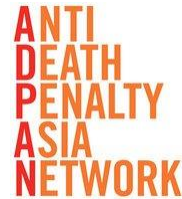


CAPITAL PUNISHMENT
JUSTICE PROJECT



Inquiry into Australia's efforts to advocate for the worldwide abolition of the death penalty

**Joint submission made to the Human Rights Subcommittee of the
Joint Standing Committee on Foreign Affairs, Defence and Trade**

16 August 2024

Submitting organisations:

Capital Punishment Justice Project (CPJP)

Eleos Justice, Monash University

Julian Wagner Memorial Fund (JWMF)

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CAPITAL PUNISHMENT
JUSTICE PROJECT



Table of contents

Information about submitting organisations	2
Executive summary	3
Recommendations	4
Terms of Reference 1: Progress against the recommendations in the 2017 Joint Standing Committee on Foreign Affairs, Defence and Trade report: <i>A world without the death penalty: Australia's Advocacy for the Abolition of the Death Penalty</i>	5
Terms of Reference 2: Australia's international engagement to promote abolition of the death penalty.....	57
Terms of Reference 3: Opportunities and risks for Australia to advocate for the abolition of the death penalty internationally, including:	60
a) Engagement with international institutions and likeminded countries	60
b) Advocacy for Australians subject to or potentially subject to the death penalty	61
c) Addressing heightened risk of the death penalty based on sexual orientation and gender identity, ethnicity, religion and political beliefs	63
d) Cooperation with civil society and non-government organisations	64
Appendix 1 Key Amendments to the AFP National Guideline	66
Appendix 2 DFAT grant allocation for projects aimed at the abolition of the death penalty.....	69
Appendix 3 Heightened risk of the death penalty for identified groups	73

CAPITAL PUNISHMENT
JUSTICE PROJECT



Information about submitting organisations

Capital Punishment Justice Project

Capital Punishment Justice Project (CPJP) is an Australian based NGO that stands for a world without the death penalty or other forms of state-sanctioned killing. CPJP works closely with partners in Asia – where the majority of the world’s executions take place – to support the defence of people facing the death penalty, assist local anti-death penalty civil society organisations, and campaign to convince governments to abolish the death penalty. Australia has identified abolition of the death penalty as one of its human rights priority areas and CPJP’s work is imperative to ensuring that Australia is a leading voice on abolition.

Eleos Justice, Monash University

Eleos Justice is a research initiative on state-sanctioned killing including the death penalty, which was launched by Capital Punishment Justice Project and the Faculty of Law, Monash University in 2020. It is the Asia-Pacific region's leading academic hub for evidence-based research, policy and clinical casework devoted to restricting and abolishing the death penalty.

Julian Wagner Memorial Fund

The Julian Wagner Memorial Fund (JWMF) is committed to the worldwide abolition of the death penalty through public education, providing opportunities for Australians to gain experience in defending individuals facing the death penalty and supporting ongoing and strategic anti-death penalty campaigns. The JWMF is committed to promoting Australia as a strong opponent of the death penalty in the Asia-Pacific area and worldwide while working for the abolition of capital punishment.

Australians Against Capital Punishment

Australians Against Capital Punishment (AACP) is a community group formed in early 2007 to advocate for a total abolition of the death penalty across the globe, and to call on our government to once again commit itself to opposing the death penalty in all cases, in all countries, wholeheartedly. AACP raises awareness of the issue through public forums, petitions, letter writing, and leafleting, as well as through the media.

Anti-Death Penalty Asia Network

The Anti-Death Penalty Asia Network (ADPAN) is the peak regional body for organisations committed to the abolition of the death penalty across the Asia-Pacific, with members from 20 countries within the region. As such, ADPAN maintains that the death penalty violates the right to life, that it is the ultimate form of cruel, inhuman, and degrading punishment and that the death penalty should be entirely abolished internationally.

Executive summary

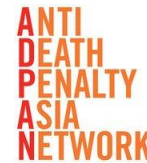
1. The submitting organisations thank the Human Rights Subcommittee (the **Subcommittee**) of the Joint Standing Committee on Foreign Affairs, Defence and Trade (the **Committee**) for undertaking this inquiry into Australia's efforts to advocate for the worldwide abolition of the death penalty, and for the opportunity to make a submission.
2. Australia's stance on the death penalty has progressively consolidated over time as an abolitionist state.¹ Since the previous inquiry on this topic was held across 2015-16, the Australian Government has worked towards realising the commitment that 'Australia will be a leader in efforts to end use of the death penalty worldwide,' which was made in June 2018 in *Australia's Strategy for Abolition of the Death Penalty* (the **2018 Strategy**).²
3. Australia should rightly be proud of the 2018 Strategy and our efforts to realise its intent. Geographically located in a region where a significant number of states retain the death penalty, our leadership on this issue matters and we should use 'all the avenues available to us' to pursue the universal abolition of the death penalty.³ Crucially, the 2018 Strategy has always had bipartisan support from both major political parties, meaning it has endured through changes in government.
4. This submission reviews the Australian Government's progress against the recommendations of the previous inquiry and highlights opportunities for improvement to ensure Australia's consistency as an abolitionist nation and leader in global efforts to end capital punishment.
5. Having formalised Australia's opposition to the death penalty in a strong policy document that has been operational for over six years, the commitment to preventing this brutal punishment needs to be reflected in the actions of all levels of government, including in the rules that determine how they act.
6. Issues that were raised at the time of the previous inquiry remain problematic, such as concerns about extradition requests and that authorities, including the Australian Federal Police, may be assisting authorities in retentionist countries in a manner that contributes to prosecutions resulting in the death penalty. This is something we believe must change and that we have persistently raised in our advocacy to the Australian Government.
7. Through our work assisting people here in Australia to help family or friends facing the death penalty overseas, we know that many face the same challenges of identifying local lawyers with expertise in such cases, securing timely funding to pay legal costs and determining if and how they can help a loved one who is detained and may never come home.
8. We urge the Subcommittee to take the opportunity afforded by this inquiry to make recommendations that will properly address these issues.

¹ Mai Sato, 'Politics of International Advocacy Against the Death Penalty: Governments as Anti-Death Penalty Crusaders' (2022) 11(3) *International Journal for Crime, Justice and Social Democracy* 1, 3.

² Department of Foreign Affairs and Trade (Cth), *Australia's Strategy for Abolition of the Death Penalty* (June 2018) 2 <<https://www.dfat.gov.au/sites/default/files/australia-strategy-abolition-death-penalty.pdf>> ('DFAT 2018 Strategy').

³ Ibid i.

CAPITAL PUNISHMENT
JUSTICE PROJECT



Recommendations

The submitting organisations make the following recommendations:

Recommendation 1: That the Australian Government revise sections 8(1A) and (1B) of the Mutual Assistance in Criminal Matters Act 1987 (Cth) to remove the Attorney-General's discretion to permit the sharing of information in cases where the death penalty may be imposed, based on the special circumstances of the case.

Recommendation 2: That the Australian Government legislate against the AFP sharing information in situations that could result in the death penalty. Should this be rejected, it is recommended that – at minimum – the AFP be directed to revisit sub-recommendation 2(c) of the 2016 Committee report and amend the AFP National Guideline on International Police-to-Police Assistance in Death Penalty Situations to include a requirement that the AFP seek assurances from foreign law enforcement bodies that the death penalty will not be sought or applied if information is provided.

Recommendation 3: That the Australian Government, via the Attorney-General's Department, should consider making emergency legal assistance funding available immediately (and with minimal bureaucracy involved) upon the arrest of an Australian citizen for a death penalty eligible offence, to ensure adequate legal representation can be secured.

Recommendation 4:⁴ That DFAT, in collaboration with Australian embassies, consulates and representative offices in retentionist countries, improve their approach to assisting Australians exposed to the risk of the death penalty in foreign jurisdictions, by:

- conducting appropriate intervention and advocacy at the earliest possible stages in all cases;
- ensuring the list of lawyers provided to detainees who are at risk of facing the death penalty is regularly reviewed and quality-assured, and that it only includes lawyers who have experience on death penalty cases or, at a minimum, practice in criminal law;
- funding CSOs and NGOs in Australia to support and amplify the work of lawyers on the ground in retentionist countries;
- partnering more closely with NGOs, CSOs, lawyers, and other service providers to ensure a strategic and coordinated approach to supporting Australians at risk; and
- further adapting policies and practices governing the Scheme for Overseas Criminal Matters Involving the Death Penalty to ensure that lawyers working 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.

Recommendation 5: That the Australian Government provide a significant boost to the available amount of dedicated, ongoing funding to the Department of Foreign Affairs and Trade to fund grants to civil society organisations, scholarships, training, research and/or capacity building projects aimed at the abolition of the death penalty.

⁴ Note that Recommendation 4 merges the content of recommendations that we have made in two separate sections of our submission (see pages 31 and 63), as both relate to assistance provided to Australians facing the death penalty.

Terms of Reference 1: Progress against the recommendations in the 2017 Joint Standing Committee on Foreign Affairs, Defence and Trade report: *A world without the death penalty: Australia's Advocacy for the Abolition of the Death Penalty*

9. This is the most in-depth section of our submission, as we have analysed the progress against each of the 13 recommendations made in *A world without the death penalty: Australia's Advocacy for the Abolition of the Death Penalty*, released in May 2016 by the Committee (hereafter the **2016 Committee report**).⁵
10. While covered in numerical order, we draw the Subcommittee's attention to Recommendations 1, 2, 5 and 12 from the 2016 Committee report, which we have identified as priorities for further examination and action, as outlined in our recommendations.

Context following the previous inquiry

11. While there is an encouraging global trend towards abolition, countries within Australia's geographic region remain stubbornly persistent in their use of the death penalty. The World Coalition Against the Death Penalty (WCADP), in their submission to the Committee's previous inquiry on the death penalty, noted that, in the Asia-Pacific, 'the 13 retentionist countries (Afghanistan, Bangladesh, China, India, Indonesia, Japan, North Korea, Malaysia, Pakistan, Singapore, Taiwan, Thailand, Viet Nam) are among those who execute most people in the world and who are the most vocal in favour of the death penalty at the international level.'⁶
12. Asia-Pacific nations that implemented the death penalty in 2023 included Afghanistan, Bangladesh, China, North Korea, Singapore and Vietnam.⁷
13. In the time since the previous inquiry, some nearby states have taken positive steps towards abolition. This includes Malaysia abolishing the mandatory death penalty in April 2023 and Papua New Guinea (PNG) repealing the death penalty for a second time in January 2022 – although it is yet to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights (the **Second Optional Protocol**), which would prohibit PNG from reintroducing the death penalty again.
14. And yet other nearby states have regressed. Singapore was viewed in 2015-16 with optimism for having amended its mandatory sentencing laws in 2012 to allow some judicial discretion

⁵ While noting that the inquiry Terms of Reference refer to the report as 'the 2017 report', we refer to it as the 2016 Committee report, given it was released in May 2016. The Government's response was released on 1 March 2017.

⁶ World Coalition Against the Death Penalty, Submission No 36 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Australia's Advocacy for the Abolition of the Death Penalty* (September 2015) 1 ('WCADP Submission No 36').

⁷ Amnesty International, *Global Report: Death Sentences and Executions in 2023* (Report, 29 May 2024) 21 <<https://www.amnesty.org/en/documents/act50/7952/2024/en/>>.

for people considered drug couriers.⁸ However, decisions in subsequent capital cases have raised concerns about the application of this discretion.

15. Most distressingly, since March 2022, Singapore has executed 19 people, most for convictions for trafficking small quantities of drugs. Having seemingly paused executions since late July 2023 – presumably, because a number of people on death row are involved in legal challenges, and with the exception of one carried out in February 2024 – it now appears Singapore will commence executions again at pace. Two executions were carried out in the first week of August 2024. Both hangings were scheduled despite the prisoners being involved in ongoing legal proceedings.
16. The Philippines – a country that has abolished the death penalty more than once and ratified the Second Optional Protocol when it last did so in 2006 – was cited in submissions and hearings of the previous inquiry as a potential key regional ally in opposing the death penalty.⁹ However, under former President Rodrigo Duterte, reintroducing the death penalty became a real possibility from mid-2016, despite the potential harm of acting in contravention of the Second Optional Protocol.
17. To combat this, CPJP conducted a project with the Commission on Human Rights of the Philippines and WCADP, which produced compelling research and policy advice to refute arguments about the effectiveness of the death penalty as a deterrent to crime, particularly in relation to drug-related offending. This project was supported with evidence-based research conducted by Eleos Justice and was funded by the European Union for four years. The possibility for reintroduction of the death penalty remains in the Philippines, as several bills on this are pending, but the likelihood is much diminished thanks to the efforts of the strong anti-death penalty movement.
18. Notwithstanding the fact that less countries than ever are using the death penalty, there are worrying trends in those that do. In their most recent global report on death sentences and executions, Amnesty International put it very simply – ‘in 2023 the lowest number of countries on record carried out the highest number of known executions in close to a decade.’¹⁰
19. There was also a significant spike in the number of executions carried out for drug-related offences, with Harm Reduction International recording at least 467 in 2023 – a 44 per cent increase from 2022 and a 1450 per cent increase from 2020. The countries confirmed to have

⁸ See, eg, Felicity Gerry QC and Narelle Sherwill, Submission No 31 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Australia's Advocacy for the Abolition of the Death Penalty* (1 October 2015) 16; Julian McMahon et al, Submission No 12 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Australia's Advocacy for the Abolition of the Death Penalty* (2015) 3 ('McMahon et al Submission No 12').

