5

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.[1]

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).[2]

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.[3]
- 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.[4]

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.[5]

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

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.[6]

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.'[7]

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.'[8]

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.[9]

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[10] which officially support the campaign for the ratification of the UN Protocol for the abolition of the death penalty'.[11]

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.[12]

5.13 Professor Peter Norden (WCADP) reiterated this request when he appeared before the inquiry in November 2015.[13]

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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.[14]

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.[15]

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'.[16]

5.17 In its submission, DFAT provided data about its diplomatic representations on the death penalty from January 2014 to September 2015.[17] 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.[18]

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'.[19]

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.[20]

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.[21]

5.22 DFAT also explained that its officials 'raise the death penalty at our bilateral Human Rights Dialogues with China, Laos and Vietnam'.[22]

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.[23]

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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).[24] DFAT then increased this funding to a total of $300 000 in 2015-16 to further support the 2016 World Congress.[25]
- 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.[26] However, the figure of $150 000 was revised down to $100 000.[27]
- 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.[28]

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 parliamentarian decision-makers) to complement DFAT's government-to-government work.[29]

5.26 DFAT clarified that this funding was intended for projects that focussed on the Indo-Pacific region.[30] 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.[31]

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.[32]

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.[33]

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.[34]

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.[35]

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.[36]

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.[37]

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.[38]

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.[39]

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.[40]

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.[41]

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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.[42]

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.[43]

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.[44]

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

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/> 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.[45]

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.[46]

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…[47]

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'.[48]

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.[49]

5.45 DFAT advised that as of December 2015, there were 13 Australians facing the possibility of the death penalty overseas.[50]

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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.[51]

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.[52]

5.48 DFAT also clarified that consular officers monitor developments in relevant court cases and attend court hearings where appropriate and practical.[53]

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.[54]

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

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.[55]

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.[56]

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.[57]

5.53 However, according to DFAT, such 'representations are rarely made public, as doing so can diminish their effectiveness'.[58]

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.[59]

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.[60]

5.56 According to AGD, the scheme 'is administered under the Commonwealth Guidelines for Legal Financial Assistance 2012'.[61]

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.[62]

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'.[63]

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.[64]

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

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.[65]

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'.[66] 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'.[67]

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.[68]

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.[69]

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.[70]

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.[71]

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.[72]

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.[73]

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'.[74]

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.[75]

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.'[76]

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.[77]

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.[78]

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.[79]

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

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.[80]

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.[81]

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.[82]

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.[83]

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'.[84]

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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.[85]

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'.[86]

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.[87]

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

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.[88]

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.[89]

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.[90]

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.[91]

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'.[92]

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.'[93]

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.[94]

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.[95]

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.[96]

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.[97]

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

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.[98]

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.[99]

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.[100]

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.[101]

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.[102]

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.[103] Furthermore, UnitingJustice Australia contended that execution itself constitutes a 'cruel and degrading' punishment.[104]

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'.[105]

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'.[106]

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.[107]

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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.[108]

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.[109]

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.[110]

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.[111]

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.[112]

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.[113]

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.[114]

5.113 Human Rights Watch suggested that Australian advocacy could focus on '[e]nsuring fair trials and ending abusive interrogations'.[115]

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.[116]

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

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.[117]

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.[118]

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).[119]

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.[120]

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.[121]

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'.[122]

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'.[123]

5.122 Dr Malkani proposed that countries where juveniles may be sentenced to death represented an 'interesting place to start' with abolitionist advocacy.[124] 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.[125]

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.[126]

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'.[127]

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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 Reprieve 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.[128]

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'.[129]

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'.[130]

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.[131]

5.129 UnitingJustice Australia suggested that Australia 'collaborate with child rights organisations to highlight the detrimental impacts on children'.[132]

Committee comment

5.130 The Committee notes that in 2011 Australia declined an invitation to join the international group, the 'Friends of the Protocol'.[133] We recommend this decision be revisited.

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128 Reprieve 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;[134]
- 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;

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.**