how international law and international norms could lead to change:
- ... proscriptions and restrictions in international law have a potential to influence behaviour and, to the extent that international law imposes those restrictions, there is a potential for it to be used to influence national behaviour away from the use of capital punishment.<sup>42</sup>
- 2.33 The Asia Pacific Forum of National Human Rights Institutions (APF) observed how international norms could be used to progress reform in the region. Mr Greg Heesom (Legal Counsel, APF) said:
- We will be looking particularly at what has been said in the safeguards that were adopted by the Economic and Social Council

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36 Australian Lawyers for Human Rights (ALHR), *Submission 18*, p. 5.

37 Amnesty International Australia, *Submission 34*, p. 14; see also Dr Catherine Renshaw, Professor Steven Freeland and Ms Francine Feld, *Submission 58*, pp. 4-5.

38 Mr Ronald Keith Heinrich AM, Executive Committee Member, Commonwealth Lawyers Association, *Committee Hansard*, Sydney, 20 November 2015, pp. 19-20.

39 Commonwealth Lawyers Association, *Submission 26*, Attachment 2, pp. 9-10, Attachment 4, pp. 5-6; see also Mr Mark Pritchard MP, Chair, UK All-Party Parliamentary Group for the Abolition of the Death Penalty, *Committee Hansard*, Canberra, 15 March 2016, p. 3.

40 Mr Heinrich, Commonwealth Lawyers Association, *Committee Hansard*, Sydney, 20 November 2015, pp. 18. In some former British colonies, the Judicial Committee of the Privy Council remains the final court of appeal.

41 Dr Catherine Renshaw and Mr Dane Burge, *Supplementary Submission 58.1*, pp. 2-3.

42 LAC and ABA, *Submission 24*, pp. 6-7.

many years ago and how they are currently being interpreted by the various special procedure mandate holders of the UN. I think that our approach will be very much to utilise those arguments to highlight the restrictions on the use of the death penalty in relation to only certain crimes.<sup>43</sup>

- 2.34 Overall, international law in this area places countries into one of three broad categories:
- The death penalty is abolished for all crimes for states party to the ICCPR Second Optional Protocol or the ECHR protocols. For states lodging a reservation at the time of ratification or accession, the death penalty may be applied for crimes arising during times of war;
  - There is a partial prohibition for states party to the ICCPR that have not yet abolished the death penalty from their domestic law, provided it is imposed consistent with due process requirements of the ICCPR. Some states may be party to regional treaties with a prohibition on use of the death penalty; and
  - States not party to the ICCPR (or another treaty with requirements to limit or abolish the death penalty) are not obliged to abolish the death penalty. Nevertheless, the manner of imposition and methods of execution may be subject to international standards and resolutions of UN bodies.

## International Covenant on Civil and Political Rights and the Second Optional Protocol

- 2.35 Article 6 of the ICCPR guarantees the ‘inherent right to life... protected by law.’ Articles 6 and 7 of the ICCPR respectively require that ‘in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes’ and treatment or punishment amounting to ‘cruel, inhumane or degrading’ is prohibited. Article 6 also prohibits the execution of children and pregnant women.<sup>44</sup> The ICCPR does not explicitly prohibit the death penalty being imposed on people with mental illnesses.
- 2.36 The UN’s Special Rapporteur on extrajudicial, summary and arbitrary executions<sup>45</sup> reported in 2012 that 38 of 44 retentionist States and 33 of 49 de facto abolitionist States have laws allowing the death penalty ‘for

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43 Mr Greg Heesom, Legal Counsel, Asia Pacific Forum of National Human Rights Institutions (APF), *Committee Hansard*, Canberra, 1 March 2016, p. 3.

44 ‘International Covenant on Civil and Political Rights’ (entered into force 23 March 1976), *United Nations Treaty Series*, vol. 999, pp. 172-186.

45 The position of Special Rapporteur on extrajudicial, summary and arbitrary executions was established by resolution E/RES/1982/35 of the UN Economic and Social Council in 1982.

crimes resulting in death but where there was no intent to kill' that would not amount a 'most serious' crime; however, in practice, few states execute for these offences.<sup>46</sup>

2.37 Harm Reduction International (HRI) reported in 2015 that the death penalty may be applied for drug offences in 33 countries. According to the report, 'very few countries ... execute drug offenders with any frequency', although, as discussed in Chapter 4, those countries that do execute drug offenders execute large numbers.<sup>47</sup>

2.38 Submissions noted views of the ICCPR's Human Rights Committee given in 1982, which described abolition of the death penalty as a desirable objective.<sup>48</sup> At the time, the ICCPR Human Rights Committee stated:

While it follows from article 6 (2) to (6) [of the ICCPR] that States parties are not obliged to abolish the death penalty totally, they are obliged to limit its use and, in particular, to abolish it for other than the 'most serious crimes'. Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the 'most serious crimes'. The article also refers generally to abolition in terms which strongly suggest... that abolition is desirable.<sup>49</sup>

2.39 Article 14 of the ICCPR provides various guarantees of due process in relation to criminal trials, such as the presumption of innocence, access to legal assistance and the right of appeal to a higher court.<sup>50</sup> The UN Office of the High Commissioner for Human Rights (OHCHR) submitted that the imposition of a death sentence following a trial contrary to Article 14 'constitutes a violation of the right to life' guaranteed in Article 6.<sup>51</sup>

2.40 The Second Optional Protocol to the ICCPR (the Second Optional Protocol) prohibits the death penalty regardless of the crime committed. Article 1 of the Second Optional Protocol states:

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46 *Extrajudicial, Summary or Arbitrary Executions: Note by the Secretary-General*, 9 August 2012, , document A/67/275, p. 9 and p. 11.

47 Harm Reduction International, *The Death Penalty for Drug Offences: Global Overview 2015*, October 2015, p. 6.

48 ALHR, *Submission 18*, p. 3; Castan Centre for Human Rights Law, *Submission 9*, p. 2; Amnesty International Australia, *Submission 34*, p. 5.

49 Report of the UN Human Rights Committee, October 1982, document A/37/40 (UN General Assembly Official Record, 37<sup>th</sup> Session, Supplement No. 40), pp. 93-94.

50 'International Covenant on Civil and Political Rights' (entered into force 23 March 1976), *United Nations Treaty Series*, vol. 999, pp. 172-186.

51 UN Office of the High Commissioner of Human Rights (OHCHR), *Submission 49*, p. 2.



1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.
  2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.<sup>52</sup>
- 2.41 Article 2 of the Second Optional Protocol makes an exception for ‘a most serious crime of a military nature committed during wartime’; however, as stated in Article 4, this provision only applies to those states party that lodged a reservation at the time of ratification or accession.<sup>53</sup>
- 2.42 In addition, there is a body of legal jurisprudence informing the interpretation and practical implementation of the ICCPR. In particular, this addresses:
- The meaning of a ‘most serious’ crime in Article 6 of the ICCPR; and
  - The threshold of a ‘cruel, inhumane or degrading punishment’ in Article 7 of the ICCPR.

## Article 6 of the ICCPR

- 2.43 Whilst countries may retain the death penalty, Article 6 of the ICCPR prescribes a range of conditions for use of the death penalty. In particular, there is a stipulation that the death penalty is limited to the ‘most serious crimes’. Article 6 states:
1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
  2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
  3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any

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52 ‘Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at Abolition of the Death Penalty’ (entered into force 11 July 1991), *United Nations Treaty Series*, vol. 1642, pp. 414-418.

53 ‘Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at Abolition of the Death Penalty’ (entered into force 11 July 1991), *United Nations Treaty Series*, vol. 1642, pp. 414-418.

obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.<sup>54</sup>

2.44 In 1982, the ICCPR's Human Rights Committee<sup>55</sup> examined the details of Article 6 and stated:

The Committee is of the opinion that the expression 'most serious crimes' must be read restrictively to mean that the death penalty should be a quite exceptional measure.<sup>56</sup>

2.45 In 2007, the UN Human Rights Council's Special Rapporteur on extrajudicial, summary or arbitrary executions examined the jurisprudence and found that the term 'most serious crimes' refers to crimes associated with an intentional killing. The Special Rapporteur found:

The conclusion to be drawn from a thorough and systematic review of the jurisprudence of all of the principal United Nations bodies charged with interpreting these provisions is that the death penalty can only be imposed in such a way that it complies with the stricture that it must be limited to the most serious crimes, in cases where it can be shown that there was an intention to kill which resulted in the loss of life.<sup>57</sup>

2.46 A submission from the OHCHR reiterated this view:

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54 'International Covenant on Civil and Political Rights' (entered into force 23 March 1976), *United Nations Treaty Series*, vol. 999, pp. 172-186.

55 The Human Rights Committee is established under Article 40 of the ICCPR and may publish 'general comments' based upon reports it receives of progress made towards implementation of the rights recognised within the treaty.

56 *Report of the Human Rights Committee*, document A/37/40 (UN General Assembly Official Record, 37<sup>th</sup> Session, Supplement No. 40), October 1982, pp. 93-94.

57 UN Human Rights Council, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions', January 2007, document A/HRC/4/20, p.15; see also International Drug Policy Consortium (IDPC), *Submission 16*, p. 1; Australian Drug Foundation and New Zealand Drug Foundation, *Submission 28*, pp. 1-2.

As a minimum, international human rights law requires full compliance with the clear restrictions prescribed in article 6 of ICCPR. In countries which have not abolished the death penalty, international human rights law requires as a minimum full compliance with the clear restrictions prescribed in particular in article 6 of ICCPR. According to this provision, its application shall be limited to the 'most serious crimes.' This term has been interpreted to mean that the death penalty should only be applied to the crime of intentional killing.<sup>58</sup>

2.47 DFAT's submission indicated that there are crimes understood to be excluded from the 'most serious' category:

The ICCPR provides that the death penalty can only be used for the 'most serious' of crimes – which is undefined under international law but is generally understood as excluding economic, property, political and minor violent crimes and offences not involving the use of force.<sup>59</sup>

2.48 Professor Rothwell said the most serious crimes were 'predominantly crimes which are of considerable violence to the person resulting in death.'<sup>60</sup> He said that drug offences would not amount to a 'most serious' crime.<sup>61</sup> He also noted there are 'varying positions on the interpretation of Article 6'<sup>62</sup> and that no international court or tribunal has ruled on the meaning of most serious crimes.<sup>63</sup>

2.49 Dr Amy Maguire (Lecturer, University of Newcastle Law School) referred to Paragraph 1 of Article 6, relating to the right to life, stating that in her view 'this fundamental right is not subject to limitation under human rights law.'<sup>64</sup>

## Article 7 of the ICCPR

2.50 Torture and cruel treatment are prohibited under Article 7 of the ICCPR. The mistreatment of a person sentenced to death may be regarded as contrary to Article 7. Article 7 states:

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58 OHCHR, *Submission 49*, pp. 1-2.

59 DFAT, *Submission 35*, p. 3.

60 Professor Rothwell, *Committee Hansard*, Canberra, 27 November 2015, p. 28.

61 Professor Rothwell, *Committee Hansard*, Canberra, 27 November 2015, p. 29; see also Mr John Rogerson, Chief Executive Officer, Australian Drug Foundation; and Representative, New Zealand Drug Foundation, *Committee Hansard*, Melbourne, November 2015, p. 26.

62 Professor Rothwell, *Committee Hansard*, Canberra, 27 November 2015, p. 26.

63 Professor Rothwell, *Committee Hansard*, Canberra, 27 November 2015, p. 28.

64 Dr Amy Maguire, Lecturer, University of Newcastle Law School, *Committee Hansard*, Canberra, 27 November 2015, p. 13.

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.<sup>65</sup>

- 2.51 In 2009, the UN Human Rights Council's Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment found Article 7 to be complex area, based on past adjudication of the issue.<sup>66</sup> The Special Rapporteur reported:

...certain methods, such as stoning to death, which intentionally prolong pain and suffering, amount to cruel, inhuman or degrading punishment. But opinions differ considerably as to which methods of execution can still be considered 'humane' today.<sup>67</sup>

- 2.52 The Special Rapporteur also observed that interpretation of the law in this area could evolve over time:

International human rights monitoring bodies and domestic courts ... developed and effectively apply a dynamic interpretation of the provisions of human rights treaty law. They consider human rights treaties 'living instruments' that need to be interpreted in the light of present-day conditions.<sup>68</sup>

- 2.53 A submission from UnitingJustice Australia stated that Article 7 was intended to regulate the treatment of people on death row and methods of execution:

... the manner in which executions take place and the way prisoners on death row are treated have been found to amount to cruel and inhuman treatment and to be counter to the spirit of the ICCPR. Prisoners on death row suffer isolation for long and indeterminate periods of time, are subject to excessive use of handcuffing and/or other physical restraints, and may have no

65 'International Covenant on Civil and Political Rights' (entered into force 23 March 1976), *United Nations Treaty Series*, vol. 999, pp. 172-186.

66 The Special Rapporteur observed: 'In *Kindler v. Canada*, the majority held in 1993 that execution by lethal injection, as practised in Pennsylvania, did not amount to inhuman punishment. The United States Supreme Court arrived at a similar conclusion in 2008. On the other hand, in its views on *Ng v. Canada* in 1993, the majority of the Human Rights Committee found that execution by gas asphyxiation, as practised until recently in California, did amount to cruel and inhuman treatment and, as a consequence, Canada had violated article 7 of the Covenant by having extradited the applicant to the United States.'

67 UN Human Rights Council, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, January 2009, document A/HRC/10/44, p. 12.

68 UN Human Rights Council, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, January 2009, document A/HRC/10/44, p. 15.

access to meaningful activity such as work or education programs.<sup>69</sup>

2.54 In addition, UnitingJustice Australia submitted:

...conditions that death row inmates face including restrictions on visits and correspondence, extreme temperatures, lack of ventilation, and cells infested with insects. This treatment and these conditions amount to cruel, inhuman and degrading treatment or punishment, which is prohibited under Article 7 of the ICCPR.<sup>70</sup>

## Norms of international law

2.55 Imposing the death penalty on children, pregnant women, or people with mental illnesses, and use of torture, are regarded as being contrary to international legal standards, which may apply notwithstanding signature, ratification or accession to treaties.

2.56 A submission from Dr Amy Maguire, Holly Fitzsimmons and Daniel Richards suggested that all methods of execution involve torture and are potentially contrary to international law. The submission stated:

Capital punishment is a violation of the right to freedom from torture and inhuman or degrading treatment or punishment. The prohibition of torture is a *jus cogens* standard under international law.<sup>71</sup>

2.57 The Convention Against Torture requires states to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'.<sup>72</sup> In addition:

No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.<sup>73</sup>

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69 UnitingJustice Australia, *Submission 24*, p. 3.

70 UnitingJustice Australia, *Submission 24*, p. 4.

71 Dr Maguire, Ms Fitzsimmons and Mr Richards, *Submission 40*, p. 6. The submission also noted that the term *jus cogens* refers to a 'category of international legal norms which are regarded as peremptory and non-derogable standards.'

72 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (entered into force 26 June 1987), *United Nations Treaty Series*, vol. 1465, pp. 113-122.

73 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (entered into force 26 June 1987), *United Nations Treaty Series*, vol. 1465, pp. 113-122.

- 2.58 Ms Gerry QC and Ms Sherwill submitted that the ban on application of the death penalty to children was ‘so broadly accepted that it is considered a norm of customary international law.’<sup>74</sup> The submission cited a report by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, which stated:
- The Special Rapporteur believes that the current practice of imposing death sentences and executions of juveniles in the United States violates international law. ... He is further concerned about the execution of mentally retarded and insane persons which he considers to be in contravention of relevant international standards.<sup>75</sup>
- 2.59 The United States has signed, though not ratified, the *Convention on the Rights of the Child* and has ratified the ICCPR with a reservation to allow the death penalty on people under 18 years old.<sup>76</sup> As such, the Special Rapporteur’s report indicated that in his view, international standards in relation to the death penalty may override the status of treaty ratification or reservations.
- 2.60 Reprieve Australia observed that notwithstanding UN resolutions seeking to protect people with mental illnesses, in some countries the definitions of mental health and intellectual impairment are ‘so stringent ... many individuals are considered legally competent.’<sup>77</sup>

## Decisions of the United Nations

- 2.61 Decisions of UN bodies, particularly the General Assembly, have further clarified the status of the death penalty in international law or stated an intention to progress its abolition worldwide. Successive resolutions have refined international standards on the imposition of the death penalty.

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74 Ms Gerry QC and Ms Sherwill, *Submission 31*, p. 6.

75 *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Mr Bacre Waly Ndiaye, Submitted Pursuant to Commission Resolution 1997/61: Addendum, 22 January 1998, document E/CN.4/1998/68/Add.3, p. 32.

76 The reservation states: ‘That the United States reserves the right ... to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.’ See the United Nations Treaty Collection, at <[treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-4&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en#EndDec)> viewed 15 April 2016.

77 Reprieve Australia, *Submission 41*, p. 10. See also *UN Economic and Social Council Resolution 1984/50*, 25 May 1984, document E/RES/1984/50.

- 2.62 The Universal Declaration of Human Rights (UDHR), agreed to by the UN General Assembly in 1948, established the right to life in Article 3, which provided that ‘everyone has the right to life, liberty and the security of person.’<sup>78</sup> Although the UDHR is not a treaty and Article 3 does not refer directly to the death penalty, a number of submissions alluded to the significance of the UDHR as the first international proclamation of its kind.<sup>79</sup>
- 2.63 The text of the ICCPR and the *International Covenant on Economic, Social and Cultural Rights* were adopted in a cognate resolution of the General Assembly at its 1966 session. The same resolution also recognised the UDHR to be ‘a common standard of achievement for all peoples and all nations.’<sup>80</sup>
- 2.64 In 1971, the UN General Assembly agreed that in order to ‘fully guarantee the right to life ... in article 3’ of the UDHR, abolishing the death penalty was a desirable objective:
- ...the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries.<sup>81</sup>
- 2.65 In 1984, the UN Economic and Social Council adopted a resolution on providing ‘safeguards guaranteeing protection of the rights of those facing the death penalty.’<sup>82</sup> The resolution recognised due process rights similar to those already contained in ICCPR; however, additional safeguards were agreed, including:
- the category of ‘most serious’ crimes to which the death penalty could be applied was clarified to mean ‘intentional crimes with lethal or other extremely grave consequences’;
  - the death penalty should not be imposed upon new mothers or people with mental illnesses; and
  - executions should be ‘carried out so as to inflict the minimum possible suffering.’<sup>83</sup>

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78 *Universal Declaration of Human Rights, UN General Assembly Resolution 217(III)*, document A/RES/217(III)(A).

79 LCA and ABA, *Submission 24*, p. 6; ALHR, *Submission 18*, p. 3; Dr Maguire, Ms Fitzsimmons and Mr Richards, *Submission 40*, p. 4; Ms Gerry QC and Ms Sherwill, *Submission 31*, p. 6.

80 *UNGA Resolution 2200 (XXI)*, 16 December 1966, document A/RES/2200(XXI).

81 *UNGA Resolution 2857 (XXVI)*, 20 December 1971, document A/RES/2857(XXVI).

82 *UN Economic and Social Council Resolution 1984/50*, 25 May 1984, document E/RES/1984/50.

83 *UN Economic and Social Council Resolution 1984/50*, 25 May 1984, document E/RES/1984/50, Annex.

2.66 The UN has appointed special rapporteurs with a mandate to provide advice on death penalty-related matters, including:

- the Special Rapporteur on extrajudicial, summary and arbitrary executions (first appointed in 1982);<sup>84</sup> and
- the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (first appointed in 1984).<sup>85</sup>

2.67 In 2007 the UN General Assembly adopted a resolution ‘to establish a moratorium on executions with a view to abolishing the death penalty.’<sup>86</sup> The moratorium has been adopted at subsequent sessions of the General Assembly.<sup>87</sup> During the inquiry, this series of resolutions were described as having significant and contemporary importance for progressing universal abolition of the death penalty.<sup>88</sup>

2.68 The LCA and ABA stated:

In 2007, a landmark United Nations General Assembly resolution called for an immediate moratorium on executions as a first step towards the universal abolition of the death penalty. ... While not binding, this UN Resolution sends a powerful message that a large majority of the world’s nations are committed to the abolition of the death penalty both within their own jurisdictions, and beyond their borders.<sup>89</sup>

2.69 Amnesty International submitted:

Successive United Nations General Assembly resolutions have seen growing numbers in favour of abolition. The tide of international law is moving towards abolition.<sup>90</sup>

2.70 ALHR also identified that the ‘international trend towards abolition of the death penalty received resounding support in December 2014’. Adding:

While not binding, the growing support for this resolution shows that world opinion is hardening against the use of the death penalty.<sup>91</sup>

84 Appointed by resolution E/RES/1982/35 of the UN Economic and Social Council in 1982.

85 Appointed by resolution 1985/33 of the UN Human Rights Commission and re-appointed by resolution 25/13 of the Human Rights Council in 2014.

86 *UNGA Resolution 62/149*, 18 December 2007, document A/RES/62/149.

87 *UNGA Resolution 63/168*, 18 December 2008, document A/RES/63/168; *UNGA Resolution 65/206*, 21 December 2010, document A/RES/206; *UNGA Resolution 67/176*, 20 December 2012, document A/RES/67/176; *UNGA Resolution 69/186*, 18 December 2014, document A/RES/69/186.

88 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 3; DFAT, *Submission 35*, p. 5.

89 LCA and ABA, *Submission 24*, p. 6.

90 Amnesty International Australia, *Submission 34*, p. 5.



2.71 A submission from the European Commission stated:

Through extensive lobbying and outreach, the EU actively participated in the cross-regional alliance promoting UN General Assembly Resolution 69/2014 reaffirming the call for a moratorium on the use of the death penalty. The resolution was adopted with an unprecedented 117 votes in favour and an impressive record of 95 co-sponsors, compared to similar resolutions in 2007, 2008, 2010 and 2012.<sup>92</sup>

2.72 DFAT noted that the resolution has ‘enjoyed gradually increased support each time it has been adopted by the General Assembly’.<sup>93</sup>

Table 2.2 UN General Assembly voting on death penalty moratorium resolutions

<b>2007 vote 62<sup>nd</sup> Session</b>	<b>2008 vote 63<sup>rd</sup> Session</b>	<b>2010 vote 65<sup>th</sup> Session</b>	<b>2012 vote 67<sup>th</sup> Session</b>	<b>2014 vote 69<sup>th</sup> Session</b>
In favour: 104 Against: 54 Abstentions: 29	In favour: 106 Against: 46 Abstentions: 34	In favour: 109 Against: 41 Abstentions: 35	In favour: 111 Against: 41 Abstentions: 34	In favour: 117 Against: 37 Abstentions: 34

Source *United Nations General Assembly records*

2.73 Notwithstanding the views above, debate at the UN General Assembly in 2007 indicated that some states were opposed to a moratorium. Singapore presented the following view:

The reality is that for many delegations this is a criminal justice issue and not a purely human rights issue, as the European Union and its allies assert. The UDHR does not prohibit the death penalty. Neither does the ICCPR. In fact, many EU countries had the death penalty on their statutes when they signed the UDHR. For Singapore, capital punishment is a strong deterrent that is imposed with robust safeguards and only for the most serious crimes. We believe that it is the right of all our citizens to live in a safe environment, free from criminal threat to their lives and personal safety.<sup>94</sup>

2.74 The Singaporean representatives also protested that there was ‘acrimony’ during prior negotiations caused by states sponsoring the resolution:

91 ALHR, *Submission 18*, p. 4.

92 European Commission, *Submission 46*, p. 3.

93 DFAT, *Submission 35*, p. 5.

94 *UN General Assembly, 62<sup>nd</sup> Session, 76<sup>th</sup> Plenary Meeting*, 18 December 2007, document A/62/PV.76, p. 15.

They suppressed the efforts of retentionist States to express themselves on individual paragraphs and resorted to pressure tactics and demarches.<sup>95</sup>

- 2.75 When considered by the Third Committee of the General Assembly,<sup>96</sup> the moratorium resolution was subject to a range of amendments. A proposal to replace the key paragraph establishing a moratorium with an alternative calling for the death penalty to be restricted to the most serious crimes was defeated.<sup>97</sup>
- 2.76 Since 2007, some states have changed their views from being against the resolution to being in favour or abstaining.<sup>98</sup>

## American Convention on Human Rights and related Protocol

- 2.77 The American Convention on Human Rights was agreed in 1969, although it did not enter into force until 1978. The Convention contains a limitation on the death penalty in similar terms to the ICCPR, with some distinct aspects in Article 4:
- The death penalty shall not be re-established in states that have abolished it.
  - In no case shall capital punishment be inflicted for political offenses or related common crimes.
  - Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were ... over 70 years of age...<sup>99</sup>

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95 *UN General Assembly, 62<sup>nd</sup> Session, 76<sup>th</sup> Plenary Meeting*, 18 December 2007, document A/62/PV.76, p. 15.

96 The Third Committee considers General Assembly agenda items related to social, humanitarian and cultural issues.

97 The result of the vote was 67 in favour, 86 against and 17 abstentions. The text of the amendment was to: 'Restrict the crimes for which the death penalty may be imposed to only the most serious ones in accordance with the law in force at the time of the commission of the offence.' The proposed amendment was sponsored by the Bahamas, Barbados, Botswana, Comoros, Dominica, Egypt, Eritrea, Grenada, Iran, Jamaica, Kuwait, Malaysia, Mauritania, Nigeria, Oman, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Sierra Leone, Singapore, Sudan, Suriname Syria and Trinidad and Tobago. *UN General Assembly Third Committee, 62<sup>nd</sup> Session, 45<sup>th</sup> Meeting*, 15 November 2007, document A/C.3/62/SR.45, pp. 5-6; see also document A/C.3/62/L.81.

98 For example, Chad and Mongolia voted against the 2007 resolution and voted in favour in 2014; Bahrain, Indonesia, Myanmar, Nigeria, Thailand and others voted against in 2007 and abstained in 2014.

99 'American Convention on Human Rights – Pact of San José' (entered into force 18 July 1978), *United Nations Treaty Series*, vol. 1144, pp. 144-212.

- 2.78 The Convention is open to signature, ratification or adherence by member states of the Organization of American States.<sup>100</sup> A Protocol to Abolish the Death Penalty was agreed in 1990 with terms similar to the ICCPR Second Optional Protocol and entry into force occurs as and when individual states ratify or accede. As at March 2016, there were 13 ratifications.<sup>101</sup>

## The European region

- 2.79 Europe has introduced a range of treaty and policy measures intended to abolish the death penalty both within Europe and globally. Dr Bharat Malkani (University of Birmingham) submitted that the EU has had an ‘incredibly important and effective role in promoting abolition of the death penalty worldwide.’<sup>102</sup>
- 2.80 When signed in 1950 by members of the Council of Europe,<sup>103</sup> Article 2 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights – ECHR) provided that the death penalty was permitted:
- Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.<sup>104</sup>
- 2.81 This position stood until 1983. Additional Protocol 6 of ECHR provided that other than ‘in time of war or of imminent threat of war’, the death penalty ‘shall be abolished.’<sup>105</sup> In 2002 Additional Protocol 13 abolished the death penalty without exception.<sup>106</sup> By 2015, nearly all of the Council

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100 The United States has signed but not ratified the Convention.

101 ‘Protocol to the American Convention on Human Rights to Abolish the Death Penalty’, *Organisation of American States Treaty Series*, No. 73, at <[www.oas.org/juridico/english/sigs/a-53.html](http://www.oas.org/juridico/english/sigs/a-53.html)> viewed 15 April 2016; see also ALHR, *Submission 18*, p. 5.

102 Dr Bharat Malkani, University of Birmingham, *Submission 4*, p. 2.

103 The Council of Europe is an organisation separate to the European Union, with membership including the Russian Federation and Switzerland.

104 ‘Convention on the Protection of Human Rights and Fundamental Freedoms’ (entered into force 3 September 1953), *European Treaty Series*, No. 5. See also *United Nations Treaty Series* No. 2889, pp. 222-270.

105 ‘Protocol No. 6 to the Convention on the Protection of Human Rights and Fundamental Freedoms’ (entered into force 1 March 1985), *European Treaty Series*, No. 114; ALHR, *Submission 18*, p. 4.

106 ‘Protocol No. 13 to the Convention on the Protection of Human Rights and Fundamental Freedoms’ (entered into force 3 May 2003), *European Treaty Series*, No. 187; ALHR, *Submission 18*, pp. 4-5.

of Europe's 47 member states had ratified these two additional protocols.<sup>107</sup>

2.82 The European Union's members agreed to the Charter of Fundamental Rights in 2000, which stated: 'No one shall be condemned to the death penalty, or executed.'<sup>108</sup> The Charter remained non-binding until 2007, when EU member states agreed to incorporate the Charter and the ECHR into the EU's treaty framework by amending Article 6 of the Treaty of the European Union.<sup>109</sup>

2.83 The Minister for Foreign Affairs and Trade, Republic of Ireland, submitted:

We consider that our engagement as part of a regional bloc lends greater weight to our efforts to promote abolition. ... Our EU membership also enables us to influence EU action at a multilateral level, its relations with non-EU countries as well as action on individual cases.<sup>110</sup>

2.84 Dr Renshaw said that Europe's position towards abolition had gradually evolved:

Within closed political communities where certain goals are adopted, pressure intensifies on states to similarly achieve goals that other states have already achieved. ... The leading example is, of course, Europe, where the abolition of the death penalty is a condition for membership in the Council of Europe and the European Union. What we should note, however, is that abolition in Europe was a gradual process that first began with the articulation of the goal of abolition as a regional goal for European states.<sup>111</sup>

2.85 Dr Pascoe noted that abolishing the death penalty can have a 'regional contagion' effect:

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107 Russia has signed but not ratified Protocol 6; Armenia has signed but not ratified Protocol 13; Azerbaijan and Russia have not signed nor ratified Protocol 13.

108 *Charter of the Fundamental Rights of the European Union, Official Journal of the European Union, document 2012/C 326/02*. See also European Parliament, *Conclusions of the Presidency: 7-10 December 2000*, at <[www.europarl.europa.eu/summits/nice1\\_en.htm](http://www.europarl.europa.eu/summits/nice1_en.htm)> viewed 15 April 2016.

109 'Treaty of Lisbon Amending the Treaty of the European Union and the Treaty Establishing the European Community' (entered into force 1 December 2009), *Official Journal of the European Union*, document 2007/C 306/01.

110 Irish Republic Minister for Foreign Affairs and Trade, *Submission 56*, p. 1.

111 Dr Renshaw, University of Western Sydney, *Committee Hansard*, Sydney, 20 November 2015, p. 10; see also Dr Catherine Renshaw, Professor Steven Freeland and Ms Francine Feld, *Submission 58*, p. 3.

... the classic example being Eastern European nations abolishing during the 1990s in order to further their ambitions of European Union/Council of Europe membership.<sup>112</sup>

- 2.86 In addition to abolishing the death penalty among its member states, the European Union has actively sought to encourage other countries to follow its example. A submission from the European Commission (EC – the executive branch of the European Union) stated that ‘the abolition of capital punishment is at the very heart of the EU’s external policy and constitutes a flagship thematic area.’<sup>113</sup>
- 2.87 The EC also submitted that the EU is ‘the leading donor supporting the efforts of abolitionist civil society organisations in retentionist countries.’<sup>114</sup> The EU has supported the UN General Assembly moratorium resolutions, discussed earlier in this Chapter.<sup>115</sup>
- 2.88 The EU introduced guidelines on its death penalty policy towards third-countries in 1998 and, subsequently, an updated version in 2013.<sup>116</sup> The EU’s Guidelines confirm that its members should ‘work towards universal abolition of the death penalty as a strongly held policy agreed by all EU Member States.’<sup>117</sup>
- 2.89 The first Cotonou Agreement in 2000 (succeeded by similar agreements in 2005 and 2010) between the EU and African, Caribbean and Pacific countries includes incentives to improve human rights, democracy and rule of law standards in exchange for preferential trade and other assistance.<sup>118</sup>
- 2.90 Dr David Donat Cattin (Secretary-General, Parliamentarians for Global Action) said that this agreement had encouraged more states to ratify human rights treaties. He said:

In the Cotonou system you have an incentive to ratify and respect a number of treaties, which I believe also includes the second optional protocol to the ICCPR on the abolition of the death penalty. If you as a state from these developing countries ratify,

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112 Dr Pascoe, *Submission 19*, p. [4].

113 European Commission, *Submission 46*, p. 1.

114 European Commission, *Submission 46*, p. 2.

115 European Commission, *Submission 46*, p. 3.

116 European Commission, *Submission 46*, p. 1.

117 European Commission, *Submission 46*, Attachment 1, p. 5.

118 Article 9 of the Cotonou Agreement states: ‘Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement.’ See *Official Journal of the European Union*, 15 December 2000, document 2000/L 317/3.

implement or otherwise abide to all these treaties then you can become a favourite-plus partner of the EU for trade.<sup>119</sup>

- 2.91 Since 2005, the European Commission has introduced regulations prohibiting trade in goods related to capital punishment and torture; including electric chairs, airtight vaults, guillotine blades and the barbiturate anaesthetic agents amobarbital, pentobarbital, secobarbital and thiopental.<sup>120</sup>
- 2.92 Ms Maia Trujillo (Campaign Manager, Parliamentarians for Global Action) said the EU's restrictions on pharmaceuticals were 'mainly directed to the US'.<sup>121</sup>
- 2.93 The Danish company Lundbeck changed its distribution methods in 2011 to prevent Nembutal (a brand name for pentobarbital) reaching US prisons in executing states, after the company learnt of the 'distressing misuse of our product in capital punishment'.<sup>122</sup>
- 2.94 Other individual European countries have taken their own initiatives on death penalty abolition, including the UK and Norway, which are discussed below.

## United Kingdom

- 2.95 The UK Government undertakes advocacy intended to encourage other countries to abolish the death penalty. The UK's approach to death penalty advocacy was summarised in a submission from the Foreign and Commonwealth Office (FCO):
- We use a full range of diplomatic tools to persuade others to move towards abolition, including UN work, project work and multilateral and bilateral diplomacy.<sup>123</sup>
- 2.96 The UK introduced a strategy for abolition of the death penalty in 2010, which 'sets out the UK's policy on the death penalty, and offers guidance

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119 Dr David Donat Cattin, Secretary-General, Parliamentarians for Global Action (PGA), *Committee Hansard*, Canberra, 25 February 2016, p. 3.

120 'Commission Implementing Regulation (EU) No. 775/2014', 16 July 2014, *Official Journal of the European Union*, L 210/1.

121 Ms Maia Trujillo, Campaign Manager, PGA, *Committee Hansard*, Canberra, 25 February 2016, p. 5; see also Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 3; DFAT, *Submission 35*, p. 5.

122 H Lundbeck A/S, press release, 'Lundbeck Overhauls Pentobarbital Distribution Program to Restrict Misuse', 1 July 2011, at <investor.lundbeck.com/releasedetail.cfm?ReleaseID=605775> viewed 15 April 2016; see also 'Danish Company Blocks Sale of Drug for US Executions', *New York Times*, 1 July 2011.

123 UK Foreign and Commonwealth Office (FCO), *Submission 15*, p. 1.

to FCO overseas missions on how they can take forward our objectives.’<sup>124</sup> While notionally expiring in 2015, the UK Government has indicated that there has been ‘no change in the British Government’s policy of working towards global abolition of the death penalty.’<sup>125</sup>

2.97 The UK strategy confirms the UK Government’s objectives in relation to the death penalty:

- Increase in the number of abolitionist countries, or countries with a moratorium on the use of the death penalty
- Reduction in the numbers of executions and further restrictions on the use of the death penalty in retentionist countries
- Ensuring EU minimum standards are met in countries which retain the death penalty.<sup>126</sup>

2.98 The strategy identifies priority countries and techniques that might be utilised to deliver the strategy’s objectives:

- Supporting projects which mount constitutional and other legal challenges to the death penalty, restrict the scope of the death penalty and promote alternatives
- Encourage adherence to international standards
- Lobbying countries to immediately establish moratoriums with a view to abolition (core script attached at Appendix Seven)
- Lobbying countries to vote in favour of the UN Resolution on the Moratorium on the use of the Death Penalty
- Lobbying on individual cases of British Nationals who have been sentenced to the death penalty or are facing death penalty charges. ...
- Support projects which change opinions, engaging with civil society, the public, the media and policy makers
- Other bilateral and regional projects supporting our three goals.<sup>127</sup>

2.99 There are criteria for identifying priority countries:

We use five criteria to identify our priority countries. These are:

- The ability to make progress against our three goals
- Willingness of country to engage on the abolition of the death penalty
- Numbers of executions
- Lack of minimum standards/transparency

124 FCO, *HMG Strategy for Abolition of the Death Penalty 2010-2015*, October 2011 (revised), p. 3; Amnesty International Australia, *Submission 34*, p. 10.

125 UK Parliament, *Capital Punishment: Written Question HL 5007*, at <[www.parliament.uk/written-questions-answers-statements/written-question/lords/2016-01-13/HL5007](http://www.parliament.uk/written-questions-answers-statements/written-question/lords/2016-01-13/HL5007)> viewed 15 April 2016.

126 FCO, *HMG Strategy for Abolition of the Death Penalty 2010-2015*, October 2011 (revised), pp. 4-5.

127 FCO, *HMG Strategy for Abolition of the Death Penalty 2010-2015*, October 2011 (revised), p. 8.

- Global influence of country concerned/ impact of country's abolition elsewhere in the world.<sup>128</sup>

2.100 Mr Phil Robertson (Asia Division Deputy Director, Human Rights Watch) said that the UK strategy represented 'international best practice'.<sup>129</sup> ALHR also gave an endorsement:

In particular we applaud its recognition of the need to earmark funding to aid local lawyers and civil society groups in their advocacy efforts towards the abolition of the death penalty.<sup>130</sup>

- 2.101 The UK Government requires its officials to consider the human rights implications of assisting retentionist countries.<sup>131</sup> Assessment and checklist guidelines apply to 'all ... officials making policy decisions on UK engagement in justice and security assistance overseas' and, among other human rights issues, the death penalty forms part of the 'human rights risk assessment process'.<sup>132</sup>
- 2.102 The UK also has an active All-Party Parliamentary Group against the death penalty, whose advocacy activities are discussed in Chapter 6 of this report.

## Norway

2.103 Similarly to the UK, the Norwegian Government undertakes advocacy intended to encourage other countries to abolish the death penalty.

2.104 Mr Julian McMahon (private capacity) described Norway as a leader of global advocacy:

If it is not the leading country, it is certainly one of the leading countries in the world to be consistent in this. They speak up about cases that have nothing to do with Norwegian citizens.<sup>133</sup>

2.105 Norway's Ambassador to Australia, Her Excellency Ms Unni Kløvstad, outlined her Government's approach:

The government of Norway gives high priority to the global fight against the death penalty. This has broad bipartisan support. We work to promote a global abolition of the death penalty by law or

128 FCO, *HMG Strategy for Abolition of the Death Penalty 2010-2015*, October 2011 (revised), p. 10. Priority countries are updated annually. In 2011, the strategy listed China, Iran, the Commonwealth Caribbean, the US and Belarus as priorities.