⁹ See, eg, Daniel Pascoe, Submission No 19 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Australia's Advocacy for the Abolition of the Death Penalty* (2015) 11; Human Rights Watch, Submission No 23 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Australia's Advocacy for the Abolition of the Death Penalty* (October 2015) 1-2; Evidence to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Sydney, 20 November 2015, 27 (Chris Hayes MP).

¹⁰ Amnesty International (n 7) (Report, 29 May 2024) 7.

executed for drug-related offences in 2023 are China, Iran, Kuwait, Saudi Arabia and Singapore, with Iran having carried out 98 per cent of the known drug-related executions.¹¹

20. Yet, Amnesty International also noted that the trends show an 'ever-increasing isolation' of the countries that retain the death penalty.¹² This presents an opportunity to work collaboratively with other abolitionist nations to advocate for an end to the death penalty.
21. This inquiry is an opportunity to refresh memories and priorities to ensure that Australia's commitment to ending the death penalty receives the attention and resources it deserves.

2016 Recommendation 1

Recommendation 1 (made May 2016)

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

Government Response (March 2017)

Accepted: *The Attorney-General's Department has reviewed the current legislative arrangements for extradition and mutual assistance for consistency with Australia's obligations as a Party to the Second Optional Protocol to the ICCPR and is satisfied that they are consistent.*

22. The preamble to the Second Optional Protocol acknowledges key principles, including that:
 - a. death penalty abolition 'contributes to enhancement of human dignity and progressive development of human rights'; and
 - b. 'all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life.'¹³
23. As a State Party to the Second Optional Protocol since 1990, Australia is bound to the abolition of the death penalty and obligated to 'take all necessary measures to abolish the death penalty within its jurisdiction'.¹⁴ This domestic obligation was achieved by amending the Death Penalty Abolition Act 1973 (Cth) in 2010 to ensure the death penalty cannot be reimposed in any Australian state or territory.¹⁵
24. Yet the submission from the United Nations Office of the High Commissioner for Human Rights (OHCHR) to the previous inquiry raised doubts about whether other aspects of Australia's domestic law truly accord with 'international legal standards regarding the application of the death penalty'.¹⁶

¹¹ Harm Reduction International, *The Death Penalty for Drug Offences: Global Overview 2023* (Report, March 2024) 8-10.

¹² Amnesty International (n 7) 7.

¹³ *Second Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 15 December 1989, 999 UNTS 414 (entered into force 11 July 1991) Preamble ('*Second Optional Protocol*').

¹⁴ *Ibid* art 1.

¹⁵ *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth).

¹⁶ UN Office of the High Commissioner for Human Rights, Submission No 49 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Australia's Advocacy for the Abolition of the Death Penalty* (October 2015) [18] ('UN OHCHR Submission No 49').

25. Recommendation 1 was made by the Committee in response to the concerns raised by the OHCHR about Australia's Extradition Act 1988 (Cth) (**Extradition Act**) and Mutual Assistance in Criminal Matters Act 1987 (Cth) (**MACM Act**).¹⁷
26. Specifically, the OHCHR submission raised concerns that the Extradition Act and the MACM Act are subject to numerous bilateral treaties regarding mutual criminal assistance and extradition and that these treaties may facilitate death penalty convictions and executions in retentionist countries.¹⁸ The OHCHR raised Australia's bilateral treaty on extradition with the People's Republic of China as a specific example of a bilateral treaty containing provisions on mutual criminal assistance and extradition that do not accord with international legal standards for abolitionist countries.
27. In December 2016, the Joint Standing Committee on Treaties published their report on an inquiry into the proposed Treaty of Extradition between Australia and the People's Republic of China. Despite the Attorney-General submitting that Australia's extradition treaty with China provides sufficient assurances, the Joint Standing Committee on Treaties recommended that:
- the extradition decision-maker take into account government and non-government sources regarding the degree to which China currently complies with human rights obligations and the rule of law; and
 - undertakings to provide a fair and open trial are included in agreements to surrender an individual in China.¹⁹
- The Australian government accepted and noted these recommendations.²⁰
28. Various regulations exist relating to bilateral extradition treaties between Australia and countries that retain the death penalty, each containing a statement that extradition will be refused if a person may be sentenced to death for the offence for which the extradition is requested, unless the requesting party undertakes that the death penalty will not be imposed or, if imposed, it will not be carried out.²¹
29. This indicates a readiness to address concerns such as those raised by the OHCHR and the Joint Standing Committee on Treaties, and that the death penalty is a consideration in the development of such regulations. We hope that such statements are not merely added as a routine exercise and that genuine and fulsome consideration of the risk of the death penalty being applied takes place in relation to extradition requests.

¹⁷ Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *A World Without the Death Penalty: Australia's Advocacy for the Abolition of the Death Penalty* (Report, May 2016) 48 [3.62] ('2016 Committee report'); See, also, UN OHCHR Submission No 49 (n 16) [14]-[26].

¹⁸ UN OHCHR Submission No 49 (n 16) [21].

¹⁹ Joint Standing Committee on Treaties, Parliament of Australia, *Report 167: Nuclear Cooperation-Ukraine; Extradition-China* (Report, December 2016) 33-4 [3.49]-[3.54].

²⁰ Australian Government, *Australian Government response to the Joint Standing Committee on Treaties Report 167: Treaty on Extradition between Australia and the People's Republic of China* (Response, March 2017).

²¹ See, eg, *Extradition (Malaysia) Regulations 2006* (Cth), Article 3(2); *Extradition (Vietnam) Regulation 2013* (Cth), Article 3(1)(d); *Extradition (Republic of Indonesia) Regulations 1994* (Cth), Article 7; *Extradition (India) Regulations 2010* (Cth), Article 4(1)(c).

30. The following tables provide brief review and commentary on the consistency of both the Extradition Act and the MACM Act with obligations under the Second Optional Protocol.

Table 1: Extradition Act

Extradition Act obligation	Commentary on this obligation
The Attorney-General must effectively screen an extradition application to ensure that the person is an extraditable person in relation to the extradition country. ²²	This provides an initial safeguard against unmeritorious extradition applications.
<p>The Attorney-General may determine that a person be surrendered to the extradition country only if the Attorney-General is satisfied that there is no real risk that the death penalty will be carried out upon the person in relation to any offence.²³</p> <p>To satisfy the Attorney-General that such a risk will not materialise, the extradition country must provide an undertaking to Australia that either:</p> <ul style="list-style-type: none"> the person facing extradition is not tried for the extradition offence that is punishable by death; or if the person is tried for the offence, the death penalty will not be imposed on the person; or if the death penalty is imposed, it will not be carried out.²⁴ 	<p>The Full Federal Court of Australia ruled that an undertaking by an extradition country under s 22 of the Extradition Act does not have to be legally enforceable.²⁵ Amendments have not been made to the Extradition Act that reverse this ruling. Nor does it provide any mechanisms to ensure undertakings are enforceable.</p> <p>The OHCHR's 2015 submission to the Committee's inquiry raised concerns that this does not align with international legal standards, as, without a legally enforceable assurance that the death penalty will not be carried out against an accused person, a retentionist country could backtrack or ignore its own undertaking.²⁶</p> <p>The Attorney-General's Department has expressed that, even though there are no legal consequences for a retentionist country ignoring or backtracking on such an undertaking, there are consequences for non-compliance, as it will impact the broader bilateral relationship between Australia and the country seeking extradition.²⁷</p>

Table 2: MACM Act

MACM Act obligation	Commentary on this obligation
<p>Australia must refuse a request by a foreign country for assistance if the request relates to the investigation, prosecution or punishment of a person where the death penalty may be imposed.²⁸</p> <p>However, prohibition on cooperation with retentionist countries may be waived if the Attorney-General is of the opinion that the</p>	<p>The OHCHR's 2015 submission to the Committee's inquiry raised concerns that 'special circumstances' were defined in the 1996 explanatory memorandum to the MACM Act as situations where the assistance sought related to exculpatory evidence or information. As such, the OHCHR submission suggested that the provision is capable of broad</p>

²² *Extradition Act 1988* (Cth) s 16(2); Judicial Commission of New South Wales, *Local Court Bench Book* (Web Page) <<https://www.judcom.nsw.gov.au/publications/benchbks/local/extradition.html>>.

²³ *Extradition Act 1988* (Cth) s 15B(3)(b).

²⁴ *Ibid* s 22(3)(c)(i)-(iii).

²⁵ *McCrea v Minister for Customs and Justice* [2005] FCAFC 180 [20].

²⁶ UN OHCHR Submission No 49 (n 16) [20].

²⁷ Joint Standing Committee on Treaties (n 19) 24-5 [3.22].

²⁸ *Mutual Assistance in Criminal Matters Act 1987* (Cth) s 8(1A).

MACM Act obligation	Commentary on this obligation
<p>assistance requested should be granted having regard to 'special circumstances'.²⁹</p>	<p>interpretation, which could be detrimental in various ways to people facing a possible death sentence.³⁰</p> <p>The Attorney-General's website provides examples of 'special circumstances', including:³¹</p> <ul style="list-style-type: none"> • when a requesting country provides an undertaking that the death penalty will not be imposed; • when a requesting country provides an undertaking that, if the death penalty is imposed, it will not be carried out; and • when the assistance provided would assist a defendant to prove their innocence.

31. While it is wise to hold a healthy dose of scepticism about how seriously other countries view the consequences on bilateral relationships of non-compliance with an undertaking (as highlighted by the Attorney-General's Department in Table 1 above), it remains true that bilateral advocacy – and the strength of the associated relationships – is a key mechanism for influencing change on the death penalty.

2018 Strategy's exclusion of government-to-government assistance in a death penalty context

32. Of great concern to the submitting organisations is the fact that the 2018 Strategy explicitly 'does not consider... Australia's approach to government-to-government assistance or police cooperation in a death penalty context' and, instead, notes that this is governed by the Extradition Act and the MACM Act.
33. Police-to-police assistance in death penalty situations is also excluded from the 2018 Strategy – while there is cross-over with the discussion here, we cover our concerns about this in detail under our review of progress against Recommendations 2 and 3.
34. It is an offence to disclose any request for assistance made by a foreign country to Australia. Therefore, we are unable to discern whether the Attorney-General has exercised their power under the MACM Act to grant a request under 'special circumstances' where the request relates to a matter where the death penalty may be imposed and, if so, the frequency of the exercise of that power.
35. It is our view that, in line with the 2018 Strategy's statement of intent, Australia should not be extraditing people where they could face the death penalty, regardless of circumstances or of assurances provided about not seeking or carrying out a death sentence.
36. In November 2023, we were pleased that the Australian Government maintained a principled approach that they will not send people to countries where they clearly face the death penalty.

²⁹ *Mutual Assistance in Criminal Matters Act 1987* (Cth) s 8(1A).

³⁰ UN OHCHR Submission No 49 (n 16) [19].

³¹ Attorney-General's Department, Australian Government, 'Foreign requests to Australia', (Web Page, undated) <<https://www.ag.gov.au/international-relations/international-crime-cooperation-arrangements/mutual-assistance/foreign-requests-australia>>.

CAPITAL PUNISHMENT
JUSTICE PROJECT



This occurred under pressure from the media and from the opposition to deport people released from immigration detention following a High Court ruling. One of the people released was a man who had been sentenced to death for murder in Malaysia in 2006 and came to Australia to seek asylum while his appeal was pending. His asylum application was rejected in 2019 and he was held in immigration detention until his release following the ruling. The Australian Government, in accordance with the 2018 Strategy, said they would not deport him to face the death penalty.

37. Commenting on the ABC's *PM* program about the government's response, CPJP's Chair, barrister Stephen Keim SC said:

Australia's official policy, which is a bi-partisan policy, which was developed after [Andrew] Chan and [Myuran] Sukumaran were executed in Indonesia in 2015, is to oppose the death penalty at all times and in all places. So, when you have a policy like that, which is a proper policy and is in accord with international human rights law, then it would obviously be the wrong thing to send people back to a country to be hanged. It would almost be like we were putting the noose around the person's neck, ourselves.³²

38. We note that the risk to this person was unusually clear, as they had already been given a death sentence, albeit with their opportunity to appeal having not yet been exhausted. However, the exclusion of government-to-government assistance from the 2018 Strategy leaves a very grey area for people in earlier stages of a criminal process, especially in the pre-arrest period.
39. While the 2018 Strategy emphasises engagement with foreign countries on anti-death penalty policy through diplomatic outreach, only by removing any loopholes within Australia's own legislation can the government say with integrity that it is using all avenues available to it to work towards abolishing the death penalty.
40. As such, we believe that, in line with the recommendation of the OHCHR to the previous inquiry, the Australian Government must take steps to implement fully the recommendations of the United Nations human rights mechanisms, including by prohibiting the extradition of a person to a state where he or she may face the death penalty.

Recommendation 1: That the Australian Government revise sections 8(1A) and (1B) of the Mutual Assistance in Criminal Matters Act 1987 (Cth) to remove the Attorney-General's discretion to permit the sharing of information in cases where the death penalty may be imposed, based on the special circumstances of the case.

³² 'Government under pressure of released detainees', *PM* (ABC Radio, 14 November 2023) <<https://www.abc.net.au/listen/programs/pm/government-under-pressure-of-released-detainees/102959982>>.

