

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.¹

2.4 DFAT's submission contained details of the status of individual countries² 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).³

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.⁴

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 2015.⁵ 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.⁶

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

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.⁸

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 ⁹ |
| 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'.¹⁰

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

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).¹²

2.12 Human Rights Watch's submission contained detail of contemporary uses of the death penalty in questionable circumstances.¹³ 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.¹⁴

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.¹⁵

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

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

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;¹⁸ and
 - keeping prisoners on death row for an indefinite period and then executing them without notice.¹⁹
- 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.²⁰
- 2.16 Migrant workers on death row were also noted to have limited protections and be in a 'powerless situation'.²¹

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.²²
- 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

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.²³

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.²⁴

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.²⁵

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;²⁶ rather, in several ways its use is regulated and limited.²⁷ For instance, the death penalty may not be imposed on juveniles.²⁸

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

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 ICCPR³⁰ and 81 states party to the Second Optional Protocol.³¹
- 2.24 Depending on the circumstances, execution practices amounting to torture would be subject to the Convention Against Torture.³²
- 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.³³
- 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.³⁴
- 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.³⁵

30 See <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> 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.’³⁶ Nevertheless, Amnesty International Australia submitted that there were ‘positive signs... with side events being held urging abolition’ at ASEAN conferences.³⁷
- 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.³⁸ Some Commonwealth countries retain use of the death penalty.³⁹
- 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.⁴⁰
- 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.⁴¹
- 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.⁴²
- 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

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.⁴³

- 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.⁴⁴ 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 executions⁴⁵ reported in 2012 that 38 of 44 retentionist States and 33 of 49 de facto abolitionist States have laws allowing the death penalty ‘for

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.⁴⁶

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.⁴⁷

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.⁴⁸ 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.⁴⁹

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.⁵⁰ 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 6.⁵¹

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:

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, 37th 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.⁵²
- 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.⁵³
- 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

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.⁵⁴

2.44 In 1982, the ICCPR's Human Rights Committee⁵⁵ 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.⁵⁶

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.⁵⁷

2.46 A submission from the OHCHR reiterated this view:

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, 37th 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.⁵⁸

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.⁵⁹

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

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.'⁶⁴

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:

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.⁶⁵

- 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.⁶⁶ 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.⁶⁷

- 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.⁶⁸

- 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.⁶⁹

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.⁷⁰

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.⁷¹

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'.⁷² 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.⁷³

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.’⁷⁴ 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.⁷⁵
- 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.⁷⁶ 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.’⁷⁷

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.

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> 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.’⁷⁸ 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.⁷⁹
- 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.’⁸⁰
- 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.⁸¹
- 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.’⁸² 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.’⁸³

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);⁸⁴ and
- the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (first appointed in 1984).⁸⁵

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.’⁸⁶ The moratorium has been adopted at subsequent sessions of the General Assembly.⁸⁷ During the inquiry, this series of resolutions were described as having significant and contemporary importance for progressing universal abolition of the death penalty.⁸⁸

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.⁸⁹

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.⁹⁰

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.⁹¹

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 2012.⁹²

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

Table 2.2 UN General Assembly voting on death penalty moratorium resolutions

| 2007 vote 62nd Session | 2008 vote 63rd Session | 2010 vote 65th Session | 2012 vote 67th Session | 2014 vote 69th Session |
|--|--|--|--|--|
| 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.⁹⁴

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, 62nd Session, 76th 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.⁹⁵

- 2.75 When considered by the Third Committee of the General Assembly,⁹⁶ 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.⁹⁷
- 2.76 Since 2007, some states have changed their views from being against the resolution to being in favour or abstaining.⁹⁸

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...⁹⁹

95 *UN General Assembly, 62nd Session, 76th 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, 62nd Session, 45th 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.¹⁰⁰ 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.¹⁰¹

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.’¹⁰²
- 2.80 When signed in 1950 by members of the Council of Europe,¹⁰³ 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.¹⁰⁴
- 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.’¹⁰⁵ In 2002 Additional Protocol 13 abolished the death penalty without exception.¹⁰⁶ By 2015, nearly all of the Council

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> 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.¹⁰⁷

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.'¹⁰⁸ 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.¹⁰⁹

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.¹¹⁰

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.¹¹¹

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

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> 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.¹¹²

- 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.’¹¹³
- 2.87 The EC also submitted that the EU is ‘the leading donor supporting the efforts of abolitionist civil society organisations in retentionist countries.’¹¹⁴ The EU has supported the UN General Assembly moratorium resolutions, discussed earlier in this Chapter.¹¹⁵
- 2.88 The EU introduced guidelines on its death penalty policy towards third-countries in 1998 and, subsequently, an updated version in 2013.¹¹⁶ 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.’¹¹⁷
- 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.¹¹⁸
- 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,

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.¹¹⁹

- 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.¹²⁰
- 2.92 Ms Maia Trujillo (Campaign Manager, Parliamentarians for Global Action) said the EU's restrictions on pharmaceuticals were 'mainly directed to the US'.¹²¹
- 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'.¹²²
- 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.¹²³
- 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

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.’¹²⁴ 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.’¹²⁵

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.¹²⁶

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.¹²⁷

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> 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.¹²⁸

2.100 Mr Phil Robertson (Asia Division Deputy Director, Human Rights Watch) said that the UK strategy represented 'international best practice'.¹²⁹ 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.¹³⁰

- 2.101 The UK Government requires its officials to consider the human rights implications of assisting retentionist countries.¹³¹ 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'.¹³²
- 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.¹³³

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.¹³⁴

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.¹³⁵

2.107 Norway has introduced guidelines for its foreign service in relation to death penalty matters.¹³⁶ 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.¹³⁷

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.¹³⁸

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.¹³⁹

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.

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