129 Mr Robertson, Human Rights Watch, *Committee Hansard*, Sydney, 9 December 2015, p. 24.

130 ALHR, *Submission 18*, p. 8.

131 Ms Sarah Gill, *Submission 37*, p. 1.

132 FCO, *Overseas Security and Justice Assistance Guideline: Human Rights Guidance*, February 2014 (update), pp. 6-8.

133 Mr Julian McMahon, (Private capacity), *Committee Hansard*, Melbourne, 17 November 2015, p. 55.



the introduction of a moratorium on executions. Where it is retained, we urge states to observe minimum standards according to Article 6 in the ICCPR.<sup>134</sup>

2.106 The Ambassador added:

The fact that a country applies the death penalty has implications for the degree of assistance Norway can provide in police, justice and security matters. If there is a possibility that a country will use the death penalty, cooperation on criminal investigations and other judicial assistance will be limited. Norwegian authorities will not provide information or evidence that increases the likelihood of a death sentence being imposed.<sup>135</sup>

2.107 Norway has introduced guidelines for its foreign service in relation to death penalty matters.<sup>136</sup> The Guidelines summarise Norway's approach as follows:

...Norway will urge countries that still impose the death penalty and/or carry out executions to:

- Refrain from executions and introduce a moratorium on the death penalty;
- Respect the restrictions set out in international law;
- Limit the number of offences that are punishable by death;
- Allow for commutation to a prison sentence;
- Strengthen legal safeguards;
- Disclose the number of persons sentenced to death and executed; [and]
- Reduce the number of executions and introduce more restrictions on the use of the death penalty.<sup>137</sup>

2.108 The Guidelines also state:

Abolition of the death penalty is a priority issue that should be raised whenever appropriate at political-level meetings and during official visits, in political dialogues, human rights dialogues and in consultations on human rights with other countries.<sup>138</sup>

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134 Her Excellency Ms Unni Kløvstad, Ambassador, Royal Norwegian Embassy, *Committee Hansard*, Canberra, 15 March 2016, p. 1.

135 HE Ms Kløvstad, Norwegian Ambassador, *Committee Hansard*, Canberra, 15 March 2016, p. 1.

136 Norwegian Ministry of Foreign Affairs, *Promoting Abolition of the Death Penalty: Guidelines for the Foreign Service*, October 2012. See also Amnesty International Australia, *Submission 34*, p. 10.

137 Norwegian Ministry of Foreign Affairs, *Promoting Abolition of the Death Penalty: Guidelines for the Foreign Service*, October 2012, p. 7.

138 Norwegian Ministry of Foreign Affairs, *Promoting Abolition of the Death Penalty: Guidelines for the Foreign Service*, October 2012, p. 11.

2.109 In addition, the Guidelines outline Norway's approach to prioritisation of individual cases:

The Foreign Service should give special priority to individual cases where we know that there are plans to carry out the death penalty in a particularly inhumane way (for example by stoning) or plans to execute minors, pregnant women or persons who cannot be deemed criminally responsible. ... The overall situation must be considered in order to determine what is best in each case. Norway's response must be determined in consultation with the Ministry.<sup>139</sup>

## **Committee comment**

2.110 The Committee is particularly concerned that the numbers of executions appear to have increased, although a small group of countries account for a large proportion of executions. On the other hand, witnesses and submissions suggested that the moratorium resolutions at the UN demonstrated that the tide had turned against the death penalty as fewer countries actively execute. The increased number of executions in 2015 above recent trends is a cause for grave concern.

2.111 International law and norms do not as yet comprehensively prohibit the use of the death penalty. While some countries have ratified or acceded to treaties requiring abolition of the death penalty, other countries have agreed only to regulate or partially restrict its application. Nevertheless, there was some evidence that international standards may be advancing ahead of treaty law.

2.112 The application of international law regarding the death penalty is fragmented and is further complicated by varying interpretations of how the rules apply. These arrangements would of course be greatly simplified if there was global consensus to abolish the death penalty.

2.113 Initiatives of the European Union and individual European countries may provide a basis upon which Australia can improve or refine its advocacy efforts, in particular through the example of the death penalty strategies developed by the United Kingdom and Norway.

2.114 Recommendations relating to Australia's advocacy efforts follow in the remaining chapters of this report.

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139 Norwegian Ministry of Foreign Affairs, *Promoting Abolition of the Death Penalty: Guidelines for the Foreign Service*, October 2012, p. 24.

## Australia and the death penalty

- 3.1 Australia has a politically bipartisan stance against the death penalty, which is represented in laws and practices relating to criminal justice, extradition and the formal assistance it provides to foreign countries.
- 3.2 This chapter outlines Australia's domestic position in relation to capital punishment, looking at:
- Australia's domestic legal and political position;
  - the laws and practices surrounding extradition, as they relate to the death penalty;
  - the laws and practices surrounding mutual assistance, as they relate to the death penalty; and
  - an analysis of Australia's international obligations as an abolitionist country and a signatory to the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).

### Australia's domestic position

- 3.3 Capital punishment is comprehensively outlawed in Australia. The Law Council of Australia (LCA) and the Australian Bar Association (ABA) explained that:

No person has been executed in Australia since 2 February 1967. Since 1973 and the passage of the *Death Penalty Abolition Act 1973* (Cth), the death penalty has not been applied in respect of offences under the law of the Commonwealth and Territories.<sup>1</sup>

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<sup>1</sup> Law Council of Australia (LCA) and the Australian Bar Association (ABA), *Submission 24*, p. 4.

- 3.4 In 2010, the *Death Penalty Abolition Act 1973* (Cth) was amended to provide that the death penalty 'must not be imposed as the penalty for any offence' in Australia, including the State and Territory jurisdictions.<sup>2</sup>
- 3.5 The LCA and ABA submitted:
- Queensland was the first to abolish the death penalty for all crimes in 1922; New South Wales was the last in 1985. In 2010, with bipartisan support, the Commonwealth Parliament passed legislation to foreclose the possibility of any individual State jurisdiction reintroducing the death penalty.<sup>3</sup>
- 3.6 Former Senator Gary Humphries told the inquiry about the impetus for this law, saying that prior to 2010:
- ... there was no legal impediment for any one of the jurisdictions concerned to bring it back in certain circumstances, and we felt it was appropriate to take some steps to ensure that that process could not be reversed. Our focus was on a program to get states to refer their powers over the death penalty to the Commonwealth parliament and have the Commonwealth parliament, with the referral of powers, legislate for the whole country.<sup>4</sup>
- 3.8 Dr Amy Maguire, Ms Holly Fitzsimmons and Mr Daniel Richards quoted former Attorney-General, the Honourable Robert McClelland MP, whose second reading speech contended:
- Such a comprehensive rejection of capital punishment will also demonstrate Australia's commitment to the worldwide abolitionist movement and complement Australia's international lobbying efforts against the death penalty.<sup>5</sup>
- 3.9 Mr Humphries explained that the law was ultimately passed by the Rudd government in 2010 using 'the foreign affairs power':
- It legislated using the Second Option Protocol to the International Covenant on Civil and Political Rights, and, when it did so, it did so with barely a murmur of dissent.<sup>6</sup>
- 3.10 Despite almost universal opposition to the death penalty among Australia's politicians, there are occasional calls for reintroduction, though these are few and far between.

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2 *Death Penalty Abolition Act 1973* (Cth), s. 6.

3 LCA and ABA, *Submission 24*, p. 4.

4 Mr Gary Humphries, Private capacity, *Committee Hansard*, Canberra, 27 November 2015, p. 43.

5 Dr Amy Maguire, Ms Holly Fitzsimmons and Mr Daniel Richards, *Submission 40*, p. 2; see also House of Representatives *Hansard*, 19 November 2009, p. 12197.

6 Mr Humphries, *Committee Hansard*, Canberra, 27 November 2015, p. 43.

- 3.11 In November 2015, Queensland State MP Christian Rowan called for a debate on reinstating the death penalty in Australia, in response to the issue of terrorism.<sup>7</sup> His call was not supported by the Queensland Liberal National Party, of which he was a member.<sup>8</sup>
- 3.12 When asked if they intended to respond to this call, Reprieve Australia told the Committee that their organisation discussed the MP's call and chose to ignore it, rather than making any formal statements, as they 'did not want to give it oxygen'.<sup>9</sup>

### Popular views in Australia

- 3.13 There was some debate among witnesses as to the views of the Australian public on capital punishment.
- 3.14 Civil Liberties Australia (CLA) argued:  
... there is a rump group in Australia, and surveys show this to be around 45 to 55 per cent depending on what particularly horrendous killing has just occurred, that would reintroduce the death penalty if it were possible in Australia, even though it practically is not possible.<sup>10</sup>
- 3.15 CLA further stated that support for the death penalty among Australians increased between 2009 and 2015. This claim is based on a comparison of two Roy Morgan polls on capital punishment.<sup>11</sup>
- 3.16 The first poll, conducted in 2009, found that 64 per cent of Australians believed the penalty for murder should be imprisonment, and 23 per cent believed it should be the death penalty.<sup>12</sup>
- 3.17 The comparison poll, conducted in 2014, asked for people's views regarding the death penalty for terrorist attacks resulting in death, rather than 'murder'. This poll found that 52.5 per cent of respondents 'favour the death penalty for deadly terrorist attacks in Australia', and 47.5 per

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7 Ms Emily Howie, Director of Advocacy and Research, Human Rights Law Centre, *Committee Hansard*, Melbourne, 17 November 2015, p. 15.

8 Ms Gail Burke, 'Queensland MP Christian Rowan calls for debate on reinstating the death penalty in Australia', *ABC News online*, 12 November 2015, at <[www.abc.net.au/news/2015-11-12/lnp-mp-christian-rowan-calls-death-penalty-in-australia/6935954](http://www.abc.net.au/news/2015-11-12/lnp-mp-christian-rowan-calls-death-penalty-in-australia/6935954)> viewed 13 April 2016.

9 Ms Sally Warshaft, Vice-President, Reprieve Australia, *Committee Hansard*, Melbourne, 17 November 2015, p. 17.

10 Mr William Murray Rowlings, Chief Executive Officer, Civil Liberties Australia *Committee Hansard*, Canberra, 27 November 2015, p. 9.

11 Civil Liberties Australia (CLA), *Answer to Questions on Notice No. 1*, p. [1].

12 'Australians say penalty for murder should be Imprisonment (64%) rather than the Death Penalty (23%)', *Roy Morgan Research*, 27 August 2009, at <[www.roymorgan.com.au/findings/finding-4411-201302260051](http://www.roymorgan.com.au/findings/finding-4411-201302260051)> viewed 13 April 2016.

cent do not. The question asked was: 'If a person is convicted of a terrorist act in Australia which kills someone should the penalty be death?'<sup>13</sup>

- 3.18 The two polls being compared asked very different questions, with one referring to 'murder' and the other to 'a terrorist act'.
- 3.19 Professor Gregory Craven (Vice Chancellor, Australian Catholic University) offered the opinion that, in relation to public polling, the death penalty is 'a classic push-poll type policy area'. He asserted:
- If you set up polls that say, 'Is terrorism the greatest problem facing the world; do you absolutely loathe the people who kill for terror; do people who kill for terror deserve to get a corresponding punishment; are you in favour of the death penalty?' then you are going to go quite a long way towards getting an answer.<sup>14</sup>
- 3.20 Notably, the earlier 2009 poll also asked for respondents' views on the imposition of the death penalty for drug trafficking in overseas jurisdictions, and 50 per cent of respondents agreed that 'If an Australian is convicted of trafficking drugs in another country and sentenced to death, the penalty should be carried out', while 44 per cent answered that the death penalty 'should not be carried out' and 6 per cent answered that they 'can't say'.<sup>15</sup>
- 3.21 Professor Craven argued that policy makers must be vigilant to ensure popular consensus does not shift to support for the death penalty. He remarked:
- I have always been concerned at the ease with which discourse in Australia could or can very easily slip back into support for the death penalty. We commonly tell ourselves that in Australia this could never happen again. But there is a natural knee-jerk reaction if cases are bad enough, if they involve child abuse or terrorism, for example, that people will very quickly consider the possibility of capital punishment. My view is that the reason it does not get anywhere is not necessarily because that is the popular view but that there is, if you like, an aristocratic consensus at the policy-[class] level that prevents it.<sup>16</sup>

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13 'Small majority of Australians favour the death penalty for deadly terrorist acts in Australia', *Roy Morgan Research*, 27 August 2009, at <[www.roymorgan.com/findings/5814-death-penalty-for-terrorist-acts-september-19-2014-201409190533%20](http://www.roymorgan.com/findings/5814-death-penalty-for-terrorist-acts-september-19-2014-201409190533%20)> viewed 13 April 2016.

14 Professor Craven, *ACU, Committee Hansard*, Sydney, 9 December 2015, p. 21.

15 'Australians say penalty for murder should be Imprisonment (64%) rather than the Death Penalty (23%)', *Roy Morgan Research*, 27 August 2009.

16 Professor Gregory Joseph Craven, Vice-Chancellor, Australian Catholic University (ACU), *Committee Hansard*, Sydney, 9 December 2015, p. 18.

3.22 Witnesses including CLA<sup>17</sup> and Professor Craven proposed that there is still a need to educate the Australian public, to ensure broad-based support for country's abolitionist stance. Professor Craven said:

If you do not have the Australian public behind a position against the death penalty then overseas efforts, I think, are going to be fruitless.<sup>18</sup>

## Extradition

3.23 The Attorney General's Department is responsible for extradition in Australia. The Department describes extradition as 'the process by which one country apprehends and sends a person to another country to face criminal charges or serve a sentence'.<sup>19</sup>

3.24 The United Nations Office of the High Commissioner for Human Rights (OHCHR) stated that international law prohibits extradition in cases where the death penalty is a genuine risk:

This prohibition of non-refoulement primarily derives from the prohibition of torture, cruel inhuman and degrading treatment and punishment contained in Article 7 of ICCPR. It is also enshrined in Article 3 of the Convention against Torture. In accordance with international human rights jurisprudence, this prohibition should take precedence over specific bilateral extradition treaties or other agreements, such as on mutual assistance in criminal matters.<sup>20</sup>

3.25 Australia also has its own law, which is vocal on the issue of the death penalty and provides significant protections. Ms Catherine Hawkins (First Assistant Secretary, International Crime Cooperation Division, Attorney-General's Department) explained:

The Extradition Act 1988 does not allow for the extradition of a person where the offence is subject to the death penalty unless an undertaking is provided that the death penalty will not be imposed, or, if it is imposed, that it will not be carried out. In cases

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17 Mr Rowlings, Civil Liberties Australia, *Committee Hansard*, Canberra, 27 November 2015, p. 9.

18 Professor Craven, ACU, *Committee Hansard*, Sydney, 9 December 2015, p. 18.

19 Attorney General's Department (AGD), *Fact sheet 2 - Overview of the Extradition Process*, at <[www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/Extradition/Documents/Factsheet%20Overview%20of%20the%20Extradition%20Process.pdf](http://www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/Extradition/Documents/Factsheet%20Overview%20of%20the%20Extradition%20Process.pdf)> viewed 13 April 2016.

20 United Nations Office of the High Commissioner for Human Rights (OHCHR), *Submission 49*, p. [4].

where a person elects to waive extradition, the Attorney-General must be satisfied that, on return to the requesting country, there is no real risk that the death penalty will be carried out upon the person in relation to that offence.<sup>21</sup>

3.26 The *Extradition Act 1988* (Cth) was amended in 2012 to add additional safeguards where there is a risk of a person being subject to the death penalty or torture:

The Attorney-General may only determine that the person be surrendered to the extradition country concerned if:

- (a) the Attorney-General does not have substantial grounds for believing that, if the person were surrendered to the extradition country, the person would be in danger of being subjected to torture; and
- (b) the Attorney-General is satisfied that, on surrender to the extradition country, there is no real risk that the death penalty will be carried out upon the person in relation to any offence.<sup>22</sup>

3.27 The Minister said these amendments were intended to ensure that ‘terminology used in our domestic regime mirrors our international obligations’.<sup>23</sup> The overall purpose of the amendments was to:

...streamline and modernise the process for extradition, and to ensure Australian authorities can offer a comprehensive range of assistance to our international criminal justice partners.<sup>24</sup>

3.28 Before being enacted, the Bill was reviewed by the House Standing Committee on Social Policy and Legal Affairs, which stated that the legislation sought to ‘strengthen safeguards in relation to the provision of assistance where there are death penalty or torture concerns in a particular case’.<sup>25</sup>

3.29 Witnesses to the current inquiry were broadly satisfied that the Extradition Act provides the necessary safeguards to prevent refoulement in death penalty cases.<sup>26</sup>

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21 Ms Catherine Hawkins, First Assistant Secretary, International Crime Cooperation Division, Attorney-General’s Department (AGD), *Committee Hansard*, Canberra, 27 November 2015, p. 33.

22 *Extradition Act 1988* (Cth) s. 15B (3).

23 *Senate Hansard*, 21 September 2011, p. 6739.

24 *Senate Hansard*, 21 September 2011, p. 6738.

25 House Standing Committee on Social Policy and Legal Affairs, *Advisory report: Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*, p. 5.

26 See for instance: Human Rights Law Centre, *Submission 39*, p. 1; LCA and ABA, *Submission 24*, p. 14.



3.30 However, the United Nations Office of the High Commissioner for Human Rights (OHCHR) expressed concerns that the Act allows Australia to 'assist a retentionist country if the latter provides an assurance that the death penalty will not be carried out against the accused'. The OHCHR further observed:

The Federal Court of Australia has ruled that such assurance 'does not need to be legally enforceable', which would therefore allow a requesting country manipulating, backtracking or even ignoring its own assurances.<sup>27</sup>

3.31 The AGD's Ms Hawkins argued that the current process is effective and provides sufficient protections. She asserted:

Australia has effective relationships with a number of countries which retain the death penalty including the United States of America and Singapore. In the course of multiple extraditions over many years countries have provided death penalty undertakings to secure extradition for offences which carry the death penalty. Our experience is that those death penalty undertakings have been honoured.<sup>28</sup>

## Mutual assistance

3.32 Mutual assistance is 'the formal Government to Government process by which countries assist each other in the investigation and prosecution of criminal offences'.<sup>29</sup> Mutual assistance can also be used to recover proceeds of crime.<sup>30</sup>

3.33 Importantly, mutual assistance is 'separate from police-to-police and agency-to-agency assistance and other forms of informal assistance',<sup>31</sup> and as such is discussed separately from the issue of police-to-police information sharing, which is addressed in Chapter 4 of this report.

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27 OHCHR, *Submission 49*, p. [6].

28 Ms Hawkins, AGD, *Committee Hansard*, Canberra, 27 November 2015, p. 33.

29 House Standing Committee on Social Policy and Legal Affairs, *Advisory report: Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*, p. 3.

30 AGD, 'Mutual Assistance', AGD website, at <[www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/MutualAssistance/Pages/default.aspx](http://www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/MutualAssistance/Pages/default.aspx)> viewed 13 April 2016.

31 House Standing Committee on Social Policy and Legal Affairs, *Advisory report: Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*, p. 5.

3.34 The following figure describes the difference between mutual assistance and police-to-police assistance in a murder case:

Figure 3.1 Difference between mutual assistance and police-to-police assistance



Source Attorney General's Department, 'Mutual Assistance', AGD website.<sup>32</sup>

3.35 Australia's requests for mutual assistance are made by the Attorney-General and Minister for Justice, generally on behalf of a law enforcement agency, prosecuting agency, or a defendant in a criminal matter. Australia also receives requests from other countries in a 'reciprocal process'.<sup>33</sup>

3.36 Australia's mutual assistance processes are governed by the *Mutual Assistance in Criminal Matters Act 1987*. Section 8 of the Act was amended in 2012:

(1) A request by a foreign country for assistance under this Act shall be refused if, in the opinion of the Attorney-General:

...

(ca) there are substantial grounds for believing that, if the request was granted, the person would be in danger of being subjected to torture;

32 AGD, 'Mutual Assistance', AGD website, at <[www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/MutualAssistance/Pages/default.aspx](http://www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/MutualAssistance/Pages/default.aspx)> viewed 13 April 2016.

33 AGD, 'Mutual Assistance', AGD website.

...

(1A) A request by a foreign country for assistance under this Act must be refused if:

- (a) the request relates to the investigation, prosecution or punishment of:
  - (i) a person arrested or detained on suspicion of having committed an offence; or
  - (ii) a person charged with, or convicted of, an offence; and
- (b) the offence is one in respect of which the death penalty may be imposed in the foreign country;

unless the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.<sup>34</sup>

3.37 When introducing the amendments, the Minister said:

This will ensure the mandatory ground of refusal for death penalty offences applies regardless of whether formal charges have been laid.<sup>35</sup>

3.38 Further, the amendments included:

...an express mandatory ground for refusal where there are substantial grounds to believe the provision of the assistance would result in a person being subjected to torture.<sup>36</sup>

3.39 Ms Hawkins confirmed that the Act provides 'grounds for refusal in mutual assistance cases', with these grounds including exposure to the death penalty. She explained:

... in situations where a person has been charged, arrested, detained or convicted of an offence that could result in the death penalty, the act provides that mutual assistance must be refused unless there are special circumstances.<sup>37</sup>

3.40 While 'special circumstances' are not defined in the Act, Ms Hawkins provided these examples: 'the provision of exculpatory evidence', or where 'the foreign country has provided an undertaking that they would not carry out the death penalty'.<sup>38</sup>

3.41 Ms Hawkins also clarified that the Act provides discretion for the Attorney-General to refuse assistance in circumstances where 'no person

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34 *Mutual Assistance in Criminal Matters Act 1987* (Cth), s. 8.

35 *Senate Hansard*, 21 September 2011, p. 6740.

36 *Senate Hansard*, 21 September 2011, p. 6740.

37 Ms Hawkins, AGD, *Committee Hansard*, Canberra, 27 November 2015, p. 33.

38 Ms Hawkins, AGD, *Committee Hansard*, Canberra, 27 November 2015, p. 33.

has yet been charged, arrested, detained or convicted of a death penalty offence'. Further:

The Attorney-General may refuse assistance if he or she believes that the assistance may result in the death penalty being imposed and, after taking into account the interests of international cooperation, is of the opinion that, in the circumstances of the case, the request should not be granted.<sup>39</sup>

- 3.42 Very few witnesses commented on Australia's mutual assistance regime. However, the LCA and ABA proposed a change to the legislation, arguing:

Clarity around what is meant by 'special circumstance' in the legislation would assist in providing the community with reassurance that mutual assistance will only be provided in appropriate cases.<sup>40</sup>

- 3.43 The OHCHR was also concerned that 'special circumstances' is not defined in the Act, suggesting this could give the Attorney-General too much discretion.<sup>41</sup>

- 3.44 An inquiry into the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011* (to amend the Extradition Act and Mutual Assistance Act) was conducted by the House Standing Committee on Social Policy and Legal Affairs in 2011. The Committee recognised that there was reliance in the legislation on 'assurances' provided by foreign countries in exchange for information, saying this 'raises questions about the monitoring and enforcement schemes in place in relation to undertakings', though the Committee did *not* recommend defining 'special circumstances' in the Act.<sup>42</sup>

- 3.45 The Committee did recommend that 'if the Minister for Justice or the Attorney-General becomes aware of a serious breach of an undertaking, this breach should immediately be reported to the Parliament'.<sup>43</sup>

- 3.46 The Committee also recommended that the Attorney General's Department 'conduct a review of the operations of the amendments

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39 Ms Hawkins, AGD, *Committee Hansard*, Canberra, 27 November 2015, p. 33.

40 LCA and ABA, *Submission 24*, p. 16.

41 OHCHR, *Submission 49*, pp. [5-6].

42 House Standing Committee on Social Policy and Legal Affairs, *Advisory report: Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*, p. 36.

43 House Standing Committee on Social Policy and Legal Affairs, *Advisory report: Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*, p. 37.

contained in the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*, within three years of its enactment.<sup>44</sup>

## Australia's international obligations

3.47 Witnesses submitted that Australia has certain international obligations as an abolitionist nation, and as a signatory to the Second Optional Protocol to the ICCPR.

3.48 Dr Bharat Malkani (University of Birmingham) asserted:

Not only do states that have abolished the death penalty have political and moral obligations to refrain from aiding and assisting the use of the death penalty elsewhere, they may also have legal obligations in some circumstances.<sup>45</sup>

3.49 The ICCPR forbids abolitionist states from facilitating executions in foreign countries. This is articulated in *General Comment No. 31*, which states:

... the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.<sup>46</sup>

3.50 The OHCHR also noted the existence of jurisprudence whereby collaboration between abolitionist and retentionist states, which leads to an execution, would broaden responsibility beyond the executing state.<sup>47</sup>

3.51 In 2012 the Special Rapporteur on extrajudicial, summary or arbitrary executions reported to the UN General Assembly:

Where the death penalty is imposed in violation of international standards, this assistance may amount to complicity and should

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44 House Standing Committee on Social Policy and Legal Affairs, *Advisory report: Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*, p. 42.

45 Dr Bharat Malkani, University of Birmingham, *Submission 4*, p. 4.

46 ICCPR Human Rights Committee, *General Comment No. 31*, 'The Nature of the Legal Obligation Imposed on States Party to the Covenant', document CCPR/C/21/Rev.1/Add.13, p. 5.

47 UN Office of the High Commissioner of Human Rights, *Submission 49*, pp. 2-3.

lead to indirect legal or other responsibility on the part of the assisting party.<sup>48</sup>

3.52 Furthermore, as an overarching principle, the Special Rapporteur reported:

States that have abolished capital punishment may not assist in bringing about the death penalty in other countries, while States that retain it in law may support only its lawful imposition.<sup>49</sup>

3.53 A submission from Monash University's Castan Centre for Human Rights Law (Castan Centre) suggested that cooperation leading to an execution could be regarded as a breach of treaty obligations:

So far, the jurisprudence has addressed extradition, deportation and other forms of removal in this context, but we would argue that official cooperation foreseeably leading to the imposition of the death penalty should logically also be encompassed by this rule, particularly where it concerns people for whom a State has specific responsibility, such as citizens and permanent residents.<sup>50</sup>

3.54 Mr Adam Fletcher (Research Fellow, Castan Centre) submitted:

There is some disagreement as to how far that obligation extends. There is some argument over the jurisdictional scope of the ICCPR ... It is for the state to interpret its obligations, but it is good for jurisprudence to be consistent internationally, and the Human Rights Committee are the leading experts.<sup>51</sup>

3.55 Ms Sarah Gill observed that:

The International Commission of Jurists notes three requisite milestones for a country to be genuinely abolitionist: abolition of the death penalty in domestic law; non-refoulement of people to jurisdictions where they may face the death penalty; and a refusal to provide international police cooperation in death penalty situations.<sup>52</sup>

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48 'Extrajudicial, Summary or Arbitrary Executions: Note by the Secretary-General', 9 August 2012, document A/67/275; p.14. See also: OHCHR, *Submission 49*, p. 2. The Special Rapporteur noted that transferring a person may be lawful where 'adequate and reliable' diplomatic assurances are provided.

49 'Extrajudicial, Summary or Arbitrary Executions: Note by the Secretary-General', 9 August 2012, document A/67/275, p.16.

50 Castan Centre for Human Rights Law (Castan Centre), *Submission 9*, p. 3.

51 Mr Adam Fletcher, Research Fellow, Castan Centre, *Committee Hansard*, Melbourne, 17 November 2015, p. 25.

52 Ms Sarah Gill, *Submission 37*, p. [1].

- 3.56 The Castan Centre contended that Australia needs to show consistency in its formulation of international treaty agreements to ensure this obligation is reflected:

Australia's bilateral treaties regarding mutual assistance in criminal matters generally contain some internationally accepted safeguards, such as the right of refusal to cooperate where the request relates to a political or military offence. ... However, in the two most recent of these treaties (with India and the [United Arab Emirates]), the death penalty is mentioned specifically only in one (with the UAE), which seems inconsistent given both countries retain capital punishment for a range of crimes. Australia made clear in agreed minutes of negotiations for the equivalent treaty with China that 'imposition of the death penalty may be in conflict with the essential interests of Australia,' but the actual words 'death penalty' do not appear in the text of the treaty.<sup>53</sup>

- 3.57 The Castan Centre further recommended including references to international human rights law in the *Extradition Act 1988*, the *Mutual Assistance in Criminal Matters Act 1987*, and the *AFP National Guideline on international police-to-police assistance in death penalty situations*. It argued:

This would help to make it clear that the Australian Government takes its international obligations with respect to abolition of the death penalty seriously, and that those obligations are not lower-order concerns to be overridden by the need for international cooperation in combatting crime.<sup>54</sup>

## Committee comment

- 3.58 The Committee believes Australia's domestic legislative position on the death penalty is unambiguous, and applauds the positions taken by successive Australian governments, which have relegated executions in Australia to the past.
- 3.59 It is the Committee's view that an ongoing dialogue is required to ensure Australians understand the importance of a universal and principled opposition to the death penalty.
- 3.60 The Committee notes that Australia's *Extradition Act 1988* and *Mutual Assistance in Criminal Matters Act 1987* contain safeguards for preventing the exposure of persons to the risk of the death penalty in foreign

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53 Castan Centre, *Submission 9*, p. 4.

54 Castan Centre, *Submission 9*, p. 7.

jurisdictions. Further, that the 2011 amendments to these Acts were in part intended to provide further protections against exposing people to the risk of execution.

- 3.61 Few witnesses expressed concerns about these laws, and the Committee notes statements by the Attorney General's Department that the laws as they stand are working to protect persons from exposure to the death penalty.<sup>55</sup>
- 3.62 However, the Committee notes concerns raised by the United Nations Office of the High Commissioner for Human Rights in relation to possible ambiguity in Australia's mutual assistance and extradition laws, and recommends that the Attorney General's Department review the legislative arrangements to ensure that they uphold Australia's obligations as a signatory to the Second Optional Protocol to the International Covenant on Civil and Political Rights.

## Recommendation

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### Recommendation 1

**The Committee recommends that the Attorney-General's Department conduct a review of the current legislative arrangements for extradition and mutual assistance to ensure that they uphold Australia's obligations as a signatory to the Second Optional Protocol to the International Covenant on Civil and Political Rights.**

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55 Ms Hawkins, AGD, *Committee Hansard*, Canberra, 27 November 2015, p. 33.



## Law enforcement and the death penalty

- 4.1 The role of law enforcement in exposing people to execution was a significant topic of discussion for the inquiry, particularly in relation to transnational drug crime.
- 4.2 This chapter examines evidence received by the Committee on the following:
- the Australian Federal Police's (AFP) cooperation with overseas law enforcement agencies on international crime prevention, as it relates to the death penalty;
  - Australia's aid to foreign law enforcement bodies, particularly in countries which retain the death penalty; and
  - international approaches to drug crime and control and their impact on the global status of capital punishment.

### **Police cooperation on international crime prevention**

- 4.3 A number of witnesses to the inquiry raised the issue of the AFP's cooperation with international law enforcement, concerned that Australia's efforts to protect its citizens from exposure to the death penalty could be undermined by the sharing of information in possible death penalty cases.
- 4.4 In their combined submission, Amnesty International, Human Rights Watch, Human Rights Law Centre, Reprieve, Australians Detained Abroad, NSW Council for Civil Liberties, and Civil Liberties Australia, proposed that the Australian Government:
- Amend Australian laws to prohibit the Australian Federal Police from sharing information with other law enforcement agencies

that could potentially result in suspected perpetrators facing the death penalty.<sup>1</sup>

- 4.5 This issue rose to prominence with the death sentences imposed upon Australians Andrew Chan and Myuran Sukumaran in Indonesia. The Human Rights Law Centre claimed:

It was foreseeable that AFP's provision of information would lead to members of the Bali 9 facing the death penalty. It was also open to the AFP to arrest the Bali 9 in Australia and ensure that they were tried in Australian courts that would not impose the death penalty. Yet there is nothing to prevent AFP from doing the same thing again.<sup>2</sup>

- 4.6 The United Nations Office of the High Commissioner for Human Rights (OHCHR) also expressed views on this matter:

We recommend that the Australian Parliament, the Ministry of Justice and AFP strengthen relevant laws, regulations and policies to ensure that agency-to-agency cooperation does not lead to the application and implementation of the death penalty by cooperating countries. There should not be any exception.<sup>3</sup>

- 4.7 Ms Sarah Gill submitted that the AFP's activities:

... are at odds with Australia's opposition to the death penalty and inconsistent with the approach to international cooperation articulated in the Mutual Assistance in Criminal Matters Act 1987 and the Extradition Act 1988.<sup>4</sup>

- 4.8 Ms Felicity Gerry QC and Ms Narelle Sherwill<sup>5</sup> highlighted Ms Gill's research, which claimed that information obtained through Freedom of Information requests indicated:

In the five years to 2015, the AFP knowingly exposed about 1800 people to the risk of execution by sharing intelligence with death penalty states.<sup>6</sup>

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1 Amnesty International, Human Rights Watch, Human Rights Law Centre, Reprieve, Australians Detained Abroad, NSW Council for Civil Liberties, Civil Liberties Australia, *Submission 21*, p. [2].

2 Human Rights Law Centre, *Submission 39*, p. 1.

3 United Nations Office of the High Commissioner for Human Rights (OHCHR), *Submission 49*, p. [7].

4 Ms Sarah Gill, *Submission 37*, p. [1].

5 Ms Felicity Gerry QC and Ms Narelle Sherwill, *Submission 31*, p. [9].

6 Ms Sarah Gill, 'AFP exposes Australians to the risk of execution in foreign countries more often than you think', *The Age* (Comment), 8 September 2015, at <[www.theage.com.au/comment/the-afp-peddles-injustice-by-helping-asian-death-penalty-states-20150902-gjdvu3.html](http://www.theage.com.au/comment/the-afp-peddles-injustice-by-helping-asian-death-penalty-states-20150902-gjdvu3.html)> viewed 15 March 2016.

- 4.9 Ms Gill's figure includes both Australian citizens and foreign nationals, with a majority likely to be foreign nationals.
- 4.10 The AFP provided the following table which includes figures for the same period. The figures add up to a total of 411 approved requests in the period, although a single request may relate to more than one person of interest.<sup>7</sup>

Table 4.1 AFP approved information sharing in potential death penalty matters

Year	Total Requests	Approved	Not Approved
2010	120	107	13
2011	90	84	6
2012	94	83	11
2013	50	47	3
2014	92	90	2

Source AFP, *Submission 22*, p. 9.

- 4.11 The AFP's submission to the inquiry sought to address concerns raised about its practices, stating that the AFP acts 'in accordance with Australian and international policies and guidelines regarding the provision of information to foreign jurisdictions in death penalty matters'.<sup>8</sup>
- 4.12 The submission further clarified that the AFP operates under the *Australian Federal Police National Guideline on International Police-to-Police Assistance in Death Penalty Situations (the Guideline)*, 'which is in accordance with Australia's long standing opposition to the death penalty'.<sup>9</sup>
- 4.13 Deputy Commissioner Leanne Close explained that the AFP's actions in relation to the Bali 9 were found by the Federal Court to be lawful:

As you may be aware, Justice Finn of the Federal Court ruled in 2006 that the AFP acted lawfully and in accordance with its legal obligations following his review of AFP actions and procedures arising from Operation Midship. The review did recommend that we review our processes to strike a better balance between justice outcomes and the AFP's responsibility to protect the community from criminal activities. Since that time we have regularly updated and reviewed our guidelines.<sup>10</sup>

7 AFP, *Submission 22*, p. 9.

8 Australian Federal Police (AFP), *Submission 22*, p. 3.

9 AFP, *Submission 22*, p. 3.

10 Deputy Commissioner Leanne Close, Deputy Commissioner Operations, Australian Federal Police, *Committee Hansard*, Canberra, 27 November 2015, p. 31.

4.14 However, the Castan Human Rights Law Centre (Monash University) drew attention to criticisms by the UN Human Rights Committee, which found in 2009 that the AFP's Guideline may still expose people to death sentences:

In 2009, in the context of news about Australia's cooperation with Indonesia in the Bali Nine case, the UN Human Rights Committee expressed its concern about Australia's 'lack of a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state, in violation of the State party's obligation under the Second Optional Protocol.'<sup>11</sup>

4.15 The AFP's Guideline governs police-to-police assistance in possible death penalty cases, and was developed in consultation with the Attorney-General's Department.<sup>12</sup>

4.16 The following is an excerpt from the Guideline:

**Assistance before detention, arrest, charge or conviction**

The AFP is required to consider relevant factors before providing information to foreign law enforcement agencies if it is aware the provision of information is likely to result in the prosecution of an identified person for an offence carrying the death penalty.

Senior AFP management (Manager /SES-level 1 and above) must consider prescribed factors before approving provision of assistance in matters with possible death penalty implications, including:

- the purpose of providing the information and the reliability of that information
- the seriousness of the suspected criminal activity
- the nationality, age and personal circumstances of the person involved
- the potential risks to the person, and other persons, in providing or not providing the information
- Australia's interest in promoting and securing cooperation from overseas agencies in combatting crime.<sup>13</sup>

4.17 The Guideline also clarifies that:

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11 Castan Human Rights Law Centre, Monash University, *Submission 9*, p. 3.

12 AFP, *Submission 22*, p. 8. The *Australian Federal Police National Guideline on International Police-to-Police Assistance in Death Penalty Situations* was provided as Attachment A at page 13 of the AFP submission.

13 AFP, *Submission 22*, p. 14.

Ministerial approval is required in any case in which a person has been arrested or detained for, charged with, or convicted of an offence which carries the death penalty.<sup>14</sup>

4.18 Further, the Guideline mandates reporting the 'nature and number' of cases annually to the Minister.<sup>15</sup>

4.19 Several witnesses argued that there are shortcomings in the Guideline and the AFP's current practices. The OHCHR submitted that the current guidelines:

... do not prohibit cooperation when the information could, may, or will likely be used in a death penalty case. They only require the officials to consider this as a possible factor along with several others. Second, the management level review of requests is triggered only if the AFP 'is aware' that the information may be used in a death penalty charge.<sup>16</sup>

4.20 The Castan Centre contended that:

No indication is given in the Guideline of how these potentially conflicting interests are to be weighed. In addition, despite the evident shortcomings of the Guideline in terms of safeguards, the Government and the AFP have maintained that they are satisfied of its appropriateness.<sup>17</sup>

4.21 The Law Council of Australia and the Australian Bar Association (LCA and ABA) suggested that:

Consideration could also be given to reviewing or amending [the Guideline] to clearly set out the parameters of the exercise of discretion of senior AFP management relating to Australia's cooperation with foreign countries where the imposition of the death penalty may be a possible outcome.<sup>18</sup>

4.22 Mr Richard Galloway even proposed criminalising actions that 'lead to a conviction anywhere in the world' for a death penalty offence, and refusing entry to Australia to any foreign national involved in imposing or carrying out death sentences in their own country.<sup>19</sup>

4.23 The Australian Lawyers for Human Rights (ALHR) suggested that:

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14 AFP, *Submission 22*, p. 15.

15 AFP, *Submission 22*, p. 16.

16 OHCHR, *Submission 49*, p. [7].

17 Castan Centre, *Submission 9*, p. 4-5.

18 Law Council of Australia and the Australian Bar Association (LCA and ABA), *Submission 24*, p. 15.

19 Mr Richard Galloway, *Submission 32*, p. [1].

Had it not been for inconsistencies between the safeguards applicable to mutual assistance and agency assistance, Andrew Chan and Myuran Sukumaran may not have been exposed to a sentence of death. There are currently no Australian laws that prevent a repeat of the circumstances that saw the Bali 9 sentenced to death and executed.<sup>20</sup>

4.24 According to the Castan Centre, practices such as those undertaken by the AFP appear to:

... reveal a troubling inconsistency in what the Government says publicly about its strong opposition to the death penalty and what it expects of the AFP (hence what the AFP actually does) when dealing with death penalty cases overseas.<sup>21</sup>

4.25 Responding to the proposal that the situation could recur under the current guidelines, Deputy Commissioner Leanne Close said:

We had a number of arrests in Australia that went to some of those earlier drug importations as well as the one that resulted in the nine arrests in Indonesia. It is impossible to say. Would this new guideline have stopped that? You can never say never. We certainly have strengthened the processes for our offices working offshore and in Australia to make sure that they always consider this first before the provision of any information.<sup>22</sup>

4.26 Civil Liberties Australia were particularly critical of the AFP's current processes cautioning that the AFP must not be allowed to 'behave [like] a rogue agency' in relation to the provision of information to overseas law enforcement agencies.<sup>23</sup>

4.27 Some witnesses argued that stronger guidelines would not be sufficient, and suggested changes to the AFP Act were required. For instance, Ms Emily Howie (Human Rights Law Centre) stated:

We think the AFP Act should place clear parameters around information and intelligence sharing that lead to the death penalty. One way to do this is to amend the AFP Act to prohibit intelligence sharing that leads to the death penalty, unless an assurance is given by foreign counterparts that the death penalty

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20 Australian Lawyers for Human Rights (ALHR), *Submission 18*, p. 9.