2016 Recommendation 2

41. To allow close analysis, our review of Recommendation 2 has been separated into sub-parts. Bold emphasis has been added to each sub-recommendation to highlight the relevant aspect.
42. The AFP National Guideline on International Police-to-Police Assistance in Death Penalty Situations (hereafter **AFP National Guideline**) was updated following the 2016 Committee report recommendations. It is not a publicly available document but has been released in response to a freedom of information request.
43. The table in **Appendix 1** identifies and summarises the key amendments in the [revised AFP National Guideline](#), as made in response to Recommendation 2.³³

2016 Recommendation 2(a)

Recommendation 2(a) (made May 2016)

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

- a) ***articulating as its primary aim preventing the exposure of persons to arrest or charge in retentionist countries for crimes that are likely to attract the death penalty;***

Government Response (March 2017)

Noted: *The AFP's primary aim is to enforce Commonwealth criminal law, contribute to combating complex, transnational, serious and organised crime that impacts on national security, as well as protecting Commonwealth interests from criminal activity in Australia and overseas. The AFP works with national and international partners to enhance safety and provide a more secure regional and global environment. To achieve this aim, the AFP facilitates the movement of information between countries in a manner that is consistent with Government policy in relation to crimes that attract the death penalty.*

44. This sub-recommendation is one of several aimed at strengthening the safeguards to prevent exposing people to the death penalty via police-to-police cooperation on transnational crime.
45. A significant topic of discussion for the previous inquiry was the role of law enforcement in exposing people to execution, particularly in relation to drug crimes.³⁴ A number of witnesses specifically raised the issue of the AFP's cooperation with international law enforcement.³⁵ The Committee stated: 'The need to combat transnational crime cannot override the need to uphold Australia's human rights obligations and avoid exposing people to the death penalty.'³⁶
46. The Government 'noted' sub-recommendation 2(a) but it may be more correctly characterised as 'not accepted'. The plain wording of the AFP's stated primary aim does not include any

³³ Appendix 1 is not an exhaustive summary and only highlights the key amendments to assist in considering progress against the 2016 Committee report recommendations. The table should be read in conjunction with, and not as a substitute for, reading the revised AFP National Guideline.

³⁴ 2016 Committee report (n 17) 49 [4.1].

³⁵ Ibid 49 [4.3].

³⁶ Ibid 77 [4.139].

express or implied reference to preventing the exposure of people to arrest or charges likely to attract the death penalty in retentionist countries. Instead, the stated primary aim emphasises the AFP's law enforcement role.

47. The Government's narrative response to sub-recommendation 2(a) is largely replicated in the introduction to the revised AFP National Guideline. However, we note that the final line of the revised guideline's introduction omits the reference to achieving its aim by 'facilitat[ing] the movement of information between countries', which was included in the Government's response (see above). Instead, the revised guideline states that the AFP's primary aim is achieved by 'cooperat[ing] with foreign police and law enforcement agencies', a term that is open to far wider interpretation.³⁷
48. The clauses that follow the introduction in the revised AFP National Guideline enliven considerations of Australian Government policy regarding the death penalty.
49. [Australia's Strategy for Abolition of the Death Penalty](#) was released in June 2018 and formally launched on 15 October 2018, forming part of the relevant Australian Government policy that the revised AFP National Guideline considers.³⁸
50. As noted under our review of progress against Recommendation 1 above, the statement of intent to the 2018 Strategy explicitly states that it does not consider 'Australia's approach to government-to-government assistance or police cooperation in a death penalty context – governed by the *Extradition Act 1988*, the *Mutual Assistance in Criminal Matters Act 1987* and the AFP National Guideline.'³⁹
51. However, the 2018 Strategy relevantly outlines:
 - a. Australia's policy goals, including to:
 - reduce both the number of executions and the number of crimes that attract the death penalty, especially for those offences which do not meet the threshold of 'most serious crimes' under the International Covenant on Civil and Political Rights, such as economic, property, political and religious offences, minor violent crimes, and offences not involving the use of force, including drug-related offences;⁴⁰
 - b. That Australia may discourage retentionist countries from enforcing the death penalty by 'refusing to provide or placing conditions around the provision of information [or] assistance ... in situations where the death penalty may be applied',⁴¹ and
 - c. That the death penalty affects Australia's:
 - cooperation with foreign law enforcement agencies and our provision of police or other justice and security assistance in countries that retain the death penalty. For example, we

³⁷ Australian Federal Police, *AFP National Guideline on International Police-to-Police Assistance in Death Penalty Situations* (2024) 1 ('AFP National Guideline').

³⁸ Senator the Hon Marise Payne, 'Launch of Australia's Strategy for Abolition of the Death Penalty' (Media Release, 15 October 2018) <<https://www.foreignminister.gov.au/minister/marise-payne/media-release/launch-australias-strategy-abolition-death-penalty>>.

³⁹ DFAT 2018 Strategy (n 2) ii.

⁴⁰ Ibid 3.

⁴¹ Ibid 11.

cannot extradite an individual to a country where the offence concerned is punishable by death.⁴²

52. The statement extracted immediately above at point 51.c, however, is followed by noting that 'an exception may apply when the foreign government requesting assistance gives a credible and reliable diplomatic assurance stating that the death penalty will not be imposed or, if it is imposed, that it will not be carried out.'
53. And, yet, the Government response to sub-recommendation 2(c) – discussed below – side-stepped the recommendation that the AFP also seek such assurances from foreign law enforcement, stating that such assurances are 'outside the role and responsibility of police and law enforcement agencies.'
54. As such, the Government and the AFP are sending concerningly mixed messages about whether they will extradite someone to a situation where they may face the death penalty or cooperate in police investigations that may lead to capital charges and, in such circumstances, about their capacity to seek assurances that the person will be protected from this outcome.
55. Responses to questions in Senate Estimates in May 2023 regarding the interaction between AFP practices and Australian Government policy on the death penalty include:
- a. When being questioned on information sharing with Myanmar in relation to drug-related crimes attracting the death penalty, AFP Deputy Commissioner, National Security, Ian McCarthy APM agreed with Senator Dean Smith's statement that:

In these matters, in engagement with Myanmar policing, there's a high level of consciousness and awareness in the AFP of Australia's commitment over various governments – bipartisan, tripartisan commitment – to global abolition of the death penalty.⁴³

Mr McCartney stated that the AFP's process in relation to such information sharing, or a potential issue relating to the death penalty, is 'a very robust and mature process' and would be a trigger to escalate it to the AFP's sensitive investigations board.⁴⁴
 - b. Similarly, in response to questioning on the recurring pattern of executions in Singapore, AFP Commissioner Reece Kershaw APM told Senator Smith, 'it's important, I think, that you understand we don't support the death penalty as Australian police.'⁴⁵ Mr Kershaw explained that decision-making about the exchange of any information posing risks relating to the death penalty would be escalated to the Deputy Commissioner level.⁴⁶
56. In the Senate Estimates exchange referred to above, AFP representatives revealed that, since the 2021 Myanmar military coup, the AFP had shared 296 pieces of intelligence in relation to drug exportation from Myanmar. This is of particular concern because drug trafficking is not only eligible for the death penalty in Myanmar but carries a mandatory death sentence if

⁴² DFAT 2018 Strategy (n 2) 2.

⁴³ Evidence to Senate Standing Committee on Legal and Constitutional Affairs Legislation, Parliament of Australia, Canberra, 25 May 2023, 19 (Ian McCartney APM, Deputy Commissioner, National Security).

⁴⁴ Ibid.

⁴⁵ Evidence to Senate Standing Committee on Legal and Constitutional Affairs Legislation, Parliament of Australia, Canberra, 25 May 2023, 44 (Reece Kershaw APM, Commissioner).

⁴⁶ Ibid 44-45.

certain criteria are met, such as being a recidivist or part of a criminal organisation.⁴⁷ Compounding this concern is the fact that Myanmar executed four human rights defenders in July 2022 after over three decades without having undertaken any known executions (and thus had been considered abolitionist in practice).

57. AFP representatives also stated that decisions on information sharing in a death penalty context are made by the Sensitive Investigation Oversight Board.
58. However, while this provides some safeguards, the Sensitive Investigation Oversight Board is, concerningly, made up of internal AFP members and their legal counsel. To our knowledge, the Board does not include death penalty experts or people with expertise on specific countries, or members of the DFAT human rights team that covers death penalty matters.
59. Further, Senator Smith was later provided with an answer to a question taken on notice which showed that none of the 296 police-to-police requests from Myanmar for information were elevated to the Sensitive Investigation Oversight Board.⁴⁸
60. Our concerns are twofold. First, we fundamentally disagree with sharing information that has the potential to put someone at risk of the death penalty, regardless of the circumstances or the desired outcome of that information sharing.
61. Secondly, even if we accept that sufficient safeguard processes have been established via the amendments to the AFP National Guideline, we have grave concerns that they are not being followed, given the revelations about information sharing with Myanmar.

2016 Recommendation 2(b)

Recommendation 2(b) (made May 2016)

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

- b) explicitly applying the Guideline to all persons, not just Australian citizens;**

Government Response (March 2017)

Accepted: *The Guideline currently applies to all persons, not just Australian citizens.*

The AFP must consider relevant factors before providing information to foreign law enforcement agencies if it is aware the provision of information is likely to result in the prosecution of an identified person, regardless of nationality, for an offence carrying the death penalty. A person's nationality is taken into account only in the context of consideration of any legal or prosecutorial provisions that may apply.

⁴⁷ *Narcotic Drug and Psychotropic Substances Law*, arts. 20, 22-23, No. 1 of 1993 (Myanmar).

⁴⁸ Australian Federal Police, Senate Standing Committee on Legal and Constitutional Affairs, *Response to Question on Notice: BE23-096 - Myanmar Mutual Assistance Request (25 May 2023)* <<https://www.afp.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId6-EstimatesRoundId21-PortfolioId5-QuestionNumber95>>.

62. The Committee noted that the wording of the previous AFP National Guideline indicated that the guideline applied to all persons, but that nationality was a factor taken into consideration when deciding whether to provide information.⁴⁹
63. The revised AFP National Guideline no longer lists nationality as a factor to be taken into consideration, and the introduction has been expanded to state:
- This guideline governs police-to-police assistance and cooperation, including sharing information, in situations where an identified person/s, *regardless of nationality*, may be exposed to the death penalty.⁵⁰
64. This makes it clear from the outset that the revised AFP National Guideline applies to all persons, not just Australian citizens.

2016 Recommendation 2(c)

Recommendation 2(c) (made May 2016)

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

- c) ***including a requirement that the AFP seek assurances from foreign law enforcement bodies that the death penalty will not be sought or applied if information is provided;***

Government Response (March 2017)

Noted: *The Government notes that foreign law enforcement partners cannot themselves provide binding assurances that the death penalty will not be applied if information is provided. This is outside the role and responsibility of police and law enforcement agencies. In the instances where assurances have been provided to Australia, they have usually occurred at Ministerial level.*

The Government has and will continue to seek Ministerial assurances in appropriate cases where it is clear that the death penalty is likely to be imposed. In practical terms some factors can prevent this occurring, including:

- *in some limited circumstances, where the AFP is engaging with operational law enforcement representatives in high risk, time-critical situations, seeking binding assurances could jeopardise investigative outcomes. This may hamper the AFP's ability to combat transnational organised crime at its source, causing significant harm to Australia and its citizens; and*
- *in many instances when it is not clear whether a death penalty offence may be applicable. Information requests can come at an early stage of an investigation when an investigation is yet to identify crime types or all persons of interest.*

65. Several witnesses to the previous inquiry suggested that the AFP should require assurances from foreign counterparts that the death penalty will not be sought or imposed before providing information, except in emergency circumstances.⁵¹

⁴⁹ 2016 Committee report (n 17) 78 [4.18].

⁵⁰ AFP National Guideline (n 37) 1 (emphasis added).

⁵¹ 2016 Committee report (n 17) 54-55 [4.27], 57-58 [4.40].

66. The AFP's submission to the inquiry stated that the 'AFP has and will continue to seek assurances to [sic] foreign law enforcement partners that the death penalty will not be sought prior to the provision of information.'⁵²
67. At a public hearing for the inquiry, the then-Deputy Commissioner for the AFP, Leanne Close, stated that she did not have any examples of situations in which seeking an assurance that a person would not be executed for an offence had jeopardised the AFP's working relationships with overseas partners.⁵³ Yet Deputy Commissioner Close also noted that suggestions that information sharing be prohibited for certain offences, such as drug-related matters would 'severely limit' the AFP's capacity to 'stop those crime types and the drugs entering Australia'.⁵⁴
68. The 2016 Committee report noted that the United Kingdom (UK) Foreign and Commonwealth Office's submission suggested that:
- The UK's position in relation to police-to-police assistance is stronger than Australia's... before providing information, the UK authorities 'are generally unable to assist foreign prosecutions when [they] cannot rule out the possibility that the death penalty might result'.⁵⁵
- The Report also noted that Norway was understood to have similar prohibitions in place.⁵⁶
69. In a supplementary submission to the inquiry, the AFP indicated that it would work towards a similar approach to that of the United Kingdom.⁵⁷ Yet the Government response to sub-recommendation 2(c) is unsatisfactory and suggests no such approach was being contemplated.
70. The revised AFP National Guideline has not been updated to include a requirement that the AFP seek assurances from foreign law enforcement bodies that the death penalty will not be sought or applied if information is provided. It does, however, contain processes for reviewing information requests based on a risk categorisation of exposure to the death penalty.
71. We believe that sub-recommendation 2(c) sought to balance Australia's position opposing the death penalty with the risk of harm to the Australian community if information is not provided, for example in preventing drug crime. In negotiating the provision of information, the AFP should be able to express its expectation that their foreign counterparts resist the imposition of the death penalty.
72. However, the AFP does not appear to have the power to request such assurances and, despite the UK approach suggesting otherwise, the Government appears to take the view that foreign law enforcement agencies do not have the power to make such assurances.

⁵² Australian Federal Police, Submission No 22 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Australia's Advocacy for the Abolition of the Death Penalty* (September 2015) 7.

⁵³ Australian Government, 'Australian Government Response to the Joint Standing Committee on Foreign Affairs, Defence and Trade Report: A world without the death penalty: Australia's Advocacy for the Abolition of the Death Penalty' (March 2017) 59 [4.46] ('Australian Government Response 2017').

⁵⁴ Ibid 59 [4.45].

⁵⁵ Ibid 63 [4.63].

⁵⁶ Ibid 63 [4.64].

⁵⁷ Ibid 62 [4.57].

73. There is limited public information about whether, since the 2016 Committee Report, assurances have been sought at the AFP or Ministerial level in cases where it is clear that the death penalty is likely to be imposed. This is likely because of the sensitivity of such cases.
74. In May 2023, Ian McCartney APM, AFP Deputy Commissioner, National Security, made comments in Senate Estimates about the risk categorisation process, including that, '... we take these matters incredibly seriously, in ensuring that we have an appropriate process in place to handle, in effect, the proposed exchange of information with countries at that time.'⁵⁸ Mr McCartney and other senior AFP personnel present before Senate Estimates did not specifically refer to any process for seeking assurances regarding the death penalty prior to information being provided.
75. Information sharing treaties entered into by Australia in recent years indicate that assurances continue to be sought, at least at the Ministerial level.
76. For example, the *Agreement between the Government of Australia and the Government of the United States of America on Access to Electronic Data for the Purpose of Countering Serious Crime*, signed in December 2021, requires the United States to seek Australia's permission before using information provided by Australia in a manner inconsistent with Australia's essential interests (i.e., if the information is used in a prosecution for which the death penalty is sought). Australia may impose conditions on such permission.⁵⁹ Andrew Warnes, the First Assistant Secretary, Electronic Surveillance and Law Enforcement Policy Division, Attorney-General's Department, told the Joint Standing Committee on Treaties:

There are also strong safeguards in relation to the use of Australian sourced data in prosecutions that could result in the death penalty. Permission must be sought for the use of the data from the Australian Government before such data could be used in a prosecution for an offence carrying the death penalty. Consistent with longstanding government policy and the approach in mutual legal assistance, it's expected that this permission would only be given in exceptional circumstances. Those exceptional circumstances would be usually where that information is exculpatory or that an assurance was given by the United States that the death penalty was not to be sought in that prosecution or the death penalty was not to be imposed.⁶⁰

77. The United Kingdom's Overseas and Security Justice Assistance Guidance is an example of a position that the Australian Government could adopt in relation to the AFP. It applies to:

All departmental and agency leads for proposed assistance work and officials making decisions on UK justice and security assistance overseas, including where the engagement is undertaken by external agencies on behalf of a department or agency and/or with UK funding or endorsement.⁶¹

⁵⁸ McCartney (n 43).

⁵⁹ *Agreement between the Government of Australia and the Government of the United States of America on Access to Electronic Data for the Purpose of Countering Serious Crime*, Australia–United States of America, signed 15 December 2021 (entered into force 31 January 2024) art 9(4).

⁶⁰ Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Canberra, 14 September 2022, 3 (Andrew Warnes, First Assistant Secretary, Electronic Surveillance and Law Enforcement Policy Division, Attorney-General's Department).

⁶¹ HM Government, *Overseas and Security Justice Assistance: Human Rights Guidance* (2017) 4 [8] <https://assets.publishing.service.gov.uk/media/5a81781be5274a2e87dbdcc0/OSJA_Guidance_2017.pdf>.

The Overseas and Security Justice Assistance Guidance specifically applies to police.⁶²

78. At step 9 of 'Stage 3: Mitigate risks', the guidance states:

Written assurances should be sought before agreeing to the provision of assistance that anyone found guilty would not face the death penalty.

Where no assurances are forthcoming or where there are strong reasons not to seek assurances, the case should automatically be deemed High Risk and Ministers should be consulted to determine whether, given the specific circumstances of the case, we should nevertheless provide assistance.⁶³

***Recommendation 2:** That the Australian Government legislate against the AFP sharing information in situations that could result in the death penalty. Should this be rejected, it is recommended that – at minimum – the AFP be directed to revisit sub-recommendation 2(c) of the 2016 Committee report and amend the AFP National Guideline on International Police-to-Police Assistance in Death Penalty Situations to include a requirement that the AFP seek assurances from foreign law enforcement bodies that the death penalty will not be sought or applied if information is provided.*

2016 Recommendation 2(d)

Recommendation 2(d) (made May 2016)

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

- d) including a provision that, in cases where the AFP deems that there is a 'high risk' of exposure to the death penalty, such cases be directed to the Minister for decision;**

Government Response (March 2017)

***Accepted in principle:** Under Section 37 of the Australian Federal Police Act 1979 the Commissioner controls the operations of the AFP. It is essential that law enforcement operations retain a measure of discretionary operational decision-making to effectively balance competing considerations, namely the preservation of public safety and the disruption of crime impacting the Australian community. As a result, decision-making in the pre-arrest phase is best made within the AFP.*

Ministerial approval is currently required to provide information to foreign law enforcement agencies in any case where a person has been arrested or detained for, charged with, or convicted of, an offence which carries the death penalty.

79. The 2016 Committee report acknowledged community concerns regarding:

- a. the AFP's practices of sharing information with foreign law enforcement bodies in cases which may lead to the death penalty being imposed; and
- b. that the need to tackle transnational crime cannot override the need to uphold human rights obligations.⁶⁴

⁶² HM Government (n 61) 5 [9].

⁶³ Ibid 22.

⁶⁴ 2016 Committee report (n 17) 61 [4.54].

80. One of the issues raised in the 2016 Committee report was the AFP's ability to make such decisions without independent oversight.⁶⁵ To alleviate concern in cases where there is a high risk of the death penalty being imposed, the Committee recommended that such cases should be directed to the Minister for decision.
81. Sub-recommendation 2(d) was only 'accepted in principle' and it was not incorporated in the revised version of the AFP National Guideline.
82. The AFP National Guideline separates the provision of assistance and cooperation into two categories:
- pre-arrest, which relates to assistance and cooperation before detention, arrest, charge or conviction; and
 - post-arrest, which relates to assistance after detention, arrest, charge or conviction.
83. Ministerial approval is not required for any pre-arrest cases where the provision of assistance or cooperation with a foreign law enforcement agency is likely to result in an identified person, regardless of nationality, being detained, arrested, charged or prosecuted for an offence carrying the death penalty. This corresponds with the Government's response that decisions in the pre-arrest phase are best made within the AFP.
84. If the AFP is aware that the provision of assistance will likely result in a prosecution for an offence carrying the death penalty, additional steps are now required to be followed. However, in the initial stage of the pre-arrest process, the AFP National Guideline contains no express requirement for the AFP appointee to assess the risk of exposure to the death penalty. This therefore creates the risk the additional steps will not be triggered.
85. If it is not appropriate for all 'high risk' pre-arrest cases to require Ministerial approval, a requirement to inform Ministers of such cases could be included within the process. This may provide an additional safeguard to ensure Ministers are, at a minimum, made aware of cases categorised as high risk.
86. Ministerial approval is always required for post-arrest cases in which an identified person, regardless of nationality, has been arrested or detained for, charged with, or convicted of, an offence which carries the death penalty.
87. We believe that the vastly different practices in criminal investigation processes and arrest frameworks and thresholds in retentionist states' jurisdictions makes the distinction between pre-arrest and post-arrest cases artificial and potentially harmful. It undermines the safeguard of the Ministerial approval requirement and increases the likelihood of the AFP inadvertently sharing information that leads to a person being convicted of a death-eligible offence.

⁶⁵ 2016 Committee report (n 17) 58 [4.42].

2016 Recommendation 2(e)

Recommendation 2(e) (made May 2016)

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

- e) **articulating the criteria used by the AFP to determine whether requests are ranked 'high', 'medium' or 'low' risk.**

Government Response (March 2017)

Accepted: The Guideline is currently being reviewed and will reflect this in the revised version.

88. Sub-recommendation 2(e) was made by the Committee following the AFP:

- a. providing information in its submissions to the inquiry about allocating risk levels to relevant approved requests for police-to-police assistance in the years 2013 to 2015,⁶⁶ but with no corresponding details on the criteria used by the AFP to determine the risk category; and
- b. revealing in its submission that it was currently reviewing the AFP National Guideline and intending to adopt a risk assessment model.

89. The 2016 Committee report acknowledged that the AFP National Guideline and policies at the time did not prohibit the AFP from exposing people to the death penalty in foreign jurisdictions. However, the Committee believed the AFP took these matters seriously and was encouraged to see that the AFP was reviewing the AFP National Guideline.⁶⁷

90. The revised AFP National Guideline incorporates a detailed explanation of what the AFP considers to be low, medium and high-risk cases, as extracted in Table 3 below.

Table 3: Risk categories in the revised AFP National Guideline

Category	Description
Low Risk	"Involves the provision of assistance to, including the release of information, or cooperation with, a foreign law enforcement agency where the nature of the investigation is such that there are few confirmed facts or details about the suspected criminal conduct. The provision of assistance in such matters is generally for the purpose of identifying possible lines of inquiry to assist investigations in Australia and/or in other countries, or to promote the commencement of an investigation overseas. Examples of information that may be shared in low risk releases include: details of a consignor and/or consignee, call charge records, telecommunication subscriber checks, criminal records, operational intelligence, movement checks, financial records, and personal indices."
Medium Risk	"Involves the provision of assistance to, including the release of information, or cooperation with, a foreign law enforcement agency which is likely to result in the identification of an

⁶⁶ 2016 Committee report (n 17) 61 [4.54].

⁶⁷ Ibid 78 [4.141].

Category	Description
	offender who may be detained, arrested, charged or prosecuted for a death penalty offence or the immediate detection of criminal offences which may carry the death penalty. It includes requests where direct contact, overt or covert is sought, such as surveillance or undercover operations."
High Risk	"Involves the release of significant inculpatory information or the provision of assistance to a foreign law enforcement agency which is likely to be used in or to lead to the detention, arrest, charge or prosecution of an identified person/s for a death penalty offence. In some instances, the AFP may release information assessed as 'high risk' to a foreign law enforcement agency because the delegate considers the release necessary to prevent a serious offence to a person, to protect an innocent agent, or to prevent significant harm to society."

91. The AFP made two submissions to the previous inquiry; an initial submission, and a supplementary submission. Within the supplementary submission the AFP stated that:

As part of our current review of the National Guideline the intention is that the AFP will work towards a similar approach to that of the UK, but in the short term, adopt a risk assessment model modified to support death penalty deliberations in an Australian enforcement context.⁶⁸

92. The approach adopted by the UK in the Overseas Security and Justice Assistance Guidance relates to assessing human rights and international humanitarian law risks prior to providing justice or security assistance.⁶⁹

93. In contrast, the approach of the AFP is to have specific guidelines on international police-to-police assistance in death penalty situations. As such, the two approaches are not directly comparable.

94. The UK approach involves four stages:

- a. Assess – assessing the situation in the relevant foreign country, including its attitude towards human rights and international humanitarian law;
- b. Identify – identify the risks posed to human rights and international humanitarian law associated with the proposed assistance;
- c. Mitigate – consider what (if any) steps can be taken in order to mitigate these risks (including seeking assurances of compliance with human rights and international humanitarian law); and
- d. Strengthen – consider whether the assistance will strengthen security, justice and human rights i.e. is there a serious risk that the assistance will directly or significantly contribute to a human rights violation?⁷⁰

95. The Overseas Security and Justice Assistance Guidance includes a mandatory checklist for officials to consider in their approach to assisting foreign authorities which may lead to

⁶⁸ Australian Federal Police, Supplementary Submission No 22.1 to Joint Standing Committee on Foreign Affairs Defence and Trade, Parliament of Australia, *Inquiry into Australia's Advocacy of the Death Penalty Submission by the Australian Federal Police* (January 2016) 11.

⁶⁹ HM Government (n 61) 4.

⁷⁰ Ibid 3.

individuals being identified, interviewed, investigated or detained. Officials must consider several factors, including:

- a. the nature of the proposed assistance;
- b. the beneficiaries of the information;
- c. the nature of the UK's relationship with the relevant institution;
- d. any human rights concerns with the relevant institution;
- e. whether the assistance might directly or significantly contribute to a human rights violation; and
- f. whether there is any reputational or political risk from providing the assistance.

96. The official is required to consider if there is a serious risk that the assistance might directly or significantly contribute to a violation of human rights or international humanitarian law and how effective any mitigation will be in managing the risk.⁷¹

97. The risk model has been split into three categories – low, medium and high risk. Depending on the risk category, the action required to be taken by the relevant officer will differ, acknowledging a difference in approach is required to deal with different risk categories.⁷²

98. Significantly, it is noted within the Overseas Security and Justice Assistance Guidance that, where no assurances can be provided by the foreign law enforcement agency that any assistance provided will not result in anyone found guilty facing the death penalty, or where there are strong reasons not to seek such assurances, the case is automatically classed as high risk and ministers must be consulted to determine whether it is appropriate to provide assistance. As such, the UK Government treats any cases where there is a possibility of the death penalty being imposed as a serious case, as shown in Table 4 below.

Table 4: Risk categories in the Overseas Security and Justice Assistance Guidance (UK model)

Category	Description
Low risk	Less than a serious risk that the assistance might directly or significantly contribute to a violation of human rights with little or no political or reputational political risk.
Medium risk	A serious risk that the assistance might directly or significantly contribute to a violation of human rights with some reputational or political risk, but both can effectively be mitigated.
High Risk	Serious risk that the assistance might directly or significantly contribute to a violation of human rights with serious reputational or political risk, but both cannot be effectively mitigated. In all high risk cases, the official must consult Ministers unless ministerial approval has already been given for this activity with this unit/institution and nothing material has changed. ⁷³

⁷¹ HM Government (n 61) 24.