21 Castan Centre, *Submission 9*, p. 6.

22 Deputy Commissioner Close, AFP, *Committee Hansard*, Canberra, 27 November 2015, p. 37.

23 Mr William Murray Rowlings, Chief Executive Officer, Civil Liberties Australia *Committee Hansard*, Canberra, 27 November 2015, p. 11.

- will not be sought or imposed or, perhaps, in emergency situations, such as where there is an imminent danger to life.<sup>24</sup>
- 4.28 Ms Ursula Noye (Reprieve) proposed that 'Australia's provision of assistance must be conditional upon there being appropriate safeguards against the use of the death penalty.'<sup>25</sup>
- 4.29 The LCA and ABA suggested 'appropriate legislative reform of the *Australian Federal Police Act 1979* (Cth), in light of the complexities presently faced by the AFP in exercising discretion to disclose information'.<sup>26</sup>
- 4.30 Ms Howie argued:
- ... our Extradition Act protects against surrendering people to the death penalty and the Mutual Assistance Act protects against assisting other countries if the death penalty may be imposed, whereas the AFP Act contains no such safeguards. That inconsistency should be addressed.<sup>27</sup>
- 4.31 The Human Rights Law Centre proposed legislative amendments, saying:
- One way to do that might be by amending s 60A of the AFP Act to expressly prevent the sharing of prescribed information in circumstances that may lead to the imposition [of the] death penalty.<sup>28</sup>
- 4.32 The ALHR suggested more Ministerial oversight would be appropriate:
- There is a pressing need for a requirement of Ministerial oversight to be introduced into the AFP guidelines concerning the sharing of information that could lead to the death penalty when Australian law enforcement agencies are providing assistance before arrest, charge, or conviction.<sup>29</sup>
- 4.33 Most witnesses were focussed on suggesting changes to the AFP's Guideline, rather than the AFP Act. Amnesty proposed:
- legislative reform to ensure a guarantee is sought against a possible death penalty ...

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24 Ms Emily Howie, Human Rights Law Centre, *Committee Hansard*, Melbourne, 17 November 2015, p. 12.

25 Ms Ursula Noye, Board member, Reprieve Australia, *Committee Hansard*, Melbourne, 17 November 2015, p. 12.

26 LCA and ABA, *Submission 24*, p. 15.

27 Ms Howie, Human Rights Law Centre, *Committee Hansard*, Melbourne, 17 November 2015, p. 13.

28 Human Rights Law Centre, *Submission 39*, pp. 1-2.

29 ALHR, *Submission 18*, p. 9.

- the AFP guidelines should be strengthened to ensure that at some point before arrest, Ministerial guidance is sought in cases carrying a death penalty risk.<sup>30</sup>
  - The Attorney-General should request an independent audit and review of relevant law enforcement policies and procedures (particularly in relation to police cooperation and counter-narcotics) to ensure they reflect Australia's stance against the death penalty.<sup>31</sup>
- 4.34 The ALC and ABA suggested that the AFP's Guideline should not consider the age, nationality and circumstances of the suspect, saying:
- Such considerations appear inconsistent with absolute opposition to the death penalty - which would dictate that the personal characteristics of the suspect are irrelevant.<sup>32</sup>
- 4.35 The ALC and ABA further suggested that the requirement to consider 'Australia's interest in promoting and securing cooperation from overseas agencies in combating crime' should also be removed from the Guideline, as it 'suggests that Australia's opposition to the death penalty is not absolute and can be put aside where it is expedient for other purposes'.<sup>33</sup>
- 4.36 The AFP acknowledged that its 'involvement in combating transnational crime in the region primarily involves drug trafficking'<sup>34</sup> and argued that:
- The AFP would not have been able to achieve its longstanding operational results [on narcotics crime] without significant cooperation between the AFP and international law enforcement agencies.<sup>35</sup>
- 4.37 Deputy Commissioner Close further stated:
- Collaboration with international police agencies is critical to the AFP's ability to combat, prevent and interdict serious and organised crimes. The cornerstone of this activity is the AFP's international network, with approximately 100 members deployed across 30 countries. Of the members deployed, 66 per cent are concentrated in the Asia-Pacific region, which highlights the importance of working within these countries to combat the flow-on effects of transnational crime to Australia. AFP members work on a range of bilateral and multilateral investigations in close partnership with host country law enforcement agencies. Of the
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30 Amnesty International, *Submission 34*, p. 15.

31 Amnesty International, *Submission 34*, p. 4.

32 LCA and ABA, *Submission 24*, p. 16.

33 LCA and ABA, *Submission 24*, p. 16.

34 AFP, *Submission 22*, p. 5.

35 AFP, *Submission 22*, p. 11.



1924 investigations that are currently underway by the AFP, 69 per cent have a direct link or association with international law enforcement or transnational organised crime.<sup>36</sup>

4.38 The AFP noted that several submissions to the inquiry called for legislative measures to govern the provision of information overseas in death penalty matters. Deputy Commissioner Close argued that such measures:

... would hamper the critical work the AFP does with our international partners in addressing transnational crime and fighting crime at its source, which could result in significant harm to Australia and our citizens. The AFP's ability to detect and prevent crime is reliant upon strong reciprocal relationships with law enforcement partners to facilitate the exchange of criminal intelligence and information. The real-time exchange of tactical information is an essential part of the AFP's ability to combat crime.<sup>37</sup>

4.39 In their supplementary submission to the inquiry, the AFP provided the following 'risks associated with codification of the AFP's national guidelines':

- National Guidelines and governance instrument amendments are based on AFP internal reviews as part of a measured process over a period of time, providing greater flexibility than legislative reform.
- The processes within governance instruments may be departed from in some circumstances, so long as the decision maker has had regard to the instrument and the departure is reasonable and lawful in the circumstances. The reason for the departure is also fully recorded. Depending on the drafting of the provisions, the departure from legislative instruments may amount to the commission of a criminal offence or attract criminal or civil penalties.
- Codification of the National Guideline may inhibit flexibility between the AFP and foreign law enforcement agencies (FLEAs) which could lead to inferior outcomes and harm AFP partnerships.<sup>38</sup>

4.40 However, some witnesses argued that stronger guidelines to prevent exposing people to the death penalty need not hamper cooperation between countries. For instance, Dr Bharat Malkani (University of Birmingham) stated:

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36 Deputy Commissioner Close, AFP, *Committee Hansard*, Canberra, 27 November 2015, p. 32.

37 Deputy Commissioner Close, AFP, *Committee Hansard*, Canberra, 27 November 2015, pp. 31-32.

38 AFP, *Supplementary Submission 22.2*, p. 4.

One thing to remember is that in a lot of these cases you would have the upper hand, in the sense that they are coming to you requesting you for help, especially the countries that say they need death sentences to combat drug trafficking. ... So if you say, 'We are not going to assist you unless you give these assurances,' at some point they will buckle, because they need to show their citizens that they are tackling drug trafficking offences and they need your help to do that.<sup>39</sup>

- 4.41 Dr Maguire, Ms Fitzsimmons and Mr Richards drew attention to the *Treaty between Australia and the Republic of Indonesia on Mutual Assistance in Criminal Matters*, which entered into force on 17 July 1999.<sup>40</sup> The treaty includes provision for Australia to refuse cooperation if the death penalty is in play. Dr Maguire et al argued:

It is apparent Australia is able to maintain international and bi-lateral relationships while still advocating against the death penalty, and preventing its use against people in a number of situations.<sup>41</sup>

- 4.42 Lawyers McMahon, Wilson, Haccou, O'Connell and Morrissey suggested that the issue lies in the fact that AFP makes the decisions itself, without independent oversight. They wrote:

We readily acknowledge the desirability of the AFP being able to work effectively. However, currently it appears that too much discretion resides with the AFP on this matter. In our view, it would be appropriate to consider the appointment of a Monitor, independent of the AFP and Government, with the responsibility of overseeing the provision of information overseas. ... This structure would ultimately serve the interests of Government, the AFP and the community. The reality is there will often be very difficult judgment calls, and a person or persons outside the pressures of a particular investigation, and outside of the Minister's office, are better suited to make the final decision.<sup>42</sup>

- 4.43 Speaking about United States law enforcement, Mr Richard Bourke (Director, Louisiana Capital Assistance Centre) suggested that law enforcement agencies are primarily focussed on solving and preventing

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39 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 5.

40 *Treaty Between Australia and the Republic of Indonesia on Mutual Assistance in Criminal Matters* (entered into force 17 July 1999), *Australian Treaty Series*, 1999 No. 10.

41 Dr Maguire, Ms Fitzsimmons and Mr Richards, *Submission 40*, p. 8.

42 McMahon, Wilson, Haccou, O'Connell and Morrissey, *Submission 12*, p. 6.

crime: 'Committed as they are to their mission, they will always want all of the tools that they could possibly have in the tool kit'.<sup>43</sup>

- 4.44 Ms Howie proposed that the problem lies in the emphasis of the guidelines:

At the moment, the Australian Federal Police Act and the guidelines allow an extremely broad discretion for information sharing, and what I think we need to move towards is a default position where information sharing that could lead to the imposition of the death penalty would be prohibited.<sup>44</sup>

- 4.45 Deputy Commissioner Close responded to suggestions that revised guidelines could stipulate that 'some crimes are in, and some crimes are out' in relation to police-to-police information sharing:

It would be easy to say, 'We won't share on drug related matters.' That will then mean that, as I pointed out, the significant percentage of investigations that we currently have within the Federal Police to stop those crime types and the drugs entering Australia will be severely limited.<sup>45</sup>

- 4.46 The Committee sought clarification from the AFP as to whether there were any situations in which seeking an assurance that a person would not be executed for any offence had 'jeopardised your working relationships with your overseas partners'? Deputy Commissioner Close replied: 'No. I do not have any examples of that.'<sup>46</sup>

- 4.47 Not all witnesses raised objections to the AFP's current guidelines and practices. For instance, Professor Donald Robert Rothwell (private capacity) was more complementary:

I think, to a degree, one can say that the proof is in the pudding and that is that, since [the Bali 9], no similar issues have arisen in terms of AFP cooperation with their Indonesian counterparts which raises no concerns. We have received a number of assurances in the public domain by the AFP commissioner that they are satisfied that those measures are appropriate. I think that is all I can really say at the moment on that point.<sup>47</sup>

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43 Mr Richard Bourke, Director, Louisiana Capital Assistance Center, *Committee Hansard*, Melbourne, 17 November 2015, p. 7.

44 Ms Howie, Human Rights Law Centre, *Committee Hansard*, Melbourne, 17 November 2015, p. 14.

45 Deputy Commissioner Close, AFP, *Committee Hansard*, Canberra, 27 November 2015, p. 34.

46 Deputy Commissioner Close, AFP, *Committee Hansard*, Canberra, 27 November 2015, p. 35.

47 Professor Donald Robert Rothwell, Private capacity, *Committee Hansard*, Canberra, 27 November 2015, p. 29.

4.48 Mr Gary Humphries (private capacity) suggested that the issue had a level of complexity that must be taken into account:

We took an in-principle view at the beginning that we should never share information that might lead to somebody receiving the death penalty. After a period of time we were persuaded that that a position had many practical difficulties associated with it.<sup>48</sup>

4.49 Numerous witnesses were questioned about whether they believed there is a need to maintain some flexibility or discretion in the Guideline, particularly for dealing with situations where lives may be at risk, such as in instances of planned terrorist attacks.<sup>49</sup>

4.50 Ms Howie's response was typical of those provided in evidence:

I think the default position needs to be that you do not disclose. If there are extraordinary circumstances, the parameters for sharing information should be set [out] very clearly in the legislation so that the decision maker knows in what circumstances that kind of information sharing would be allowed. And there should be proper monitoring of the way that is done in practice because we do not want to see an exception like that being used as a de facto means of circumventing the ordinary prohibition on information sharing.<sup>50</sup>

4.51 In defence of its current processes and guidelines, the AFP submitted the following:

- Since the Bali 9 there has not been a situation in which an Australian citizen has been arrested, detained or charged with an offence that could lead to the death penalty as a result of AFP assistance.<sup>51</sup> Note that this only relates to Australian citizens – not foreign nationals.
- While technically the Guideline only applies where information is 'likely to result in a prosecution', the AFP 'takes a conservative approach', also referring lower risk matters to the processes under the National Guideline.<sup>52</sup>

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48 Mr Gary Humphries, Private capacity, *Committee Hansard*, Canberra, 27 November 2015, p. 43.

49 See for instance: Ms Howie, Human Rights Law Centre, *Committee Hansard*, Melbourne, 17 November 2015, p. 14; and Ms Stephanie Cousins, Government Relations Manager, Amnesty International, *Committee Hansard*, Sydney, 20 November 2015, p. 3.

50 Ms Howie, Human Rights Law Centre, *Committee Hansard*, Melbourne, 17 November 2015, p. 14.

51 Deputy Commissioner Close, AFP, *Committee Hansard*, Canberra, 27 November 2015, p. 37.

52 AFP, *Supplementary Submission 22.2*, p. 7.

- Any changes to the Guideline already require the approval of both the Minister for Justice and the Attorney-General.<sup>53</sup>

4.52 The AFP advised that a significant amount of the information they provide ‘is extremely low risk’. Assistant Commissioner Scott Lee explained:

... it is hotel records, call charge records, movement records: those types of inquiries that are obviously relevant to our investigations but are not necessarily more intrusive in terms of the surveillance of an individual. With the passing of information – for example, where we would suspect a person may come into possession of drugs in those countries – in those instances, for example, where we suspect that a person may come into possession of drugs when they travelled, which we have had recently, we actually did not pass the information. But in those instances it is scalable and in those more intrusive, or those high risk areas, it is only in quite small numbers.<sup>54</sup>

4.53 Assistant Commissioner Lee also told the Committee that the police choose *not* to communicate information in many cases:

Can I assure you that in recent days and weeks we have had individuals that we are aware of who are travelling offshore as drug couriers. We have taken active decisions not to communicate that information.<sup>55</sup>

4.54 The following table, provided by the AFP indicates the varying risk levels allocated by the AFP to relevant approved requests for police-to-police assistance in the last three years:

Table 4.2 Risk ratings of Internally Approved Requests to provide assistance in Potential Death Penalty Situations

Year	Total Approved Requests	Low	Medium	High
2013	47	39 (83%)	8 (17%)	0
2014	90	75 (83%)	12 (13.5%)	3 (3.5%)
2015	63	52 (82.5%)	6 (9.5%)	5 (8%)
<b>Total</b>	<b>200</b>	<b>166 (83%)</b>	<b>26 (13%)</b>	<b>8 (4%)</b>

Source AFP, Supplementary Submission 22.2, p. 9.

53 AFP, Supplementary Submission 22.2, p. 4.

54 Assistant Commissioner Scott Lee, AFP, Committee Hansard, Canberra, 27 November 2015, p. 42.

55 Assistant Commissioner Scott Lee, Assistant Commissioner International Operations, Australian Federal Police, Committee Hansard, Canberra, 27 November 2015, p. 39.

- 4.55 The AFP clarified that the 200 approved requests in fact related to 835 persons of interest, and that about 26 per cent of those (221 persons) were Australian citizens.<sup>56</sup>

### The AFP's planned review

- 4.56 The AFP also revealed that it is currently reviewing its National Guideline.<sup>57</sup>
- 4.57 While not intending to pre-empt the outcome of this review, the AFP indicated that it:
- ... will work towards a similar approach to that of the UK, but in the short term, adopt a risk assessment model modified to support death penalty deliberations in an Australian law enforcement context.<sup>58</sup>

### The United Kingdom's approach

- 4.58 The Committee asked the AFP to examine the UK's approach to police-to-police information-sharing and provide their opinion on its applicability to the Australian law enforcement context.
- 4.59 The UK's provision of information on a police-to-police basis has been guided by the revised *Overseas Security and Justice Assistance Human Rights Guidance* since 2014.<sup>59</sup>
- 4.60 This Guidance document applies to all sectors, including:
- ... armed forces, police, gendarmeries, paramilitary forces, presidential guards, intelligence and security services (military and civilian), coast guards, border guards, customs authorities, reserve or local security units (civil defence forces, national guards, militias), judiciary, defence, interior and justice ministries, and criminal investigation services.<sup>60</sup>
- 4.61 According to the AFP, the 'UK Guidance articulates the human rights and international humanitarian law risks that should be considered by Her Majesty's Government (HMG) officials prior to providing justice or security sector assistance'.<sup>61</sup>

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56 AFP, *Supplementary Submission 22.2*, p. 9.

57 AFP, *Supplementary Submission 22.2*, p. 11.

58 AFP, *Supplementary Submission 22.2*, p. 11.

59 Available at: <[www.gov.uk/government/speeches/overseas-security-and-justice-assistance-guidance](http://www.gov.uk/government/speeches/overseas-security-and-justice-assistance-guidance)>, viewed 30 March 2016.

60 Her Majesty's Government, *Overseas Security and Justice Assistance Human Rights Guidance*, p. 6.

61 AFP, *Supplementary Submission 22.2*, p. 11.

- 4.62 The UK Foreign and Commonwealth Office submitted that the Guidance:  
... screens all British Government assistance and co-operation with foreign justice systems. A key aspect of that guidance is identifying and avoiding cases where assistance may lead to application of the death penalty. A message that we give to partners who continue to execute is that we are constrained in the assistance that we can offer them.<sup>62</sup>
- 4.63 These comments suggest that the UK's position in relation to police-to-police assistance is stronger than Australia's: where the AFP must consider various factors, including risk to the accused, before providing information, the UK authorities 'are generally unable to assist foreign prosecutions when [they] cannot rule out the possibility that the death penalty might result'.<sup>63</sup>
- 4.64 According to Her Excellency Ms Unni Kløvstad (Ambassador, Royal Norwegian Embassy), Norway has similar prohibitions in place.<sup>64</sup>
- 4.65 Ms Gill drew attention to public statements by the British Government 'in relation to transnational crime, that protection of human rights is no less important than enforcement of the rule of law'.<sup>65</sup>
- 4.66 However, Dr Malkani criticised the UK's past performance in this area, stating that the UK 'has on occasion provided assistance to foreign authorities in the investigation and prosecution of specific individuals and offences, leading to the imposition of the death penalty'.<sup>66</sup>
- 4.67 Dr Malkani further claimed:  
In Kenya there is Ali Babitu, who is facing a death sentence as a result of the assistance of the Metropolitan Police. ... with Antigua, Kenya, Pakistan and Iran, there are quite a few examples where our assistance has led to death sentences abroad.<sup>67</sup>
- 4.68 The AFP indicated that it has begun a formal review of the UK's model to 'benchmark and identify potential opportunities to inform the existing death penalty governance framework' in Australia.<sup>68</sup>

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62 UK Foreign and Commonwealth Office, *Submission 15*, p. [3].

63 UK Foreign and Commonwealth Office, *Submission 15*, p. [3].

64 Her Excellency Ms Unni Kløvstad, Ambassador, Royal Norwegian Embassy, *Committee Hansard*, Canberra, 15 March 2016, p. 1.

65 Ms Sarah Gill, *Submission 37*, p. [1].

66 Dr Malkani, *Submission 4*, pp. 2-3.

67 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 3.

68 AFP, *Supplementary Submission 22.2*, p. 11.

## Aid to foreign law enforcement agencies

- 4.69 An additional area of concern for witnesses was Australian aid to overseas law enforcement bodies, and Australian grants to support international counter-narcotics activities.
- 4.70 The OHCHR cautioned of a need to ‘implement risk assessments’ to ensure that Australian aid to foreign law enforcement agencies or programs does not ‘directly or indirectly lead to the application and implementation of the death penalty’.<sup>69</sup>
- 4.71 Amnesty International Australia claimed ‘Australia helps fund counter-narcotics investigations in other countries, providing over \$4 million in 2013/14’.<sup>70</sup>
- 4.72 McMahon et al noted that ‘there is an increasing international concern that non-executing countries are funding anti-narcotics police work in countries which execute’. They added:  

The [United Nations Office on Drug and Crime] UNODC is coming under increasing scrutiny in this regard. This [Committee] should enquire in a similar vein into our own anti-narcotics funding and work in countries, such as Pakistan, where executions are common.<sup>71</sup>
- 4.73 UnitingJustice Australia claimed that ‘increases in drug law enforcement and counter-narcotics campaigns have been shown to increase the numbers of people facing the death penalty’.<sup>72</sup>
- 4.74 The Australian Drug Foundation and New Zealand Drug Foundation stated:  

Harm Reduction International reports that the UNODC, the European Commission and individual European governments have all actively funded and/or delivered support to strengthen domestic drug enforcement in death penalty states.<sup>73</sup>
- 4.75 Dr Malkani asserted that:  

[Britain] give[s] a lot of money to Iran and Pakistan for anti-drug-trafficking and counternarcotics efforts that is pure financial aid, but we also train border patrols and provide resources and sniffer dogs. There has been evidence that that sort of work has led to an

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69 OHCHR, *Submission 49*, p. [9].

70 Amnesty International Australia, *Submission 34*, pp. 14-15.

71 McMahon et al, *Submission 12*, p. 5.

72 UnitingJustice Australia, *Submission 25*, p. 8.

73 Australian Drug Foundation and New Zealand Drug Foundation, *Submission 28*, p. 2.



increase in the number of people convicted of drug-trafficking offences who are then sentenced to death. There is a clear causal link.<sup>74</sup>

4.76 Ms Gerry QC and Ms Sherwill submitted that the UK, Ireland and Denmark 'have recently withdrawn funding for [drug] supply control operations in Iran', due at least in part to death penalty concerns.<sup>75</sup>

4.77 Dr Malkani, and other witnesses<sup>76</sup> argued that:

... it is imperative that Australia does not inadvertently act in such a way that facilitates the use of capital punishment elsewhere. If Australia is complicit in the use of the death penalty abroad, this will inevitably limit the extent to which Australia can be effective in advocating for abolition.<sup>77</sup>

4.78 The World Coalition Against the Death Penalty highlighted a statement by the UNODC in 2012 that if 'executions for drug-related offences continue, UNODC may have no choice but to employ a temporary freeze or withdrawal of support'.<sup>78</sup>

4.79 However, according to the World Coalition, the UNODC has continued to fund law enforcement-focused counter-narcotics activities in countries which continue to apply the death penalty for drug offences:

Earlier this year it was finalizing a new five year funding settlement in Iran, a country that has executed at least 394 drug offenders in 2015.<sup>79</sup>

4.80 In light of these findings, the World Coalition proposed:

... that abolitionist donors should freeze all financial support pending an investigation into how it has been spent, clear risk assessments and accountability mechanisms being put in place. Australia could play a strong role in calling for this investigation and accountability mechanisms.<sup>80</sup>

4.81 International Drug Policy Consortium (IDPC) proposed that Australia should:

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74 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 3.

75 Ms Felicity Gerry QC and Ms Narelle Sherwill, *Submission 31*, p. [9].

76 See for instance: Mrs Susan Wilkinson, *Submission 5*, p [1]; Mr Stephen William, *Submission 7*, p. [1].

77 Dr Malkani, *Submission 4*, p. 1.

78 UNODC Position Paper, *UNODC and the Promotion and Protection of Human Rights*, 2012, at <[www.unodc.org/documents/justice-and-prison-reform/UNODC\\_Human\\_rights\\_position\\_paper\\_2012.pdf](http://www.unodc.org/documents/justice-and-prison-reform/UNODC_Human_rights_position_paper_2012.pdf)> viewed 12 April 2016.

79 World Coalition Against the Death Penalty (WCADP), *Submission 36*, p. 3.

80 World Coalition Against the Death Penalty (WCADP), *Submission 36*, p. 3.

Call on the UNODC to cease support for drug enforcement operations in countries where such support can lead to increased use of the death penalty and executions.<sup>81</sup>

- 4.82 The Australian Drug Foundation and New Zealand Drug Foundation suggested Australia 'advocate for UNODC and European states to use the influence of drug enforcement aid as a tool to promote abolishing the death penalty for drug offences'.<sup>82</sup>

### Australia's aid commitments

- 4.83 In light of these concerns and recommendations, the Committee sought clarification from the Department of Foreign Affairs and Trade (DFAT) as to the size, scope and nature of Australia's involvement in funding the UNODC, overseas law enforcement bodies and counter-narcotics programs.
- 4.84 DFAT coordinated a whole of government response focussing on Australia's financial support to the UNODC, which has been provided 'as part of a regional and global approach to addressing the problem of illicit drugs and transnational crime'.<sup>83</sup>
- 4.85 The following provides a summary of support funded through Australian government agencies since 2010:
- Australia provided voluntary annual General Purpose contributions to UNODC up until 2012. The General Purpose contribution for 2010-11 was AU\$1.5 million, and AU\$750,000 for 2011-12.
  - Australia's contributions to UNODC projects peaked in 2012, when Australia provided approximately US\$11.3 million.
  - In 2013 Australia provided approximately US\$7.1 million; in 2014 approximately US\$6 million; and in 2015 approximately US\$4.3 million, some of which relates to funding for multi-year projects commenced in previous years.<sup>84</sup>
- 4.86 DFAT advised that Australia ceased general annual up-front contributions to the UNODC after 2012, with more recent contributions being 'project-based' and delivered through various Australian government agencies.<sup>85</sup>

81 International Drug Policy Consortium (IDPC), *Submission 16*, p. 3.

82 Australian Drug Foundation and New Zealand Drug Foundation, *Submission 28*, p. 3.

83 Department of Foreign Affairs and Trade (DFAT), 'Attachment E: Australian funding to the UN Office on Drugs and Crime 2010-2016', *Answers to Questions on Notice Number No. 12*, p. [1].

84 DFAT, 'Attachment E: Australian funding to the UN Office on Drugs and Crime 2010-2016', *Answers to Questions on Notice Number No. 12*, p. [1].

85 DFAT, 'Attachment E: Australian funding to the UN Office on Drugs and Crime 2010-2016', *Answers to Questions on Notice Number No. 12*, p. [1].

4.87 DFAT defended the Australian Government's funding of the UNODC, stating that:

The UNODC advises that it adheres to 2005 UN General Assembly Resolution 60/1 as well as an internal human rights due diligence policy. These documents dictate that UN support cannot be provided to non-UN security forces where there is a real risk of the receiving entities committing violations of human rights.<sup>86</sup>

4.88 DFAT noted that witnesses were concerned about UNODC activities in Iran and Pakistan. DFAT explained that Australia has 'contributed approximately USD 4.8 million from 2010 to 2015', and claimed that this funding:

... provided by the Department of Immigration and Border Protection, was for the UNODC's project to help Pakistan combat migrant smuggling and human trafficking. The project aimed to: strengthen Pakistan's legal, regulatory and enforcement frameworks on migrant smuggling and human trafficking; enhance knowledge and skills of Pakistani law enforcement officers; and assist Pakistan to collect and analyse migration-related crime information.<sup>87</sup>

4.89 The Department of Immigration and Border Protection (DIBP) also indicated, through DFAT, that the funding was used for:

- specialist training
- the provision of technical equipment
- a comprehensive analysis of the national legislative framework instrument to identify and address gaps in national legislation.<sup>88</sup>

4.90 DIBP further argued:

The project focuses on legislation related to human trafficking and migrant smuggling – not on drug trafficking. We also note that the UNODC opposes the death penalty in all circumstances. Therefore, DIBP is willing to partner with UNODC to implement projects on the ground in Pakistan.<sup>89</sup>

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86 DFAT, *Answers to Questions on Notice Number No. 12*, p. 12.

87 DFAT, *Answers to Questions on Notice Number No. 12*, p. 12.

88 DFAT, *Response to Questions on Notice Number No. 7*, p. [3].

89 DFAT, *Response to Questions on Notice Number No. 7*, p. [3].

- 4.91 However, the UNODC website describes the program as having three outcomes, one of which is dedicated to drug trafficking: 'Outcome 1: Drug and precursor trafficking operations identified and acted upon'.<sup>90</sup>
- 4.92 Regardless, DFAT advised the Committee that in its view Australian funding has not led to executions in Pakistan and Iran, stating:
- In light of the due diligence processes ... and the nature of the UNODC activities Australia has funded in Pakistan and Iran, the government is confident that this funding did not lead to any persons being arrested and placed on death row or executed for narcotics-related crime. The government has no plans at this time to make any further contributions to UNODC country programs in Pakistan or Iran.<sup>91</sup>

## International approaches to drug crime and control

- 4.93 Witnesses to the inquiry were concerned with the number of executions that are carried out for drug offences, especially in the Asia Pacific region and Iran.<sup>92</sup>
- 4.94 Ms Felicity Gerry QC and Ms Narelle Sherwill stated that an estimated 1000 people are executed worldwide for drug offences each year.<sup>93</sup>
- 4.95 This estimate was also highlighted by the Australian and New Zealand Drug Foundations, who argued that in some countries 'drug offenders comprise a significant proportion, or even a majority, of those executed'.<sup>94</sup>
- 4.96 Ruth Birgin (Australians Against Capital Punishment) presented a similar view:
- ... the majority of death sentences are delivered to people who have committed drug related offences. Likewise, the majority of executions in all retentionist countries are meted out to people who have been convicted of drug related offences.<sup>95</sup>

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90 'Pakistan: Illicit Trafficking and Border Management', *UNODC website*, at <[www.unodc.org/pakistan/en/illicit-trafficking-and-border-management.html](http://www.unodc.org/pakistan/en/illicit-trafficking-and-border-management.html)> viewed 15 March 2016.

91 DFAT, *Answers to Questions on Notice Number No. 12*, p. 13.

92 For instance: Ms Susan Lepper, *Submission 27*; the IDPC, *Submission 16*; Human Rights Watch, *Submission 23*.

93 Ms Felicity Gerry QC and Ms Narelle Sherwill, *Submission 31*, p. [8].

94 Australian Drug Foundation and New Zealand Drug Foundation, *Submission 28*, p. 1.

95 Ms Birgin, *Australians Against Capital Punishment, Committee Hansard*, Canberra, 27 November 2015, p. 22.

- 4.97 The Australian and New Zealand Drug Foundations pointed out that more countries today utilise the death penalty for drug crimes (33 countries) than did in 1979 (10 countries).<sup>96</sup>
- 4.98 The Australian and NZ Drug Foundations also noted the irony that ‘while most [drug-related] deaths [are] due to opioids, cannabis traffickers make up a large number, and in some countries even a majority of drug-related offenders sentenced to die’.<sup>97</sup>
- 4.99 The IDPC remarked that the trend towards executing for drug offences is particularly prevalent in the Asia Pacific region:
- Many of those executions were for drug offences, including the 14 individuals executed so far this year in Indonesia, and in 2014, over 40 [per cent] of the officially announced executions in Iran (122 of 289 individuals), 46 [per cent] of the reported executions in Saudi Arabia (42 of 90 individuals), 8 [per cent] of the recorded executions in China, and the two individuals executed in Singapore that year. In Vietnam, 80 [per cent] of the people receiving a death sentence in 2014 were convicted of a drug offence.<sup>98</sup>
- 4.100 The Honourable Justice Lex Lasry AM QC (private capacity) highlighted the political nature of these executions in countries such as Indonesia:
- It is a simplistic approach, but it is: we have a drug problem and the only way we can solve this drug problem is to be hard on drug traffickers and couriers; therefore, we send the message to everybody involved in the drug industry that if you are caught you will be executed.<sup>99</sup>
- 4.101 Witnesses offered a number of arguments against applying the death penalty for drug crimes. Professor Rothwell stated that, according to international law and UN policy, drug offences do not constitute ‘the most serious crimes’, for which the death penalty may be applied:
- At the moment there has been no decision by an international court or tribunal on precisely that question but ... the preponderance of legal opinion, not only from academics such as

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96 Australian Drug Foundation and New Zealand Drug Foundation, *Submission 28*, p. 1.

97 Australian Drug Foundation and New Zealand Drug Foundation, *Submission 28*, p. 1.

98 IDPC, *Submission 16*, p. 1.

99 The Hon. Justice Lex Lasry AM QC, Private capacity, *Committee Hansard*, Melbourne, 17 November 2015, p. 3.

me, but also relevant UN bodies, is that drugs do not constitute the most serious crimes.<sup>100</sup>

4.102 The IDPC also provided evidence that the International Narcotics Control Board, which was established to monitor states' implementation of UN narcotics control measures, actively encourages states which retain the death penalty to consider abolishing it for drug offences and to seek 'proportionate sentencing' for such offences.<sup>101</sup>

4.103 The UN further clarified its views in the 2012 *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, in which it wrote:

... it is alarming that the States that do resort to the death penalty for these offences sometimes do so with high frequency. A small group of States is responsible for the vast majority of death sentences and executions for drug-related offences worldwide: China, the Islamic Republic of Iran, Saudi Arabia and Viet Nam, followed by, to a lesser extent, Malaysia and Singapore.<sup>102</sup>

4.104 The Special Rapporteur's report further clarified:

The special rapporteurs on health and torture have confirmed the view of the current mandate holder and the Human Rights Committee that the weight of opinion indicates that drug offences do not meet the threshold of 'most serious crimes' to which the death penalty might lawfully be applied.<sup>103</sup>

4.105 Aussies Against Capital Punishment argued that 'drug smuggling must be universally recognized as not qualifying as a heinous crime'.<sup>104</sup> It added:

Drug mules who face execution are often individuals of low socio economic status driven to this activity either by force or for economic reasons. This is not an appropriate punishment for these individuals.<sup>105</sup>

4.106 Professor Rothwell suggested advocating for the UN to develop a clearer statement on what constitutes the 'most serious crimes' for which the

100 Professor Rothwell, *Committee Hansard*, Canberra, 27 November 2015, p. 28. See also: IDPC, *Submission 16*, p. 1.

101 IDPC, *Submission 16*, pp. 1-2.

102 United Nations General Assembly, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 2012, UN Document number A/67/275, p. 11.

103 United Nations General Assembly, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 2012, UN Document number A/67/275, p. 12.

104 Aussies Against Capital Punishment, *Submission 13*, p. [1].

105 Aussies Against Capital Punishment, *Submission 13*, p. [1].

death penalty can be applied, particularly to address the question of drug trafficking:

I can certainly see merit in there being a more contemporary authoritative statement on the interpretation of article 6 on the particular question we are talking about – that is, what are the categories and most serious crimes?<sup>106</sup>

4.107 The IDPC pointed to evidence that found no deterrent effect in using the death penalty in relation to drug crimes, adding:

... the majority of individuals sentenced with the death penalty for drug offences do not play a serious or high-level role in drug trafficking operations. They are often poor, vulnerable to exploitation, and engaged in low-level drug trafficking roles, therefore, easily replaced.<sup>107</sup>

4.108 Human Rights Watch proposed that Australia should focus efforts on removing mandatory sentencing for drug crimes, 'starting with Malaysia, where Australia has a great deal of influence and where now the Prime Minister's office is considering doing away with mandatory sentencing for drug crimes'.<sup>108</sup>

4.109 The Hon Justice Lasry AM QC provided some suggestions for approaching this debate with Singapore:

The question is: we need to understand what the problem is and then go to them and say, 'We've looked at the aspects of the drug problem you are trying to solve. Here is what the data shows in other countries. This is what we think you can do to improve the drug problem in your country and here is why we think you can improve it. That does not include executing people because it does not work'.<sup>109</sup>

4.110 Dr Daniel Pascoe provided some arguments that may be useful in Islamic countries in South East Asia. He commented:

I have heard of one judge in the Indonesian Supreme Court who used this justification as being a good Muslim to impose a death sentence for a drugs crime. The other point to note there – the way to refute that – is that the Koran mentions nothing of drug crimes. Drug crimes form the majority of death sentences in South-East Asia. It is not murder, serious crimes against the person, apostasy,

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106 Professor Rothwell, *Committee Hansard*, Canberra, 27 November 2015, p. 30.

107 IDPC, *Submission 16*, p. 2.

108 Mr Robertson, Human Rights Watch, *Committee Hansard*, Sydney, 9 December 2015, p. 25.

109 The Hon. Justice Lex Lasry AM QC, Private capacity, *Committee Hansard*, Melbourne, 17 November 2015, p. 5.

rape and so forth; drug crimes are the main issue in South-East Asia.<sup>110</sup>

- 4.111 Aussies Against Capital Punishment acknowledged that the argument can be hard to win due to the political nature of executions in the region. Ms Birgin asserted that execution for drug crimes is often ‘a bit of a scapegoat to draw attention away from more difficult governmental challenges’.<sup>111</sup>
- 4.112 DFAT’s submission stated that the planned whole-of-government strategy would focus on work to reduce the use of the death penalty for drug crime and other economic crimes, like corruption, which do not meet the definition of ‘most serious crimes’.<sup>112</sup>

### Harm reduction

- 4.113 The IDPC argued that, while the death penalty is ‘ineffective’ for addressing drug-related activities:

... there are other drug policy measures that have proven to be effective for preventing and reducing the harms relating to drug use, notably harm reduction measures to address the risks of overdose, HIV, viral hepatitis and tuberculosis.<sup>113</sup>

- 4.114 Ms Gerry QC and Ms Sherwill referred to recent Australian research, funded by the National Drug Law Enforcement Research Fund, which ‘revealed that drug seizures by Australian police had no effect on drug-related harm as measured by emergency department admissions or arrests.’<sup>114</sup>
- 4.115 Acknowledging the serious problems caused by drug abuse in societies in the region, McMahon et al asserted that Australia could ‘take the lead in the region to investigate and critique the status quo on drug control’. They wrote:
- Without condoning or encouraging drug use or abuse, governments in the region, including our own, need to grapple with the reality that the law and order approach to drug use and abuse has proven inadequate over recent decades.<sup>115</sup>

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110 Dr Daniel Pascoe, *Committee Hansard*, Canberra, 27 November 2015, p. 49.