⁷² Ibid.

⁷³ Ibid.

99. Observations regarding the differences between the Overseas Security and Justice Assistance Guidance in the UK and the revised AFP National Guideline include:
- a. The Overseas Security and Justice Assistance Guidance and AFP National Guideline require consideration of similar factors by a senior decision-maker.
 - b. The Overseas Security and Justice Assistance Guidance requires consideration of how the serious risk of human rights violations could be mitigated, which is not considered by the AFP National Guideline.
 - c. The risk categories set out in the AFP National Guideline includes criteria regarding the type of investigation being carried out and is not just linked to whether there is a risk that the assistance is likely to expose a person to the death penalty. Including such information provides context for the relevant decision-maker in applying the risk categories.
 - d. The threshold under the AFP National Guideline is arguably wider than the Overseas Security and Justice Assistance Guidance, as the assistance or cooperation must be *likely to result* in or lead to exposing a person to the death penalty, rather than *directly* or *significantly contribute to* a violation of human rights (including the death penalty).
 - e. Under the AFP National Guideline, the risk categories are only used to assist the International Assistant Commissioner and the Sensitive Investigations Oversight Board in considering a Death Penalty Request. The process is the same regardless of whether the provision of assistance or cooperation is categorised as low, medium or high risk. This provides consistency of approach. This is in contrast to the UK model where the risk category determines the appropriate seniority of the reviewer, with all high-risk cases reviewed by Ministers.
100. Recommendation 2(e) has arguably been completed through the inclusion of the criteria for risk categorisation in the revised AFP National Guideline. Further, the guideline sets out a clear process for escalating matters deemed to be death penalty requests to the Sensitive Investigations Oversight Board.
101. However, given the known example of the AFP sharing 296 pieces of intelligence in relation to drug exportation in Myanmar – a country with the mandatory death penalty for certain drug offences – we have concerns about whether the process is being implemented correctly, particularly for pre-arrest matters.
102. Prior to a request for police-to-police assistance being put to the Sensitive Investigations Oversight Board, there are many steps where a decision may be made that the request does not need Board oversight. We would like the Subcommittee to question the AFP about how many requests *begin* the ‘Death Penalty Request process’ outlined under section 9 of the AFP National Guideline, but do not make it to step 7, where the Sensitive Investigations Oversight Board would become the decision-maker on the request.
103. Further, we are concerned that a request will only be put through the ‘Death Penalty Request process’ if ‘an AFP appointee is aware that the provision of assistance will *likely* result in the prosecution of an identified person/s for an offence carrying the death penalty’.⁷⁴ We would

⁷⁴ AFP National Guideline (n 37) section 9.1 (emphasis added).

like the Subcommittee to question the AFP about how an assessment of likelihood is determined.

2016 Recommendation 3

Recommendation 3 (made May 2016)

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

Government Response (March 2017)

Not Accepted: *The Government notes that foreign law enforcement partners cannot themselves provide binding assurances that the death penalty will not be applied if information is provided. An undertaking from a prosecutor not to seek to apply the death penalty may not be reliable where a Court can still impose the death penalty. Generally speaking, the Government does not consider it appropriate to seek, or rely on, an undertaking from a prosecutor. In the instances where assurances have been provided to Australia, they have usually occurred at Ministerial level.*

Combatting serious drug crimes is a high priority for the Government and the Government's ability to detect, deter and prevent drug crimes would be impeded if Australia could not cooperate with states in the region that retain the death penalty. An inability to cooperate with foreign law enforcement partners poses risk of harm to the Australian community and significant impact to society.

Although desirable, some states will not agree to a blanket assurance that the death penalty will not be applied where convictions result from cooperation with Australia.

The National Guideline on International Police-to-Police Assistance in Death Penalty Situations is the most appropriate way to balance the need for effective cooperation on transnational crime and the commitment to protecting individuals from the death penalty.

The Department of Foreign Affairs and Trade will continue diplomatic efforts to encourage states to abolish the death penalty.

104. The Government response to Recommendation 3 – the only recommendation that was rejected outright – focused on the questionable reliability of any assurance or undertaking provided by a prosecutor in a retentionist country.
105. Given the predominance in our region for the death penalty to be applied for drug crimes and the AFP's prioritisation of combating serious drug crimes, it is inescapable that information requests to the AFP from foreign police forces will seek information to support prosecutions in such matters. As such, there is significant cross-over with our discussion above on Recommendation 2 – where we have covered Australia's practice regarding the AFP seeking assurances from foreign law enforcement bodies in relation to death penalty matters, and we would seek to avoid repetition here.
106. Further, the capacity to comment on how the AFP negotiates with prosecutors in retentionist countries, in practice, is limited. We have not been able to locate specific commentary regarding seeking undertakings or assurances from prosecutors in retentionist countries.
107. However, we do wish to reiterate for this inquiry that the submitting organisations do not accept any arguments that drug-related crimes can be considered among the 'most serious

crimes' under the ICCPR. We reject assertions that the death penalty works as an effective deterrent to drug crimes, or that there is any credible evidence to support such assertions.

108. We note the statement of the Hon Tim Watts MP, the Assistant Minister for Foreign Affairs, given on behalf of Australia, Canada and New Zealand on a high-level panel on the death penalty at the 52nd UN Human Rights Council (HRC) session in February 2023. Mr Watts stated that Australia 'particularly condemn[s]' the use of the death penalty 'for crimes which do not meet the threshold of "most serious" crimes' and further stated that the 'death penalty must never be imposed' for drug offences.⁷⁵
109. We also note that both the OHCHR and the UN HRC have raised concerns specifically in relation to Australia's failure to prohibit 'the provision of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state, in violation of the State party's obligation under the ICCPR Second Optional Protocol.'⁷⁶
110. As with our recommendation under our review of the implementation of Recommendation 1, this is an area where the Australian Government must take steps to fully implement recommendations of the United Nations human rights mechanisms.
111. We reiterate the recommendation made under our discussion of Recommendation 2 that the Australian Government should – whether through legislative amendments or directing the AFP to review the AFP National Guideline – prohibit the AFP from sharing information on drug crimes with countries that retain the death penalty for such crimes.

2016 Recommendation 4

Recommendation 4 (made May 2016)

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'.

Government Response (March 2017)

Accepted: *That decision will be reconsidered in the context of developing the whole-of-government strategy on advocacy for the abolition of the death penalty (see recommendation 8).*

112. This recommendation was prompted by the World Coalition Against the Death Penalty (WCADP), in their submission to the previous inquiry, calling on the Australian Government to reconsider their decision not to join the Friends of the Protocol.⁷⁷

⁷⁵ Australia, CANZ Statement on High-Level Panel on the Death Penalty, UN HRC, 52nd sess (28 February 2023) (the Hon Tim Watts MP) <<https://www.dfat.gov.au/international-relations/canz-statement-high-level-panel-death-penalty-28-february-2023-aus-led>> (emphasis added).

⁷⁶ OHCHR Submission No 49 (n 16) [24].

⁷⁷ 2016 Committee report (n 17) 83 [5.11]-[5.13].

CAPITAL PUNISHMENT
JUSTICE PROJECT



113. The Friends of the Protocol is a group of like-minded countries, including Belgium, Chile, France, Norway, Spain and Switzerland, that formally support the campaign for full ratification of the Second Optional Protocol to the ICCPR.
114. WCADP's submission stated that 'Australia's unique geographic position places it in a crucial situation for the abolition of the death penalty in Asia-Pacific' and recognised Australia's 'influence' in the region.⁷⁸
115. Having identified that 'non-European countries needed to be part of' the Friends of the Protocol, WCADP had invited Australia to join as 'the logical choice'. WCADP also argued that a 'clear benefit of being part of this select group is the extra weight that will be given to Australia's representations against the death penalty during bilateral discussions.'⁷⁹
116. Australia subsequently joined the Friends of the Protocol and is now recognised as an important participant in the group's meetings and activities. Australia's Permanent Mission to the UN in Geneva has hosted meetings of the Friends of the Protocol, chaired by WCADP, and Australia continues to play a significant role in advancing the group's objectives.
117. WCADP is currently striving to ensure that the Friends of the Protocol has more diverse, cross-regional participation from UN Member States. All countries who have ratified the Second Optional Protocol are immediately eligible to join and are encouraged to participate as active members of the group. Invitations to observe may also be extended to countries who have taken steps to bring about moratorium conditions, and for whom abolition of the death penalty is a distinct possibility.
118. WCADP is working with the Australian Permanent Mission to the UN, and other existing members, to substantially expand the membership base of the Friends of the Protocol, to better reflect the group's ambitions for the global eradication of the death penalty. Australia's ongoing commitment, and support for the group is particularly notable in this context.
119. Regarding the working practices of the group, WCADP utilises the Friends of the Protocol to relay current information and advice from the field that may have an impact upon the campaign to secure universal ratification of the Second Optional Protocol.
120. Priority is given to coordination ahead of important international meetings and events, including sessions concerning the UN Human Rights Council's Resolution on the Question of the Death Penalty, the UN General Assembly's Resolution Calling for a Moratorium on the Death Penalty, sessions of the Universal Periodic Review Working Group where retentionist states are reviewed, consultations ahead of the UN Secretary-General's calls for contributions, and sessions during which the biennial high-level panel on the death penalty is convened.
121. With the support of Eleos Justice, Monash University, digital systems for information sharing and cooperation are being developed to enhance decision making within this group. Terms of Reference have been adopted to reflect these measures.

⁷⁸ WCADP Submission No 36 (n 6) 1-2.

⁷⁹ Ibid.

122. The Friends of the Protocol is regarded as a valuable resource for abolitionist states, and the information generated within the group has the potential to fast-track thematic preparation for relevant UN sessions, and handover processes within permanent missions.
123. Members utilise the information and resources generated within the group to inform their own national, bilateral and multilateral actions. The Friends of the Protocol may:
- Issue statements if agreed by all members;
 - Develop systematic recommendations for the UPR of relevant member states, on a country-by-country basis;
 - Utilise the group for consultation concerning the drafting, introduction and adoption of relevant resolutions; and
 - Participate in events at the UN General Assembly, UN Commission on Narcotic Drugs, or UN Human Rights Council, including those organised by civil society.
124. Australia should continue to lead in the adoption of these working practices within the Friends of the Protocol Group, with the support of its civil society counterparts, and should also prioritise the successful expansion of the group's membership among eligible states.

2016 Recommendation 5

Recommendation 5 (made May 2016)

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.

Government Response (March 2017)

Accepted: *Guidelines have been finalised and will be attached to DFAT's internal Consular Policy Handbook.*

125. The 2016 Committee report noted that a number of witnesses to their inquiry submitted that the Australian Government could do more to assist Australian citizens at risk of facing the death penalty overseas, including by establishing a more formalised process for handling death penalty cases.⁸⁰
126. To the best of our knowledge, the guidelines referred to in the Government's response to Recommendation 5, and the Consular Policy Handbook to which they are attached, are internal DFAT documents and are not publicly available, therefore we cannot comment specifically on the guidelines or their utility in meeting the aims of this recommendation.

⁸⁰ 2016 Committee report (n 17) 99-101 [5.80]-[5.87].

CAPITAL PUNISHMENT
JUSTICE PROJECT



127. Australian citizens for whom diplomatic representations are known to have been made by Members of Parliament, due to media coverage, include Dr Yang Hengjun (given a suspended death sentence in China for espionage in February 2024), Mr Gregor Haas (arrested in the Philippines in May 2024 at the request of Indonesian authorities for alleged drug trafficking), and Mr Karm Gillespie (sentenced to death in China in 2020 for drug trafficking).
128. Having supported the final appeal of Australian man, Mr Luke Cook, after he was arrested in Thailand in December 2017 and sentenced to death 11 months later in November 2018 for drug-related charges, CPJP can briefly comment on Mr Cook's experience of support provided by the Australian Government.
129. When CPJP got involved in March 2020, Mr Cook's death sentence had been upheld on appeal and he had one final opportunity to appeal his case to the Supreme Court of Thailand. To ensure the court was informed about serious concerns regarding the evidence in his case, CPJP and the then co-chairs of the Australian Parliamentarians Against the Death Penalty Group, Senator Dean Smith and Mr Chris Hayes MP, co-signed and submitted an amicus curiae (or 'friend of the court') brief to the court. This brief highlighted the weaknesses in the prosecution's case and the human rights violations endured.
130. Mr Cook also received support from the Australian Ambassador to Thailand at that time, Mr Allan McKinnon PSM, who joined him in the prison for the appeal, which took place during the Covid-19 pandemic, when many other officials avoided visiting. Having Mr McKinnon there made a huge difference to Mr Cook's morale, and he believes it also impacted the outcome of his case by showing that the Australian Government was bearing witness.
131. The court ultimately found that the convictions of Mr Cook and his two co-defendants were obtained and founded on unreliable evidence and all three were exonerated and immediately released in September 2021, after spending almost four years in prison.
132. This approach of using an amicus curiae brief and working with the Australian Parliamentarians Against the Death Penalty Group brought to life the 2018 Strategy. It has also created a precedent for future intervention by the Australian Government, where it could be beneficial to an individual's legal position and to the issues.
133. Reflecting on Mr Cook's experience, his sister, Wendy Durrant, in mid-2023, acknowledged the support provided to him by Mr Hayes MP, Senator Smith and CPJP. Ms Durrant said 'knowing that without all the work they did and their help, our family could still be fighting for you today and you could still be in that hellish place, makes me overwhelmingly grateful to them all. It really makes me proud to be an Australian.'
134. However, the process to secure financial assistance for legal costs was so arduous that Mr Cook's initial trial had already concluded – and he had been given the death penalty – before funding was approved. In reflecting on this in an email to Mr Cook and CPJP, Ms Durrant said:

The Financial Assistance Office took such a long time to agree to the assistance, weeks and weeks, and gave our family so many difficult hurdles to overcome in providing them information to prove you were a good citizen and not a criminal (bank statements, after the bank had closed your accounts, your house title, employer payment slips, superannuation details, proof that you paid child

support etc etc) ... it simply took them too long ... we were begging them for the assistance before and whilst the first trial was going on so that you could have an English speaking lawyer in the courtroom assisting with your case ... the day they gave us the word that they would provide assistance was too late ... the trial was over and you had been given the death penalty. I have always believed that if their assistance came earlier, and we were able to use our English speaking legal team to present the court with the defence evidence that we had all worked so hard to gather during the first trial, the outcome could have been much different and the cost to the Australian government would have been much less than the cost of funding the legal team to mount the two subsequent appeals.