111 Ms Birgin, *Australians Against Capital Punishment, Committee Hansard*, Canberra, 27 November 2015, p. 23.

112 DFAT, *Submission 35*, p. 11.

113 IDPC, *Submission 16*, p. 2.

114 Ms Felicity Gerry QC and Ms Narelle Sherwill, *Submission 31*, p. [10].

115 McMahon et al, *Submission 12*, p. 4.



4.116 Dr Maguire proposed that there is a role for countries like Australia to promote a health-focussed, harm reduction approach to managing illicit drugs in the region:

If we look at Indonesia, a prominent current case, Australia could offer support in relation to drug treatment and prevention programs, considering that at the moment people are being executed solely for drug-related offences and President Widodo has cited drug offending as a national scourge and something that is killing many Indonesian young people.<sup>116</sup>

4.117 The IDPC suggested Australia could engage with retentionist governments by assisting with alternative, and more 'humane', approaches to drug control. It wrote:

Such assistance should aim to achieve improved outcomes for public health, human rights, human security, development and social inclusion through the implementation of harm reduction measures for people who use drugs, and proportionate sentencing frameworks for drug offences.<sup>117</sup>

4.118 The Australian Drug Foundation and New Zealand Drug Foundation asserted that harm reduction methods, such as education and health promotion, are under-utilised strategies, 'especially in countries that impose capital punishment for drugs offences'. The Foundations added:

The drug treatment sectors in these states should be supported and expanded to implement international best practice, so their drug problems are more effectively addressed.<sup>118</sup>

### United Nations General Assembly Special Session on Drugs

4.119 Witnesses saw the United Nations Special Session (UNGASS) on the world drug problem, held in April 2016, as an opportunity to challenge the concerning number of drug-crime-related executions.<sup>119</sup>

4.120 Ms Birgin argued that:

... regarding the upcoming UNGASS on the so-called world drug problem – which might perhaps more aptly be described as the world bad drug policy problem – the Australian government could also consider pressing the United Nations Office on Drugs and Crime to follow its own human rights guidance to ensure that

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116 Dr Maguire, University of Newcastle, *Committee Hansard*, Canberra, 27 November 2015, p. 14.

117 IDPC, *Submission 16*, p. 3.

118 Australian Drug Foundation and New Zealand Drug Foundation, *Submission 28*, p. 4.

119 Witnesses including: McMahon et al, *Submission 12*; Aussies Against Capital Punishment, *Submission 13*; and IDPC, *Submission 16*.

UNODC programs are not complicit in executions or death sentences.<sup>120</sup>

4.121 Aussies Against Capital Punishment also proposed that the Australian Government:

... consider commitment to and promotion of the 10by20 campaign, which is being led by the International Drug Policy Consortium and has been joined by a number of other prominent international civil society organisations. It is to ask for the redirection of just 10 per cent of international drug enforcement aid into health and harm reduction programs by 2020. This would in turn impact on the reduction in the use of the death penalty for drug couriers.<sup>121</sup>

4.122 DFAT confirmed that it has advocated against the death penalty in past forums dedicated to the international narcotics problem:

Australia has ... used our annual appearance at the Commission on Narcotic Drugs (CND) to underscore our opposition to the death penalty. During the CND's 58th session in March 2015, the Assistant Minister for Health made a strong statement outlining Australia's opposition to the use of the death penalty in all circumstances, including in relation to offences of a drug-related nature. The Assistant Minister for Health also called on the UN Office on Drugs and Crime to continue its efforts in advocating for death penalty abolition as it relates to drug offences.<sup>122</sup>

4.123 Dr Lachlan Strahan (First Assistant Secretary, Multilateral Policy Division) further explained that the death penalty has been an issue of concern leading up to Australia's involvement in UNGASS 2016:

We have been working to include anti-death-penalty language in the draft outcome document of the UNGASS on the world drug problem. Given that this is, however, a divisive issue in this context, we have been meeting a fair bit of quite strong opposition to this language, so we have been working with others to get some language which can be appropriately framed and will survive this discussion. We would note that the outcome document already invites states to firstly consider alternative measures to incarceration for actions of a minor or non-violent nature, and,

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120 Ms Birgin, *Australians Against Capital Punishment, Committee Hansard*, Canberra, 27 November 2015, p. 22.

121 Ms Birgin, *Australians Against Capital Punishment, Committee Hansard*, Canberra, 27 November 2015, p. 22.

122 DFAT, *Submission 35*, p. 6.

secondly, to promote consistent and proportionate sentencing, and to promote the severity of penalties that is consistent with the gravity of the offences. So we are doing our best in that context.<sup>123</sup>

4.124 The WCADP acknowledged Australia's attempts to have the issue of the death penalty and drugs included at UNGASS, saying:

Australia joined the statement, signed by 58 countries, on the issue of the death penalty, regretting that the Joint Ministerial Statement of the 2014 high-level review by the Commission on Narcotic Drugs of the implementation by Member States of the Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem did not include language on the death penalty. In preparation for the UNGASS, Australia could join other countries to make sure that the abolition of the death penalty is high on the agenda and that UNGASS makes some recommendations on abolition, at least for drug-related offences.<sup>124</sup>

4.125 By the time this report is tabled, UNGASS 2016 will have already been conducted from 19 to 21 April 2016. However, there are a number of future forums where Australia could continue to prosecute these arguments.

4.126 The IDPC pointed to the UN Commission on Narcotic Drugs<sup>125</sup> and also asserted that:

Australia could consider requesting that the Human Rights Council set up a Special Procedure to focus specifically on the impact of the world drug problem on the enjoyment of human rights.<sup>126</sup>

### Human trafficking victims

4.127 Witnesses including the IDPC offered evidence suggesting that a proportion of drug couriers or 'drug mules' may be coerced or 'tricked' into breaking the law.<sup>127</sup>

4.128 Ms Gerry QC and Ms Sherwill submitted that:

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123 Dr Lachlan Strahan, First Assistant Secretary, Multilateral Policy Division, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 8.

124 WCADP, *Submission 36*, p. 3.

125 IDPC, *Submission 16*, pp. 2-3.

126 IDPC, *Submission 16*, p. 3.

127 See for example: Ms Felicity Gerry QC and Ms Narelle Sherwill, *Submission 31*, p. [16]; Reprieve Australia, *Submission 41*, p. 12.

Not every drug offender can be considered a trafficked person, however it is increasingly recognised that the vast majority of individuals apprehended with drugs in their possession – so-called ‘drug mules’ – are not the primary initiators, financiers, or profiteers behind drug trafficking operations. In recognition of the low status that most drug traffickers occupy within drug syndicates, Singapore recently amended its mandatory sentencing to allow judicial discretion in cases where an offender could be considered a ‘courier’, rather than a supplier or organizer.<sup>128</sup>

4.129 Reprieve Australia pointed to research from Thailand which showed:

... while women make up only 10 per cent of the death row population, 83 percent of those women have been sentenced to death for drug related offences. This data shows that women are disproportionately represented in death eligible drug crimes, and their specific vulnerability to being victims of human trafficking.<sup>129</sup>

4.130 Discussing the example of Mary Jane Voloso, currently under sentence of death in Indonesia, Ms Gerry QC and Ms Sherwill concluded:

Australia must work both locally and transnationally to better equip law enforcement officers, legal professionals and members of the judiciary to recognise and tackle likely circumstances of human trafficking and thus reduce the number of vulnerable people exposed to risk of execution.<sup>130</sup>

4.131 Reprieve expressed concern that despite Australian Crime Commission views that ‘a significant number of drug traffickers are duped or manipulated by crime syndicates’, there remains a lack of formal processes to identify victims of human trafficking.<sup>131</sup>

4.132 Ms Gerry QC and Ms Sherwill added that:

... in Australia there is no defence (partial or complete) that the suspect was a victim of human trafficking and therefore exploited nor do defences of mental impairment allow for involuntary acts in the context of human trafficking. This needs to change ... this is not just a sentencing issue. Trafficked victims need to be identified before they are charged, during any legal proceedings and for the purposes of appeal.<sup>132</sup>

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128 Ms Felicity Gerry QC and Ms Narelle Sherwill, *Submission 31*, p. [16].

129 Reprieve Australia, *Submission 41*, p. 12.

130 Ms Felicity Gerry QC and Ms Narelle Sherwill, *Submission 31*, p. [3].

131 Reprieve Australia, *Submission 41*, p. 12.

132 Ms Felicity Gerry QC and Ms Narelle Sherwill, *Submission 31*, pp. [18-19].

- 4.133 Reprieve put forward suggestions for action, including proposing that the Australian Government:
- ... resource the monitoring of human trafficking with respect to drug trafficking, particularly in our region, and develop and implement mechanisms to identify and protect victims from the death penalty.<sup>133</sup>
- 4.134 Reprieve also referred the Committee to the UK, which has introduced the *Modern Slavery Act 2015* (UK), designed to protect exploited persons.<sup>134</sup>
- 4.135 Section 45 of the *Modern Slavery Act* provides a defence in cases of offences committed by a person subject to slavery or human trafficking, provided the person was compelled or the offence was a direct consequence being enslaved or trafficked.<sup>135</sup>
- 4.136 Reprieve contended:
- Australia can complement this leadership by advocating, in appropriate fora, for greater restrictions on the use of the death penalty, including more proportionate sentencing and guaranteed protections for vulnerable and exploited people.<sup>136</sup>
- 4.137 Among other recommendations, Ms Gerry QC and Ms Sherwill proposed:
- Advocacy for victims of human trafficking must be available at a frontline position, with law enforcement and legal professionals trained to differentiate them from a regular criminal offender.
  - Introduce 'Human Trafficking Protection' Laws modelled on the *Modern Slavery Act 2015* in England and Wales.<sup>137</sup>

## Committee comment

- 4.138 The Committee acknowledges community concerns regarding the Australian Federal Police's practices of sharing information with foreign law enforcement bodies in cases which may lead to the death penalty being imposed.
- 4.139 The need to combat transnational crime cannot override the need to uphold Australia's human rights obligations and avoid exposing people to the death penalty.

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133 Reprieve Australia, *Submission 41*, p. 12.

134 Reprieve Australia, *Submission 41*, p. 12.

135 *Modern Slavery Act 2015* (UK) c. 30 s. 45.

136 Reprieve Australia, *Submission 41*, p. 12.

137 Ms Felicity Gerry QC and Ms Narelle Sherwill, *Submission 31*, pp. [21 and 24].

- 4.140 Australia has an obligation to not only protect Australian citizens from exposure, but to avoid exposing foreign nationals to the death penalty where it is in a position to do so.
- 4.141 The Committee acknowledges that the AFP's current guidelines and policies do not prohibit it from exposing people to the death penalty in foreign jurisdictions, and that it retains discretion in these matters. However, the Committee believes the AFP take this issue seriously, and is encouraged to see the AFP is currently reviewing the *Australian Federal Police National Guideline on International Police-to-Police Assistance in Death Penalty Situations*.
- 4.142 The Committee recommends that the AFP strengthen the Guideline by ensuring that it:
- articulates as its primary aim preventing the exposure of persons to arrest or charge in retentionist countries for crimes that attract the death penalty;
  - explicitly applies to all persons, not just Australian citizens;<sup>138</sup>
  - includes a requirement that the AFP seek assurances from foreign law enforcement bodies that the death penalty will not be sought or applied if information were to be provided; and
  - includes a provision for cases where there is a 'high risk' of exposure to the death penalty to be directed to the relevant Minister for decision.
- 4.143 If these amendments were to be made, the Committee believes that amendments to the *Australian Federal Police Act 1979* (Cth) may not be necessary.
- 4.144 In light of UN statements that drug crimes, such as trafficking, do not constitute 'most serious crimes' for which the death penalty may be applied under international law,<sup>139</sup> the Committee encourages the AFP to work to reduce information-sharing in relation to drug crimes *where exposure to the death penalty is a genuine risk*.
- 4.145 The Committee accepts assurances that recent Australian aid for foreign law enforcement projects has not led to executions. However, the Committee encourages relevant Government agencies to be vigilant in ensuring that Australian assistance for overseas law enforcement projects does not directly or indirectly expose people to the threat of execution.

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138 The Committee notes the current Guideline *does* apply to all persons, but that nationality is a factor taken into consideration when deciding whether or not to provide information. This distinction should be removed.

139 United Nations General Assembly, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 2012, UN Document number A/67/275, p. 12.

- 4.146 The Committee acknowledges that the worldwide problems of drug abuse and drug crime cannot be solved by executing drug dealers and drug traffickers. As such, the Committee urges that retentionist countries be encouraged to adopt health-based and education-focussed harm reduction approaches to reduce the demand for illicit drugs.
- 4.147 The Committee is encouraged that the Australian representatives to the United Nations Special Session (UNGASS) on the world drug problem, held in April 2016, strongly communicated Australia's stance against the death penalty.
- 4.148 The Committee encourages Australian agencies, diplomats and parliamentarians to identify further opportunities to promote harm reduction approaches to dealing with drug crime, and lobby against the application of the death penalty for drug crimes.
- 4.149 The Committee is concerned about the issue of human trafficking in relation to the application of the death penalty to drug runners, or 'drug mules'.
- 4.150 The Committee notes recent developments in the United Kingdom, which has introduced the *Modern Slavery Act 2015* (UK) to protect exploited persons, including providing a defence for those compelled to commit a crime under the conditions of slavery.<sup>140</sup>
- 4.151 The Committee encourages the AFP to be especially vigilant in seeking to protect those who fall into this category from exposure to the death penalty.

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140 UK Government, 'Modern Slavery Act 2015', *legislation.gov.uk*, at <[www.legislation.gov.uk/ukpga/2015/30/section/45/enacted](http://www.legislation.gov.uk/ukpga/2015/30/section/45/enacted)> viewed 8 April 2016.

## Recommendations

### Recommendation 2

The Committee recommends the *Australian Federal Police (AFP) National Guideline on International Police-to-Police Assistance in Death Penalty Situations* (the Guideline) be amended to include a stronger focus on preventing exposure of all persons to the risk of the death penalty, by:

- articulating as its primary aim preventing the exposure of persons to arrest or charge in retentionist countries for crimes that are likely to attract the death penalty;
- explicitly applying the Guideline to all persons, not just Australian citizens;
- including a requirement that the AFP seek assurances from foreign law enforcement bodies that the death penalty will not be sought or applied if information is provided;
- including a provision that, in cases where the AFP deems that there is a 'high risk' of exposure to the death penalty, such cases be directed to the Minister for decision; and
- articulating the criteria used by the AFP to determine whether requests are ranked 'high', 'medium' or 'low' risk.

### Recommendation 3

In light of the United Nations' position that drug crimes, including drug trafficking, do not constitute 'most serious crimes' for which the death penalty may be applied under international law, the Committee recommends that the Australian Federal Police (AFP) obtain guarantees that prosecutors in partner countries will not seek to apply the death penalty before providing information in relation these crimes. In situations where such guarantees cannot be obtained, the AFP should withhold provision of information that may be relevant to the cases concerned.



## Australia's international engagement

5.1 Australia has actively advocated for worldwide abolition of capital punishment. According to the Law Council of Australia (LCA) and the Australian Bar Association (ABA):

Australia has ... been a principal actor in advocating for the abolition of the death penalty. Australia has previously advocated for a moratorium as a first step towards abolition. It has also called for it to be progressively restricted and insisted that it be carried out at least according to international minimum standards.

Australia has also intervened in individual cases and privately raises concerns with relevant governments in bilateral dialogues.<sup>1</sup>

5.2 This chapter reviews how Australia currently engages internationally to promote abolition of the death penalty. Specifically, this chapter examines:

- Australia's recent multilateral and international advocacy against capital punishment;
- Australia's recent bilateral advocacy against capital punishment;
- Recent support provided to civil society organisations to promote abolition;
- The advocacy work of Australia's parliamentarians;
- Australia's current mechanisms for supporting Australians at risk or facing the death penalty abroad; and
- Analysis of Australia's current approaches to anti-death penalty advocacy and discussion of suggested approaches.

5.3 The chapter concludes with the Committees commentary on these issues, and recommendations for action.

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1 Law Council of Australia (LCA) and the Australian Bar Association (ABA), *Submission 24*, p. 4.

## Recent international advocacy

- 5.4 Witnesses to the inquiry roundly praised the active role Australia has played in the international movement towards abolition. The Castan Centre for Human Rights Law (Castan Centre) stated:

Australia has generally been considered a world leader in seeking the abolition of the death penalty, having voted in favour of all five [United Nations] UN General Assembly Resolutions calling for a worldwide moratorium (in 2007, 2008, 2010, 2012 and 2014).<sup>2</sup>

- 5.5 The Department of Foreign Affairs and Trade (DFAT) listed further actions undertaken through the UN by Australia:

- Australia co-sponsors anti-death penalty resolutions at the [Human Rights Council] and did so at the former UN Commission on Human Rights.
- Australia is also a co-sponsor of the death penalty moratorium resolution in the General Assembly. ... Australia's advocacy during negotiations on this resolution has been important in helping ensure strong, robust language is adopted each time.<sup>3</sup>
- There is also a biennial high-level panel discussion on the death penalty in which Australia is an active participant. The 2015 panel focussed on regional challenges to death penalty abolition. The next panel is in March 2017, with a focus on the use of the death penalty and torture.<sup>4</sup>

- 5.6 DFAT added that Australia utilises the UN Universal Periodic Review process to advocate, stating:

Australia makes recommendations to every state under review. Australia has made recommendations on the death penalty consistently since 2013, except in rare instances where it has been judged that there are more immediate human rights priorities.<sup>5</sup>

- 5.7 The Department explained that it has undertaken occasional direct international advocacy against the death penalty. For instance:

DFAT has also from time to time undertaken global representations to all retentionist countries. The last such round was undertaken in 2010. These representations were of a general nature that set out Australia's universal opposition to the death penalty and called on retentionist countries to introduce moratoria with a view to ratifying the Second Optional Protocol to the

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2 Castan Centre, *Submission 9*, p. 3.

3 Department of Foreign Affairs and Trade (DFAT), *Submission 35*, p. 5.

4 DFAT, *Submission 35*, p. 6.

5 DFAT, *Submission 35*, p. 6.

[International Covenant on Civil and Political Rights] ICCPR. Targeted, country-sensitive approaches were used for eight countries. Representations were either conducted in person or through Third Person Notes to countries of non-resident accreditation.<sup>6</sup>

- 5.8 However, DFAT observed that these kinds of actions may not have a significant impact: 'As there was limited use of country-sensitive approaches, these global representations have had limited practical benefit.'<sup>7</sup>
- 5.9 Australia has announced its candidacy for a seat on the UN Human Rights Council (HRC) for the period 2018-2020. DFAT stated: 'If elected, death penalty abolition advocacy will be a priority for our term on the HRC.'<sup>8</sup>
- 5.10 The European Commission, who provided a submission to the inquiry, was supportive of Australia's intention to make the death penalty a priority in Australia's campaign.<sup>9</sup>
- 5.11 The World Coalition Against the Death Penalty (WCADP) reported that in 2011 Australia declined an invitation to join the 'Friends of the Protocol', 'a group of countries<sup>10</sup> which officially support the campaign for the ratification of the UN Protocol for the abolition of the death penalty'.<sup>11</sup>
- 5.12 The WCADP called upon Australia to reconsider this view, stating that:  
... being a Friend of the Protocol will add a global dimension to Australia's dealings with those countries that are one step away from ratifying the Second Optional Protocol. Specifically, our experts believe that Australia could play a vital role in seeing Cambodia ratify.<sup>12</sup>
- 5.13 Professor Peter Norden (WCADP) reiterated this request when he appeared before the inquiry in November 2015.<sup>13</sup>

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6 DFAT, *Submission 35*, p. 8.

7 DFAT, *Submission 35*, p. 8.

8 DFAT, *Submission 35*, p. 6.

9 European Commission, *Submission 46*, p. [1].

10 The current countries are Belgium, Chile, France, Norway, Spain and Switzerland.

11 World Coalition Against the Death Penalty (WCADP), *Submission 36*, p. 2.

12 WCADP, *Submission 36*, p. 2.

13 Professor Peter Norden, Australian Representative, WCADP, *Committee Hansard*, Melbourne, 17 November 2015, p. 45.

## Recent bilateral advocacy

- 5.14 Evidence provided by DFAT summarised Australia's recent bilateral advocacy in relation to capital punishment. The Department submitted:
- Since the 1990s, our advocacy has primarily been to promote the introductions of moratoria on the use of the death penalty, with a view to countries ratifying the Second Optional Protocol as the key to achieving universal abolition. Our overseas missions also make targeted representations on behalf of individuals sentenced to death.<sup>14</sup>
- 5.15 DFAT explained that Australia's diplomats:
- ... complement our negotiating and lobbying work at the General Assembly with bilateral representations by our overseas missions in selected countries to reinforce the importance we place on the resolution.<sup>15</sup>
- 5.16 However, DFAT also conceded that 'posts have only undertaken [death penalty] advocacy when asked to do so by Canberra, generally in response to a particular case attracting civil society and/or media attention'.<sup>16</sup>
- 5.17 In its submission, DFAT provided data about its diplomatic representations on the death penalty from January 2014 to September 2015.<sup>17</sup> The Department's diplomatic posts made representations to 12 of the 20 countries that carried out executions in 2014, and four of the 33 countries that retain the death penalty but did not sentence anyone to death or carry out any executions in 2014. A majority of these representations were to countries in the Asia Pacific region.<sup>18</sup>
- 5.18 A full list of DFAT's bilateral representations is provided in Appendix E.
- 5.19 DFAT reflected on 'Australia's small diplomatic footprint in particular regions', stating that the Department 'has resident posts in only 23 of the 56 retentionist countries and ten posts in the 33 countries considered abolitionist in practice'.<sup>19</sup>
- 5.20 DFAT also made the following comments about its bilateral advocacy in recent years:

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14 DFAT, *Submission 35*, p. 5.

15 DFAT, *Submission 35*, pp. 5-6.

16 DFAT, *Submission 35*, p. 7.

17 DFAT, *Submission 35*, p. 6.

18 DFAT, *Submission 35*, pp. 7-8.

19 DFAT, *Submission 35*, p. 7.

Beyond calls to end the use of the death penalty, either through moratoria or ratification of the Second Optional Protocol to the ICCPR (depending on the circumstance), there have been only a few exceptions where we have taken a more targeted, nuanced approach. There are only a few instances where we have focussed our efforts on encouraging increased minimum standards for the death penalty's use and/or advocated for a reduction in the number of crimes that attract the death penalty.<sup>20</sup>

5.21 One example of bilateral representations was provided by DFAT's Dr Lachlan Strahan, who stated that:

... our post in Saudi Arabia, in Riyadh, has made representations to the Saudi authorities in response to media reporting of the imminent execution of 50 people. ... The number of executions in Saudi Arabia has been quite troubling. There has been a definite increase. We have made our fundamental opposition to the death penalty known to the Saudi authorities. I think others are doing this. It is likely the British have done something similar. We will have to wait and see if that stays their hand at all. One would have to be probably a little bit pessimistic, but we have made our position clear.<sup>21</sup>

5.22 DFAT also explained that its officials 'raise the death penalty at our bilateral Human Rights Dialogues with China, Laos and Vietnam'.<sup>22</sup>

5.23 Some witnesses lamented that Australia's bilateral representations may have limited effectiveness in contexts where executions are strongly political. McMahon, Wilson, Haccou, O'Connell and Morrissey (McMahon and colleagues) provided these examples:

... we have seen recent executions in the region which are purely political. We refer the [Committee] to the six prisoners executed in Taiwan in June 2015, apparently in response to the unrelated case of a terrible murder of a girl a week earlier. Similarly, when fully analysed, it is our opinion that the execution of Mr Sukumaran and Mr Chan, and others this year in Indonesia, can mostly be reduced to an example of a domestic vote grabbing exercise.<sup>23</sup>

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20 DFAT, *Submission 35*, p. 7.

21 Dr Lachlan Strahan, First Assistant Secretary, Multilateral Policy Division, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Sydney, 9 December 2015, p. 2.

22 DFAT, *Submission 35*, p. 8.

23 McMahon, Wilson, Haccou, O'Connell and Morrissey, *Submission 12*, p. 5.

## Support for civil society advocacy

- 5.24 In 2015-16 DFAT provided funding to three civil society organisations to support their advocacy against capital punishment:
- DFAT provided \$100 000 in funding to Together Against the Death Penalty (Ensemble contre la peine de mort, or ECPM) in 2015-16, in support of their activities including the Sixth World Congress Against The Death Penalty (Oslo, June 2016).<sup>24</sup> DFAT then increased this funding to a total of \$300 000 in 2015-16 to further support the 2016 World Congress.<sup>25</sup>
  - DFAT pledged financial support of \$150 000 to the Asia-Pacific Forum on National Human Rights Institutions (APF) to ‘reinvigorate the APF’s engagement’ on the issue of the death penalty.<sup>26</sup> However, the figure of \$150 000 was revised down to \$100 000.<sup>27</sup>
  - DFAT also provided financial assistance of \$100 000 to Parliamentarians for Global Action (PGA) to support PGA’s work on the death penalty in the Asia-Pacific region. DFAT submitted:
 

PGA has established a Global Parliamentary Platform on the death penalty to encourage meaningful action and to exchange information by political decision-makers.<sup>28</sup>
- 5.25 The three organisations funded in 2015-16 are organisations ‘DFAT had an ongoing relationship with or had worked with in the past’. DFAT further stated:
- The organisations target different levers of engagement (civil society, national human rights institutions, and parliamentary decision-makers) to complement DFAT’s government-to-government work.<sup>29</sup>
- 5.26 DFAT clarified that this funding was intended for projects that focussed on the Indo-Pacific region.<sup>30</sup> As an example, Dr Strahan explained that:
- [DFAT] supported Together Against the Death Penalty in organising the second Asian regional congress in [Kuala Lumpur]. That congress brought together legislative, legal and executive officials from abolitionist and retentionist countries, regional and

24 DFAT, *Submission 35*, pp. 12-13.

25 DFAT, *Answers to Questions on Notice No. 12*, p. 7.

26 DFAT, *Submission 35*, pp. 12-13.

27 Dr Strahan, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 3.

28 DFAT, *Submission 35*, pp. 12-13.

29 DFAT, *Answers to Questions on Notice No. 12*, p. 7.

30 DFAT, *Answers to Questions on Notice No. 12*, p. 7.

international organisations, the media and relevant academic networks.<sup>31</sup>

5.27 Dr Strahan also provided this background information regarding DFAT's funding of the APF:

... the Asia Pacific Forum of National Human Rights Institutions is a very longstanding partner for DFAT. As the committee would know, it brings together over 20 national human rights institutions from the broad Asia region – we define that as from the Middle East across into the Pacific – and quite a number of other national human rights institutions want to join, so it has an expanding membership and is very active. We see that they very much have the capacity to progress human rights issues while remaining independent of government.<sup>32</sup>

5.28 Dr Daniel Pascoe asserted that supporting human rights institutions in the Asia-Pacific is a worthy use for Australian funding:

In the Asia-Pacific context, regional human rights institutions of any kind are conspicuously rare. The ASEAN Intergovernmental Commission on Human Rights (AICHR) is a reasonable beginning but requires a more significant enforcement mechanism.<sup>33</sup>

5.29 DFAT's Dr Strahan described the Department's support for the PGA's work in the Indo-Pacific region, saying:

For example, in November ... their support enabled a workshop of parliamentarians to be held in Kuala Lumpur. It was at this workshop that the Malaysian minister for law announced that the Malaysian government intended to remove the mandatory application of the death penalty for certain categories of crime. We see that as a very good, tangible benefit in our own region.<sup>34</sup>

5.30 Australia also supports civil society advocacy through other means. Professor Andrew Byrnes (Diplomacy Training Program) highlighted DFAT's Australian Leadership Awards. He said:

... we had an international fellows program this last year of people from the region. That was funded by the Australian Leadership Awards, a DFAT program which brings leaders in particular areas to Australia. They have met with parliamentarians, the Human Rights Commission and a whole range of people in order to get

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31 Dr Strahan, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 3.

32 Dr Strahan, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 3.

33 Dr Daniel Pascoe, *Submission 19*, p. [9].

34 Dr Strahan, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 3.

exposure, experience and connections. So those forms of support are ones which we think are very important.<sup>35</sup>

5.31 Professor Byrnes added:

... we have a number of students undertaking graduate degrees who are actually human rights advocates at home. One, in fact, works on the death penalty in Indonesia.<sup>36</sup>

## The work of Parliamentarians

5.32 Australia is one of a select number of countries with a formalised cross-party grouping of politicians who actively oppose the death penalty; Australian Parliamentarians Against the Death Penalty.<sup>37</sup>

5.33 The Committee heard evidence from current co-convenor, Mr Chris Hayes MP, Member for Fowler, who explained that:

The group was reconvened earlier this year in part of the campaign with respect to two Australian citizens, Andrew Chan and Myuran Sukumaran, who were on death row at that point in time in Indonesia. The parliament had had for some time a parliamentary working group against the death penalty, but it seemed to become less than active. Together with the chair, Mr Ruddock, we reconvened the Australian Parliamentarians Against the Death Penalty. To date – I could be corrected, but I think – we have received applications for 112 members and senators to be members of that group. It was by invitation, and clearly people joined because they similarly shared our views about the death penalty.<sup>38</sup>

5.34 Mr Hayes explained that Australian Parliamentarians Against the Death Penalty made ‘many, many submissions to the Attorney-General, the Minister for Foreign Affairs and the Indonesian ambassador, as well as the relevant authorities in Indonesia’ in an attempt to stop the executions of Mr Andrew Chan and Mr Myuran Sukumaran. He added that he and

35 Professor Andrew Byrnes, Diplomacy Training Program, *Committee Hansard*, Sydney, 9 December 2015, p. 15.

36 Professor Byrnes, Diplomacy Training Program, *Committee Hansard*, Sydney, 9 December 2015, p. 15.

37 Dr David Donat Cattin, Secretary-General, Parliamentarians for Global Action, *Committee Hansard*, Canberra, 25 February 2016, p. 2. Dr Cattin said: ‘Our understanding, of course, is that other parliaments are not as organised as you and the UK are.’

38 Mr Chris Hayes MP, Member for Fowler, Commonwealth Parliament; and Co-Chair, Australian Parliamentarians Against the Death Penalty, *Committee Hansard*, Sydney, 20 November 2015, p. 23.



other members attended a sunrise vigil held at Parliament House before the executions.<sup>39</sup>

- 5.35 Former Senator Mr Gary Humphries was a member of Australian Parliamentarians Against the Death Penalty when it was previously active. Mr Humphries recalled some of the work the group undertook around the detention of the Bali 9 in Indonesia:

We particularly wanted to use whatever traction members of parliament had to interact with decision makers in other countries to get this idea advanced in those places. We focused particularly on Indonesia, given the detention of the Bali Nine in 2005. The group organised meetings with the Indonesian ambassador. We had a delegation go to the embassy and meet with the ambassador. When President Yudhoyono visited about that time, we were able to spend some time with members of his delegation pointing out the position that Australia, in principle, adopted in these areas and suggesting that Indonesia might consider the same approach. I think that those efforts made some small contribution to the removal of the death penalty on Scott Rush, which occurred a few years later.<sup>40</sup>

- 5.36 Australian Parliamentarians Against the Death Penalty has also advocated for others on death row. Mr Hayes talked about the 'planned execution of a young Saudi Arabian man, Mr Ali Al-Nimr', explaining:

He was 17 when he was arrested in a pro-democracy protest. By all accounts, according to the lawyers involved, the charges looked trumped up. ... I think it is fair to say that the court proceedings themselves were restricted to his being part of a pro-democracy movement. Australian Parliamentarians Against the Death Penalty wrote to Saudi representatives, the Crown Prince and diplomatic representatives in the country. We also strongly relied on the fact that, when this young man was arrested, he was 17 years of age and drew on the fact that Saudi Arabia was and has been a signatory to the Convention on Rights of the Child, which strictly prohibits the use of the death penalty for a crime that is committed by a person under the age of 18.<sup>41</sup>

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39 Mr Hayes MP, Australian Parliamentarians Against the Death Penalty, *Committee Hansard*, Sydney, 20 November 2015, p. 23.

40 Mr Gary Humphries, Private capacity, *Committee Hansard*, Canberra, 27 November 2015, p. 43.

41 Mr Hayes MP, Australian Parliamentarians Against the Death Penalty, *Committee Hansard*, Sydney, 20 November 2015, pp. 25-26.

5.37 At the time of preparing this report, Al-Nimr was still in custody on death row.<sup>42</sup>

5.38 Other work undertaken by Australian Parliamentarians Against the Death Penalty includes advocating with Ambassadors and Foreign Missions in Australia. Mr Hayes described this work:

One of the things that the chair [the Hon Philip Ruddock MP] did, which I thought was a very good thing, was to set in place a program inviting ambassadors from other jurisdictions and countries that engage the death penalty in respect of criminal cases to address our group. ... Having Ambassador John Berry from the United States address the very first meeting of our group with the ambassadors was a very good thing to do, I thought. He was able to explain where progress had been made in various American states.<sup>43</sup>

5.39 Mr Hayes also described discussions recently held with likeminded countries in Geneva:

... we had a lot of engagement with the French mission head, and then a lot of mission heads over lunch when we were able to explore what more we might be able to do with like-minded countries.<sup>44</sup>

5.40 Other witnesses to the inquiry highlighted the important role this cross-party work plays in demonstrating Australia's commitment to abolition. Ms Ursula Noye (Reprieve) observed:

Australia's commitment to abolition is evident in the bipartisanship shown this year in parliament. In February 2015 foreign affairs minister, Julie Bishop, and shadow minister, Tanya Plibersek, moved a joint motion in support of clemency for Andrew Chan and Myuran Sukumaran, who were tragically executed in Indonesia for drug trafficking offences. In July 2015, the government announced this inquiry into Australia's advocacy for the abolition of the death penalty. Almost 100 members of parliament currently constitute the cross-party Parliamentarians

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42 Mr James Jones, 'Sentenced to Die in Saudi Arabia', Video at *PBS.org*, at <[www.pbs.org/wgbh/frontline/video/sentenced-to-die-in-saudi-arabia/](http://www.pbs.org/wgbh/frontline/video/sentenced-to-die-in-saudi-arabia/)> viewed 22 March 2016.

43 Mr Hayes MP, Australian Parliamentarians Against the Death Penalty, *Committee Hansard*, Sydney, 20 November 2015, p. 26.

44 Mr Hayes MP, Australian Parliamentarians Against the Death Penalty, *Committee Hansard*, Sydney, 20 November 2015, p. 27.

against the Death Penalty group, led by long-time anti death penalty advocates, Philip Ruddock and Chris Hayes.<sup>45</sup>

- 5.41 The Parliamentarians for Global Action (PGA) group praised the work of the Australian Parliament in evidence to the inquiry in February 2016. Secretary Dr David Donat Cattin explained:

Our understanding, of course, is that other parliaments are not as organised as you and the UK are. While there are individual initiatives – another country where there is a group similar to yours, as far as we know, is Switzerland, but it is not so well organised.<sup>46</sup>

- 5.42 The PGA is a network of more than 1,300 parliamentarians from 143 Parliaments across the world, who in their personal capacity and in the framework of their mandate, support international justice, the rule of law, democracy and human rights. PGA (International) submitted that:

...as the largest transnational network of individual parliamentarians promoting the respect of Human Rights, [it is ideally placed] to make a difference on the abolition of the death penalty, including supporting, enhancing and maximising the impact of country-specific initiatives...<sup>47</sup>

## Supporting Australians at risk overseas

- 5.43 Australia is active in its support for Australian citizens at risk of facing the death penalty in foreign jurisdictions. According to DFAT, the Department 'accords any consular client to whom the death penalty may apply the highest priority'.<sup>48</sup>

- 5.44 Ms Felicity Gerry QC and Ms Narelle Sherwill submitted that:

Currently, 27 Australian citizens are detained for drug offences across Mainland China, Hong Kong and Malaysia, with nine facing the death penalty in China alone.<sup>49</sup>

- 5.45 DFAT advised that as of December 2015, there were 13 Australians facing the possibility of the death penalty overseas.<sup>50</sup>

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45 Ms Ursula Noye, Board member, Reprieve Australia, *Committee Hansard*, Melbourne, 17 November 2015, p. 12.

46 Dr David Donat Cattin, Secretary-General, Parliamentarians for Global Action, *Committee Hansard*, Canberra, 25 February 2016, p. 2.

47 Parliamentarians for Global Action, *Submission 60*, p. [1].

48 DFAT, *Answers to Questions on Notice No. 12*, p. 1.

49 Ms Felicity Gerry QC and Ms Narelle Sherwill, *Submission 31*, p. [9].

5.46 Australians detained overseas who may be facing a possible death sentence are eligible to receive basic consular services, including visits from consular officers who seek to ensure detainees:

- are provided with regular contact
- have access to legal advice
- are treated no less favourably than local citizens detained for similar offences
- are subject to humanitarian standards of prisoner welfare
- have [their] basic needs met.<sup>51</sup>

5.47 Consular officers also help detainees obtain information about their rights and privileges while in prison, including access to work, mail and telephone and visiting rights, as well as assist detainees in contacting family, and receiving money from family and friends.<sup>52</sup>

5.48 DFAT also clarified that consular officers monitor developments in relevant court cases and attend court hearings where appropriate and practical.<sup>53</sup>

5.49 DFAT's consular officers also assist detainees in obtaining legal advice, but do not provide it. Specifically, DFAT provides the following advice to detainees:

While consular officers can provide you with a list of local English-speaking lawyers, consular officers are not lawyers and cannot provide you or your family with legal advice or make recommendations as to which lawyer you should choose. You have the responsibility to choose your own lawyer and maintain close interest in your case. Consular officers are not able to make representations to the court on your behalf. Consular officers are not able to provide interpreting services and you may need to make arrangements through your lawyer to obtain a suitable interpreter if required.<sup>54</sup>

5.50 In serious matters, such as those that may attract the death penalty, DFAT informs detainees:

The Australian Government may also consider making formal representations to the host government in support of applications

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50 Dr Strahan, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 5.

51 DFAT, 'Attachment A: Summary of Consular Assistance', DFAT, *Answers to Questions on Notice No. 12*, p. 1.

52 DFAT, 'Attachment A: Summary of Consular Assistance', DFAT, *Answers to Questions on Notice No. 12*, pp. 1-2.

53 DFAT, *Answers to Questions on Notice No. 12*, p. 2.

54 DFAT, 'Attachment A: Summary of Consular Assistance', DFAT, *Answers to Questions on Notice No. 12*, p. 2.

for pardon or clemency and, if a prisoner is facing a death sentence, converting that sentence to a prison term. While the Australian Government will closely monitor the case and expect procedural fairness, there can be no guarantee that our actions will achieve your desired outcome or that the foreign government will respond to our representations.<sup>55</sup>

5.51 DFAT explained:

Potential death penalty cases are handled in accordance with Chapter 6 (Arrest, Detention and Imprisonment) of the *Consular Operations Handbook*, with additional case management strategies developed on individual cases taking into consideration:

- location of offence;
- details of offence;
- personal circumstances of the alleged offender; and
- receptiveness of the host government.<sup>56</sup>

5.52 Additional efforts by the Australian government can include creating a strategy for an individual case and submitting it to the Foreign Minister for endorsement, and making bilateral representations on behalf of Australians on death row.<sup>57</sup>

5.53 However, according to DFAT, such 'representations are rarely made public, as doing so can diminish their effectiveness'.<sup>58</sup>

5.54 In addition to consular services and advocacy, DFAT can direct detainees at risk of the death penalty or a very long period of imprisonment (20 years or more) towards two financial assistance schemes operated by the Attorney General's Department (AGD) – the Serious Overseas Criminal Matters Scheme and the Special Circumstances Scheme.<sup>59</sup>

## Serious Overseas Criminal Matters Scheme and Special Circumstances Scheme

5.55 AGD described the Serious Overseas Criminal Matters Scheme as 'akin to legal aid', and explained:

The purpose of this scheme is to provide legal financial assistance for an individual facing an overseas criminal action if:

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55 DFAT, 'Attachment A: Summary of Consular Assistance', DFAT, *Answers to Questions on Notice No. 12*, p. 5.

56 DFAT, *Answers to Questions on Notice No. 12*, p. 6.

57 DFAT, *Answers to Questions on Notice No. 12*, p. 6.

58 DFAT, *Answers to Questions on Notice No. 12*, p. 6.

59 DFAT, 'Attachment A: Summary of Consular Assistance', DFAT, *Answers to Questions on Notice No. 12*, pp. 3-4.

- (a) the individual is being, or will be, prosecuted for a criminal offence for which the individual may be punished by:
    - (i) a term of imprisonment equal to or longer than 20 years; or
    - (ii) the death penalty; and
  - (b) the individual has a continuing connection with Australia.<sup>60</sup>
- 5.56 According to AGD, the scheme 'is administered under the Commonwealth Guidelines for Legal Financial Assistance 2012'.<sup>61</sup>
- 5.57 DFAT explained that the Department 'informs all clients who potentially face the death penalty of their eligibility to apply for financial assistance through AGD's Serious Overseas Criminal Matters Scheme'. Further:
  - This information is provided to them at their initial prison or detention visit both verbally, and in the arrest letter which outlines the purpose of the scheme. Acknowledging the potentially overwhelming nature of their circumstances, particularly in the initial stages, consular staff follow up at respective visits to ensure that clients are aware of their entitlement to apply for this financial assistance.<sup>62</sup>
- 5.58 DFAT then assists detainees in applying for assistance under the scheme, before handing the application over to the AGD for consideration. However, DFAT remains involved, monitoring the progress of the application and ensuring 'that forms are completed and any missing information is provided in a timely manner'.<sup>63</sup>
- 5.59 Advice on DFAT's website specifies where detainees may not be eligible for this assistance:
  - For both schemes, assistance will not generally be granted to people who can meet their costs without incurring serious financial difficulty, are eligible for legal assistance in the overseas country, or do not have a continuing connection with Australia.<sup>64</sup>
- 5.60 Where detainees are eligible there are limits to what can be provided. AGD explained that:
  - The Department must assess whether it is reasonable in all the circumstances to provide a grant. If a grant is provided the Department must make an assessment of how much assistance is

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60 Attorney General's Department (AGD), *Answers to Questions on Notice No. 6*, p. [1].

61 AGD, *Answers to Questions on Notice 6*, p. [1].

62 DFAT, *Answers to Questions on Notice No. 12*, p. 2.

63 DFAT, *Answers to Questions on Notice No. 12*, pp. 2-3.

64 DFAT, 'Attachment A: Summary of Consular Assistance', DFAT, *Answers to Questions on Notice No. 12*, p. 4.

reasonable, including consideration of hourly rates for legal representatives that are comparable to those paid in Australia. Rates paid in Australia are akin to legal aid and are less than full commercial rates. Payments under grants of legal financial assistance are paid in arrears once the Department is invoiced for work completed. All invoices are assessed against the original grant offer and excessive costs are refused.<sup>65</sup>

5.61 AGD provided the following data in relation to the scheme. Note that these grants relate to 30 individuals:

Table 5.1 Total grants provided under Serious Overseas Criminal Matters Scheme 2012-2016

Financial Year	Number of grants	Total Funds Granted
2012 – 2013	11	\$854,429.34
2013 – 2014	11	\$343,035.77
2014 – 2015	38	\$1,302,554.05
2015 – 9 March 2016	17	\$521,252.53

Source DFAT, *Answers to Questions on Notice No. 12*, p. 4.

5.62 In addition to the Serious Overseas Criminal Matters Scheme, AGD operates the Special Circumstances Scheme. This scheme is designed to 'provide financial assistance for an entity involved in legal action in special circumstances'.<sup>66</sup> Death penalty cases are included under this scheme.

5.63 According to the Commonwealth Guidelines for Legal Financial Assistance, one motivation for providing funding under this scheme is where there is a 'moral obligation on the Commonwealth'.<sup>67</sup>

5.64 According to information provided by AGD:

The Guidelines provide discretion for the delegate to decide what constitutes a moral obligation on the Commonwealth. However, it is important to understand that in determining whether there is a moral obligation on the Commonwealth, the consistent approach applied by AGD is that the delegate must consider whether the applicant's situation occurred as a result of actions by the Australian Government, actions by an Australian Government official or actions on behalf of the Australian Government.<sup>68</sup>

65 AGD, *Answers to Questions on Notice No. 6*, p. [2].

66 'Commonwealth Guidelines for Legal Financial Assistance' (Exhibit 30), p. 14.

67 'Commonwealth Guidelines for Legal Financial Assistance' (Exhibit 30), p. 14.

68 DFAT, *Answers to Questions on Notice No. 12*, p. 5.

5.65 AGD provided the following data in relation to the scheme. Note that these grants relate to seven individuals:

Table 5.2 Total grants provided under Special Circumstances Scheme 2012-2016

Financial Year	Number of grants	Total Funds Granted
2012 – 2013	Nil	Nil
2013 – 2014	1	\$15,909
2014 – 2015	5	\$248,718
2015 – 9 March 2016	2	\$19,272

Source DFAT, *Answers to Questions on Notice No. 12*, p. 5.

## Andrew Chan and Myuran Sukumaran

5.66 Australian citizens Andrew Chan and Myuran Sukumaran were sentenced to death in Indonesia on 14 February 2006 for smuggling heroin in 2005 and were executed on 29 April 2015.<sup>69</sup>

5.67 The Australian Government, Australian politicians, diplomats and consular officials sought commutations of the death sentences of Mr Chan and Mr Sukumaran. DFAT's Dr Strahan explained:

We always extend consular support to Australians who are overseas, and that is done in all sorts of ways. To take the most recent case where it is relevant in relation to the death penalty, Chan and Sukumaran, our support was enormous and extensive. It unfolded over many, many months. Of course, a lot of these cases are quite sensitive.<sup>70</sup>

5.68 Mr Hayes revealed the Australian Parliamentarians Against the Death Penalty:

... asked Indonesia to respect the fact that Australia not only has a legal position against the death penalty but has very much a moral and cultural position against it.<sup>71</sup>

5.69 Mr Hayes visited Kerobokan Prison in 2009, explaining that he left with the impression that Mr Chan and Mr Sukumaran had made a significant positive impact upon the prison:

When you have the prison governor speaking about how good they were as part of the prison community – the way they were extending their abilities to assist others – I thought was pretty

69 ABC News, 'Bali Nine: Timeline of Key Events', at <<http://www.abc.net.au/news/2015-02-12/bali-nine-timeline-andrew-chan-myuran-sukumaran/6085190>> viewed 14 April 2016.

70 Dr Strahan, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 5.

71 Mr Hayes MP, Australian Parliamentarians Against the Death Penalty, *Committee Hansard*, Sydney, 20 November 2015, p. 25.



significant. I came away thinking that these guys must be destined to have their prison sentence commuted.<sup>72</sup>

5.70 Mr Hayes and other Australians tried to argue for clemency for the pair on the basis that they had totally reformed themselves over their ten year imprisonment. Mr Hayes said:

I made the comment, and I know many others did following their execution, that what should have been the success story was their rehabilitation and the way they have been able to turn their lives around, particularly coming from a particularly dark past.<sup>73</sup>

5.71 Some witnesses criticised the approach taken by many commentators who focussed on the men's rehabilitations. For instance Dr Amy Maguire, Ms Holly Fitzsimmons and Mr Daniel Richards (Dr Maguire et al) pointed out that the vigorous support for Mr Chan and Mr Sukumaran was not couched in the rhetoric of human rights, saying 'Australia did not emphasise specific human rights principles in its lobbying of Indonesia for clemency'.<sup>74</sup>

5.72 Dr Maguire suggested:

That was one thing that came across to me in Australia's advocacy on behalf of Chan and Sukumaran – that the effort was mostly focussed on the men's rehabilitation in prison and the idea that it was wasteful to kill them. I am not disputing that that was true, but there was very little specific advocacy from Australia based on the ideas that I identified in my opening statement – the human rights principles that Australia has committed itself to for a very long time, and the reasons underpinning our very strong domestic, legal opposition to capital punishment.<sup>75</sup>

5.73 Dr Maguire et al also suggested that the choice to withdraw Australia's Ambassador 'in protest, as happened following the executions of Sukumaran and Chan, [was] unlikely to change the policy positions of foreign governments.'<sup>76</sup>

5.74 Aussies Against Capital Punishment criticised the public representations made on behalf of Mr Chan and Mr Sukumaran:

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72 Mr Hayes MP, *Australian Parliamentarians Against the Death Penalty, Committee Hansard*, Sydney, 20 November 2015, p. 24.

73 Mr Hayes MP, *Australian Parliamentarians Against the Death Penalty, Committee Hansard*, Sydney, 20 November 2015, p. 24.

74 Dr Amy Maguire, Ms Holly Fitzsimmons and Mr Daniel Richards (Dr Maguire et al), *Submission 40*, p. 3.

75 Dr Maguire, University of Newcastle, *Committee Hansard*, Canberra, 27 November 2015, p. 15.

76 Dr Maguire et al, *Submission 40*, p. 4.

The approach taken by the government in the lead up to the last round of executions in Indonesia appeared to be ill informed at best – evoking the tsunami aid, suggesting prisoner exchange etc. Government must take a less reactionary stance in future and be strategic and sustained in calling for abolition for all people regardless of citizenship.<sup>77</sup>

- 5.75 Other witnesses were more sympathetic towards the attempts made by the Australian Government in the Chan and Sukumaran case. For instance, the Hon Justice Lasry AM QC contended:

My experience tells me that the worst time to be advocating for the abolition of a death penalty in a foreign country, particularly in an Asian country, is when an Australian is on death row in that country, when the government of that country has boxed itself into a position that [it] cannot back away from and probably does not want to back away from, and when the whole debate is continuously emotional. The time for advocacy, persuasion and diplomatic and political representations is when that is not happening – to a degree, like now, for example. A lot of emotion and effort is wasted during campaigns like the ones to save Van Nguyen, Andrew Chan and Myuran Sukumaran, which would never be taken notice of.<sup>78</sup>

- 5.76 Amnesty International praised the efforts of Australia's officials:

While these efforts were not successful in saving the lives of Andrew Chan and Myuran Sukumaran, statements made by all sides of politics at this time strengthened Australia's position and resolve as an abolitionist country.<sup>79</sup>

- 5.77 DFAT explained that by the time the campaign to stop the executions was nearing its end, the usual diplomatic avenues had been exhausted. The Department provided this explanation of the Government's later attempts:

We will judge, however, at various points that sometimes you have no alternative. You may have exhausted all the other avenues of communication and lobbied. Ultimately that did happen with Chan and Sukumaran. We did get to the point where we decided we had nothing to lose, where going overt and public was something we had to do and we were no longer going to cause a

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77 Aussies Against Capital Punishment, *Submission 13*, p. [1].

78 The Hon Justice Lasry AM QC, *Committee Hansard*, Melbourne, 17 November 2015, p. 1.

79 Amnesty International Australia, *Submission 34*, p. 3.

counterproductive effect in Indonesia given how far that process by that point had moved.<sup>80</sup>

- 5.78 Professor Byrne commented on suggestions by some that the case could have been referred to the UN Human Rights Committee or to the International Court of Justice, saying:

My understanding is that there was serious consideration given to those possibilities. They may have foundered on the unlikelihood of Indonesian consent, but I do not know whether any approaches were made. I suppose that is a strategic assessment. Clearly the government decided not to go with what it may have seen as an ineffective and heavy-handed legal route for which there was no compulsion.<sup>81</sup>

- 5.79 Mr McMahon and his colleagues felt that the decision to execute Mr Chan and Mr Sukumaran was ultimately a political decision, related to domestic politics in Indonesia, and that Australia had a very limited ability to prevent to it.<sup>82</sup>

## Proposals for change

- 5.80 A number of witnesses submitted that Australia could do more to prevent future executions. Mr Richard Bourke (Director, Louisiana Capital Assistance Center) suggested:

I would urge the Australian government to be proactive, as so many other countries are being in this area. That does not mean aggressive and it does not mean obstreperous, but it does mean to be proactive and to genuinely, sincerely and actively advocate for the interests of Australian nationals from the moment of arrest onwards.<sup>83</sup>

- 5.81 The United Nations Office of the High Commissioner for Human Rights (OHCHR) recommended 'that the Government of Australia develops a specific programme to provide legal and other assistance to its nationals facing the death penalty abroad'.<sup>84</sup>

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80 Dr Strahan, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 9.

81 Professor Byrnes, Diplomacy Training Program, *Committee Hansard*, Sydney, 9 December 2015, p. 15.

82 See for instance, McMahon et al, *Submission 12*, p. 5.

83 Mr Richard Bourke, Director, Louisiana Capital Assistance Center, *Committee Hansard*, Melbourne, 17 November 2015, p. 9.

84 United Nations Office of the High Commissioner for Human Rights (OHCHR), *Submission 49*, p. [8].

5.82 Dr Malkani provided the example of the 'Mexican Capital Legal Assistance Program':

Mexico have a fantastic capital legal advice project. Because a lot of Mexicans are facing the death penalty in the United States, particularly in Texas, the Mexican government set up this unit, which intervenes in cases from the very outset. ... There has been a huge decline in the number of Mexican people being sentenced to death, because the Mexican government gets involved as soon as they are arrested, before death sentences are sought. Prosecutors tend not to seek the death penalty when they realise that they are going to have difficulty in getting it and they have a whole country coming up behind this person. It is just not worth the time and effort to seek a death sentence. So the place to look for guidance on best practice is Mexico.<sup>85</sup>

5.83 Mr McMahon and his colleagues proposed that the Australian Government ensure the list of local lawyers provided by consular officers to those arrested or detained was regularly reviewed to ensure that 'only the most appropriate lawyers be on such lists'.<sup>86</sup>

5.84 Mr McMahon and his colleagues also proposed DFAT should establish a 'response team' for dealing with cases of Australians exposed to the death penalty overseas:

This loose committee could be immediately available for an Australian facing execution. It could provide a list of names of people who may be ready to assist, from lawyers, to linguists, to government officials, NGOs such as Reprieve or Australians Detained Abroad. It could provide previously done research on the relevant country and its laws.<sup>87</sup>

5.85 Mr Bourke proposed the Australian government 'develop a playbook' for dealing with death penalty cases. He explained the need for such a resource:

Frequently, we have seen, in the last 15 or 20 years, staff and politicians within the Australian government forced to consider, for the first time, issues of where to intervene and how far the intervention will go. Will funding be supplied? Will we handle the cases of dual nationals? Will we fund defence functions? Will we fund humanitarian functions, like assisting the family of Australian citizens in visiting their loved ones? What will our

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85 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 5.

86 McMahon et al, *Submission 12*, p. 5.

87 McMahon et al, *Submission 12*, p. 7.

advocacy be at the charging level? What will we do in terms of assistance during any trial or appellant process? These are questions that can readily be considered in the cool, calm light of day before we are stuck with our next case of Bali or Singapore. Australia has a lot of experience now with this.<sup>88</sup>

- 5.86 Mr McMahon and his colleagues saw benefit in having these best practice processes more formalised and death penalty cases handled by a set person or team:

The practical experience of these cases is that the lawyers are usually acting pro-bono. This increases the time pressures on the lawyers involved. It is important that the decision making processes for the provision of any disbursement assistance - often of critical importance be responsive, agile and speedy. ... In our experience the best way is consistent dealing with the same person.<sup>89</sup>

- 5.87 DFAT was questioned if a ready response team existed for death penalty cases. Their response indicated that it does not, given 'the small number' of cases:

However, this is not to suggest that these cases are not managed as our highest priority. Cases potentially involving the death penalty are handled by experienced consular officers in the Consular Operations Branch and at the relevant Embassy, High Commission or Consulate, with close oversight and strategic guidance provided by senior managers, and the Minister for Foreign Affairs briefed on developments.<sup>90</sup>

## **Approaches to advocacy – focusing on human rights**

- 5.88 A number of witnesses, especially those from academic and legal spheres, made observations about the nature of Australia's recent advocacy, including the cases of Mr Chan and Mr Sukumaran, and argued that Australian diplomats and politicians needed to take a stronger human rights approach.

- 5.89 Dr Maguire proposed:

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88 Mr Bourke, Louisiana Capital Assistance Center, *Committee Hansard*, Melbourne, 17 November 2015, p. 9.

89 McMahon et al, *Submission 12*, p. 6.

90 DFAT, *Answers to Questions on Notice No 12*, pp. 5-6.

... Australia must aim for consistency in its human rights orientation. An essential step in this regard is to build an advocacy position grounded in human rights principles, particularly the following three. First, Australia must identify the death penalty as a violation of the right to life. This fundamental right is not subject to limitation under human rights law. ... Second, the ICCPR imposes a pragmatic limitation which requires retentionist countries to impose capital punishment for only the most serious crimes. It must be unacceptable to Australia that some countries execute people for crimes which would not be regarded as crimes under Australian law or for crimes which should not be regarded as most serious crimes under Australian law. Third, Australia should decry capital punishment as torture.<sup>91</sup>

5.90 This position was supported by the UN Office of the High Commissioner for Human Rights, who submitted: 'Australia's position on the death penalty could be strengthened by making clear reference to human rights considerations'.<sup>92</sup>

5.91 Mr Bourke argued the need for Australia to see capital punishment as a core human rights issue, not an issue of a difference of opinion or approach between nations. He criticised the view held by some in Australia that the death penalty is a 'legitimate local political choice', saying:

If we see the issue as a fundamental human rights issue and act accordingly, we will find ourselves better able to advocate and more credibly able to advocate in the United States and elsewhere, rather than simply say: 'Well, we do not believe in the death penalty. We understand that you do and that these are differing approaches to law enforcement.'<sup>93</sup>

5.92 Mr Bourke made the following observation:

Understanding that this is a human rights issue, rather than a legitimate local political choice, Australia is less encumbered in choosing to support human rights advocacy, as it does in so many

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91 Dr Amy Maguire, Lecturer, University of Newcastle Law School, *Committee Hansard*, Canberra, 27 November 2015, p. 13. The submission tendered by Dr Maguire and others, *Submission 40*, further explores this proposal.

92 OHCHR, *Submission 49*, p. [5].

93 Mr Richard Bourke, Director, Louisiana Capital Assistance Center, *Committee Hansard*, Melbourne, 17 November 2015, p. 7.

other areas that it has identified as areas for human rights concern.<sup>94</sup>

- 5.93 Mr McMahon and his colleagues argued that advocating against the death penalty provides an opportunity to highlight related injustices in relevant countries:

By focussing on the death penalty, we immediately see the serious injustices that are occurring in legal systems and justice administrations in the relevant countries. These problems vary, from corruption, to procedural injustices, to torture, to inhuman incarceration conditions, to punishment regimes of excessive brutality or cruelty as examples. However, all these issues can have the spotlight shone upon them, hopefully with good results, by focusing on the most extreme injustice of all, state sanctioned killings.<sup>95</sup>

- 5.94 Barrister Stephen Keim proposed that approaching the death penalty as a matter of human rights law provided powerful arguments to sway public opinion. He claimed:

... public attitudes are often formed in the absence of a coherent and principled debate and they will often change when issues are explained and politicians, themselves, refuse to peddle simplistic notions. ... One factor that can affect public opinion is the explanation of what international law, especially, international human rights law, has to say about a particular policy or practice.<sup>96</sup>

- 5.95 Dr Pascoe argued that the human rights approach was superior to policy-based arguments against the death penalty, saying:

... the major problem with tackling the death penalty directly as a policy initiative is that this risks a sovereign backlash from nations who believe criminal justice policies are a matter of domestic policy only, rather than one of international human rights.<sup>97</sup>

- 5.96 Australian Lawyers for Human Rights (ALHR) also promoted the human rights approach:

As a nation our domestic, regional and international interactions should very clearly reflect a view that the death penalty is an inhuman, cruel and irreversible punishment that has no place in a modern legal system. We must be consistent and unambiguous in

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94 Mr Richard Bourke, Director, Louisiana Capital Assistance Center, *Committee Hansard*, Melbourne, 17 November 2015, p. 8.

95 McMahon et al, *Submission 12*, p. 4.

96 Mr Stephen Keim SC, *Submission 17*, p. 4.

97 Dr Pascoe, *Submission 19*, p. [7].

conveying that its abolition is a prioritised task for the Government in efforts to promote and increase respect for human rights.<sup>98</sup>

- 5.97 Witnesses argued that approaching the death penalty as a human rights issue was better than using financial arguments. For instance, Dr Malkani argued that while it is true that it costs more to attempt to execute someone in the USA than to imprison them for life, this argument is short sighted:

I am very cautious about that approach. I think the idea that it is cheaper to keep people sentenced to life works in the short term, because it is true, and especially in these times of economic crisis people do not want to be spending money on that sort of thing. The danger is that you have to look at why so much money is spent on death penalty cases as opposed to life sentence cases. The reason is that because life and death is an issue there are heightened scrutiny and appeals processes. There are much more stringent appeals to make sure that only the most deserving are being executed. What we find is that we do not have that same level of scrutiny for people who are serving life sentences and they can be hundreds of people. There are literally hundreds or thousands of people in America who are serving life sentences who do not deserve to be there.<sup>99</sup>

- 5.98 When asked for their response to proposals suggested during the inquiry, DFAT advised:

A lot of the submissions spoke about the need to make sure that we are entirely consistent in opposing the death penalty and that we do it as a matter of fundamental principle; I have no objection to that. A number of the witnesses said it was important for us to couch our arguments both in fundamental human rights as well as in law enforcement argumentations; I have no problem with that.<sup>100</sup>

- 5.99 Some of the specific human rights arguments in relation to capital punishment are discussed below.

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98 Australian Lawyers for Human Rights (ALHR), *Submission 18*, p. 6.

99 Dr Bharat Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 7.

100 Dr Strahan, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 4.



## Capital punishment as torture

5.100 One aspect of the human rights argument against capital punishment is the idea that imposing and carrying out death sentences amounts to torture, which is against international law. Dr Maguire claimed:

[Capital punishment] is torturous because of the methods used in executions, because of the length of time convicted persons are kept on death row, the uncertainty they face about when they may or may not be executed and the terror of awaiting ones own scheduled killing by the state.<sup>101</sup>

5.101 In their submission, Dr Maguire et al also claimed:

Not only does capital punishment inflict inhumane pain and suffering at the time of execution ... [but] some people sentenced to death have been subjected to torture as a means of extracting their confessions.<sup>102</sup>

5.102 UnitingJustice Australia also raised concerns that prisoners on death row are often subject to 'cruel and inhumane treatment', such as isolation, excessive physical restraint, limited visits and correspondence, poor cell conditions, and restriction from meaningful activities like work or education programs.<sup>103</sup> Furthermore, UnitingJustice Australia contended that execution itself constitutes a 'cruel and degrading' punishment.<sup>104</sup>

5.103 The Castan Centre remarked that many execution methods are now being found to be 'contrary to the prohibition on cruel, inhuman and degrading punishment in article 7 of the ICCPR'.<sup>105</sup>

5.104 Dr Maguire et al also argued that none of the methods used 'to carry out death sentences can be shown to be "humane" or painless'.<sup>106</sup>

5.105 The Law Council of Australia and the Australian Bar Association (LCA and ABA) suggested that Australia should '[r]aise individual cases of third country nationals [on death row] ... when minimum standards have not been met' and support 'appropriate legal challenges to the death penalty' on human rights grounds.<sup>107</sup>

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101 Dr Amy Maguire, University of Newcastle, *Committee Hansard*, Canberra, 27 November 2015, p. 13.

102 Dr Maguire, Ms Fitzsimmons and Mr Richards, *Submission 40*, p. 5.

103 UnitingJustice Australia, *Submission 25*, pp. 3-4.

104 UnitingJustice Australia, *Submission 25*, p. 4.

105 Castan Centre, *Submission 9*, p. 2.

106 Dr Maguire, Ms Fitzsimmons and Mr Richards, *Submission 40*, p. 5.

107 LCA and ABA, *Submission 24*, p. 11.

- 5.106 Connecting capital punishment to torture has proven to be a powerful tool in advocating for abolition. For instance, the Institute for Justice and Reconciliation in South Africa submitted:

On 6th June 1995, the Supreme Court of South Africa made a landmark ruling in the *State vs. Makanywane* and others case which ultimately led to the abolishment of the country's death penalty. The reasoning in the ruling was that the death penalty was inconsistent with the commitment to human rights including the protections from cruel and degrading treatment as outlined in the country's then interim constitution.<sup>108</sup>

### Miscarriages of justice

- 5.107 Witnesses observed that a compelling human rights argument against the death penalty is the occurrence of miscarriages of justice. For instance, Amnesty International expressed concerns about the quality of justice and court proceedings in death penalty cases, claiming that:

... in the majority of countries where people were sentenced to death or executed in 2014, the sentence was imposed after proceedings which did not meet international standards.<sup>109</sup>

- 5.108 The OHCHR cautioned that:

States that maintain the death penalty must ensure scrupulous respect of due process guarantees. In accordance with the Human Rights Committee, the imposition of a death sentence upon conclusion of a trial in which the provisions of article 14 of the ICCPR have not been respected constitutes a violation of the right to life. Those accused of capital offences must be effectively assisted by a lawyer at all stages of the proceedings.<sup>110</sup>

- 5.109 Witnesses including Mr Bourke, Reprieve and Amnesty International Australia referred specifically to the United States, where the poor and racial minorities are disproportionately likely to face execution. Mr Bourke observed:

As someone who has been practising in death penalty events here for over a decade, if we could eliminate the racism and the injustice to the poor in the death penalty process and ensure that guarantees such as the right to effective representation in counsel, as recognised by the international covenant, were applied in death

108 Institute for Justice and Reconciliation, *Submission 42*, p. [1].

109 Amnesty International, *Submission 34*, p. 6.

110 Office of the United Nations High Commissioner for Human Rights (OHCHR), *Submission 49*, p. [3].

penalty courts in this country, we would establish de facto abolition of the death penalty in the United States.<sup>111</sup>

5.110 Reprieve commented on the problematic selection of jurists in the United States, which they argued impacts upon access to justice for black Americans accused of capital crimes.<sup>112</sup>

5.111 Further to this, Reprieve described the Louisiana Capital Assistance Center's (LCAC) 'Blackstrikes project', which addresses the 'disproportionate use of peremptory challenges against African-American prospective jurors', saying:

The LCAC partnered with Reprieve Australia in developing and working on this project. This data revealed that prosecutors in Louisiana's Caddo Parish, which issues most of the State's death sentences, strike African American jurors at three times the rate they strike others.<sup>113</sup>

5.112 Reprieve reported that:

Together with local and national media, the research has shone a light on racism in the South and its pernicious impact on death sentencing. There have been no death sentences handed down in Caddo Parish since publication of the research in 2015. ... This is exactly the kind of research funding Australia could assist with and facilitate.<sup>114</sup>

5.113 Human Rights Watch suggested that Australian advocacy could focus on '[e]nsuring fair trials and ending abusive interrogations'.<sup>115</sup>

5.114 The United States was only one country cited for possible miscarriages of justice in relation to the death penalty. The Iraqi High Commission for Human Rights called for a higher standard of evidence (not simply confessions) for crimes involving a death sentence.<sup>116</sup>

5.115 Amnesty pointed to serious faults in the Iranian legal system regarding capital cases, contending:

... death sentences in Iran are particularly disturbing because they are invariably imposed by courts that are completely lacking in independence and impartiality. They are imposed either for vaguely worded or overly broad offences, or acts that should not

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111 Mr Richard Bourke, Director, Louisiana Capital Assistance Center, *Committee Hansard*, Melbourne, 17 November 2015, p. 8.

112 Reprieve Australia, *Submission 41*, p. 10.

113 Reprieve Australia, *Submission 41*, p. 10.

114 Reprieve Australia, *Submission 41*, p. 10.

115 Mr Robertson, Human Rights Watch, *Committee Hansard*, Sydney, 9 December 2015, p. 25.

116 High Commission for Human Rights Iraq, *Submission 30*, p. [4].

be criminalized at all, let alone attract the death penalty. Trials in Iran are deeply flawed, detainees are often denied access to lawyers in the investigative stage, and there are inadequate procedures for appeal, pardon and commutation.<sup>117</sup>

- 5.116 In Saudi Arabia, where almost half of the executions carried out in 2014-2015 were for 'non-violent crimes including drug related offences, "adultery", "apostasy" and armed robbery', Amnesty observed that:

Trials in capital cases are often held in secret and defendants are routinely denied access to lawyers. People may be convicted solely on the basis of 'confessions' obtained under torture, other ill-treatment or deception.<sup>118</sup>

- 5.117 Amnesty cited research on the use of the death penalty in Indonesia that found claims of torture and ill-treatment, denial of access to lawyers and interpreters, and denial of access to consular services (despite the fact that 12 of the 14 people executed in 2015 were foreign nationals).<sup>119</sup>

### Categories of persons exempt under international law

- 5.118 As discussed in Chapter 2, international law resolves that juveniles, pregnant women and the mentally ill should be exempt from capital punishment.<sup>120</sup>
- 5.119 Despite the fact that international law is clear in relation to the execution of minors, 'Amnesty International has documented 90 executions of child offenders (people younger than 18) in 9 retentionist countries' since the year 1990.<sup>121</sup>
- 5.120 Human Rights Watch submitted that children have recently been sentenced to death in 'Egypt, Iran, Maldives, Nigeria, Pakistan, Saudi Arabia, Sri Lanka, and Yemen'.<sup>122</sup>
- 5.121 Amnesty referred to the example of Shafqat Hussain, executed in Pakistan in 2015 for 'kidnapping and involuntary manslaughter' in 2004. Amnesty stated that Mr Hussain was:

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117 Amnesty International, *Submission 34*, p. 7.

118 Amnesty International, *Submission 34*, p. 7.

119 Amnesty International, *Supplementary Submission 34.1*, p. 2.

120 'The prohibition of executions for crimes committed by persons under the age of 18 is provided in several international and regional human rights treaties, in particular in Article of ICCPR and Article 37 of the Convention on the Rights of Child. The prohibition on the execution of pregnant women is also set out in article 6 of ICCPR'. OHCHR, *Submission 49*, p. [3].

121 Dr Maguire, Ms Fitzsimmons and Mr Richards, *Submission 40*, p. 6.

122 Human Rights Watch, *Submission 23*, p. [4].

... convicted under the Anti-Terrorism Act of Pakistan despite no known links to any terrorist organisation. According to his lawyers, Shafqat was under 18 years of age at the time of his crime, and was tortured into a 'confession'.<sup>123</sup>

- 5.122 Dr Malkani proposed that countries where juveniles may be sentenced to death represented an 'interesting place to start' with abolitionist advocacy.<sup>124</sup> He said:

I worked against the juvenile death penalty in America before it was abolished in 2005. International pressure worked very well there, because America was one of the few countries that had it. There were only about eight countries at that time that imposed the death penalty for juvenile offenders. In *Roper v Simmons*, the case that we took to the Supreme Court, the Supreme Court referred to international standards and the fact that there was such huge international pressure against this.<sup>125</sup>

- 5.123 The execution of offenders who are mentally ill or intellectually disabled is another violation of human rights law. Reprieve stated:

Understanding of the seriousness of mental illness and intellectual impairments and the effect it should have on sentencing is an area that needs to be further developed in many jurisdictions. In spite of international and domestic protections, countries often fail to provide defendants with appropriate medical examinations or take into account clear medical evidence in conviction, sentencing and execution. Countries also diverge on their definition of mental health and intellectual impairment with some countries adopting definitions that are so stringent that even many individuals are considered legally competent.<sup>126</sup>

- 5.124 As an example, Amnesty referred to the execution of Andre Cole, who was convicted by an all-white jury and executed by the State of Missouri in 2015:

... despite questions surrounding his mental capacity and whether he had received a fair trial, and a long campaign by civil society organisations in the United States and around the world. Mr Cole had been assessed by a psychiatrist as having 'prominent symptoms of psychosis' and suffered 'gross delusions'.<sup>127</sup>

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123 Amnesty International, *Submission 34*, p. 7.

124 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 2.

125 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 4.

126 Reprieve Australia, *Submission 41*, p. 10.

127 Amnesty International, *Submission 34*, p. 6.

- 5.125 Reprive submitted that this is an area where Australia's advocacy could be well-placed:

Well-resourced and strategic litigation and advocacy around the execution of mentally ill and intellectually impaired defendants is needed, including knowledge sharing and capacity building with retentionist countries.<sup>128</sup>

### Impacts on families and children

- 5.126 One further dimension of the human rights approach to advocating against capital punishment is consideration of its effects on the children and families of the accused. UnitingJustice Australia cited evidence that the children of parents facing the death penalty often experience 'emotional, behavioural and mental health problems'.<sup>129</sup>
- 5.127 The OHCHR confirmed that 'the death penalty can have serious implications for the rights of children of parents sentenced to death or executed'.<sup>130</sup>
- 5.128 Mr Hayes observed this process in relation to the families of the Bali 9:
- You can see the ups and downs of Indonesian politics – moratoriums being put in place and then taken away – taking a toll on a family that is, as I say, innocent of any crime. As parents, it does not matter what our kids do, quite frankly; nothing ever skews our love for them and how we care for them. Having people on death row, not knowing what was going to occur, certainly had an impact on the families.<sup>131</sup>
- 5.129 UnitingJustice Australia suggested that Australia 'collaborate with child rights organisations to highlight the detrimental impacts on children'.<sup>132</sup>

### Committee comment

- 5.130 The Committee notes that in 2011 Australia declined an invitation to join the international group, the 'Friends of the Protocol'.<sup>133</sup> We recommend this decision be revisited.

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128 Reprive Australia, *Submission 41*, p. 11.

129 UnitingJustice Australia, *Submission 25*, p. 4.

130 OHCHR, *Submission 49*, p. [5].

131 Mr Hayes MP, Australian Parliamentarians Against the Death Penalty, *Committee Hansard*, Sydney, 20 November 2015, p. 25.

132 UnitingJustice Australia, *Submission 25*, p. 7.

133 World Coalition Against the Death Penalty (WCADP), *Submission 36*, p. 2.

- 5.131 The Committee acknowledges the advocacy of Australia's diplomats in relation to the death penalty, particularly when Australians are on death row overseas.
- 5.132 The Committee notes that the Australian Government has provided financial support to a number of organisations in 2015-16 to further our international advocacy against the death penalty.
- 5.133 The Committee also acknowledges the work of Australian Parliamentarians Against the Death Penalty and Parliamentarians for Global Action, who play an important role in communicating Australia's opposition to the death penalty around the world.
- 5.134 The Committee is confident that our consular officials treat overseas death penalty cases involving Australian citizens with urgency and seriousness, and that these cases are a high priority for DFAT. However, the Committee believes there is scope to ensure a more consistent and proactive approach to assisting those exposed to this risk in foreign jurisdictions. This could be achieved through:
- developing a strategy document that could be used to plan and guide Australia's action in individual cases;<sup>134</sup>
  - intervention and advocacy at the earliest possible stages;
  - ensuring the list of lawyers provided to detainees is regularly reviewed and quality-assured;
  - partnering more closely with NGOs, lawyers, and other service providers to ensure a strategic and coordinated approach to supporting Australians at risk; and
  - adapting policies and practices governing the Serious Overseas Criminal Matters Scheme and Special Circumstances Scheme to ensure that lawyers working pro-bono on death penalty cases can easily access the funding they need in a timely manner, including the ability to apply for funding for reasonable expenses already incurred.
- 5.135 While acknowledging that different country contexts call for different approaches to advocacy, the Committee encourages Australian advocacy for abolition of the death penalty refer to human rights arguments, particularly when public statements are made opposing executions. This includes highlighting issues such as:
- the inherent 'right to life', enshrined in international law;
  - the relationships between execution and torture;

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134 The Committee understands that the *DFAT Consular Handbook* provides advice on assisting persons at risk, but believes there is scope for a more strategic document that offers techniques for coordination across the Department.

- the disproportionate impact of the death penalty on the poor, and religious and cultural minorities;
- the relationships between capital punishment and corruption, miscarriages of justice and unfair trials;
- the ongoing execution of minors, and the mentally ill in some countries; and
- the impact of death sentences and executions on family members and dependent children.

## Recommendations

### Recommendation 4

The Committee recommends that the Australian Government revisit the 2011 decision to decline becoming a member of the international group the 'Friends of the Protocol'.

### Recommendation 5

The Committee recommends that the Department of Foreign Affairs and Trade develop guidelines for the Department's support for Australians at risk of facing the death penalty overseas. This document should guide the coordination of:

- consular assistance;
- diplomatic representations;
- legal support and funding assistance;
- communications and media strategies; and
- other forms of support offered by the Government.



## **Recommendation 6**

The Committee recommends that, where appropriate and especially in relation to public messaging, Australian approaches to advocacy for abolition of the death penalty be based on human rights arguments and include:

- references to human rights law, including highlighting the 'right to life' enshrined in the Universal Declaration of Human Rights;
- condemnation for the imposition of the death penalty on juveniles and pregnant women;
- opposition to its use on people with mental or intellectual disabilities;
- highlighting the disproportionate use of capital punishment on the poor, and ethnic and religious minorities;
- communicating the risks associated with miscarriages of justice, including the irreversibility of capital punishment;
- emphasising the inherently cruel and torturous nature of the death penalty and executions; and
- refer to the ineffectiveness of the death penalty as a deterrent.

## **Recommendation 7**

The Committee recommends that the Attorney-General's Department amend the guidelines governing the Serious Overseas Criminal Matters Scheme and the Special Circumstances Scheme, and make necessary adjustments to the schemes' operation, to ensure that:

- legal representatives working pro-bono on death penalty cases can access funding from the schemes in a timely manner;
- where practical, legal representatives are able to communicate with a specific contact person for the duration of a case; and
- where necessary due to time restraints, legal representatives have the ability to apply for funding for reasonable expenses already incurred.



## Improving Australia's advocacy

- 6.1 Abolishing the death penalty worldwide will take time and a sustained effort by nations and the international community. Mr Phil Robertson (Deputy Director, Asia Division, Human Rights Watch) submitted:

Abolishing the death penalty is a long-term effort which is more like a marathon than a sprint, where progress will be seen over years rather than months. When running a marathon, one has to have persistence, training and focus. To succeed, one needs to plan on how to run the race, commit resources and overcome obstacles.<sup>1</sup>

- 6.2 This chapter reviews the many suggestions made by witnesses during the course of the inquiry for strengthening Australia's advocacy for abolition of the death penalty, as well as increasing its efficacy.
- 6.3 Specifically, the chapter examines:
- proposals for a whole-of-government strategy for international advocacy against the death penalty, including multilateral and bilateral engagement, engagement with civil society organisations, and support for research in the field;
  - suggestions for Australia's parliamentarians and the group Australian Parliamentarians Against the Death Penalty; and
  - the potential role of the private sector in advocating against the death penalty and executions.
- 6.4 The chapter concludes with the Committee's commentary on these issues, and a number of recommendations for actions Australia can take to strengthen and increase its advocacy for abolition of the death penalty.

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<sup>1</sup> Mr Phil Robertson, Deputy Director, Asia Division, Human Rights Watch, *Committee Hansard*, Sydney, 9 December 2015, p. 24.

## An Australian death penalty strategy

- 6.5 There was broad support among witnesses for the development of an Australian strategy for abolition.<sup>2</sup> Reprieve stated:
- As has been done in the United Kingdom, Reprieve recommends that Australia establish a principled and consistent whole-of-government strategy which articulates Australia's commitment to global abolition.<sup>3</sup>
- 6.6 The Australian Lawyers for Human Rights (ALHR) submitted:
- On a regional and international level ALHR urges the Australian Government to follow the impressive lead of countries like the United Kingdom and Sweden who are working actively to persuade States that still include the death penalty as part of their legislation to change their attitude.<sup>4</sup>
- 6.7 Human Rights Watch provided specific detail about what should be in the strategy, suggesting the government:
- ... ask DFAT to issue a public strategy document on stopping the death penalty worldwide with clear and specific goals on each country that still retains the death penalty, and make this a priority item for action by Australian diplomats in those countries.<sup>5</sup>
- 6.8 The Law Council of Australia and the Australian Bar Association (LCA and ABA) suggested the strategy should contain the following elements:
- An Australian strategy should explain Australia's vision, policy and basis of its opposition to the death penalty. ...
  - A strategy should also set out Australia's goals and mechanisms to achieve those goals. ...
  - The strategy should also identify the importance of a presenting a unified effort, and nominate one independent body or government agency to direct such efforts. Further, the strategy should identify who will be responsible for delivering key messages, for example ambassadors or the Minister for Foreign Affairs and Trade.<sup>6</sup>

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2 See especially: Amnesty International, Human Rights Watch, Human Rights Law Centre, Reprieve, Australians Detained Abroad, NSW Council for Civil Liberties, Civil Liberties Australia, *Submission 21*, p. [1].