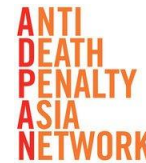
135. While all cases are unique, the importance of securing funding for legal assistance in the very early stages of arrest, interrogation and charge is not. This is a critical stage when opportunities can be lost without adequate legal representation, such as disputing unreliable evidence in Mr Cook's case, or, in other cases, gathering key evidence that is time-bound such as phone records or psychiatric assessments, or being appropriately informed of concessions available for early pleas.
136. This is not to deny the empathy and hard work we have observed from those who process such claims. However, consideration should be given to amending the process so that a sum of immediate, emergency funding can be provided upon arrest so that a person potentially facing the death penalty can retain appropriate legal representation from the start. This need not be a 'blank cheque', and it could include requirements for repayment if the funding application is ultimately rejected.

Recommendation 3: That the Australian Government, via the Attorney-General's Department, should consider making emergency legal assistance funding available immediately (and with minimal bureaucracy involved) upon the arrest of an Australian citizen for a death penalty eligible offence, to ensure adequate legal representation can be secured.

137. In the 2016 report, the Committee was confident that death penalty cases involving Australians are treated 'with urgency and seriousness' by consular officials and DFAT, yet believed there was 'scope to ensure a more consistent and proactive approach to assisting those exposed to this risk in foreign jurisdictions.'⁸¹ The Committee provided a list of how this could be achieved at point 5.134 in their report.
138. While Recommendation 5 encouraged DFAT to develop guidelines for how they support Australians at risk of facing the death penalty overseas, the recommendation used much higher-level language than the list. Some of the concerns that prompted that list still remain, particularly issues around identifying appropriate local lawyers to represent Australians in cases that are literally a matter of life or death. Assistance in securing local legal representation is discussed further in our response to Terms of Reference 3.

⁸¹ 2016 Committee report (n 17) 111 [5.134].

CAPITAL PUNISHMENT
JUSTICE PROJECT



139. It is our view that the Subcommittee should turn the list from point 5.134 in the 2016 Committee report into a recommendation for DFAT, as adapted below:

***Recommendation 4 (part 1):** That DFAT, in collaboration with Australian embassies, consulates and representative offices in retentionist countries, improve their approach to assisting Australians exposed to the risk of the death penalty in foreign jurisdictions, by:*

- *conducting appropriate intervention and advocacy at the earliest possible stages in all cases;*
- *ensuring the list of lawyers provided to detainees who are at risk of facing the death penalty is regularly reviewed and quality-assured;*
- *partnering more closely with NGOs, CSOs, lawyers, and other service providers to ensure a strategic and coordinated approach to supporting Australians at risk;*
- *further adapting policies and practices governing the Scheme for Overseas Criminal Matters Involving the Death Penalty to ensure that lawyers working 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.⁸²*

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140. As discussed further in our response to Terms of Reference 3, developing strong relationships between Australian consular officials and anti-death penalty organisations could assist in many ways.

141. In the very early stages of a death penalty case involving an Australian, such organisations can help identify lawyers who have appropriate experience in defending capital cases. In turn, such lawyers can provide informed advice to financial decision-makers about the likelihood of the death penalty being sought and the anticipated cost to run a trial, both of which must be considered in approving grants for legal financial assistance under the Scheme for Overseas Criminal Matters involving the Death Penalty, which is administered by the Attorney-General's Department.

⁸² Note that the second part of Recommendation 4 is made under our response to Terms of Reference 3(b) (see page 63), which also relates to assistance provided to Australians facing the death penalty.

2016 Recommendation 6

Recommendation 6 (made May 2016)

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.*

Government Response (March 2017)

Accepted: *These arguments are already an integral part of the advocacy the Government undertakes in opposition to the death penalty.*

142. Generally, Australia advocates vocally for the abolition of the death penalty with a principled approach. This is particularly the case following the publication of the 2018 Strategy.⁸³ This advocacy is often based on human rights arguments, including the arguments specifically listed under Recommendation 6.

143. The Australian Government's stance on the death penalty is clear from its active engagement on this issue with the UN HRC, both during and outside of Australia's term on the UN HRC.

Australian approaches to advocacy for abolition of the death penalty

144. As part of Australia's candidacy to the UN HRC, it submitted and published its note verbale to the United Nations, which outlined its voluntary pledges and commitments.⁸⁴ Australia voluntarily pledged to:

- a. continue its strong commitment to the global abolition of the death penalty. Australia considers the application of the death penalty to be a violation of basic human rights, fundamentally incompatible with the right to life and potentially inconsistent with the right to be free from cruel, inhuman and degrading punishment; and
- b. develop and implement a whole-of-government strategy for advancing the global abolition of the death penalty, including efforts through the Human Rights Council.⁸⁵

145. Consistent with this voluntary pledge, Australia has continuously advocated for the abolition of the death penalty, particularly after being elected to the UN HRC for the 2018–2020 term.

⁸³ DFAT 2018 Strategy (n 2).

⁸⁴ Permanent Mission of Australia to the United Nations, *Note Verbale Dated 14 July 2017 from the Permanent Mission of Australia to the United Nations Addressed to the President of the General Assembly*, UN Doc A/72/212 (24 July 2017).

⁸⁵ *Ibid* 4.

146. The release of the 2018 Strategy also furthered Australia's standing on the issue, with Julian McMahon SC, barrister and CPJP Ambassador, describing it as 'an unprecedentedly strong policy stance advancing the international trend in favour of global abolition'.⁸⁶
147. Experts also view Australia's 2018 Strategy as bringing tangible benefits to the Australian Government. Dr Mai Sato, inaugural director of Eleos Justice, noted that it signified a new start for Australia in establishing itself as a committed anti-death penalty advocate.⁸⁷ Prior to the publication of the 2018 Strategy, discussions of the death penalty involving the Australian Government had a predominantly Australian focus, such as revolving around the case of Australian citizens Andrew Chan and Myuran Sukumaran, who were executed in Indonesia in 2015 for drug trafficking.⁸⁸
148. Commentators have viewed the publication of the 2018 Strategy as Australia showing its willingness to work and, if necessary, lead in the Asia-Pacific region on the issue of abolition; highlighting the importance of friendship with regional partners while maintaining a consistent approach to the death penalty and abolition.⁸⁹

Public statements on abolition based on human rights arguments

149. Table 5 below contains examples of public statements based on the seven human rights arguments listed in Recommendation 6. While the majority are from Australia's statements to the UN, others were made by the Australian Minister for Foreign Affairs and other public office holders on behalf of the Australian Government.

Table 5: Public statements on abolition based on human rights arguments

Human rights argument	Example statements
<i>References to human rights law, including highlighting the 'right to life' enshrined in the Universal Declaration of Human Rights.</i>	<p>In 2018, Chris Hayes, the then Federal Member for Fowler, spoke at a regional parliamentary seminar in Malaysia titled 'Standing against the Death Penalty in Asia'. He stated: 'The death penalty represents the violation of the most fundamental and basic human rights of all, that is, the 'right to life' itself, enshrined under international human rights law', citing Article 3 of the Universal Declaration of Human Rights and Article 6 of the ICCPR.⁹⁰</p> <p>In 2022, Australia and Costa Rica led the negotiations on the biennial global moratorium on the death penalty at the UN General Assembly. The Hon Penny Wong, the Australian Minister for Foreign Affairs, released a joint media statement with Arnaldo André Tinoco, Minister of Foreign Affairs and Worship of Costa Rica, stating: 'We oppose the death penalty at all times for</p>

⁸⁶ Julian McMahon, 'Anti-Death Penalty Advocacy: A Lawyer's View from Australia' (2022) 11(3) *International Journal for Crime, Justice and Social Democracy* 12, 18.

⁸⁷ Sato (n 1) 5.

⁸⁸ Ibid.

⁸⁹ McMahon (n 86).

⁹⁰ Chris Hayes, 'Standing against the Death Penalty in Asia' (Speech, Regional Parliamentary Seminar, 31 October 2018).

Human rights argument	Example statements
	all people. This is a matter of human rights and the inherent dignity of every human being. There is no evidence that capital punishment deters crime. ⁹¹
<i>Condemnation for the imposition of the death penalty on juveniles and pregnant women.</i>	<p>Australia, as part of a joint statement led by Denmark before the UN HRC in 2020, condemned Iran's ongoing use of the death penalty against juvenile offenders.⁹²</p> <p>Separately, in 2021, in a joint statement led by Denmark before the UN HRC, Australia opposed the death penalty being imposed on minors and for non-violent crimes.⁹³</p>
<i>Opposition to the use of the death penalty on people with mental or intellectual disabilities.</i>	<p>In 2021, as part of a statement for a high-level panel discussion on the death penalty before the UN HRC, Australia stated that the death penalty is used 'disproportionately against the poor, people with intellectual or mental disabilities, and minority groups'.⁹⁴</p> <p>In 2023, Australia delivered a statement on the death penalty on behalf of Australia, Canada and New Zealand before the UN HRC, stating: It is irrevocable, and disproportionately affects people living in poverty, people with intellectual disabilities, people living with drug or mental health problems, Indigenous Peoples, minorities and people with diverse sexual orientations and gender identities.⁹⁵</p>
<i>Highlighting the disproportionate use of capital punishment on the poor and ethnic and religious minorities.</i>	<p>In 2019, as part of a statement for a high-level panel discussion on the death penalty before the UN HRC, Australia noted: The death penalty is used disproportionately against the poor, people with disabilities, and minority groups. It is an affront to justice when those who are most in need of the protection of the law, should find themselves needing protection from the law.⁹⁶</p> <p>As part of a general debate before the UN HRC in 2019, Australia deplored the death penalty 'in all circumstances, and most particularly as a sentence for non-violent conduct, such as consensual same-sex relations, blasphemy, economic crimes and drugs offences'.⁹⁷</p> <p>Further, in 2021, as part of a joint statement led by Australia before the UN HRC, Australia called on states where the death penalty remains an available</p>

⁹¹ Penny Wong and Arnaldo André Tinoco, 'Record Support for Global Moratorium on the Death Penalty at the UN' (Joint Media Release, 16 December 2022) <<https://www.foreignminister.gov.au/minister/penny-wong/media-release/record-support-global-moratorium-death-penalty-un>>.

⁹² Australia, *Australian Statement: Interactive Dialogue with the Special Rapporteur on Iran*, UN HRC, 49th sess (17 March 2022); Germany, *Joint Statement Led by Germany on the Islamic Republic of Iran*, UN HRC, 45th sess (25 September 2020).

⁹³ Denmark, *Joint Statement Led by Denmark: The Human Rights Situation in the Kingdom of Saudi Arabia for the Item 2 General Debate*, UN HRC, 45th sess (23 February 2021).

⁹⁴ Australia, *Australian Statement: High Level Panel Discussion on the Death Penalty*, UN HRC, 46th sess (23 February 2021).

⁹⁵ Australia, *CANZ Statement on High-Level Panel on the Death Penalty* (n 75).

⁹⁶ Australia, *Australian Statement: High Level Panel Discussion on the Death Penalty*, UN HRC, 40th sess (26 February 2019).

⁹⁷ Australia, *Australian Statement: Item 3 General Debate*, UN HRC, 42nd sess (13 September 2019).