3 Ms Ursula Noye, Board member, Reprieve Australia, *Committee Hansard*, Melbourne, 17 November 2015, p. 12.

4 Australian Lawyers for Human Rights (ALHR), *Submission 18*, p. 7.

5 Mr Robertson, Human Rights Watch, *Committee Hansard*, Sydney, 9 December 2015, p. 24.

6 Law Council of Australia and the Australian Bar Association (LCA and ABA), *Submission 24*, p. 9.

- 6.9 Dr Bharat Malkani (University of Birmingham) proposed that Australia could look to the United Kingdom's work in this area:
- Australia can learn a great deal from the United Kingdom, which implemented an official 'Strategy for Abolition of the Death Penalty' from 2010-2015. The Strategy identified priority countries to target, and various channels through which to promote abolition. The Foreign and Commonwealth Office of the UK Government achieved some success through the Strategy. For example, Parliamentarians from the UK travelled to Suriname to encourage abolition, and the Government of Suriname abolished the death penalty on 3rd March 2015.<sup>7</sup>
- 6.10 DFAT confirmed that an Australian strategy to advocate for abolition of the death penalty is in development, and that the Department is awaiting the findings of this inquiry:
- It has been very much our intent from the beginning of the year to do such a strategy, but we thought we would hold fire until the committee had its hearings and came up with its recommendations. We want to be very responsive to what the committee comes up with.<sup>8</sup>
- 6.11 DFAT also confirmed that it is reviewing the strategies of other countries, including Norway and the UK.<sup>9</sup> These strategies are discussed in Chapter 2 of this report.
- 6.12 Describing the planned Australian strategy, DFAT explained that it:
- ... will be a tangible manifestation of our in principle commitment to opposing the death penalty in all instances. We see that strategy as performing several simultaneous functions. Firstly, it has an internal implication for our own staff, to help them do this work more effectively. Secondly, we see it as something that reaches out very much to civil society, both in Australia and overseas. Thirdly, we see it as something that reaches out to other governments. In that way, it reinforces the claims that we are making in getting onto the Human Rights Council.<sup>10</sup>
- 6.13 Some witnesses suggested that the strategy could be read as a national statement against the death penalty. Mr Chris Hayes MP argued that 'we

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7 Dr Bharat Malkani, University of Birmingham, *Submission 4*, p. 1.

8 Dr Strahan, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 5

9 Dr Strahan, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 5.

10 Dr Strahan, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 6.

probably do need a national mission statement in that regard, whether from DFAT or from other agencies that deal internationally'.<sup>11</sup>

6.14 Amnesty proposed the following set of key performance indicators be adopted for evaluating the success of an Australian strategy:

**Multilateral**

- Increase in the number of 'yes' votes in the UNGA death penalty moratorium and movement from 'no' votes to 'abstentions'.
- Increased number of countries recommending abolition of death penalty in UPR.
- Increased numbers of countries supporting HRC resolutions against death penalty.

**Regional**

- Transition of abolitionist in practice countries in Pacific towards abolitionist in law (therefore achieving goal that Pacific is first death penalty free region by 2018).
- Establishment of Asia-Pacific bloc opposed to the death penalty (including Philippines, Timor-Leste, Cambodia, Nepal, Bhutan + Pacific states).

**Priority countries**

- Reduction of public support for death penalty in priority countries.
- Reduction of support for death penalty amongst judicial officials, legal professionals, Parliamentarians etc in priority countries.
- Increase in reporting of death penalty and transparency relating to conditions and procedures.
- Improvements to conditions for people on death row.
- Reduction of crimes carrying the death penalty.
- Ending mandatory death sentences.
- Commitments to put in place moratoriums (at national and sub-national level).
- Increased abolitionist countries in law/signatories of ICCPR Optional protocol.
- Increased sub-national moratoriums.<sup>12</sup>

11 Mr Hayes MP, Australian Parliamentarians Against the Death Penalty, *Committee Hansard*, Sydney, 20 November 2015, p. 26.

12 Amnesty International, *Supplementary Submission 34.1*, p. 12.

## Resourcing

- 6.15 Witnesses including Barrister Stephen Keim and the LCA and ABA suggested there is a need to put further resources towards Australia's advocacy for abolition of the death penalty.<sup>13</sup>
- 6.16 Civil Liberties Australia (CLA) argued:
- One of the key issues we think that is necessary is to elevate the importance of human rights within DFAT. Over the years, I would suggest to you that the status of the human rights branch in DFAT has been seriously eroded.<sup>14</sup>
- 6.17 CLA recommended the provision within DFAT of 'more staffing, more research, more power to implement whatever comes out of this process that the committee recommends'.<sup>15</sup>
- 6.18 DFAT remarked that resourcing issues limit what the Department can do in relation to the death penalty. Dr Lachlan Strahan (First Assistant Secretary, Multilateral Policy Division, DFAT) said:
- Frankly, we do not have the kind of resources that the British, French and Americans have. They have much, much larger foreign services. ... [One DFAT staff member] works for part of his time on the death penalty but he also covers many other human rights issues, including the recent HRC sessions.<sup>16</sup>
- 6.19 The DFAT submission also acknowledged a lack of funding for civil society projects:
- An avenue for stepping up our advocacy efforts could be the provision of modest financial support to a small group of civil society organisations that complement DFAT's death penalty abolition work. This is under consideration. DFAT does not have existing resources to support this stream of work.<sup>17</sup>
- 6.20 Amnesty International suggested Australia 'make a specific budget allocation of at least \$2 million within the Department of Foreign Affairs to support civil society efforts to abolish the death penalty.'<sup>18</sup>
- 6.21 Amnesty recommended this funding be used to:

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13 Mr Stephen Keim SC, *Submission 17*, p. 5; Law Council of Australia (LCA) and the Australian Bar Association (ABA), *Submission 24*, p. 8.

14 Mr William Murray Rowlings, Chief Executive Officer, Civil Liberties Australia *Committee Hansard*, Canberra, 27 November 2015, p. 8.

15 Mr Rowlings, Civil Liberties Australia, *Committee Hansard*, Canberra, 27 November 2015, p. 8.

16 Dr Lachlan Strahan, First Assistant Secretary, Multilateral Policy Division, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 9.

17 DFAT, *Submission 35*, p. 12.

18 Amnesty International, *Submission 34*, p. 4.

- Campaign publicly for change of laws and adoption of political commitments;
  - Conduct research (including public perception surveys etc which could help inform policy makers and change the debate);
  - Build regional/ global consensus against the death penalty, advocate for regional agreements or 'yet' votes for moratorium;
  - Run cases that help to highlight injustice of death penalty.<sup>19</sup>
- 6.22 As a comparison, the UK Government has, in recent years, allocated between GBP £500 000 and GBP £800 000 per annum to this cause.<sup>20</sup>
- 6.23 The following is a response to a question on notice asked in the UK Parliament:
- In the four financial years 2011-2015, the Foreign and Commonwealth Office funded 42 abolition of death penalty projects with a total expenditure of £2,382,237. The breakdown of expenditure by year was:
- 2011-12 £516,679
  - 2012-13 £760,803
  - 2013-14 £581,945
  - 2014-15 £522,809
- In the current financial year, we expect to spend around £600,000 on this topic. We will be announcing an ambitious strategy for further human rights programming shortly. This strategy will offer future opportunities for abolition of death penalty projects. The amount we allocate to projects in this area will depend on the quality of bids received.<sup>21</sup>
- 6.24 Human Rights Watch offered that the strategy should include annual reporting on progress made in countries that retain the death penalty.<sup>22</sup>
- 6.25 DFAT submitted that it intends to provide 'public updates, such as through DFAT's Human Rights NGO Forums' on the progress of the strategy.<sup>23</sup>
- 6.26 Regarding the form and structure of the proposed strategy, DFAT's Dr Strahan remarked:

19 Amnesty International, *Supplementary Submission 34.1*, p. 12.

20 Mr David Lidington, 'Answer to Question on Notice: Capital Punishment: Written question – 21767', by Mr Patrick Grady, answered 14 January 2016, *Parliament.UK*, at <[www.parliament.uk/written-questions-answers-statements/written-question/commons/2016-01-11/21767](http://www.parliament.uk/written-questions-answers-statements/written-question/commons/2016-01-11/21767)> viewed 8 April 2016.

21 Mr David Lidington, 'Answer to Question on Notice: Capital Punishment: Written question – 21767', by Mr Patrick Grady, answered 14 January 2016, *Parliament.UK*.

22 Human Rights Watch, *Submission 23*, p. [2].

23 DFAT, *Submission 35*, p. 11.



We would very much believe that you have to have a multilayered strategy, which will encompass everything from discrete bilateral contacts, just as we have done with Saudi Arabia, for instance, through to what we do in the multilateral space.<sup>24</sup>

6.27 Dr Strahan further revealed that discussion and research are taking place to inform the Australian strategy. He commented:

... we are already talking to other governments about how they have put together their work. When I was in London for the Commonwealth's Committee of the Whole I again met with the Foreign Office's human rights team and had a further conversation with them about how they are doing their death penalty work, including under their reconfigured human rights policy.<sup>25</sup>

### Whole-of-department and whole-of-government approach

6.28 Professor Donald Rothwell remarked that any Australian strategy needed to be a whole-of-government strategy with 'a consistent whole-of-government approach'. He added:

Such an approach must extend from the highest levels of government, involving the Prime Minister, the foreign minister, the Attorney-General and other relevant ministers, to government officials such as ambassadors and departmental secretaries, especially those who also exercise a diplomatic function, such as the secretary of the Department of Foreign Affairs and Trade, and to relevant government departments and agencies, including not only DFAT but also the Australian Defence Force and the Australian Federal Police.<sup>26</sup>

6.29 Amnesty International also highlighted the importance of a whole-of-government approach to the death penalty.<sup>27</sup>

6.30 Responding to these proposals, Dr Strahan confirmed:

... the strategy will be very much a whole-of-department strategy, so it will bring together all the different arms of what we do in DFAT. Thirdly, it very much has to be a whole-of-government strategy, so we will be working very closely with and will consult regularly with the AGD, the AFP and all the other stakeholders. So

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24 Dr Strahan, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 5.

25 Dr Strahan, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 9.

26 Professor Donald Robert Rothwell, Private capacity, *Committee Hansard*, Canberra, 27 November 2015, p. 26.

27 Amnesty International, *Submission 34*, p. 3.

you can be assured that it will be a document that will come out to represent our combined activities and efforts across government.<sup>28</sup>

## Multilateral strategies

6.31 Dr Daniel Pascoe drew on social science research to recommend that Australia see the 'big picture' in relation to why some countries retain capital punishment. He suggested that the Australian Government work to 'eliminate the conditions which allow the death penalty to flourish', and:

... devote more of its soft-power resources to promoting pro-democracy reforms, regional human rights institutions, treaty compliance, minimising corruption and maximising the economic development of Australia's neighbours, all in order to indirectly promote moves away from capital punishment.<sup>29</sup>

6.32 Dr Pascoe added that Australia should:

... promote democracy where it is absent in retentionist states, by providing logistical, moral and financial support for pro-democracy initiatives – such as development of civil society, independent media, freedom of information, judicial and legal reform, police and military training, and election monitoring.<sup>30</sup>

6.33 Witnesses, including lawyers McMahan, Wilson, Haccou, O'Connell and Morrissey (Mr McMahan and his colleagues) encouraged Australia to 'take a leadership role' in advocating globally against capital punishment. They suggested:

An example of such leadership would be to work extensively to encourage more countries to vote for the now regular moratorium vote at the UN, first passed in 2007.<sup>31</sup>

6.34 Amnesty International, Human Rights Watch, Human Rights Law Centre, Reprieve, Australians Detained Abroad, NSW Council for Civil Liberties, and Civil Liberties Australia, who made a joint submission to the inquiry, proposed the Australian Government:

Join forces with other nations – through the United Nations and other multilateral and regional bodies – to push for universal adoption of a global moratorium on the death penalty.<sup>32</sup>

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28 Dr Strahan, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 9.

29 Dr Daniel Pascoe, *Submission 19*, p. [2].

30 Dr Daniel Charles Pascoe, Private capacity, *Committee Hansard*, Canberra, 27 November 2015, pp. 47-48.

31 McMahan, Wilson, Haccou, O'Connell and Morrissey, *Submission 12*, p. 1.

- 6.35 Amnesty also proposed Australia 'lead the campaign to increase "yes" votes on the United Nations General Assembly's death penalty moratorium resolution in 2016'.<sup>33</sup>
- 6.36 Mr McMahon and his colleagues proposed 'striving to achieve a similar resolution at CHOGM' (Commonwealth Heads of Government Meeting).<sup>34</sup> This suggestion was echoed by the LCA and ABA<sup>35</sup> and also supported by Amnesty,<sup>36</sup> who confirmed that CHOGM 'has not been [formally] utilised as an effective forum for pursuing death penalty abolition discussions to date'.<sup>37</sup>
- 6.37 The UK Foreign and Commonwealth Office (FCO) submitted that Australia could play a stronger role in the biennial moratorium vote on the death penalty as well as promoting ratification of the second optional protocol.<sup>38</sup>
- 6.38 The FCO highlighted the relative efficacy of multilateral approaches:
- When commenting publicly, or taking diplomatic action, we favour multilateral approaches, such as statements or demarches carried out by all EU member states.<sup>39</sup>
- 6.39 Mr Robertson advocated working to reduce crimes that attract the death penalty, including drug crimes:
- ... Canberra should recognise that a 'whittling down' strategy to reduce the number of crimes punishable by death is also important. At the top of this list for action should be crimes that do not involve violence, like drug crimes, LGBT same-sex relations, adultery; so-called religious crimes like blasphemy in Pakistan or insulting the prophet in some Islamic states; or economic crimes and corruption in China or Vietnam.<sup>40</sup>
- 6.40 The ALC and ABA offered ideas for how Australia could increase its role in relation to UN-based activity, specifically:

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32 Amnesty International, Human Rights Watch, Human Rights Law Centre, Reprieve, Australians Detained Abroad, NSW Council for Civil Liberties, Civil Liberties Australia, *Submission 21*, p. [1].

33 Amnesty International, *Submission 34*, p. 4. Ms Howie, from the Human Rights Law Centre, expressed a similar view. Ms Howie, Human Rights Law Centre, *Committee Hansard*, Melbourne, 17 November 2015, p. 13.

34 McMahon et al, *Submission 12*, p. 1.

35 LCA and ABA, *Submission 24*, p. 13.

36 Amnesty International, *Submission 34*, p. 14.

37 Amnesty International, *Supplementary Submission 34.1*, p. 8.

38 UK Foreign and Commonwealth Office, *Submission 15*, p. [2].

39 UK Foreign and Commonwealth Office, *Submission 15*, p. [2].

40 Mr Robertson, Human Rights Watch, *Committee Hansard*, Sydney, 9 December 2015, p. 25.

- Make recommendations to specific countries through the Universal Periodic Review process, and follow up on recommendations which have been accepted, for example through funded projects or lobbying activities.
- Follow up on recommendations made by the UN Human Rights Committee and voice objection to capital punishment at the UN Human Rights Council.
- Support the UN Rapporteur on extrajudicial, summary or arbitrary executions – act on the basis of his reports, and use them as a tool to assist.<sup>41</sup>

6.41 Civil Liberties Australia proposed focussing on nations Australia plays in international sport:

There are some countries we play cricket against that really should be influenced – and football, soccer, netball and hockey. ... Many of these events are internationally televised, and the government could spend a little bit of money advertising our human rights position while some of these international sporting events are going on, which would get the message to a whole new group of people who do not normally think about such things.<sup>42</sup>

### A regional coalition

6.42 The World Coalition Against the Death Penalty (WCADP) clarified that of 41 countries in Asia and the Pacific, 13 are retentionist, 10 are ‘abolitionist in practice’, 18 countries (and two Special Administrative Regions of China) are ‘abolitionist for all crimes’, adding:

In total, 28 countries have abolished the death penalty in law and/or practice. However, the 13 retentionist countries (Afghanistan, Bangladesh, China, India, Indonesia, Japan, North Korea, Malaysia, Pakistan, Singapore, Taiwan, Thailand, Viet Nam) are among those who execute most people in the world and who are the most vocal in favour of the death penalty at the international level.<sup>43</sup>

6.43 Witnesses including the ALC and ABA<sup>44</sup>, and Human Rights Watch supported the idea of a regional coalition. Human Rights Watch suggested partnering with other abolitionist countries:

... including Cambodia, New Zealand, Philippines, and Timor Leste, targeting countries that continue to execute people – for

41 LCA and ABA, *Submission 24*, p. 13.

42 Mr Rowlings, Civil Liberties Australia, *Committee Hansard*, Canberra, 27 November 2015, p. 12.

43 WCADP, *Submission 36*, p. 1.

44 LCA and ABA, *Submission 24*, p. 12.

instance, China, India, Indonesia, Malaysia, Pakistan, and Vietnam – as well as countries such as Papua New Guinea and Brunei that have had moratoriums in place, but which are taking steps to reintroduce the death penalty. Australia should also not shy away from raising these issues with countries that frequently carry out executions, notably the United States, Iran, and Saudi Arabia.<sup>45</sup>

- 6.44 Dr Pascoe argued that the Australian government ‘should not act alone’, but should leverage other abolitionist states in the Asia-Pacific region, who can ‘influence their geographical and cultural neighbours’.<sup>46</sup>
- 6.45 The United Nations Office of the High Commissioner for Human Rights (OHCHR) suggested Australia also partner with key stakeholders, such as the OHCHR, the Asia-Pacific Forum on National Human Rights Institutions, the Secretariat of the Pacific Community/Regional Rights Resources Team, and ‘Commonwealth mechanisms’.<sup>47</sup>
- 6.46 Dr Malkani observed that, while the EU has played a critical role in its region, ‘there is no equivalent in the Pacific region’. He further commented:
- Australia has the opportunity to build and develop a regional coalition of abolitionist states, taking on board the experiences of the European Union.<sup>48</sup>
- 6.47 Professor Rothwell proposed that Australia advocate in the Indo-Pacific for ‘a policy or practice of not carrying out executions’, including states such as Japan and Singapore.<sup>49</sup>
- 6.48 The WCADP suggested that Australia:
- ... provide assistance to Pacific island small states, many of which are abolitionists, to help with the ratification process of ICCPR and OP2- ICCPR,<sup>50</sup> as many of them claim that they do not have the capacity to ratify these treaties.<sup>51</sup>
- 6.49 Amnesty concluded that ‘Australia should use its position as a member of the Pacific Islands Forum to pursue a regional commitment for the Pacific to be completely death penalty free by 2018’.<sup>52</sup>

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45 Human Rights Watch, *Submission 23*, pp. [1-2].

46 Dr Pascoe, *Committee Hansard*, Canberra, 27 November 2015, p. 48.

47 United Nations Office of the High Commissioner for Human Rights (OHCHR), *Submission 49*, p. [10].

48 Dr Malkani, *Submission 4*, p. 2.

49 Professor Rothwell, *Committee Hansard*, Canberra, 27 November 2015, p. 26.

50 Second Optional Protocol of the International Covenant on Civil and Political Rights.

51 WCADP, *Submission 36*, p. 3.

52 Amnesty International, *Submission 34*, p. 4.

- 6.50 Professor Rothwell suggested Australia focus on ‘abolitionist-in-practice states with whom Australia has a close bilateral relationship’, including Nauru and South Korea.<sup>53</sup>
- 6.51 This view was echoed by Mr Humphries, who proposed:
- ... working with those nations, offering legislative drafting assistance and other assistance, might make them more inclined to consider formally abolishing the death penalty as well as doing so de facto.<sup>54</sup>
- 6.52 Witnesses suggested that challenging capital punishment in South East Asia would mean challenging the notion of the ‘deterrent effect’. Mr Robertson clarified:
- ... in many South-East Asian countries the core argument boils down to the efficacy of the death penalty, which these governments and much public opinion still believe deters crime. So far ... we are losing that argument in these countries. So there is an education imperative to change the minds of people, with the possibility that, as opinions change, the positions of government can shift towards reform and abolition. We think Australia should step up efforts on this.<sup>55</sup>
- 6.53 Human Rights Watch proposed that ‘Australia could assist in educating the region’s populations on how the death penalty has failed to deter crime and been unjustly applied’.<sup>56</sup>
- 6.54 Adding to this suggestion, Dr Malkani observed that:
- Many states retain the death penalty primarily because they are afraid of the consequences of abolition. In particular, they are worried about losing popular support, they are afraid of rising crime rates, and they do not want to look ‘soft’ on crime. Through bilateral discussions, Australia can use its own experiences of abolition in order to show these countries that they need not be worried about these issues.<sup>57</sup>
- 6.55 Dr David Donat Cattin (Secretary-General, Parliamentarians for Global Action), cautioned that support for the death penalty in the Indo-Pacific was related to inadequate justice systems, which must be addressed. He asserted:

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53 Professor Rothwell, *Committee Hansard*, Canberra, 27 November 2015, p. 27.

54 Mr Gary Humphries, Private capacity, *Committee Hansard*, Canberra, 27 November 2015, p. 44.

55 Mr Robertson, Human Rights Watch, *Committee Hansard*, Sydney, 9 December 2015, p. 25.

56 Human Rights Watch, *Submission 23*, p. [1].

57 Dr Malkani, *Submission 4*, p. 2.

One of the preconditions of development is to upgrade and to modernise the justice system so that trials are fair to the accused and, of course, to the victims, who should have access to justice, and so that the impunity rate for serious crime is not so high. There is enormous frustration in the general public that out of 10 cases of drug trafficking or murder that are denounced maybe one or two are brought to justice, and then the perpetrators are tried.<sup>58</sup>

6.56 Dr Pascoe listed the following countries as 'Australia's abolitionist partners in the Asia-Pacific region':

... Cambodia (abolished the death penalty for all crimes in 1989); New Zealand (1989); Hong Kong and Macau (1993 and 1976 respectively); Samoa (2004); the Philippines (2006); Mongolia (2012); and Fiji (2015).<sup>59</sup>

6.57 Dr Pascoe concluded that countries sharing 'similar cultural and religious characteristics, are best placed to exert their foreign policy influence in one way or another'. As examples, he listed:

... Samoa and New Zealand towards Tonga; Hong Kong and Macau towards Taiwan and Singapore; Cambodia towards Laos; Philippines towards South Korea; Fiji towards Papua New Guinea, and so forth.<sup>60</sup>

6.58 Suggesting countries for regional engagement, Mr Hayes commented:

I would think that the Philippines are a key neighbour that we should be doing that with as well. They have a strong view against the death penalty, but they are also now a partner in the Trans-Pacific Partnership.<sup>61</sup>

6.59 DFAT saw merit in the concept of a regional coalition, suggesting:

Annual events such as World Day Against the Death Penalty (10 October) could form the backdrop for targeted advocacy in conjunction with other likeminded governments and abolitionist organisations. In the multilateral system, side-events held in the margins of formal meetings, such as HRC sessions, offer valuable opportunities to mobilise support and apply pressure.<sup>62</sup>

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58 Dr David Donat Cattin, Secretary-General, Parliamentarians for Global Action, *Committee Hansard*, Canberra, 25 February 2016, p. 4.

59 Dr Pascoe, *Submission 19*, p. [10].

60 Dr Pascoe, *Submission 19*, p. [11].

61 Mr Hayes MP, Australian Parliamentarians Against the Death Penalty, *Committee Hansard*, Sydney, 20 November 2015, p. 27.

62 DFAT, *Submission 35*, p. 12.

6.60 However, DFAT also cautioned that a coalition approach may not be beneficial in all circumstances:

Sometimes we will conclude that bilateral representations are preferable, especially where joint representations might have a negative impact, including by creating the impression that a group of countries is 'ganging up' against another.<sup>63</sup>

## Bilateral strategies

6.61 The LCA and ABA suggested that where countries retain the death penalty, Australian diplomats and Ministers can and should:

- urge states to restrict usage of the death penalty;
- urge transparency regarding execution statistics;
- argue for a moratorium;
- highlight practical issues with executions;
- argue against the misconception that the death penalty acts as a deterrent;
- propose credible alternatives that are suitable for the national context;
- ensure safeguards to protect vulnerable groups, such as 'children, pregnant women, persons with mental or intellectual disabilities, and the elderly';
- work towards removing mandatory death sentences;
- rebut arguments such as: 'national sovereignty, state's prerogatives and against western neo-imperialism; country specific arguments, including for reasons of national security; religious reasons; and democratic support for the death penalty'.<sup>64</sup>

6.62 Dr Malkani and Amnesty International Australia proposed country-specific approaches.<sup>65</sup> This view was supported by DFAT.<sup>66</sup>

6.63 Dr Strahan clarified that DFAT takes a 'case-by-case judgement about what is going to be most effective in relation to a particular country'. He commented:

Sometimes we take a very public stand and will do that often in the context of the Human Rights Council or in the UN General Assembly where Australia's position is totally public and we are

63 DFAT, *Submission 35*, p. 12.

64 LCA and ABA, *Submission 24*, pp. 10-11.

65 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 2; and Amnesty International, *Submission 34*, p. 9.

66 Dr Strahan, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 5.



very clear about where we stand. On other occasions, clearly the private road is the best road to go. It is also a matter of time – at what point are you in a particular case or situation? As you move through a case, you may shift gears from a private to a public means of getting your message across and that is what happened with Chan and Sukumaran.<sup>67</sup>

- 6.64 The LCA and ABA suggested DFAT should incorporate anti-death penalty strategies into their country plans to ‘proactively drive forward’ the campaign.<sup>68</sup>
- 6.65 Mr Robertson argued that it is ‘not enough’ for Australian diplomats to raise concerns about the death penalty in private meetings and at the UN:
- We think that Australia needs to get much more vocal, and that its ambassadors should be directed to find opportunities to advocate regularly and publicly on death penalty issues involving both Australian and non-Australian citizens. Publicly enunciating Australian values on the death penalty should be the rule rather than the exception.<sup>69</sup>
- 6.66 Amnesty International Australia suggested the Australian Government institute a process whereby civil society organisations could propose ‘particularly concerning individual death row cases on which to advocate’.<sup>70</sup>
- 6.67 The Honourable Justice Lex Lasry AM QC (private capacity) talked about the possibility of the Australian Government supporting ‘eminent people’ to advocate bilaterally:
- What I had in [mind] was that people who are internationally respected would come together and travel to Indonesia or Singapore, or wherever it was, with a view to putting a detailed and persuasive submission to the government and to other people in those countries with some influence.<sup>71</sup>
- 6.68 This suggestion was also supported by the ALC and ABA.<sup>72</sup>
- 6.69 DFAT’s Dr Strahan responded:
- The suggestion that we might create a panel of non-governmental experts who would support our efforts has pros and cons. ... It is

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67 Dr Strahan, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 10.

68 LCA and ABA, *Submission 24*, p. 12.

69 Mr Robertson, Human Rights Watch, *Committee Hansard*, Sydney, 9 December 2015, p. 25.

70 Amnesty International, *Submission 34*, pp. 3-4.

71 The Honourable Justice Lex Lasry AM QC, Private capacity, *Committee Hansard*, Melbourne, 17 November 2015, p. 2.

72 LCA and ABA, *Submission 24*, p. 12.

important for retentionist countries to know that there is a broad consensus of opinion in Australian society, as represented by religious leaders, political leaders et cetera who will also speak up against the death penalty. I do wonder if, at times, having a government-appointed panel might lessen the impact of some of those voices, because they would be perhaps seen as another manifestation of government policy and government opinion.<sup>73</sup>

- 6.70 CLA suggested that DFAT ‘reinvigorate’ its human rights resource materials, including presentations and social media and television engagement, on human rights issues, including the death penalty.<sup>74</sup>
- 6.71 The OHCHR encouraged Australian diplomats to advocate for governments to ‘grant amnesty, pardon or commutation of the sentence of death in all cases’. It argued that ‘clemency, pardons and commutations are critical steps towards the abolition of the death penalty’.<sup>75</sup>
- 6.72 Human Rights Watch also suggested Australia needed to respond strongly when countries regress:
- React immediately and forcefully when countries move to lift official or unofficial death penalty moratoriums. For instance, Pakistan lifted a moratorium on executions on December 17, 2014, following an attack on a public school in Peshawar, and many executions rapidly followed.<sup>76</sup>
- 6.73 The WCADP proposed Australia:
- Take part in the World Day against the Death Penalty on 10 October every year and encourage all embassies to collaborate with local NGOs to organize events, especially in retentionist countries.<sup>77</sup>

### Consistency of messaging

- 6.74 Many witnesses to the inquiry observed that consistency was an issue impacting the efficacy of Australia’s advocacy.<sup>78</sup> Mr McMahon and his colleagues submitted:

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73 Dr Strahan, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 4.

74 Mr Rowlings, Civil Liberties Australia, *Committee Hansard*, Canberra, 27 November 2015, p. 8.

75 OHCHR, *Submission 49*, p. [9].

76 Human Rights Watch, *Submission 23*, p. [5].

77 WCADP, *Submission 36*, p. 4.

78 See for instance: Mr Stephen Keim SC, *Submission 17*, p. 1; Ms Heather Wright, *Submission 47*, p. 2; Ms Heather Land, *Submission 44*, p. [1].

To be effective, Australia must speak consistently at all levels of government in a principled manner. Its opposition must be without qualification.<sup>79</sup>

6.75 Aussies Against Capital Punishment asserted:

Our government should speak out against the death penalty not just for our citizens, but for citizens of other countries. The government must be seen to be taking a consistent approach to give legitimacy to its arguments.<sup>80</sup>

6.76 This view was echoed by Mr Piovesan<sup>81</sup> and others including Mr Hayes, who declared:

I stress that when we seek the abolition of the death penalty we seek it universally, not just [when] Australians are the subject of a sentence. I took the same view, and I know the chair did too, in respect of the execution of the Bali bombers. ... I could see no benefit in their execution – making them martyrs and a pinnacle to a cause they espoused. I thought it would have been far better to have seen them rot away in a prison as mere mortals.<sup>82</sup>

6.77 Mr John van de Meene submitted:

If Australia is to engage more closely with countries to advocate for the abolition of the death penalty, we should be consistent in our message and understanding.<sup>83</sup>

6.78 Dr Malkani expressed the view that Australia should make no exceptions for its opposition to the death penalty:

After all, the death penalty is not imposed in Australia for terrorism, homicide, or other violent offences, and so it makes little sense to suggest that it is permissible for Australia to be complicit in the imposition of the death penalty in such cases. In order to effectively advocate for abolition elsewhere, Australia must be seen to oppose the death penalty in all circumstances.<sup>84</sup>

6.79 Professor Rothwell was unequivocal, saying:

There must be no exception to this form of advocacy, irrespective of how heinous a crime may have been committed by a particular

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79 McMahon et al, *Submission 12*, p. 1.

80 Aussies Against Capital Punishment, *Submission 13*, p. [1].

81 Mr Piovesan, *Submission 6*, p. 1.

82 Mr Hayes MP, Australian Parliamentarians Against the Death Penalty, *Committee Hansard*, Sydney, 20 November 2015, p. 25.

83 John van de Meene, *Submission 2*, p. [1]. See also: Mr James King, *Submission 29*, p. [1].

84 Dr Bharat Malkani, University of Birmingham, *Submission 4*, p. 3.

individual, including war crimes, crimes against humanity, acts of genocide and terrorist acts.<sup>85</sup>

- 6.80 The Castan Centre observed that a lack of consistency was evident in 2003 when the Australian Government ‘conspicuously failed to object to the imposition of the death penalty on the Bali bombers’. The Centre continued:

While that failure may have seemed politically justified given the level of domestic resentment for the bombers, it clearly did not assist in the diligent (and at times even passionate) efforts of senior Government representatives in the subsequent cases involving Australian citizens.<sup>86</sup>

- 6.81 According to Amnesty International Australia, in 2007 then Opposition Leader Kevin Rudd said on the ABC’s ‘World Today’ program:

...when it comes to the question of the death penalty, no diplomatic intervention will ever be made by any government that I lead in support of any individual terrorist’s life. We have only indicated in the past, and will maintain a policy in the future, of intervening diplomatically in support of Australian nationals who face capital sentences abroad.<sup>87</sup>

- 6.82 Amnesty International Australia further stated that:

When he became Prime Minister Kevin Rudd continued this line of reasoning, stating in 2008 that the Bali bombers deserved the ‘justice’ they had coming.<sup>88</sup>

- 6.83 The Lowy Institute reported these statements by politicians:

... Howard said that if the perpetrators of the 2002 Bali bombing, which killed 202 people including 88 Australians, were sentenced to death there ‘won’t be any protest from Australia’. The following month the Prime Minister told America’s Fox 9 News Channel that he would welcome the execution of Osama Bin Laden. In August 2003, the then Labor frontbencher Mark Latham rejoiced in the sentencing of Bali bomber Amrozi to death by firing squad: ‘I think it’s a day where all political parties should be celebrating, thankful for the fact that one of the bastards has been got and he’s

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85 Professor Rothwell, *Committee Hansard*, Canberra, 27 November 2015, p. 26.

86 Castan Centre, *Submission 9*, p. 7.

87 Amnesty International, *Supplementary Submission 34.1*, p. 7. The original transcript is available at <[www.abc.net.au/cgi-bin/common/printfriendly.pl?http://www.abc.net.au/worldtoday/content/2007/s2054597.htm](http://www.abc.net.au/cgi-bin/common/printfriendly.pl?http://www.abc.net.au/worldtoday/content/2007/s2054597.htm)> viewed 14 April 2016.

88 Amnesty International, *Supplementary Submission 34.1*, p. 7.

going to face the full weight of the law in the jurisdiction where this act of evil was committed.<sup>89</sup>

6.84 At the time Labor backbencher Mr Duncan Kerr MP criticised the reticence shown by certain MPs on the issue of Bali Bomber Amrozi's execution, saying '[p]rincipled opposition to the death penalty cannot be switched off and on'.<sup>90</sup>

6.85 As well as being inconsistent with Australia's absolute opposition to the death penalty, UnitingJustice Australia argued that such messages 'have the potential to erode general community support [for] an abolitionist stance'.<sup>91</sup>

6.86 Mr Piovesan concluded that:

... whether the condemned prisoner is a terrorist or drug runner in Indonesia or Iraq, a murderer in Texas, or a white collar criminal in China, Australia's condemnation of capital punishment must be no less vocal.<sup>92</sup>

6.87 Mr McMahon and his colleagues argued that maintaining consistency would benefit Australia:

By being seen as a nation which approaches this debate in a consistent, principled fashion, we also remove ourselves from a criticism currently levelled at us, that we only care about this issue when it involves Australians.<sup>93</sup>

6.88 Witnesses argued that consistency relates to Australia's effort level, as well as its messaging. The Hon Justice Lasry AM QC highlighted the need for ongoing engagement on the death penalty:

Within a week or two of the Chan-Sukumaran case concluding and them being executed the story disappeared altogether. ... I felt the frustration because I had the same feeling in 2005 after Van Nguyen was executed, after having led the effort to try to save his life and failing. I did think that we had public momentum with us, but that just vanished as well.<sup>94</sup>

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89 Dr Michael Fullilove, 'Capital Punishment and Australian Foreign Policy', *Lowy Institute Policy Brief*, August 2006, p. 8. At <[www.lowyinstitute.org/publications/capital-punishment-and-australian-foreign-policy](http://www.lowyinstitute.org/publications/capital-punishment-and-australian-foreign-policy)> Viewed 4 March 2016.

90 Amnesty International, *Submission 34*, p. 8. Original comments available on the *Sydney Morning Herald website*, at <[www.smh.com.au/articles/2003/08/08/1060145849454.html](http://www.smh.com.au/articles/2003/08/08/1060145849454.html)> viewed 14 April 2016.

91 UnitingJustice Australia, *Submission 25*, p. 6.

92 Mr Piovesan, *Submission 6*, p. 1.

93 McMahon et al, *Submission 12*, p. 4.

94 The Hon Justice Lasry AM QC, *Committee Hansard*, Melbourne, 17 November 2015, p. 4.

6.89 The LCA and ABA proposed that Australia needs a communications strategy to guide public and private advocacy against the death penalty.<sup>95</sup>

6.90 Human Rights Watch wrote:

In addition to ‘quiet’ diplomacy, the government needs a principled, consistent, and more vocal opposition to the death penalty, whether or not the lives at stake are Australian.<sup>96</sup>

### Focussing Australia’s advocacy

6.91 During the inquiry witnesses were questioned about which countries they believed should be the focus of Australia’s bilateral efforts.

6.92 Dr Malkani commented:

We have to be strategic. We have to remember that most countries – pretty much all countries – abolish the death penalty incrementally. Countries with a mandatory death penalty are certainly a priority, because if you get it to discretionary death sentences you then see a huge reduction in the number of death sentences handed down. You are immediately in the business of saving lives there. If you are in a position to do that, you absolutely should.<sup>97</sup>

6.93 Regarding countries with active moratoriums, Dr Malkani added that ‘public education is key to making sure that people do not support the death penalty. Then leaders feel enabled to take the moratorium a step forward.’<sup>98</sup>

6.94 Mr Bernard Piovesan proposed Australia focus on:

Bilateral discussions with regional neighbours, in particular Indonesia, Malaysia, and Singapore, advocating for alternative forms of punishment, and moratoriums on the use of the death penalty, starting with crimes not involving the death of a victim.<sup>99</sup>

6.95 Dr Pascoe supported the view that Australia should focus on the Asia-Pacific region. He wrote:

... the Asia-Pacific nations that now form the most promising candidates for full abolition consist of Brunei, Laos, Maldives, Myanmar, Nauru, Papua New Guinea, Sri Lanka, South Korea,

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95 LCA and ABA, *Submission 24*, p. 13.

96 Human Rights Watch, *Submission 23*, p. [1].

97 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 4.

98 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 4.

99 Mr Bernard Piovesan, *Submission 6*, p. 2.

- and Tonga, due to their abolitionist de facto status, not having conducted a judicial execution for more than 10 years.<sup>100</sup>
- 6.96 Some witnesses argued that China should be the number one focus. For instance, Falun Dafa argued that '[e]ffective change worldwide means effectively engaging China'.<sup>101</sup>
- 6.97 Falun Dafa pointed to recent changes to the death penalty system in China, 'labelled "kill fewer, kill carefully" laws'. Falun Dafa added:
- In seeking popular legitimacy the [Communist Party] has toned down the Mao-era legacy of blatant killing to enforce social control, and responded to internal calls for greater accountability in applying the death penalty.<sup>102</sup>
- 6.98 Falun Dafa also proposed that:
- Helping to change China's attitude to killing its people will help human rights in all aspects in China and also have a positive impact on how the rest of the world, including Australia is impacted by a future China.<sup>103</sup>
- 6.99 However, most witnesses saw China as a particularly challenging country with which to advocate, with Dr Malkani describing China as 'the long-term game'.<sup>104</sup>
- 6.100 Mr McMahon and his colleagues recommend that Australia should make a point of recognising the positive steps taken by countries in the region:
- We should also acknowledge our friends, such as Singapore and Malaysia, who have in recent years done so few executions compared to some previous years. Steps in the right direction should be welcomed and encouraged, as steps towards total abolition. In Singapore, welcome changes to the mandatory death penalty laws have greatly reduced the number of executions. These countries should now be encouraged to take the next, final step.<sup>105</sup>
- 6.101 Similarly, Mr Robertson remarked that South-East Asian governments 'are not necessarily as hard-headed' as governments like Saudi Arabia, Iran or China. He claimed that these governments:

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100 Dr Pascoe, *Submission 19*, p. [10].

101 Falun Dafa Association of Australia, *Submission 14*, p. 3.

102 Falun Dafa Association of Australia, *Submission 14*, p. 4.

103 Falun Dafa Association of Australia, *Submission 14*, p. 4.

104 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 2.

105 McMahon et al, *Submission 12*, p. 3.

... are susceptible to public campaign and international pressure, even if they try to maintain that they are not. For instance, we found that the intense pressure on Singapore from the international community – in particular, its neighbour Malaysia – in the case of drug mule Yong Vui Kong two years ago helped push forward the sentencing reforms that have done away with mandatory death sentences for low-level drug couriers who prosecutors certify as being cooperative in helping to solve crime.<sup>106</sup>

- 6.102 Ms Maia Trujillo, Campaign Manager for the PGA Global Parliamentary Platform for the Abolition of the Death Penalty, suggested Australia should also consider if it has a role to play in advocating with African countries.<sup>107</sup>
- 6.103 DFAT explained that its ‘modest diplomatic profile in Africa (with only five missions across Sub-Saharan Africa)’ means the Department has ‘less capacity to actively make representations across the continent’.<sup>108</sup>
- 6.104 There was support for the view that Australia should not shy away from advocating with the United States and other allies. Mr McMahon and his colleagues contended:
- ... we must regularly speak truth to our friends both powerful and less powerful on this matter. The realities which must be confronted include:
- The numerous serious criticisms of the American death penalty regimes including procedural and outcome issues relating to poverty, race, methods of execution, botched and brutally cruel executions etc.
  - The extraordinarily large number of executions in China, a figure kept secret from the rest of the world. Estimates in the last decade range between 1 and 8000 executions per year.
  - The unacceptable conditions of incarceration for prisoners on death row in Japan.<sup>109</sup>
- 6.105 Amnesty International Australia proposed the Australian strategy should focus on South East Asia and the USA, specifically by:
- promoting transparency in China and Vietnam;
  - reducing crimes that attract the death penalty in China, Vietnam, Thailand, Taiwan and India;

106 Mr Robertson, Human Rights Watch, *Committee Hansard*, Sydney, 9 December 2015, p. 26.

107 Ms Maia Trujillo, Campaign Manager, PGA Global Parliamentary Platform for the Abolition of the Death Penalty, PGA, *Committee Hansard*, Canberra, 25 February 2016, p. 3.

108 Department of Foreign Affairs and Trade (DFAT), *Submission 35*, p. 8.

109 McMahon et al, *Submission 12*, p. 3.



- improving death row conditions in Japan;
  - working to end mandatory sentencing in Malaysia and Singapore;
  - advocating for Pakistan and Indonesia to resume their moratoria;
  - assisting Papua New Guinea, Nauru, Tonga, South Korea and Myanmar to 'move from abolitionist in practice to abolitionist in law'; and
  - promoting state-level moratoria in the United States.<sup>110</sup>
- 6.106 DFAT listed the likely aims of the strategy, which align well with Amnesty's proposal:
- first, to increase transparency and safeguards governing the application of the death penalty, including excluding its use on pregnant women, children, and people with mental or intellectual disabilities;
  - second, to reduce the number of crimes that attract the death penalty and its mandatory application by encouraging alternative criminal justice penalties;
  - third, to introduce a formal moratorium on the death penalty's use; and
  - finally, to accede to the ICCPR Second Optional Protocol, aiming at the abolition of the death penalty and ensuring countries that have signed or ratified the Protocol remove all references to the death penalty from their legislation.<sup>111</sup>

### The United States of America

6.107 Witnesses believed that advocating to reduce and ultimately eliminate capital punishment in the United States was a critical part of advocating for worldwide abolition.

6.108 Mr McMahon and his colleagues expressed the view that 'the USA is central to the future of this debate in most countries'.<sup>112</sup> Dr Malkani agreed:

I think once America does become an abolitionist country, then the whole landscape, worldwide, would change in terms of other states abolishing the death penalty.<sup>113</sup>

6.109 Dr Malkani argued that there is 'movement in the United States at the moment towards abolition' and proposed 'identifying which states in America are close to abolition and ... focusing efforts in there.'<sup>114</sup>

110 Amnesty International, *Supplementary Submission 34.1*, pp. 10-11.

111 DFAT, *Submission 35*, p. 11.

112 McMahon et al, *Submission 12*, p. 3.

113 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 2.

114 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 2.

6.110 Mr Bourke reasoned that:

...the United States occupies a unique role in the international community as a death penalty nation. It is essentially isolated among western developed nations but, because of its role in advancing human rights throughout the globe, its choice to continue to adhere to the death penalty in its federal, military and several civilian jurisdictions hampers international abolition efforts. So the United States, whilst not the most executing country in the world, remains perhaps the most important of the countries that continue to favour the death penalty.<sup>115</sup>

6.111 There were other witnesses to the inquiry that proposed a focus on the USA. For example Emeritus Professor Desmond O'Connor,<sup>116</sup> Mr Anthony Robinson,<sup>117</sup> and Human Rights Watch.<sup>118</sup>

6.112 According to Amnesty, states that retain the death penalty are:

Alabama; Arizona; Arkansas; California; Colorado\*; Delaware; Florida; Georgia; Idaho; Indiana; Kansas; Kentucky; Louisiana; Mississippi; Missouri; Montana; Nevada; New Hampshire; North Carolina; Ohio; Oklahoma; Oregon\*; Pennsylvania\*; South Carolina; South Dakota; Tennessee; Texas; Utah; Virginia; Washington\*; Wyoming. (States marked with \* have moratoriums in place currently).<sup>119</sup>

6.113 Many of these witnesses argued for targeting the individual states, but some thought the target should be the Federal Government.<sup>120</sup>

6.114 The US Death Penalty Information Centre proposed that Australia has the ability to influence the United States:

Because of our long-standing friendship with Australia, our similar roots and language, and our sharing of common problems and solutions in many areas, your country's insights on the death penalty could carry particular weight here.<sup>121</sup>

6.115 Mr Bourke agreed that Australia has a 'special place' in the hearts and minds of Americans, adding:

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115 Mr Richard Bourke, Director, Louisiana Capital Assistance Center, *Committee Hansard*, Melbourne, 17 November 2015, p. 9.

116 Emeritus Professor Desmond O'Connor, *Submission 10*, p. [1].

117 Mr Anthony Robinson, *Submission 11*, p. [1].

118 Mr Robertson, Human Rights Watch, *Committee Hansard*, Sydney, 9 December 2015, p. 28.

119 Amnesty International, *Supplementary Submission 34.1*, p. 6.

120 Mr Robertson, Human Rights Watch, *Committee Hansard*, Sydney, 9 December 2015, p. 27.

121 Death Penalty Information Centre, *Submission 8*, p. [2].

Australia ... has a unique relationship and a unique opportunity to intervene with the United States. We, of course, are a nation that has a shared legal background and we have a recognisable and shared community between our nations.<sup>122</sup>

6.116 Dr Malkani echoed this view:

I know from having worked briefly in Louisiana that there are a lot of connections between American principles and Australian principles. I know the Americans hold Australia in very high regard.<sup>123</sup>

6.117 Amnesty International Australia talked about its work in the USA and offered some suggestions for Australian engagement:

In Amnesty's experience it is vital this work is closely coordinated with others in the grassroots abolition movement in the USA. For example, Amnesty worked closely with Nebraskans for Alternatives to the Death Penalty (NADP), Equal Justice USA (EJUSA) and American Civil Liberties Union (ACLU) to educate policy makers and constituents in Nebraska about the death penalty. This contributed to Nebraska becoming the nineteenth US State to abolish the death penalty in May 2015.<sup>124</sup>

6.118 Mr Bourke proposed coupling the issue of the death penalty to other human rights abuses, including 'unfairness to the poor, the failure to meet minimum standards of legal representation and the very vulnerable groups, including especially the mentally ill'. He contended:

By approaching the death penalty abolition cause through this lens, we were able to have a very direct effect on death penalty practice, and as a result death penalty policy, while standing firmly on inarguable moral high ground.<sup>125</sup>

6.119 Representatives from DFAT saw merit in the idea of focussing more on the United States. They clarified:

We do, and have done, state based representations to the United States. ... Where you have a system of government where the death penalty is being carried out not at the federal level but at the

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122 Mr Bourke, Louisiana Capital Assistance Center, *Committee Hansard*, Melbourne, 17 November 2015, p. 9.

123 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 2.

124 Amnesty International, *Supplementary Submission 34.1*, p. 5.

125 Mr Richard Bourke, Director, Louisiana Capital Assistance Center, *Committee Hansard*, Melbourne, 17 November 2015, p. 8.

state level indicates that a lot of our advocacy has to be at the state level.<sup>126</sup>

6.120 However, DFAT's submission indicated that such representations have been fairly limited:

In the United States, our post has not undertaken any bilateral representations to the federal government in the review period. However, our Ambassador wrote to two state governors on behalf of individuals in two specific cases on human rights grounds.<sup>127</sup>

6.121 Amnesty International Australia proposed an increased focus on states where there's a strong public debate around capital punishment, such as California, where Amnesty's current campaign is focussed:

California is a key state for the abolitionist movement in the United States, given there currently 745 people on death row. The California regulation itself would introduce a new protocol for the use of the lethal injection – including which drugs are used, and how California chooses and trains the lethal injection team.<sup>128</sup>

6.122 Mr Bourke reasoned that the United States was amenable to arguments that seek to 'isolate America on the world stage as one of the sole western developed purveyors of the death penalty'. He proposed reminding the US of 'the company it keeps – with countries such as China, Iraq and, at one time, Syria, as leading proponents of the death penalty. It is not a list the United States is accustomed to seeing itself on.'<sup>129</sup>

### Bilateral treaties

6.123 Some witnesses proposed that trade and other bilateral treaties should be used as a means of pressuring retentionist countries to take steps towards abolition.

6.124 The Castan Centre recommended that 'Australia make potential imposition of the death penalty a mandatory ground of refusal in future bilateral treaties on mutual assistance in criminal matters'.<sup>130</sup>

6.125 Professor Rothwell saw merit in this idea.<sup>131</sup>

6.126 The ALHR called on the Australian Government to 'be more transparent' in terms of its bilateral treaties relating to law enforcement, extradition, or

126 Dr Strahan, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 7.

127 DFAT, *Submission 35*, p. 8.

128 Amnesty International, *Supplementary Submission 34.1*, p. 5.

129 Mr Bourke, Louisiana Capital Assistance Center, *Committee Hansard*, Melbourne, 17 November 2015, p. 9.

130 Castan Centre, *Submission 9*, p. 7.

131 Professor Rothwell, *Committee Hansard*, Canberra, 27 November 2015, p. 28.

any area 'where there is a risk of exposing persons to the death penalty in a foreign country'.<sup>132</sup>

6.127 Mr Hayes supported the idea that bilateral treaties could be a useful tool:

We should be using everything in our armoury, including issues of trade and things of that nature, to further our objectives in this regard – as we do with human rights generally.<sup>133</sup>

6.128 Human Rights Watch suggested Australia incorporate 'death penalty issues in briefings on human rights for trade delegations and other groups traveling abroad for official visits'.<sup>134</sup>

6.129 Ms Sarah Gill stated:

There is cogent evidence to suggest that adoption of human rights safeguards in treaties and legislation will legitimize 'international norms', and gradually coerce 'retentionist' nations to move towards abolition; a phenomenon known as indirect abolition.<sup>135</sup>

6.130 However, some witnesses did not support using trade or treaties to further Australia's advocacy. For example Emeritus Professor Desmond O'Connor<sup>136</sup>, and Dr Daniel Pascoe, who warned:

... that minimising trade, investment and aid to retentionist nations does not encourage the economic conditions that lead to abolition in the long term. Compromising the economic development of Australia's neighbours may instead prove counterproductive, as these retentionist nations a) solidify in their policy standpoints when they are threatened or criticised, and b) turn their backs on economic ties with socially liberal nations such as Australia to instead court authoritarian regimes (China being an obvious example).<sup>137</sup>

6.131 Mr Richard Galloway proposed a 'carrot and stick' approach, where Australia institutes 'a 'two tier' relationship with other nations', where abolitionist nations can be dealt with freely in trade arrangements, but limitations are placed upon trade deals with retentionist states.<sup>138</sup>

6.132 PGA's Dr Cattin advocated 'the carrot', rather than 'the stick', describing the European system, where:

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132 ALHR, *Submission 18*, p. 9.

133 Mr Hayes MP, *Australian Parliamentarians Against the Death Penalty, Committee Hansard*, Sydney, 20 November 2015, pp. 27-28.

134 Human Rights Watch, *Submission 23*, p. [5].

135 Ms Sarah Gill, *Submission 37*, p. [1].

136 Desmond O'Connor, *Submission 10*, p. [1].

137 Dr Daniel Pascoe, *Submission 19*, p. [9].

138 Mr Richard Galloway, *Submission 32*, p. [2].

... you have an incentive to ratify and respect a number of treaties, which I believe also includes the second optional protocol to the ICCPR on the abolition of the death penalty. If you as a state from these developing countries ratify, implement or otherwise abide to all these treaties then you can become a favourite-plus partner of the EU for trade. ... In other words, it is a system of positive incentive rather than negative conditionality.<sup>139</sup>

- 6.133 Regardless of the approach, Dr Cattin was of the view that bilateral treaties and trade agreements should be considered as an avenue to promote abolition. He remarked:

To be honest, this debate should probably be reopened. It was one that was very alive some 15 or 20 years ago. I believe that there should be some reflection again. In some cases, an approach that would be a bit more aggressive on conditionality could be useful, because, in some cases, it could be really justified and it could have an impact.<sup>140</sup>

## Civil society engagement

- 6.134 Witnesses asserted that Australia would be well-served by increasing support to civil society advocacy groups in Australia and in retentionist countries. Reprieve submitted:

Non-government organisations in retentionist countries do the bulk of the capital defence work. They do so in opposition to the State and on shoestring budgets. While they are fearless and impressive advocates, their impact is limited by available resources.<sup>141</sup>

- 6.135 Amnesty International argued that civil society groups have been effective in advocating for political change, as well as advocating in individual death penalty cases, such as the case of Moses Aktugba in Nigeria, who was pardoned in 2015 after a ten year campaign by Amnesty and others.<sup>142</sup>
- 6.136 Dr Malkani promoted the role of Reprieve Australia, the NSW Council for Civil Liberties, and others, which he argued 'have proven adept at helping those on death row abroad, and in advocating for the abolition of capital punishment'. Dr Malkani further contended:

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139 Dr David Donat Cattin, Secretary-General, Parliamentarians for Global Action, *Committee Hansard*, Canberra, 25 February 2016, p. 3.

140 Dr Cattin, PGA, *Committee Hansard*, Canberra, 25 February 2016, p. 3.

141 Reprieve Australia, *Submission 41*, p. 7.

142 Amnesty International, *Submission 34*, p. 11.

The Government should continue to fund such specialist organisations. The Government can also provide financial and other support to organisations in retentionist countries.<sup>143</sup>

- 6.137 Ms Helen Wiseman proposed that the Australian Government provide 'sustainable' funding to Reprieve Australia to assist them in their advocacy.<sup>144</sup>
- 6.138 The ALHR called on the Australian Government 'to provide strategic assistance to ASEAN civil society groups in their advocacy efforts towards the abolition of the death penalty.'<sup>145</sup>
- 6.139 Similarly, Mr McMahon and his colleagues suggested providing 'well targeted assistance' to local and regional organisations struggling against the death penalty in the Asia-Pacific region.<sup>146</sup>
- 6.140 Witnesses suggested the Australian Government could be advised by NGOs such as Reprieve and Amnesty International, who devote significant resources to understanding the prevalence and nature of capital punishment.<sup>147</sup>
- 6.141 The WCADP advised Australia to prioritise getting 'in touch' with local NGOs in Asian countries to 'help in identifying the best approach to have a significant impact in that given country'.<sup>148</sup>
- 6.142 Australians Against Capital Punishment encouraged the Australian Government to provide funding to the Anti-Death Penalty Asia Network (ADPAN). Ms Birgin explained:
- ADPAN have been quite active over the last couple of years. However, their funding – I think they had a bit of funding from Amnesty International – has dried up. But they conducted, for example, a regional level conference or congress earlier this year, inviting speakers from retentionist countries and government officials, hoping for more pressure to question or rethink the death penalty.<sup>149</sup>
- 6.143 Ms Birgin suggested now would be an 'opportune time' to fund ADPAN:
- ... given current ASEAN chairmanship and its position of influence within ASEAN, along with recent statements by the

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143 Dr Malkani, *Submission 4*, p. 2.

144 Ms Helen Wiseman, *Submission 33*, p. [1].

145 Australian Lawyers for Human Rights (ALHR), *Submission 18*, p. 5.

146 McMahon et al, *Submission 12*, p. 2.

147 Ms Heather Land, *Submission 44*, p. [1].

148 WCADP, *Submission 36*, p. 4.

149 Ms Birgin, Australians Against Capital Punishment, *Committee Hansard*, Canberra, 27 November 2015, pp. 23-24.

Malaysian de facto minister of law regarding the abolition of the mandatory death penalty and the return to the discretion of the judiciary.<sup>150</sup>

6.144 Ms Mary Farrow (private capacity) proposed that Australia also work with 'supportive media such as the Jakarta Globe and Jakarta Post and associations and festivals such as ASEAN Literary Festival in Indonesia'.<sup>151</sup>

6.145 The FCO promoted the practice of conducting project work through funding civil society organisations, providing as an example the Death Penalty Project, which provides 'pro bono support in death penalty cases worldwide and pursues litigation which might restrict the application of the death penalty'. The FCO remarked:

We have found this approach, albeit incremental and behind-the-scenes, more effective in some countries where the number of executions has dropped sharply over the last decade, than lobbying in individual cases.<sup>152</sup>

6.146 Pointing to a similar program in the European Union, UnitingJustice suggested Australia start a 'small grants program' to provide funding to civil society organisations.<sup>153</sup>

6.147 Civil Liberties Australia highlighted the role that civil society groups, such as NGOs, can play in international discussions, pointing to the DFAT-AG-NGO consultations, in which they participate. The President, Dr Kris Klugman provided this example:

I will draw your attention to a meeting that was held in 2012 when in fact there was a small group of us talking with a high-level Chinese delegation. I asked a question about the death penalty and congratulated the Chinese on reducing the number of offences for which the death penalty was applied. I was told then that they had a firm intention to reduce the death penalty overall. I think that is a very positive outcome for such consultations.<sup>154</sup>

6.148 Encouraging Australia to fund legal aid groups, Ms Birgin remarked:

In Indonesia there is Lembaga Bantuan Hukum Masyarakat. There is KontraS and a number of other large NGOs with human rights backgrounds that have been working very hard to increase the

150 Ms Ruth Birgin, *Australians Against Capital Punishment, Committee Hansard*, Canberra, 27 November 2015, p. 22.

151 Ms Farrow, *Submission 38*, p. [1].

152 UK Foreign and Commonwealth Office, *Submission 15*, p. [2].

153 UnitingJustice Australia, *Submission 25*, p. 7.

154 Dr Kristine Kay Klugman, President, Civil Liberties Australia, *Committee Hansard*, Canberra, 27 November 2015, p. 8.



domestic response within Indonesia. Another prominent and very interesting NGO in the Indonesian context is PKNI, which is the drug user organisation of Indonesia, which is getting increasing media support both domestically and on the international stage.<sup>155</sup>

- 6.149 Reprieve, and others including Human Rights Watch,<sup>156</sup> suggested that funding could support bodies providing legal representation and advocacy to persons on death row, citing the example of the Mexican-Government-funded 'Mexican Capital Legal Assistance Program', which:
- ... monitors defense counsel's performance, prepares legal memoranda and briefs for them, assists counsel in court, anticipates and coordinates appellate legal strategies, and, when necessary, provides funds for experts, attorneys, and investigators. ... There is strong evidence that this program is highly effective.<sup>157</sup>
- 6.150 Reprieve pointed out that, in Indonesia 'there are few private lawyers who will provide pro bono assistance to capital defendants', resulting in a 'gap' for defendants.<sup>158</sup>
- 6.151 DFAT's submission acknowledged the importance of working closely with civil society organisations:
- Our strategy will be informed by our ongoing engagement with civil society organisations in Australia and overseas, including those with deep expertise and strong track records on death penalty abolition ... The Australian Human Rights Commission will be an important partner.<sup>159</sup>

### The 6<sup>th</sup> World Congress Against the Death Penalty

- 6.152 A number of witnesses encouraged Australia to become more involved with the 6<sup>th</sup> World Congress Against the Death Penalty, to be hosted by Norway in June 2016. Australia is a co-sponsor of the 2016 Congress.<sup>160</sup>
- 6.153 WCADP informed the Committee that:
- [WCADP] comprises over 150 members: human rights organizations, professional associations and local authorities on the five continents who have united to campaign for the universal

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155 Ms Birgin, *Australians Against Capital Punishment, Committee Hansard, Canberra, 27 November 2015*, p. 24.

156 Mr Robertson, *Human Rights Watch, Committee Hansard, Sydney, 9 December 2015*, p. 25.

157 Reprieve Australia, *Submission 41*, p. 8.

158 Reprieve Australia, *Submission 41*, p. 9.

159 DFAT, *Submission 35*, p. 11.

160 Australian Parliamentarians Against the Death Penalty joint press release, 'Highest Number of Executions in 25 Years', 6 April 2016.

abolition of the death penalty. It was founded in 2002 in Rome. Its actions include the World Day against the Death Penalty, a ratification campaign of the United Nations Protocol aiming at the abolition of the death penalty, and a campaign for the implementation of the UNGA moratorium resolution.<sup>161</sup>

- 6.154 Mr McMahon and his colleagues highlighted the Asian Regional Congress on the death penalty, which was held in June 2015 as part of the preparation for the World Congress. They observed that:

The Norwegians sponsored the conference, organised by Ensemble contre la peine de mort (ECPM), and Anti Death Penalty Asia Network (ADPAN). Partners and supporters on the brochures included The Human Rights Commission of Malaysia (Suhakam), the Bar Council Malaysia, The Delegation of the European Union to Malaysia, and the Australian Government through DFAT.<sup>162</sup>

- 6.155 Mr McMahon and his colleagues encouraged Australia to fund attendees to participate in the World Congress:

There will be dozens of NGOs, journalists, health professionals, perhaps lawyers, in the region who would greatly benefit from attending the World Congress in June 2016. For a small sum, Australia could work through easily accessible networks and offer sponsorship to multiple organisations in the region, for say two people from many such organisations to attend the World Congress. If we funded, say, 100 people taken from numerous fields - activists, journalists, health and law workers - and perhaps from about 10 countries, the likely flow on effect may be invaluable, with a huge return in regional knowledge, linkage and capacity for a tiny investment.<sup>163</sup>

- 6.156 Amnesty International Australia recommended that:

... Australia have an active presence at the World Congress - including both DFAT and Parliamentary representatives. The World Congress will be an opportunity to actively engage with state and non-state actors in strategically developing Australia's role as a leader in the campaign to abolish the death penalty globally.<sup>164</sup>

161 WCADP, *Submission 36*, p. 1.

162 McMahon et al, *Submission 12*, p. 2.

163 McMahon et al, *Submission 12*, p. 2.

164 Amnesty International, *Supplementary Submission 34.1*, p. 8.

- 6.157 Mr Mark Pritchard MP (UK All-Party Parliamentary Group for the Abolition of the Death Penalty) indicated the UK Parliamentary group 'will be sending a representative or two people' to the Congress.<sup>165</sup>

### Education and exchange

- 6.158 Some witnesses highlighted a role for university exchanges, scholarships and other educational programs in changing attitudes towards the death penalty in the region.
- 6.159 Civil Liberties Australia proposed Australia support education campaigns, such as a 'school-to-school interaction from country to country', which could link with teenagers via the internet.<sup>166</sup>
- 6.160 Professor Gregory Craven (Vice Chancellor, Australian Catholic University), promoted the role of scholarship and student exchange, saying:

... I think there is an enormous amount to be said for having people from other countries where the death penalty is in place coming to Australia, particularly perhaps into courses like law or criminology, but I can think of others that would be just as relevant, to give them an opportunity to reflect on whether that is or is not an appropriate position for their own country to take.<sup>167</sup>

- 6.161 Professor Craven also suggested international students enrolled in teaching degrees may be good candidates for spreading a message about capital punishment in their home countries.<sup>168</sup>
- 6.162 Describing the university's 'Mercy Scholarships', developed in wake of the executions of Mr Chan and Mr Sukumaran, Professor Craven explained:

So the idea was that we face the fact that two people have lost their lives. Instead of responding to that with abuse or criticism, the idea was to give two scholarships to people in countries where lives are taken in the same way. As part of that, let people freely apply for them. Ask them to give a piece of writing – an essay, which is how you often award scholarships – on the topic of the general area of the sanctity of life. It was not necessarily to be against the death penalty, but it would be highly likely that that would happen. We advertised those scholarships and we have

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165 Mr Mark Pritchard MP, Chair, UK All-Party Parliamentary Group for the Abolition of the Death Penalty, *Committee Hansard*, Canberra, 15 March 2016, p. 3.

166 Mr Rowlings, Civil Liberties Australia *Committee Hansard*, Canberra, 27 November 2015, p. 9.

167 Professor Gregory Joseph Craven, Vice-Chancellor, Australian Catholic University (ACU), *Committee Hansard*, Sydney, 9 December 2015, p. 22.

168 Professor Craven, ACU, *Committee Hansard*, Sydney, 9 December 2015, p. 22.

received applications for the scholarships. We will award two of those scholarships for next year.<sup>169</sup>

- 6.163 Professor Craven commented that the scholarships represent a positive approach to advocacy:

I do think that one of the challenges is to try to think: in international advocacy, what have we got to offer other than approval, opposition or advice? Are there material things that we can connect to our advocacy against the death penalty that would make people think we are sincere and serious? That is not an easy thing to do. It is easy enough for me to offer two scholarships. It is much harder as a matter of national policy. But I do think that is a real problem. When one is coming from a moral position, if all one has is a moral position that says, 'Your moral position isn't as good as mine,' it is not the most attractive position to be adopting.<sup>170</sup>

- 6.164 Professor Andrew Byrnes (Diplomacy Training Program) agreed that Australia's advocacy could be further invigorated by:

... provid[ing] support for civil society advocates through human rights training programs and development assistance programs; and to support national and regional organisations, such as [National Human Rights Institutions], in carrying out this work.<sup>171</sup>

- 6.165 Ms Mary Farrow highlighted the role of community workers and educators in rehabilitating prisoners. She wrote:

Prisons should be used as educational/vocational facilities and production environments to benefit the community while teaching skills, empathy, respect and giving people with long sentences (instead of killing them) a job to perform under the prison management. Imagine sentencing someone to a lifetime of academic achievement and contribution to the community (which includes the internal prison community).<sup>172</sup>

## The judiciary

- 6.166 Some witnesses highlighted a role for international judiciary in forging connections and advocating for an end to the death penalty. The Hon Justice Lasry AM QC observed:

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169 Professor Gregory Joseph Craven, Vice-Chancellor, Australian Catholic University (ACU), *Committee Hansard*, Sydney, 9 December 2015, p. 20.

170 Professor Craven, ACU, *Committee Hansard*, Sydney, 9 December 2015, p. 22.

171 Professor Andrew Byrnes, Diplomacy Training Program, *Committee Hansard*, Sydney, 9 December 2015, p. 13.

172 Ms Mary Farrow, *Submission 38*, p. [1].

I think the lawyers' job in the advocacy is to endeavour to explain, by the use of evidence, that, if you think the death penalty is a deterrent to the commission of a crime, you are wrong, because the contrary is documented. Therefore, to the extent that we, as lawyers, are interested in solving the problems of criminal activity, and we are told over and over again how important general deterrence is, the death penalty does not have the effect.<sup>173</sup>

6.167 Commenting on possible roles for international judiciary, the Hon Justice Lasry AM QC confirmed 'if the opportunities arose to deal with judges from death penalty countries, we would grab them'.<sup>174</sup>

6.168 Mr Ronald Keith Heinrich, from the Commonwealth Lawyers Association referred to the American Bar Association as a 'very powerful and influential body' that could be utilised in advocacy with the United States.<sup>175</sup>

6.169 The American Bar Association has a number of policies on the death penalty, mostly covering its 'responsible use'. For instance, a 'Mental Illness Resolution', adopted in 2006, which:

... without taking a position supporting or opposing the death penalty, calls upon each jurisdiction that imposes capital punishment to implement policies and procedures with respect to capital defendants and prisoners with intellectual disability or mental impairment or illness.<sup>176</sup>

6.170 Professor Byrnes suggested Australia needs to:

... build on existing links with judiciaries and to include death penalty and related issues as part of judicial training and exchange programs; to support associations of lawyers here and abroad to engage in advocacy on the issue ...<sup>177</sup>

6.171 The WCADP suggested that:

In Asian countries that still have the death penalty, Australia could engage in joint bilateral programs to share experience and build capacity of judges, lawyers, parliamentarians, and university

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173 The Hon Justice Lasry AM QC, *Committee Hansard*, Melbourne, 17 November 2015, p. 5.

174 The Hon Justice Lasry AM QC, *Committee Hansard*, Melbourne, 17 November 2015, p. 4.

175 Mr Ronald Keith Heinrich, Executive Committee Member, Commonwealth Lawyers Association, *Committee Hansard*, Sydney, 20 November 2015, p. 22.

176 'ABA Death Penalty Policy', *American Bar Association website*, at <[www.americanbar.org/groups/committees/death\\_penalty\\_representation/resources/dp-policy.html](http://www.americanbar.org/groups/committees/death_penalty_representation/resources/dp-policy.html)> viewed 5 April 2016.

177 Professor Byrnes, Diplomacy Training Program, *Committee Hansard*, Sydney, 9 December 2015, p. 13.

scholars on the issue of fair trial, access to justice and the death penalty.<sup>178</sup>

## Supporting research and building capacity

6.172 The Committee heard evidence that there is a significant role for Australia in supporting research into the continued use of the death penalty, particularly in the Indo-Pacific region.<sup>179</sup>

6.173 Witnesses also argued that Australia's strategy for advocacy should include working to build capacity among academics, NGOs, legal services and others, to help them in advocating against the death penalty in the region.<sup>180</sup>

6.174 While proponents of the death penalty argue that it has a unique deterrent effect, the majority of scholarly research seeking to prove or disprove this claim has found no evidence to support a deterrent effect over and above that of life imprisonment.<sup>181</sup>

6.175 Witnesses reminded the Committee of this lack of evidence regularly. For instance, Dr Amy Maguire commented:

There is no settled evidence to show a deterrent value for capital punishment that is any greater than life imprisonment. It is obviously quite difficult to measure but the statistics in the US are very strong on this.<sup>182</sup>

6.176 Mr Mark Prichard MP (UK All-Party Parliamentary Group against the death penalty) observed:

Within the framework of a national justice system, it has been observed that it is not the severity of the penalty but the relative certainty and predictability in applying any proportionate penalty that renders a functioning criminal justice system a deterrence factor.<sup>183</sup>

178 WCADP, *Submission 36*, p. 4.

179 See for instance: Professor Byrnes, Diplomacy Training Program, *Committee Hansard*, Sydney, 9 December 2015, p. 13.

180 See for instance: Ms Heather Wright, *Submission 47*, p. 3; and Professor Byrnes, Diplomacy Training Program, *Committee Hansard*, Sydney, 9 December 2015, p. 13.

181 Amnesty International, *Submission 34*, p. 6.

182 Dr Maguire, University of Newcastle, *Committee Hansard*, Canberra, 27 November 2015, p. 16.

183 Mr. Mark Pritchard MP, Deputy Convenor, Parliamentarians for Global Action (PGA) International Law and Human Rights Programme, PGA Board Chair, PGA UK National Group Vice-Chair, and UK All-Party Parliamentary Group for the Abolition of the Death Penalty, *Address to Regional Conference on the Abolition and/or Moratorium on Execution of the Death Penalty*, Freetown 13-14 January 2014, p. 2.

At <[www.pgaction.org/pdf/activity/2014-01-13-14-Mark-Pritchard-address.pdf](http://www.pgaction.org/pdf/activity/2014-01-13-14-Mark-Pritchard-address.pdf)> Viewed 8 March 2016.

- 6.177 However, Dr Malkani concluded that support for the death penalty remains, and 'is built on myths of deterrence and retribution – the idea that it would bring closure to victims' families'. He argued that advocates must focus on 'countering those myths and getting hard empirical data'.<sup>184</sup>
- 6.178 With the benefit of 'empirical studies of homicide rates, of drug-trafficking rates and so on', Dr Malkani suggested advocates could 'utilise the media' to challenge the myth of deterrence.<sup>185</sup>
- 6.179 Professor Byrnes lamented the paucity of good quality Asian research and data in relation to the use of death penalty:
- Firstly, in the context of the Indonesian constitutional challenge ... the question of the unique deterrent effect of the death penalty came up. Nearly all of the credible social scientific material that was available in that case related to the use of the death penalty in the United States. There was little or nothing of value in the literature relating to Asian jurisdictions. There is a clear need for supporting research through linkages or in some other way.<sup>186</sup>
- 6.180 In 2016, the Asia Pacific Forum is seeking to at least in part rectify this gap in the research through reviewing and updating its 1999 study into the death penalty in the Asia-Pacific region.<sup>187</sup>
- 6.181 PGA's Dr Cattin highlighted the powerful role that research can play:
- ... let me tell you that the most powerful tool that we in PGA have been using, even abroad, to promote the idea worldwide of abolition is the study that was carried out at the beginning of 2014 by a number of scholars that was shared at the UN by Professor William Schabas from Canada. This study revealed that in the United States, in the states that had abolished the death penalty the crime rate went down vis-a-vis when the death penalty was in force, while in some of the states that retained the death penalty the crime rate went up. So, in other words, this statistical analysis, this study, highlights how the death penalty does not serve the purpose of deterrence or prevention.<sup>188</sup>

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184 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 2.

185 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 2.

186 Professor Byrnes, Diplomacy Training Program, *Committee Hansard*, Sydney, 9 December 2015, p. 13.

187 'APF to update landmark study on the death penalty', *Asia Pacific Forum website*, at <<http://www.asiapacificforum.net/news/apf-update-landmark-study-death-penalty/>> viewed 5 April 2016.

188 Dr Cattin, PGA, *Committee Hansard*, Canberra, 25 February 2016, p. 6.

6.182 Dr Maguire argued that the threat of death can even act as an incentive in the case of terrorism offences. For instance, in the example of ‘Bali bomber, Amrozi, and his colleagues’, who:

... publicly welcomed their executions as necessary for their martyrdom because they had not been killed in the course of the attacks. ... If countries apprehend terrorist suspects, try them and find them guilty then surely denying them what it is that they seek – that being a death at the hands of the state and martyrdom, in their view – is a powerful message that Australia and the allies that it tries to persuade in this regard are willing to rise above the urge to kill.<sup>189</sup>

6.183 Dr Maguire et al suggested that Australia could ‘leverage research in this area to build persuasive arguments against capital punishment globally’.<sup>190</sup>

6.184 Witnesses proposed that Australia work to increase the amount of available research evidence around the death penalty. Professor Byrnes offered:

... it may be worthwhile to explore, as part of any strategy, the possibility of conducting an audit of research and academic relationships in the region of those engaged in work in this area, with a view to stimulating such further research and building on existing relationships.<sup>191</sup>

6.185 Mr Robertson added:

We think that that kind of independent research is absolutely critical, and we would encourage both academics and donors to support that kind of independent research that then could be widely disseminated.<sup>192</sup>

6.186 Human Rights Watch particularly saw a role for this research in persuading Asian countries:

[In] South-East Asia, we have a major persuasive challenge in front of us. We have countries and places where, if you look at polling – for instance, in Thailand, Malaysia, Vietnam or Singapore – it still shows that the majority of people favour the death penalty. ... So we need to have that kind of research and have it translated into

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189 Dr Maguire, University of Newcastle, *Committee Hansard*, Canberra, 27 November 2015, p. 16.

190 Dr Maguire, Ms Fitzsimmons and Mr Richards, *Submission 40*, p. 7.

191 Professor Byrnes, Diplomacy Training Program, *Committee Hansard*, Sydney, 9 December 2015, p. 14.

192 Mr Robertson, Human Rights Watch, *Committee Hansard*, Sydney, 9 December 2015, p. 28.



the languages of the region so that the counterargument can be made ...<sup>193</sup>

6.187 Ms Farrow proposed working with community organisations, 'such as the Asia Pacific Restorative Justice Forum' to fund academic research 'to identify suitable sentencing alternatives'.<sup>194</sup>

6.188 Ms Farrow advised that the Australian Government should fund scholarships to encourage more research on capital punishment and sentencing alternatives,<sup>195</sup> as well as to help 'challenge "voodoo polls" that purport to represent the entire country's opinion on the death penalty'.<sup>196</sup>

6.189 Witnesses commented on the need to build capacity within civil society, particularly in Asia. Mr McMahon and his colleagues wrote:

Our recent experience in Indonesia has emphasized the importance for us of capacity building. Although in some quality media there was well informed and strong debate, overall there was a serious shortage of informed commentators, journalists, lawyers, health professionals, criminologists or other likely voices with the knowledge or willingness to enter the debate. ... There are many and complex reasons for this, but a significant part of the solution is capacity building – encouraging and enabling better, more informed and critical journalism, legal commentary, health commentary, political analysis and so on.<sup>197</sup>

6.190 Professor Byrnes echoed the need to build capacity and create a sustainable movement for abolition:

In my view, it is important to build capacity and to encourage informed reflections among those who are now, or may in the future become, influential in the development of human rights or criminal justice policy in retentionist countries. ... the groups with which engagement might be further developed include legal scholars, criminologists, those involved in law enforcement and policymakers developing responses to drug trafficking and other forms of serious crime.<sup>198</sup>

6.191 Ms Ursula Noye (board member, Reprieve Australia) argued that Australia has a significant role to play in providing 'accurate and up-to-

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193 Mr Robertson, Human Rights Watch, *Committee Hansard*, Sydney, 9 December 2015, p. 28.

194 Ms Mary Farrow, *Submission 38*, p. [1].

195 Ms Farrow, *Submission 38*, p. [1].

196 Ms Farrow, *Submission 38*, p. [3].

197 McMahon et al, *Submission 12*, p. 4.

198 Professor Byrnes, Diplomacy Training Program, *Committee Hansard*, Sydney, 9 December 2015, p. 13.

date information on the use of the death penalty' for media and civil society groups in the region.<sup>199</sup>

- 6.192 DFAT responded to these suggestions commenting that there might be a place for more research; however, Dr Strahan said there is a 'somewhat slim budget in this area.'<sup>200</sup>

## The role of Parliamentarians

- 6.193 The inquiry received evidence from a number of parliamentary groups that advocate for abolition of the death penalty, including:
- Parliamentarians for Global Action (PGA);
  - Australian Parliamentarians Against the Death Penalty; and
  - the UK All-Party Parliamentary Group Against the Death Penalty (the UK All-Party Group).