Human rights argument	Example statements
	punishment for blasphemy or apostasy to remove the possibility of that penalty being imposed or carried out, both in practice and in law. ⁹⁸
<i>Communicating the risks associated with miscarriages of justice, including the irreversibility of capital punishment.</i>	<p>As part of a statement for the high-level panel discussion on the death penalty before the UN HRC in 2019, Australia further stated that:</p> <ul style="list-style-type: none"> - the death penalty is irrevocable, and no legal system is free of error; - it denies any possibility of rehabilitation to the convicted individual; - there is no convincing evidence that it is a more effective deterrent than long-term or life imprisonment.⁹⁹ <p>Chris Hayes, in his 2018 speech, also stated: 'To me, capital punishment is the most cruel and inhumane response to crime. It is inevitably associated with the miscarriage of justice, the inadvertent execution of innocents and the disproportionate execution of the poor and ethnic religious minorities.'¹⁰⁰</p>
<i>Emphasising the inherently cruel and torturous nature of the death penalty and executions.</i>	While commenting on the resolution on the question of the death penalty during the 42 nd session of the UN HRC, Australia stated that the death penalty 'brutalises human society, is degrading, and is an affront to human dignity'. ¹⁰¹
<i>Referring to the ineffectiveness of the death penalty as a deterrent.</i>	Further to the excerpts of Chris Hayes' 2018 speech quoted above, he also cited multiple studies, research surveys and case studies to show that there is no credible evidence the death penalty is a deterrent for crime, stating: 'Most credible research indicates that capital punishment does not deter crime. The death penalty offers no observable change to criminal activity and only serves to satisfy the urge for vengeance.' ¹⁰²

Criticism over the Japan-Australia Reciprocal Access Agreement

150. Despite Australia's vocal engagement in advocating for the abolition of the death penalty, some may critique Australia's record, particularly in relation to the Australian Government entering into the Japan-Australia Reciprocal Access Agreement, which provides a legal framework for the Australian Defence Force and the Japan Self-Defence Forces to operate in each other's territories.¹⁰³
151. Japan is an active retentionist state that regularly imposes the death penalty. Under the Japan-Australia Reciprocal Access Agreement, if a member of the visiting force or civilian component

⁹⁸ Australia, *Joint Statement Led by Australia: Death Penalty as a Punishment for Blasphemy and Apostasy*, UN HRC, 46th sess (9 March 2021) <<https://www.dfat.gov.au/international-relations/themes/human-rights/hrc-statements/46th-session-human-rights-council/joint-statement-australia-death-penalty-blasphemy-apostasy>>.

⁹⁹ *Australian Statement: High Level Panel Discussion on the Death Penalty* (n 96).

¹⁰⁰ Hayes (n 90).

¹⁰¹ Australia, *Australia's General Comment at Action: HRC42 Resolution on the Question of the Death Penalty*, UN HRC, 42nd sess (27 September 2019).

¹⁰² Hayes (n 90).

¹⁰³ *Agreement between Australia and Japan concerning the Facilitation of Reciprocal Access and Cooperation between the Australian Defence Force and the Self-Defence Forces of Japan*, Japan–Australia, signed 6 January 2022 (entered into force 13 August 2023) ('Japan-Australia Agreement').

CAPITAL PUNISHMENT
JUSTICE PROJECT



- commits an offence within the receiving state that is punishable under the law of the receiving state, the authorities of the receiving state have criminal jurisdiction to deal with the matter.¹⁰⁴
152. As there is no blanket immunity under the agreement to protect Australian personnel from the death penalty in Japan, this leaves scope for a member of the Australian Defence Force or civilian component to be sentenced to death if they are convicted of a capital crime under Japanese law.¹⁰⁵
153. Dr Sato of Eleos Justice has stated that entering into an agreement with the full knowledge that the death penalty may be applied to its citizens is a clear breach of the 2018 Strategy and fundamentally inconsistent with Australia's ratification of the Second Optional Protocol.¹⁰⁶
154. As such, some view entering into this agreement as hypocrisy, and that the 2018 Strategy must be repeatedly reinforced and acted upon, whenever relevant, for Australia's advocacy to be truly effective, rather than a collection of platitudes.¹⁰⁷
155. Despite contributors to the consultative process prior to the signing of the Japan-Australia Reciprocal Access Agreement raising concerns about Japan's stance on the death penalty, the Joint Standing Committee on Treaties recommended that it be entered into, finding it to be consistent with Australia's stance on the death penalty and the 2018 Strategy.¹⁰⁸
156. The Joint Standing Committee further noted that while blanket immunity was not achieved in the Japan-Australia Reciprocal Access Agreement, 'considerable steps had been taken to protect Australian personnel from the death penalty in Japan while also maintaining Australia's international obligations'.¹⁰⁹ The Committee further stated that 'through the Annex [to the Japan-Australia Reciprocal Access Agreement] and Record of Discussion, Australia's opposition to the death penalty in all circumstances is clearly implied'.¹¹⁰

¹⁰⁴ Japan-Australia Agreement (n 103) art XXI(2)(b).

¹⁰⁵ Sato (n 1) 6.

¹⁰⁶ Ibid 7; Mai Sato et al, Submission to Joint Standing Committee on Treaties, *Agreement between Australia and Japan concerning the Facilitation of Reciprocal Access and Cooperation between the Australian Defence Force and the Self-Defence Forces of Japan* (23 March 2022) 4 [5].

¹⁰⁷ Sato (n 1) 7.

¹⁰⁸ Joint Standing Committee on Treaties, *Australia-Japan Reciprocal Access Agreement; Global Convention on the Recognition of Qualifications* (Report 203, November 2022) xiii, 41 [2.149].

¹⁰⁹ Ibid 40–1 [2.143].

¹¹⁰ Ibid 41 [2.144].

2016 Recommendation 7

Recommendation 7 (made May 2016)

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.*

Government Response (March 2017)

The Attorney-General's Department has reviewed the Commonwealth Guidelines for Legal Financial Assistance 2012 (the Guidelines) and is satisfied that the Guidelines in their present form, in combination with the Legal Assistance Branch's practice of assigning a case officer to a grant for the entirety of the grant, has resulted in achievement of the objectives stated in Recommendation 7.

157. On 2 July 2018, the Attorney-General's Department amended the *Commonwealth Guidelines for Legal Financial Assistance 2012*,¹¹¹ and the Serious Overseas Criminal Matters Scheme. The purpose of the amendments was to 'limit access to legal assistance under the Serious Overseas Criminal Matters Scheme to only those Australians overseas facing the death penalty, as well as introduc[e] additional stricter criteria for the Scheme'.¹¹²
158. Changes made to the Commonwealth Guidelines for Legal Financial Assistance 2012 include:
- a. Updating the 'Serious Overseas Criminal Matters Scheme' to the 'Scheme for Overseas Criminal Matters Involving the Death Penalty'.
 - b. Amending the purpose of both the 'Scheme for Overseas Criminal Matters Involving the Death Penalty' and the 'Special Circumstances Scheme'
 - c. Updating the 'special considerations' for non-statutory schemes. Decision-makers have historically considered:
 - i. the scheme's purpose;
 - ii. whether the applicant is a citizen or resident of Australia, or otherwise has a connection with Australia.
- Now, they must also consider:
- iii. whether the applicant has been the subject of criminal proceedings in Australia or overseas, and – if so – the gravity and nature of the conduct alleged against the applicant and the outcome of those proceedings;

¹¹¹ Attorney-General's Department, Australian Government, *The Commonwealth Guidelines for Legal Financial Assistance 2012* (2 July 2018) <<https://www.ag.gov.au/sites/default/files/2020-03/commonwealth-guidelines-for-legal-financial-assistance-2012.pdf>>. The Updated Guidelines replace Attorney-General's Department, Australian Government, *The Commonwealth Guidelines for Legal Financial Assistance 2012* (2012).

¹¹² Attorney-General, 'Changes to the Serious Overseas Criminal Matters Scheme' (Media Release, 2 July 2018) <https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/6062134/upload_binary/6062134.pdf>.

CAPITAL PUNISHMENT
JUSTICE PROJECT



- iv. if the applicant is currently overseas, the circumstances under which the applicant departed Australia; and
- v. taking particular account of the factors in (i) to (iv) above, the extent to which the provision of assistance is considered justified.

159. The result of these amendments is that the scheme now only provides financial assistance for individuals facing overseas criminal legal action if the individual is being, or will be, prosecuted for a criminal offence for which the death penalty is a sentencing option.

160. The following briefly considers if the aims stated in Recommendation 7 are likely being met following the 2018 amendments:

- a. **First aim:** Legal representatives working pro-bono on death penalty cases can access funding from the schemes in a timely manner.

The Commonwealth Guidelines for Legal Financial Assistance 2012 states that if the decision-maker has all the information needed to decide an application, the decision-maker must decide the application within 28 days of receipt.¹¹³ As discussed under Recommendation 5, we believe this process should be amended so that a sum of immediate, emergency funding can be provided upon arrest to secure appropriate legal representation from the start.

- b. **Second aim:** Where practical, legal representatives are able to communicate with a specific contact person for the duration of a case.

As noted in the Australian Government's response to Recommendation 7, the Legal Assistance Branch of the Attorney-General's Department maintains a practice of assigning a case officer to a grant for the entirety of the grant. There is no suggestion that this practice has changed, and, in CPJP's experience, this is how it operates. We consider this aim is being met.

- c. **Third aim:** Where necessary due to time restraints, legal representatives have the ability to apply for funding for reasonable expenses already incurred.

Sections 6.7(1) and 7.1(1) of the Commonwealth Guidelines for Legal Financial Assistance 2012 provide that costs incurred before the date on which an application is made to the Attorney-General's Department will not be covered by grants, except in the most 'exceptional of circumstances'.¹¹⁴ The Commonwealth Guidelines for Legal Financial Assistance 2012 do not define what constitutes the most 'exceptional of circumstances', therefore it is difficult to comment on whether this aim is being met. Our recommendation about emergency funding would assist to both address this aim and reduce confusion about the circumstances under which such costs will be covered.

161. If the scheme works as described, it appears to satisfy the intent of Recommendation 7, although we refer to our discussion on Recommendation 5 and the importance of ensuring competent legal assistance can be secured quickly and funded properly from the beginning.

¹¹³ Attorney-General's Department (n 111) [5.1]– [5.2].

¹¹⁴ Ibid [6.7(1)], [7.1(1)].

162. We have some concerns regarding the limitations on legal representatives claiming expenses already incurred, as this may be a barrier to securing lawyers if they require funding upfront, as most usually do via a retainer, or have concerns about being reimbursed. However, we note that it is only costs incurred *before the date the funding application is made*, not before a grant is approved. This becomes less problematic if an applicant, or family members making the application on their behalf, is aware they should apply immediately and can cover a retainer and other costs until reimbursement is possible.
163. That being said, such concerns reinforce our Recommendation 3 (made under our review of the 2016 Recommendation 5) that an immediate amount of emergency legal assistance funding should be made available through a much simpler process.

2016 Recommendations 8 and 9

Recommendation 8 (made May 2016)

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

Recommendation 9 (made May 2016)

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

- *an increase in the number of abolitionist countries;*
- *an increase in the number of countries with a moratorium on the use of the death penalty;*
- *a reduction in the number of executions;*
- *a reduction in the number of crimes that attract the death penalty;*
- *further restrictions on the use of the death penalty in retentionist countries of the Indo-Pacific region; and*
- *greater transparency of states' reporting the numbers of prisoners sentenced to death and executions carried out.*

Government Response to Recommendation 8 (March 2017)

Accepted: *Development of the strategy is underway and its content will be determined in consultation with relevant agencies and ministers. The Department of Foreign Affairs and Trade aims to have a publicly releasable document finalised by mid-2017.*

Government Response to Recommendation 9 (March 2017)

Accepted: No narrative response provided.

164. Both Recommendations 8 and 9 appear to have been satisfactorily implemented. As previously mentioned, Australia's position in the 2018 Strategy is highly commendable, and it is significant that it has always had bipartisan political support. DFAT commenced a review of the 2018 Strategy at the start of 2023 although the revised version has not yet been released.
165. The majority of the goals listed in Recommendation 9 for inclusion in a whole-of-government strategy were included in the 2018 Strategy's goals. The proposed goal relating to 'further restrictions on the use of the death penalty in the retentionist countries of the Indo-Pacific region' was not included. We were unable to find commentary on this but consider it may be

because the policy goals of the 2018 Strategy do not name any particular countries or regions, in keeping with the stated overarching goal of 'global abolition of the death penalty.'¹¹⁵

166. The 2018 Strategy does, however, include references to Australia's focus on advocating for death penalty abolition in the Indo-Pacific region. This is mentioned in the Strategy in relation to both bilateral advocacy,¹¹⁶ and multilateral advocacy, where the Strategy outlines that:

An effective coalition of countries opposing the death penalty in the Indo-Pacific region does not presently exist. Australia will look for and foster appropriate opportunities to build a regional network of abolitionist countries. We will continue to work collaboratively with regional like-minded countries.¹¹⁷

2016 Recommendation 10

Recommendation 10 (made May 2016)

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

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

Government Response

Accepted in principle: *The Department of Foreign Affairs and Trade already undertakes many of the activities outlined in this recommendation, including bilateral advocacy in all of the countries identified. The specific aims of the strategy will be determined as the strategy is developed.*

167. The 10 specific aims listed in Recommendation 10 are more targeted, country-specific versions of the goals proposed in Recommendation 9.

168. We note that the 2018 Strategy does not name specific countries in relation to any of the goals or advocacy activities listed. Given the wealth of information shared during the previous

¹¹⁵ DFAT 2018 Strategy (n 2) 3.

¹¹⁶ Ibid 5.

¹¹⁷ Ibid 8.

inquiry, there would be clear benefit in identifying country-specific opportunities to influence change across the region, based on the knowledgeable advice provided by the many experts who made submissions and participated in hearings.

169. However, given that circumstances, policies and political leadership change regularly across most countries, we can also appreciate that the 2018 Strategy is intended to have both longevity and flexibility. Thus, including the specific aims as broader goals without tying them to countries is a sensible approach.
170. One way the 2018 Strategy could be supported to deliver concrete, country-specific outcomes would be through an annual action plan. If this is something DFAT produces for internal purposes, we would suggest sharing it with the death penalty consultative group of civil society organisations to foster collaborative advocacy efforts.
171. Table 6 below contains some examples of statements and actions by Australia that align with the 10 specific aims listed in Recommendation 10.