These groups offered a number of suggestions to guide the work of Australia's parliamentarians and Australia's strategy for abolition.

- 6.194 PGA's Dr Cattin emphasised that MPs can make a 'big difference' in the campaign. He observed:

... when you talk to friends and to your peers, you have an authority that is much stronger and more direct and better heard from the other side than if it was an initiative that was identified as stemming from an NGO – as authoritative and as good as it can be.<sup>201</sup>

- 6.195 PGA further suggested that parliamentarians can make a significant impact as individuals, as well as through organised campaigns:

It is really the dialogue with other colleagues that sometimes opens the minds of domestic legislators and brings them to the decision, 'We need to do this'. So do not underestimate the role that a few can individually and collectively play.<sup>202</sup>

- 6.196 Lord Jeremy Purvis (Member, All-Party Parliamentary Group for the Abolition of the Death Penalty) expressed a similar view:

199 Ms Ursula Noye, Board member, Reprieve Australia, *Committee Hansard*, Melbourne, 17 November 2015, p. 13.

200 Dr Strahan, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 8.

201 Dr Cattin, PGA, *Committee Hansard*, Canberra, 25 February 2016, p. 2.

202 Mr Robertson, Human Rights Watch, *Committee Hansard*, Sydney, 9 December 2015, p. 26.

202 Dr Cattin, PGA, *Committee Hansard*, Canberra, 25 February 2016, pp. 5-6.

I have been on two away visits... I think the benefit that we had as parliamentarians speaking to other parliamentarians on a cross-party basis, an all-party basis, was that we could in some way detach it from formal government to government, and we were able to actually make more progress.<sup>203</sup>

6.197 Lord Purvis also highlighted the benefits of having the activities of the Parliamentarians linked with and informed by the Government's strategy.<sup>204</sup>

6.198 Amnesty International Australia suggested the Australian Government would benefit from formalising its engagement with the bipartisan Parliamentarians Against the Death Penalty group, to allow for a more coordinated and strategic approach to the advocacy of parliamentarians.<sup>205</sup>

6.199 Mr Bourke suggested Australian parliamentarians could engage with officials in the USA at the state level:

Reform at a legislative level needs to come in at a state-by-state level. So to the extent that Australian parliamentarians are reaching out to their colleagues, ordinarily Commonwealth parliamentarians will reach out to the federal government of the United States, but I would urge Australian parliamentarians not to hesitate to reach out and create those relationships on a state-by-state basis with legislators in America.<sup>206</sup>

6.200 Dr Cattin explained that PGA actively engages with state legislators in the USA,<sup>207</sup> and meets with retentionist members of parliament in various countries, stating:

It is very important for us to underscore that the PGA platform is not a place where only the abolitionists meet and exchange views and opinions, but the idea is to be able to open our doors to anyone who is interested in justice and the rule of law. In good faith they support the death penalty. We want them to be engaged and understand the reasons from our side with the view to making them open their minds and probably change their positions.<sup>208</sup>

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203 Lord Jeremy Purvis, Member, UK All-Party Parliamentary Group for the Abolition of the Death Penalty, *Committee Hansard*, Canberra, 15 March 2016, p. 5.

204 Lord Purvis, UK All-Party Parliamentary Group, *Committee Hansard*, Canberra, 15 March 2016, p. 5.

205 Amnesty International, *Submission 34*, p. 4.

206 Mr Bourke, Louisiana Capital Assistance Center, *Committee Hansard*, Melbourne, 17 November 2015, p. 8.

207 Dr Cattin, PGA, *Committee Hansard*, Canberra, 25 February 2016, p. 2.

208 Dr Cattin, PGA, *Committee Hansard*, Canberra, 25 February 2016, p. 2.

- 6.201 According to Dr Cattin, PGA sometimes meets with parliamentarians in difficult circumstances:

We are today and we were yesterday in Indonesia, where the climate is very, very difficult. There is not willingness to go on the record. Even those among the parliamentarians here who are critical of the death penalty do not want to take the issue on the public [record].<sup>209</sup>

- 6.202 Mr Pritchard made these comments about approaches for discussing capital punishment in various countries:

There are Chinese politicians I speak to and say, 'Of course, you know the United States is moving slowly but surely towards moratorium or abolition across its states,' and they are very interested to hear that. When I am in the United States, perhaps mischievously, Chair, I say, 'You know, China is moving towards fewer and fewer deaths.' Whatever it takes, as long as it is lawful and proper and right, we should use all the diplomatic devices we can.<sup>210</sup>

- 6.203 Acknowledging the sometimes sensitive contexts in which MPs communicate with each other, Mr Humphries suggested:

We should also make the point to delegates in those circumstances that we are not necessarily there to push an advocacy agenda but there may be opportunities to raise these issues in conversations, perhaps in casual conversations after the official business, or over the delegation dinner or whatever it might be, in a way that acknowledges the sensitivities of the hosts.<sup>211</sup>

- 6.204 DFAT stated that the Department is:

... very open, if parliament needs it, to you coming to us and seeking advice about particular countries, particular situations, particular partners and asking for our judgement about what the best way forward is. I think we would have a shared desire to make sure that we avoid doing things which are inadvertently counterproductive.<sup>212</sup>

- 6.205 Mr Frank Warburton (All-Party Parliamentary Group for the Abolition of the Death Penalty) offered this explanation of the way in which the UK All-Party Group functions:
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209 Dr Cattin, PGA, *Committee Hansard*, Canberra, 25 February 2016, p. 2.

210 Mr Pritchard, UK All-Party Parliamentary Group, *Committee Hansard*, Canberra, 15 March 2016, p. 4.

211 Mr Humphries, *Committee Hansard*, Canberra, 27 November 2015, p. 45.

212 Dr Strahan, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 5.

It applies annually to the Foreign and Commonwealth Office for funding to carry out a program of visits – usually four visits – to retentionist countries throughout the world which are identified in terms of whether there is a particular opportunity for engagement. That might be identified by the local UK embassy or the members of the group might identify opportunities themselves. Most members of the group are heavily engaged in networking internationally anyway. They are active in the Inter-parliamentary Union, the Commonwealth Parliamentary Association and so on. Opportunities might be identified by the members or it might be by third parties, like organisations such as Reprieve, Amnesty International or Parliamentarians for Global Action. A visit is carried out. Usually there is assistance from the UK embassy in terms of organising programs and delivering introductions to key stakeholders locally. Those are generally the mechanics of carrying out a visit.<sup>213</sup>

6.206 While complementary of the work of Australian Parliamentarians Against the Death Penalty, Amnesty International made the following suggestions:

- [A]ssistance should be provided to the parliamentary group to engage with likeminded parliamentary groups around the world – for example the United Kingdom All-Parliamentary Group Against the Death Penalty – but also to build relationships with friendly parliamentarians in nations which still practice the death penalty. ...
- Properly resourcing and enabling the Australian parliamentary group – and incorporating their work into an official Government anti-death penalty strategy – is one way to ensure Australian efforts leave no stone unturned, and are constantly engaging at the political level....
- Before embarking on an official overseas visit, Members of Parliament and Senators, whether part of the Parliamentary Group Against the Death Penalty or not, should be briefed on the death penalty situation in any country they are visiting. This should include a briefing on individual death row cases of concern.<sup>214</sup>

6.207 Amnesty also proposed:

The cross-party Parliamentarians Against the Death Penalty could establish a process for receiving individual case information from civil society. For example, the Swiss Parliament Death Penalty

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213 Mr Frank Warburton, Consultant, All-Party Parliamentary Group for the Abolition of the Death Penalty, *Committee Hansard*, Canberra, 15 March 2016, p. 4.

214 Amnesty International, *Submission 34*, p. 12.

Group receives Amnesty International Urgent Actions and makes regular interventions with country's political representatives based on these.<sup>215</sup>

## The role of the private sector

6.208 The potential role of the private sector in advocacy for abolition of the death penalty was an area of interest for witnesses and the Committee during the inquiry.

6.209 Witnesses including Mr Bourke outlined the role played by tightened regulations and export bans on pharmaceuticals in reducing the number of recent executions:

One of the critical issues there has been the US supply of drugs used to administer lethal injection – first sodium thiopental and then other drugs. US states are attempting to import drugs illegally in violation of federal [Free Trade Agreement] regulations in the market. A number of countries through Europe that house drug-manufacturing companies have expressed their dissatisfaction and have taken steps to make it either harder or impossible for death-dealing drugs to be imported into the United States when they will be used in executions.<sup>216</sup>

6.210 Ms Noye outlined the actions of Reprieve UK who 'have engaged with multinationals who are supplying the drugs that are used to kill'. She commented:

I know they have had some great success in approaching organisations at that level and asking, 'Do you want to see your product used for this purpose?' The answer is invariably no. That is creating all sorts of problems in the US with their execution drugs.<sup>217</sup>

6.211 Praising the campaign by Reprieve, Dr Malkani remarked:

Those pharmaceutical companies have come out saying, 'We make drugs to save lives. We do not want them to be used for taking away lives.' That has the practical effect of slowing down rates of executions, but it has also had a normative effect of getting the

215 Amnesty International, *Supplementary Submission 34.1*, p. 11.

216 Mr Bourke, Louisiana Capital Assistance Center, *Committee Hansard*, Melbourne, 17 November 2015, p. 10.

217 Ms Ursula Noye, Board member, Reprieve Australia, *Committee Hansard*, Melbourne, 17 November 2015, p. 16.

message across that these companies do not want to be involved in the taking of life.<sup>218</sup>

6.212 PGA's Ms Trujillio described the European trade bans:

They have a new regulation forbidding pharmaceutical companies from exporting drugs that could be used abroad to carry out death sentences, and when I talk with many EU officials on this issue it is mainly directed to the US, to be honest. ... In the United States this posed an important issue last year and the year before because they had a shortage of drugs to carry it out, especially lethal injections.<sup>219</sup>

6.213 Following the EU ban on the sale of compounds for execution, Mr Mark Pritchard MP (UK All-Party Parliamentary Group for the Abolition of the Death Penalty) suggested that some US States may be attempting to import such compounds 'allegedly' from India.<sup>220</sup> He added:

So anything you can do in your part of the world to ensure that your neighbouring countries are not tempted to sell these death compounds into US states would be particularly helpful as well, because not being able to access them is certainly slowing down the number of executions.<sup>221</sup>

6.214 Witnesses including UnitingJusticeAustralia<sup>222</sup> and Human Rights Watch suggested Australia '[c]onsider measures to ensure no Australian products are used in administering the death penalty abroad'.<sup>223</sup>

6.215 The OHCHR proposed that Australia:

... review its trade policies, laws and regulations to ensure full prohibition of trade in goods which have no practical use other than for the purpose of capital punishment or for torture and ill-treatment, as well as the supply of technical assistance related to such goods.<sup>224</sup>

6.216 Asked if there was a role for Australia in this area, Mr Bourke stated:

I am not currently aware of any medical drug manufacturer in Australia that could be used as a vehicle for lethal injections or as a

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218 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 3.

219 Ms Trujillo, PGA, *Committee Hansard*, Canberra, 25 February 2016, p. 5.

220 Mr Pritchard, UK All-Party Parliamentary Group, *Committee Hansard*, Canberra, 15 March 2016, p. 2.

221 Mr Pritchard, UK All-Party Parliamentary Group, *Committee Hansard*, Canberra, 15 March 2016, p. 2.

222 UnitingJustice Australia, *Submission 25*, p. 8.

223 Human Rights Watch, *Submission 23*, p. [5].

224 OHCHR, *Submission 49*, p. [9].

source. ... But again, we do not need to wait for that to happen. That is an area where the Australian government can say, 'We will not permit the export of the devices of execution, whether in the form of lethal drugs or whatever other mechanisms countries choose to take up.'<sup>225</sup>

6.217 Ms Trujillio suggested that the European Union may be able to provide Australian authorities with 'a list of those drugs' used in executions.<sup>226</sup>

6.218 Witnesses were also interested in the role private sector companies play in promoting human rights causes. Ms Howie contended:

We have seen, at least in Australia, the contribution that corporations have made to, for example, the marriage equality debate. I think that has been a real game changer. We would support corporations being involved in those kinds of discussions, particularly where they are working in jurisdictions that, for example, have the death penalty or have rule of law issues. These are issues that not only affect business confidence but are human rights issues on the ground.<sup>227</sup>

6.219 Dr Malkani provided some examples from the private sector, including companies such as Benetton, Lush and Virgin:

... Benetton tried to do this a few years ago when they had an ad campaign using images of people on death row, which did not go down particularly well, but maybe that was the wrong time. ... Whether a company like that could now be persuaded to do these sort of things, yes, I think there is an opportunity there. I do not know if you know of Lush, the cosmetics company. ... They did a lot of work with Reprieve speaking out against Guantanamo Bay. Richard Branson of Virgin does a lot of against the death penalty. He speaks out quite strongly and very frequently against the death penalty.<sup>228</sup>

6.220 In Dr Malkani's view, there 'is scope' for companies and CEOs play a stronger role in the campaign against the death penalty worldwide.<sup>229</sup>

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225 Mr Bourke, Louisiana Capital Assistance Center, *Committee Hansard*, Melbourne, 17 November 2015, p. 10.

226 Ms Trujillo, PGA, *Committee Hansard*, Canberra, 25 February 2016, p. 5.

227 Ms Emily Howie, Director of Advocacy and Research, Human Rights Law Centre, *Committee Hansard*, Melbourne, 17 November 2015, p. 16.

228 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 3.

229 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 3.



## Committee comment

- 6.221 Australia has traditionally been a strong advocate for abolition of the death penalty. However, there is scope for further advocacy and better coordination of our efforts.
- 6.222 The Committee recommends the development of a whole-of-government strategy which will guide Australia's ongoing advocacy for abolition of the death penalty.
- 6.223 In light of evidence received, the Committee recommends the strategy be focussed on retentionist countries in the Indo-Pacific region, as well as the United States of America. Were the United States to move towards abolition this would most likely have a significant catalytic effect on other retentionist nations.
- 6.224 The strategy should include overarching goals, including working towards moratoria and a reduction in executions, and incorporate concrete aims for Australian advocacy in the short and medium term.
- 6.225 In light of Australia's candidacy for a seat on the United Nations Human Rights Council in 2018, and the declaration that advocating for abolition of the death penalty will be an important focus of Australia's campaign, it is timely and appropriate that the Australian Government devote more resources to this advocacy. The Committee also notes that Australia is co-sponsoring the 6<sup>th</sup> World Congress Against the Death Penalty being held in June 2016.
- 6.226 The Committee recommends that a modest amount of grant funding be made available to assist civil society and other groups for their advocacy efforts in retentionist countries, as well as for training and scholarships.
- 6.227 The Committee also believes that DFAT requires specific additional resources which can be dedicated to developing, rolling out, and evaluating the strategy.
- 6.228 As part of Australia's strategy, the Committee recommends that DFAT work to forge a regional coalition of likeminded countries in the Indo-Pacific to coordinate efforts to promote abolition.
- 6.229 The Committee recognises that to be effective, Australia's advocacy for abolition of the death penalty must be consistent and universal, and strongly encourages all members of parliament and officials of the Australian Government to present a consistent, principled objection to capital punishment. Australia should advocate for further restrictions on the use of the death penalty in retentionist countries, such as where an existing law or practice allows for the execution of juveniles, people with mental illnesses and pregnant women.

- 6.230 The Committee acknowledges that misinformation and myth about the supposed unique deterrent effect of the death penalty help to maintain it in many countries. The depth of available research can be limited; for example, analysis of the extent to which the death penalty deters drug offences among Asian jurisdictions. As such, the Committee sees an important role for further research and capacity building among scholars, lawyers, academics, journalists and advocates for abolition of the death penalty. This should be included among the measures employed within the whole-of-government death penalty advocacy strategy.
- 6.231 The Committee notes the work of parliamentarians, especially the Australian Parliamentarians Against the Death Penalty, in advocating against specific executions, and against capital punishment generally. Where this advocacy work would assist in achieving the aims of the Australian strategy, it should be formally incorporated as part of the strategy. The Committee's expectation is that, as occurs to good effect with the UK All-Party Parliamentary Group Against the Death Penalty, the work of Australian Parliamentarians Against the Death Penalty would be linked with and informed by the strategy.
- 6.232 While the Committee feels that there is scope for private sector companies, CEOs and high-profile individuals to play a stronger role in the campaign against the death penalty, it acknowledges that this is an area that requires more thought and exploration. Nevertheless, the Committee urges monitoring to ensure that no Australian companies manufacture and export products that could be used for executions.

## Recommendations

### Recommendation 8

The Committee recommends that the Department of Foreign Affairs and Trade coordinate the development of a whole-of-government Strategy for Abolition of the Death Penalty which has as its focus countries of the Indo-Pacific and the United States of America.

### Recommendation 9

The Committee recommends that the goals of the Strategy for Abolition of the Death Penalty include:

- an increase in the number of abolitionist countries;
- an increase in the number of countries with a moratorium on the use of the death penalty;
- a reduction in the number of executions;
- a reduction in the number of crimes that attract the death penalty;
- further restrictions on the use of the death penalty in retentionist countries of the Indo-Pacific region; and
- greater transparency of states' reporting the numbers of prisoners sentenced to death and executions carried out.

## **Recommendation 10**

The Committee recommends that the specific aims of the Strategy for Abolition of the Death Penalty include:

- acknowledging the positive steps taken by countries in the region, for example where countries reduce the number of crimes that attract the death penalty or remove mandatory death sentences;
- promoting greater transparency in the number of executions carried out in China, Vietnam, Syria, North Korea and Malaysia, the crimes for which death sentences were imposed and the number of people under sentence of death in each country;
- promoting a reduction in the number of crimes that attract the death penalty in China, Vietnam, Thailand, Taiwan and India;
- promoting an end to mandatory sentencing in death penalty cases in Malaysia and Singapore, especially in relation to drug crimes;
- advocating for Pakistan and Indonesia to resume their moratoria;
- advocating for an improvement in the conditions and treatment of prisoners on death row in Japan;
- encouraging Papua New Guinea not to reinstate capital punishment;
- assisting Nauru, Tonga, Republic of Korea and Myanmar to move from abolitionist in practice to abolitionist in law;
- promoting abolition of the death penalty at the federal level in the United States and encouraging state-level moratoria and eventual abolition; and
- forming a coalition of like-minded countries who can work in concert to promote abolition of the death penalty in the Indo-Pacific region.

## **Recommendation 11**

The Committee recommends that the following techniques, among others, be utilised to achieve the aims of the Strategy for Abolition of the Death Penalty:

- intervening to oppose death sentences and executions of foreign nationals, especially in cases where there are particular human rights concerns, such as unfair trials, or when juveniles or the mentally ill are exposed to the death penalty;
- commissioning research and analysis to inform the specific actions and advocacy approaches which may be most effective in each priority country;
- provision of modest annual grants funding to support projects which seek to advance the cause of abolition within the region, such as efforts to influence public opinion, promoting alternatives to the death penalty, engaging with the media, political representatives, religious leaders, the legal profession and policy makers;
- provision of funding to support the Anti-Death Penalty Asia Network and abolitionist civil society groups within the region, including to assist with advice and representation in individual cases;
- provision of training and networking opportunities in Australia and elsewhere for representatives of abolitionist civil society groups within the region;
- where their involvement would help achieve specific objectives under the Strategy, utilising the Australian Parliamentarians Against the Death Penalty group, Parliamentarians for Global Action, and experts such as Australian jurists;
- engaging with the private sector and supportive high-profile or influential individuals in priority countries, where this may be effective;
- supporting the continued participation by Australian delegations at the 6<sup>th</sup> World Congress Against the Death Penalty and subsequent congresses; and
- Australia to continue to co-sponsor resolutions on abolition of the death penalty at the United Nations.

**Recommendation 12**

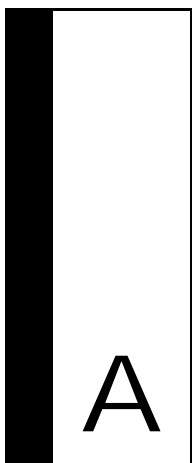
The Committee recommends the Australian Government provide dedicated and appropriate funding to the Department of Foreign Affairs and Trade to fund grants to civil society organisations, scholarships, training, research and/or capacity building projects aimed at the abolition of the death penalty.

**Recommendation 13**

The Committee recommends that the Australian Government make available to the Department of Foreign Affairs and Trade ongoing operational funds to resource the preparation and implementation of the Strategy for Abolition of the Death Penalty, including a budget for adequate staffing.

The Hon Philip Ruddock MP  
Chair  
Human Rights Sub-Committee  
4 May 2016

The Hon Teresa Gambaro MP  
Chair  
Joint Standing Committee on  
Foreign Affairs, Defence and Trade  
4 May 2016



## Appendix A—List of Submissions

- 1 Mr John Drake
- 2 Mr John van de Meene
- 3 Mr Joseph Solano
- 4 Dr Bharat Malkani
- 5 Mrs Susan Wilkinson
- 6 Mr Bernard Piovesan
- 7 Mr Stephen Williams
- 8 Death Penalty Information Center
- 9 Castan Centre for Human Rights Law
- 10 Professor Emeritus Desmond O'Connor
- 11 Mr Anthony Robinson
- 12 McMahon, Wilson, Haccou, O'Connell, Morrissey
- 13 Aussies Against Capital Punishment
- 14 Falun Dafa Association of Australia
- 15 UK Foreign & Commonwealth Office
- 16 International Drug Policy Consortium
- 17 Mr Stephen Keim
- 18 Australian Lawyers for Human Rights
- 19 Dr Daniel Pascoe
- 20 Australian Catholic Bishops Conference
- 21 Amnesty International, Human Rights Watch, Human Rights Law Centre, Reprieve, Australians Detained Abroad, NSW Council for Civil Liberties, Civil Liberties Australia
- 22 Australian Federal Police

- 22.1 Australian Federal Police
- 23 Human Rights Watch
- 24 Law Council of Australia and the Australian Bar Association
- 25 UnitingJustice Australia
- 26 Commonwealth Lawyers Association
- 27 Mrs Susan Lepper
- 28 Australian Drug Foundation and New Zealand Drug Foundation
- 29 Mr James King
- 30 Iraqi High Commission for Human Rights
- 31 Felicity Gerry QC and Narelle Sherwill
- 32 Mr Richard Galloway
- 33 Ms Helen Wiseman
- 34 Amnesty International
- 35 Department of Foreign Affairs and Trade
- 36 World Coalition Against the Death Penalty
- 37 Ms Sarah Gill
- 38 Ms Mary Farrow
- 39 Human Rights Law Centre
- 40 Dr Maguire, Ms Fitzsimmons and Mr Richards
- 41 Reprieve Australia
- 42 Institute for Justice and Reconciliation
- 43 Mr Melville Miranda
- 44 Ms Heather Land
- 45 Confidential
- 46 European Commission
- 47 Ms Heather Wright
- 47.1 Ms Heather Wright
- 48 Mr Brian Kurniawan
- 49 UN Office of the High Commissioner for Human Rights
- 50 Diplomacy Training Program
- 51 Myanmar National Human Rights Commission
- 52 Embassy of the Republic of Turkey
- 53 Confidential
- 54 Mr Peter Dixon



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- 55 Confidential
  - 56 Government of Ireland
  - 57 Holy See
  - 58 Renshaw, Freeland and Feld, Western Sydney University
  - 59 Parliamentarians for Global Action Australia
  - 59.1 Parliamentarians for Global Action Australia
  - 60 Parliamentarians for Global Action
  - 61 Asia Pacific Lawyers Network
  - 62 Royal Norwegian Embassy





## Appendix B—List of Exhibits

- 1 Amnesty International, Human Rights Watch, Human Rights Law Centre, Reprieve, Australians Detained Abroad, NSW Council for Civil Liberties, Civil Liberties Australia  
*Australian Government and the Death Penalty: A Way Forward*
- 2 Mary Farrow  
*Prison residents, relationships, rehabilitation and redemption in Kerobokan Prison, Bali*
- 3 Mary Farrow  
*Letter from DFAT to Ms Farrow*
- 4 Mary Farrow  
*Commentary: Scholars to Study Prison Restorative Justice in Bali*
- 5 Mary Farrow  
*Kerobokan Projects initiated by Myuran Sukumaran and Andrew Chan 2009-2013*
- 6 Mary Farrow  
*Kembali Project – Kerobokan Prison Projects Evaluation and Assessment*
- 7 Falun Dafa  
*Amnesty International – Changing the soup but not the medicine*
- 8 Dr Bharat Malkani  
*The obligation to refrain from assisting the use of the death penalty, International and Comparative Law Quarterly, v 62 (3)*
- 9 Amnesty International *Flawed Justice - Unfair trials and the death penalty in Indonesia (2015)*
- 10 Amnesty International  
*2015 World Day Against the Death Penalty – not the solution to drug related crime*

- 11 Amnesty International  
*Urgent Action: Imminent execution of 25 year old Iranian man (6 November 2015); Sheikh Nimr at risk of execution (27 October 2015); execution looming if appeal rejected (10 November 2015)*
- 12 Falun Dafa  
*Implausible Medical Examinations of Falun Gong Forced Labor Camp Workers in China*
- 13 Falun Dafa  
*Organ Procurement from Executed Prisoners in China, American Journal of Transplantation*
- 14 Falun Dafa  
*Driven to kill - Why drivers in China intentionally kill the pedestrians they hit*
- 15 Amnesty International  
*Death Penalty Road Map and cover letter*
- 16 Amnesty International  
*Urgent Action: California*
- 17 Amnesty International  
*Death Sentences and Executions 2014*
- 18 Dr Amy Maguire  
*Australians Sentenced to Death Overseas Monash University Law Review*
- 19 Dr Amy Maguire  
*Balancing Abolitionism and Cooperation on the World Scale*
- 20 Dr Amy Maguire  
*Extradition of the Bali Nine*
- 21 Dr Amy Maguire  
*The Global Trend Towards Abolition*
- 22 Dr Amy Maguire  
*Indonesia's Use of Capital Punishment*
- 23 Dr Amy Maguire  
*The Death Penalty in Australian Law*
- 24 Dr Amy Maguire  
*The Obligation to Refrain*
- 25 Dr Amy Maguire  
*Widodo's Foreign Policy Challenges*

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- 26 Dr Amy Maguire  
*Value of International Standards*
- 27 Asia Pacific Forum of National Human Rights Institutions  
*APF Strategic Plan 2015-2020*
- 28 Asia Pacific Forum of National Human Rights Institutions  
*Background Paper for the Advisory Council of Jurists' Terms of Reference on the Death Penalty*
- 29 Asia Pacific Forum of National Human Rights Institutions  
*Inaugural Session of the Advisory Council of Jurists: Final Report*
- 30 Department of Foreign Affairs and Trade (Attachment B of QoN 12)  
*The Commonwealth Guidelines for Legal Financial Assistance 2012*



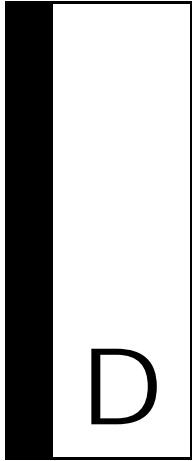


## Appendix C—Answers to Questions on Notice

- 1 Civil Liberties Australia answers to questions on notice from public hearing on 27 November 2015
- 2 Dr Bharat Malkani answers to questions on notice from public hearing on 27 November 2015
- 3 Professor Andrew Byrnes, The Diplomacy Training Program answers to questions on notice from public hearing on 9 December 2015
- 4 Falan Dafa Program answers to questions on notice from public hearing on 20 November 2015
- 5 Law Council Program answers to questions on notice from public hearing on 17 November 2015
- 6 Attorney-General's Department Program answers to questions on notice from public hearing on 27 November 2015
- 7 Department of Foreign Affairs and Trade Program answers to questions on notice from public hearing on 9 December 2015
- 8 Australian Catholic Bishop's Conference Program answers to questions on notice from public hearing on 27 November 2015
- 9 Australian Federal Police Program answers to questions on notice from public hearing on 27 November 2015
- 10 Dr Amy Maguire Program answers to questions on notice from public hearing on 27 November 2015
- 11 Dr Amy Maguire Program answers to questions on notice from public hearing on 27 November 2015
- 12 Department of Foreign Affairs and Trade







## Appendix D—List of Public Hearings

Melbourne, Tuesday, 17 November 2015

### **Australian Drug Foundation**

Mr John Rogerson, Chief Executive Officer

### **Castan Centre for Human Rights Law**

Mr Adam Fletcher, Research Fellow

### **Human Rights Law Centre**

Ms Emily Howie, Director of Advocacy and Research

### **Law Council of Australia and Australian Bar Association**

Ms Fiona Margaret McLeod, Treasurer, Law Council of Australia; President,  
Australian Bar Association

Dr Natasha Lee Molt, Senior Policy Lawyer, Criminal and National Security Law

### **Private Capacity**

The Hon Justice Lex Lasry AM QC

Mr Richard Burke

Mr Ricky Gunawan

Ms Mary Farrow

Mr Julian McMahon

Mr Michael O'Connell

Ms Alex Wilson

**Reprieve**

Ms Sally Warhaft, Vice-President

Ms Ursula Noye, Board Member

**World Coalition Against the Death Penalty**

Prof Peter Norden, Australian Representative

**Sydney, Friday, 20 November 2015****Amnesty International**

Ms Stephanie Cousins, Government Relations Manager

Ms Rose Kulak, Individuals at Risk Program Coordinator

Mr Karamzo Saccoh, Government Relations Coordinator

**Australian Parliamentarians Against the Death Penalty**

Mr Chris Hayes MP, Co-Chair

**Commonwealth Lawyers Association**

Mr Ronald Heinrich AM, Executive Committee Member

**Falun Dafa Association of Australia Inc**

Dr Lucy Zhao, President

Mr John Deller, Secretary

Ms Caroline Dobson, Research Coordinator

**University of Western Sydney**

Professor Steven Freeland, Professor of International Law

Dr Catherine Renshaw, Senior Lecturer

**UnitingJustice Australia**

Reverend Elenie Poulos, National Director

Ms Aletia Dundas, Policy Officer

**Canberra, Friday, 27 November 2015****Australians Against Capital Punishment**

Ms Ruth Birgin

**Australian Catholic Bishops Conference**

Mr Jeremy Stuparich, Public Policy Director

**Australian Federal Police**

Deputy Commissioner Leanne Close, Deputy Commissioner Operations

Assistant Commissioner Scott Lee, Assistant Commissioner International Operations

**Attorney-General's Department**

Ms Catherine Hawkins, First Assistant Secretary, International Crime Cooperation Division

Mr Chris Collett, Assistant Secretary, Transnational Crime and Corruption Branch

**Civil Liberties Australia**

Dr Kristine Klugman, President

Mr William Rowlings, Chief Executive Officer

**Private capacity**

Mr Gary Humphries

Dr Daniel Charles Pascoe

Professor Donald Rothwell

**University of Birmingham**

Dr Bharat Malkani, Lecturer

**University of Newcastle Law School**

Dr Amy Maguire, Lecturer

**Sydney, Wednesday, 9 December 2015****Australian Catholic University**

Professor Gregory Craven, Vice-Chancellor

**Department of Foreign Affairs and Trade**

Dr Lachlan Strahan, First Assistant Secretary, Multilateral Policy Division

Mr Joshua House, Executive Officer, Human Rights and Indigenous Issues Section, Human Rights Branch, Multilateral Policy Division

**Human Rights Watch**

Mr Phil Robertson, Deputy Director, Asia Division

**University of New South Wales**

Professor Andrew Byrnes, Diplomacy Training Program

**Canberra, Thursday, 25 February 2016****Parliamentarians for Global Action**

Dr David Cattin, Secretary-General

Ms Maia Trujillo, Campaign Manager

**Canberra, Monday, 29 February 2016****World Coalition Against the Death Penalty**

Mr Raphael Chenuil-Hazan, Executive Director and Vice President, Ensemble Contre la Peine de Mort (ECPM) – Together Against the Death Penalty

**Canberra, Tuesday, 1 March 2016****Asia Pacific Forum of National Human Rights Institutions**

Mr Kieren Fitzpatrick, Director

Mr Greg Heesom, Legal Counsel

**Canberra, Tuesday, 15 March 2016****Royal Norwegian Embassy**

Ms Unni Kløvstad, Ambassador

Ms Kaja Glomm, Deputy Head of Mission

**All-Party Parliamentary Group for the Abolition of the Death Penalty**

Mr Mark Pritchard, MP, Chair

Dr Paul Monaghan MP, Vice-Chair

Lord Jeremy Purvis, Member

Mr Frank Warburton, Consultant



## Appendix E—Summary of DFAT’s diplomatic advocacy on death penalty abolition

The following information was provided in Appendix 2 of DFAT’s submission in October 2015.

### Indo-Pacific

Country/ Government	Executions in 2014	Death sentences in 2014	Bilateral Representations	Universal Periodic Review (Second Cycle)
<b>Afghanistan</b>	Yes	Yes	Yes	Yes
<b>Bangladesh</b>	No	Yes	Yes	Yes
<b>Brunei Darussalam</b>	No	No	Yes	Yes
<b>China</b>	Yes	Yes	Yes	Yes
Democratic People’s Republic of Korea <sup>1</sup>	Yes	Yes	No	Yes
<b>India</b>	No	Yes	Yes	No (2012)
<b>Indonesia</b>	No	Yes	Yes	n/a
<b>Japan</b>	Yes	Yes	No	Yes
<b>Laos</b>	No	No	Yes	Yes
<b>Malaysia</b>	Yes	Yes	Yes	Yes
Maldives	No	Yes	Yes	Yes

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1 Post has not visited DPRK during the review period, which has precluded bilateral representations.

Mongolia <sup>2</sup>	No	No	No	Yes
<b>Myanmar</b>	No	Yes	Yes	n/a
<b>Nauru</b>	No	No	No	n/a
<b>Pakistan</b>	Yes	Yes	Yes	Yes
<b>Papua New Guinea</b>	No	No	Yes	n/a
<b>Republic of Korea</b>	No	Yes	Yes	Yes
<b>Singapore</b>	Yes	Yes	No	n/a
<b>Sri Lanka</b>	No	Yes	Yes	No (2012)
<b>Taiwan</b>	Yes	Yes	Yes	n/a
Tajikistan	No	No	No	n/a
<b>Thailand</b>	No	Yes	Yes	n/a
<b>Tonga</b>	No	No	No	Yes
<b>Vietnam</b>	Yes	Yes	Yes	Yes

## Europe

Country/ Government	Executions in 2014	Death sentences in 2014	Bilateral Representations	Universal Periodic Review (Second Cycle)
Belarus	Yes	No	Yes	Yes
<b>Russia</b>	No	No	No	No (2013)

## Sub-Saharan Africa

Country/ Government	Executions in 2014	Death sentences in 2014	Bilateral Representations	Universal Periodic Review (Second Cycle)
Benin <sup>3</sup>	No	No	No	Yes
Botswana	No	Yes	No	Yes
Burkina Faso	No	No	No	Yes
Cameroon	No	No	No	Yes
Central African Republic <sup>4</sup>	No	No	No	Yes
Chad	No	No	No	Yes

2 Mongolia has ratified the Second Optional Protocol to the ICCPR but the death penalty remains in the Mongolian Criminal Code. An updated Criminal Code is expected to pass Parliament in 2015.

3 Ratified the Second Optional Protocol to the ICCPR, yet to incorporate into domestic legislation.

4 Conflict has precluded representations.

Comoros	No	No	No	Yes
Democratic Republic of Congo	No	Yes	No	Yes
Equatorial Guinea	Yes	No	No	Yes
Eritrea	No	No	No	No (2014)
<b>Ethiopia</b>	No	No	No	No (2014)
<b>Ghana</b>	No	Yes	No	Yes
Guinea	No	No	No	Yes
<b>Kenya</b>	No	Yes	No	Yes
Lesotho	No	Yes	Yes	Yes
Liberia	No	No	No	Yes
Malawi	No	No	No	Yes
Mali	No	Yes	No	No (2013)
Mauritania	No	Yes	No	n/a
Niger	No	No	No	n/a
<b>Nigeria</b>	No	Yes	No	Yes
Republic of Congo	No	Yes	No	Yes
Sierra Leone	No	Yes	No	n/a
Somalia	Yes	Yes	No	n/a
South Sudan <sup>5</sup>	No	Yes	No	n/a
Sudan	Yes	Yes	Yes	n/a
Swaziland	No	No	No	n/a
Tanzania	No	Yes	No	n/a
The Gambia	No	Yes	No	Yes
Uganda	No	Yes	No	n/a
Zambia	No	Yes	No	Yes
<b>Zimbabwe</b>	No	Yes	Yes	n/a

## Middle East and North Africa

Country/ Government	Executions in 2014	Death sentences in 2014	Bilateral Representations	Universal Periodic Review (Second Cycle)
Algeria	No	Yes	No	No (2012)
Bahrain	No	Yes	No	Yes
<b>Egypt</b>	Yes	Yes	Yes	Yes
<b>Iran</b>	Yes	Yes	Yes	Yes
<b>Iraq</b>	Yes	Yes	Yes	Yes
<b>Jordan</b>	Yes	Yes	No	Yes

5 Conflict has precluded representations.

<b>Kuwait</b>	No	Yes	No	Yes
<b>Lebanon</b>	No	Yes	No	n/a
Libya <sup>6</sup>	No	Yes	No	Yes
Morocco	No	Yes	No	No (2012)
Oman	No	No	No	n/a
<b>Palestinian Territories<sup>7</sup></b>	Yes (Gaza)	Yes (Gaza)	No	n/a
Qatar	No	Yes	No	Yes
<b>Saudi Arabia</b>	Yes	Yes	Yes	Yes
Syria	No	No	No	n/a
Tunisia	No	Yes	No	No (2012)
<b>United Arab Emirates</b>	Yes	Yes	No	Yes
Yemen	Yes	Yes	No	Yes

## Caribbean and the Americas

<b>Country/ Government</b>	<b>Executions in 2014</b>	<b>Death sentences in 2014</b>	<b>Bilateral Representations</b>	<b>Universal Periodic Review (Second Cycle)</b>
Antigua and Barbuda	No	No	No	n/a
Bahamas	No	No	No	Yes
Barbados	No	Yes	No	Yes
Belize	No	No	No	Yes
Cuba	No	No	No	Yes
Dominica	No	No	No	Yes
Grenada	No	No	No	Yes
Guatemala	No	No	No	Yes
Guyana	No	Yes	No	Yes
Jamaica	No	No	No	Yes
St Kitts and Nevis	No	No	No	n/a
St Lucia	No	No	No	n/a
St Vincent and the Grenadines	No	No	No	n/a
<b>Trinidad and Tobago</b>	No	Yes	No	n/a
<b>United States<sup>8</sup></b>	Yes	Yes	No	Yes

6 Conflict has precluded representations.

7 No-contact policy with Hamas precludes representations in Gaza.

8 Representations made to two state governors (April 2014 and September 2015).



## Notes to the tables above

- Bilateral representations cover the period January 2014 to September 2015.
- Second cycle Universal Periodic Reviews commenced in 2012 and will conclude in 2016. There are still four sessions to be undertaken in the second cycle covering 43 states.
- DFAT has excluded countries that have abolished the death penalty for ordinary crimes, but maintain it in legislation for exceptional crimes such as treason during wartime. These countries include Brazil, Chile, El Salvador, Israel, Kazakhstan and Peru. DFAT has also excluded countries that have abolished the death penalty in 2015, including Fiji, Suriname and Madagascar.
- Countries and governments highlighted in bold text indicate Australia has a resident mission.