Table 6: Examples of alignment with specific aims proposed by the 2016 Committee report

Specific aims	Examples
<p><i>Acknowledging the positive steps taken by countries in the region, for example where countries reduce the number of crimes that attract the death penalty or remove mandatory death sentences;</i></p> <p>and</p> <p><i>Encouraging Papua New Guinea not to reinstate capital punishment.</i></p>	<p>At the UN General Assembly's 49th meeting, on 11 November 2022, Australia and Costa Rica led negotiations on the biennial global moratorium on the death penalty.¹¹⁸</p> <p>The resolution encouraged states with a moratorium to maintain it and to share their experience in this regard and called upon states that have not yet done so to consider acceding to or ratifying the Second Optional Protocol. The resolution received a record 125 'yes' votes at the UN General Assembly plenary in December 2022.¹¹⁹</p>
<p><i>Promoting greater transparency in the number of executions carried out in China, Vietnam, Syria, North Korea and Malaysia, the crimes for which death sentences were imposed and the number of people under</i></p>	<p>China</p> <p>DFAT's website and the website for the Australian Embassy in China both state that Australia raises a wide range of human rights issues with China including the death penalty.¹²⁰</p> <p>On 6 November 2018, Australia raised concerns during China's Universal Periodic Review (UPR) at the UN HRC in Geneva. The National Statement of Australia on 6 November stated that:</p>

¹¹⁸ Resolution 'Moratorium on the use of the death penalty' A/C.3/77/L.44/Rev.1.

¹¹⁹ Department of Foreign Affairs and Trade, Australian Government, *DFAT Annual Report 2022-2023* (Report, 2023) <<https://www.transparency.gov.au/publications/foreign-affairs-and-trade/departments-of-foreign-affairs-and-trade/departments-of-foreign-affairs-and-trade-annual-report-2022-23/2-report-on-performance/priority-5%3A-advance-global-cooperation>>.

¹²⁰ Department of Foreign Affairs and Trade, Australian Government, 'China country brief: Bilateral relations' (Web Page, May 2024) <<https://www.dfat.gov.au/geo/china/china-country-brief>>; Australian Embassy China, 'Australian China Bilateral Relations' (Web Page, undated) <<https://china.embassy.gov.au/bjng/auchbilateral.html>>.

Specific aims	Examples
<i>sentence of death in each country.</i>	<p>Australia welcomes China's improvements in evidentiary and judicial processes in capital punishment cases, including the increased scrutiny and review of death penalty cases. However, Australia remains concerned at China's retention of the death penalty and its refusal to publish execution data in an open and transparent manner. Australia recommends China work towards the abolition of the death penalty, and publish execution data as a priority, to promote transparency.¹²¹</p> <p>Australia submitted questions to the UPR Secretariat on 8 January 2024, one of these asking whether 'China would publish national statistics on death penalty sentences and executions, including information on gender, location, ethnicity and other relevant characteristics?'¹²²</p> <p>Vietnam</p> <p>In August 2018, 'Australia recognised that Vietnam's amended Penal Code has abrogated the death penalty for seven crimes and encouraged Vietnam to move towards abolition of the death penalty'.¹²³</p> <p>In September 2019, Australia and Vietnam 'discussed their respective approaches to the death penalty', but provided no further information on what was discussed.¹²⁴</p> <p>DFAT's <i>First periodic report on Human Rights</i> in March 2022, noted that the Australian Government has been working to raise concerns over human rights issues via diplomatic and inter-governmental channels with Cambodia and Vietnam. While some modest successes were noted in relation to individual cases, the Committee was urged to strengthen Australia's advocacy for human rights and the rule of law in Vietnam.¹²⁵</p>
<i>Promoting a reduction in the number of crimes that attract the death penalty in China,</i>	<p>Vietnam</p> <p>DFAT submitted a statement to the UPR of Vietnam recommending that Vietnam 'reduce crimes punishable by death, including drug offences, that do not meet the threshold of 'most serious crimes' under the ICCPR.'¹²⁶</p>

¹²¹ Australia, *National Statement of Australia: UPR Working Group Universal Periodic Review of China*, UN HRC, 31st sess (6 November 2018) <<https://www.dfat.gov.au/sites/default/files/31st-session-upr-china.docx>>.

¹²² Department of Foreign Affairs and Trade, Australian Government, 'Universal Periodic Review of China: Advance questions from Australia' (8 January 2024) <<https://www.dfat.gov.au/international-relations/themes/human-rights/universal-periodic-review/45th-session-universal-periodic-review/universal-periodic-review-china-advance-questions-australia>>.

¹²³ Department of Foreign Affairs and Trade, Australian Government, 'Australian Statement on the 15th Annual Australia-Vietnam Human Rights Dialogue' (31 August 2018) <<https://www.dfat.gov.au/news/media/Pages/australian-statement-on-the-15th-annual-australia-vietnam-human-rights-dialogue>>.

¹²⁴ Department of Foreign Affairs and Trade, Australian Government, '16th Annual Australia-Viet Nam Human Rights Dialogue' (9 September 2019) <<https://www.dfat.gov.au/news/media/Pages/16th-annual-australia-viet-nam-human-rights-dialogue>>.

¹²⁵ Joint Standing Committee on Foreign Affairs, Parliament of Australia, *First periodic report on Human Rights* (31 March 2022) 23 <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/AR1920D/FAT/Report>.

¹²⁶ Department of Foreign Affairs and Trade, Australian Government, 'Universal Periodic Review of Vietnam: Statement by Australia', UN HRC, 46th sess (7 May 2024) <<https://www.dfat.gov.au/international-relations/themes/human->

Specific aims	Examples
<i>Vietnam, Thailand, Taiwan and India.</i>	<p>Australia has reiterated its strong opposition to the death penalty in the Australia-Vietnam Human Rights Dialogue, where Australia's delegation typically includes representatives from the Australian Human Rights Commission and senior officials from DFAT.¹²⁷ In 2019 and 2021, 'Australia and Viet Nam discussed their respective approaches to the death penalty'. In 2023, a 'frank discussion about key human rights' occurred and Australia's opposition to the death penalty was discussed.¹²⁸</p> <p>In June 2023, Prime Minister Albanese made representations for two Australians who had received death sentences in Vietnam, and clemency was granted.¹²⁹</p> <p>In March 2024, in a <i>Joint Statement on the Elevation to a Comprehensive Strategic Partnership Between Vietnam and Australia</i>, Australia renewed its commitment to promoting and protecting human rights, stating it would 'continue sincere, frank and constructive conversations, including through our annual Human Rights Dialogue'.¹³⁰</p>
<i>Promoting an end to mandatory sentencing in death penalty cases in Malaysia and Singapore, especially in relation to drug crimes.</i>	<p>On 4 April 2023, at the Joint Standing Committee on Foreign Affairs, Defence and Trade, 'Inquiry into supporting democracy in our region', Kieren Fitzpatrick, director of the Asia Pacific Forum (APF), stated that Australia was:</p> <p style="padding-left: 40px;">I'm pleased to say, quite a strong advocate in the most recent news which is the limitation of the death penalty on a range of crimes, which Malaysia has just taken. There's a strong kind of advocacy position that the commission made, again, with the assistance of the APF.¹³¹</p> <p>Although Malaysia and Singapore were not directly addressed, on 28 February 2023, Australia led a CANZ statement on behalf of Canada, New Zealand and Australia, stating:</p> <p style="padding-left: 40px;">The death penalty is a brutal and degrading punishment... While we oppose the death penalty in all circumstances, we particularly condemn its use for crimes which do not meet the threshold of 'most serious' crimes under the ICCPR. The death penalty must never be imposed for consensual same-sex relations, drug offences, adultery, witchcraft, apostasy, or blasphemy. We call on states that retain the death penalty to ensure that people facing a death sentence have adequate assistance to legal counsel, and to uphold their rights to a fair trial and guarantees of due process under Article 14 of the ICCPR.¹³²</p>

[rights/universal-periodic-review/46th-session-universal-periodic-review/universal-periodic-review-vietnam-statement-australia-7-may-2024>](#).

¹²⁷ Department of Foreign Affairs and Trade, Australian Government, 'Vietnam country brief: Bilateral relations' (Web Page, undated) <<https://www.dfat.gov.au/geo/vietnam/vietnam-country-brief>>.

¹²⁸ Ibid.

¹²⁹ *7.30 Program* (ABC, 5 June 2023) <<https://www.pm.gov.au/media/television-interview-730-0>>.

¹³⁰ The Hon Anthony Albanese MP and HE Mr Pham Minh Chinh 'Joint statement on the elevation to a comprehensive strategic partnership between Vietnam and Australia' (Joint Statement, 7 March 2024) <<https://www.pm.gov.au/media/joint-statement-elevation-comprehensive-strategic-partnership-between-vietnam-and-australia>>.

¹³¹ Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into supporting democracy in our region* (Report, 4 April 2023).

¹³² Australia, *CANZ Statement on High-Level Panel on the Death Penalty* (n 75).

Specific aims	Examples
<i>Advocating for Pakistan and Indonesia to resume their moratoria.</i>	<p>Indonesia</p> <p>There is some evidence that DFAT is supporting efforts to abolish the death penalty in Indonesia. For example, it supported a parliamentary consultation held in Jakarta on 7 May 2018 (convened by Parliamentarians for Global Action (PGA) in partnership with ECPM, and with support from the European Commission) where Indonesian MPs and members of civil society discussed the reform of the Indonesian Criminal Code, which still includes the death penalty for various crimes.</p> <p>Among the participants were representatives from Australia, who advocated against the death penalty and shared their perspectives and experiences. Mr Julian McMahon urged the Indonesian Parliament to learn from other countries' experiences of criminal reform and wrongful convictions, and to consider the lack of deterrent effect and the possibility of rehabilitation for death row inmates.¹³³</p> <p>Pakistan</p> <p>On 30 January 2023, in the Universal Periodic Review of Pakistan, Australia stated that it recommends, 'Pakistan re-establish a moratorium on the death penalty and reduce the number of death penalty offences as steps toward complete abolition.'¹³⁴ An undated statement on DFAT's website states that, regarding Pakistan, 'we continue to advocate for human rights, including the rights of minorities and abolition of the death penalty.'¹³⁵</p>
<i>Advocating for an improvement in the conditions and treatment of prisoners on death row in Japan.</i>	<p>On 31 January 2023, DFAT submitted a statement to the UPR of Japan recommending that Japan: 'Establish a moratorium on the use of the death penalty as a first step towards abolition and implement a mandatory appeals system against death penalty sentences.'¹³⁶</p> <p>However, as previously discussed, having entered a Reciprocal Access Agreement with Japan, some critics, including Dr Sato of Eleos Justice, argue that DFAT's lack of concern over the potential exposure of Australians to the death penalty under the Agreement is contradictory and call for a more consistent, principled approach.¹³⁷</p>

¹³³ 'The Indonesian Judicial System, Penalties and Human Rights in the Reformed Draft Criminal Code', *Parliamentarians for Global Action* (Web page, 29 May 2018) <<https://www.pgaction.org/news/indonesian-judicial-system-reformed-criminal-code.html>>.

¹³⁴ Department of Foreign Affairs and Trade, Australian Government, 'Universal Periodic Review of Pakistan: Statement by Australia', 42nd sess (30 January 2023) <<https://www.dfat.gov.au/international-relations/universal-periodic-review-pakistan-statement-australia-30-january-2023>>.

¹³⁵ Department of Foreign Affairs and Trade, Australian Government, *DFAT Annual Report 2020-2021* (Report, 2021) <<https://www.transparency.gov.au/publications/foreign-affairs-and-trade/department-of-foreign-affairs-and-trade/department-of-foreign-affairs-and-trade-annual-report-2020-21/section-2%3A-report-on-performance/priority-1%3A-promote-a-stable-and-prosperous-indo-pacific>>.

¹³⁶ Department of Foreign Affairs and Trade, Australian Government, 'Universal Periodic Review of Japan: Statement by Australia', 42nd sess (31 January 2023) <<https://www.dfat.gov.au/international-relations/universal-periodic-review-japan-statement-australia-31-january-2023>>.

¹³⁷ Sato (n 1) 1.

Specific aims	Examples
<i>Assisting Nauru, Tonga, Republic of Korea and Myanmar to move from abolitionist in practice to abolitionist in law.</i>	<p>Myanmar</p> <p>On 26 July 2022, the Australian Government released a statement regarding the execution of four pro-democracy activists in Myanmar which strongly condemned the actions of the Myanmar military regime and reiterated that the Australian Government opposes the death penalty in all circumstances for all people.¹³⁸</p> <p>Later, in December 2022, an ABC report stated: DFAT said the government was 'deeply concerned' by the reports of death sentences, saying: 'Australia opposes the death penalty in all circumstances, for all people, and urges all countries, including Myanmar, to cease executions and establish a moratorium on the death penalty'.¹³⁹</p>
<i>Promoting abolition of the death penalty at the federal level in the United States and encouraging state-level moratoria and eventual abolition.</i>	<p>On 9 November 2020, DFAT submitted a statement to the UPR of the United States recommending that the country 'reimpose the federal moratorium on capital punishment, with a view to eventual abolition of the death penalty'.¹⁴⁰</p>
<i>Forming a coalition of like-minded countries who can work in concert to promote abolition of the death penalty in the Indo-Pacific region.</i>	<p>In October 2018, Parliamentarians for Global Action organised a regional parliamentary seminar in Malaysia titled Standing Against Death Penalty in Asia. Both co-chairs of the Australian Parliamentarians Against the Death Penalty Group at the time, Senator Dean Smith and Chris Hayes MP, attended and presented on Australia's commitment to death penalty abolition, including through parliamentary diplomacy.¹⁴¹</p>

Australia's bilateral advocacy

172. The following provides some documented examples of the Australian Government engaging in bilateral advocacy.
173. Australian consular posts in retentionist countries monitor the application of the death penalty and develop bilateral strategies.¹⁴² These bilateral strategies include increased reporting

¹³⁸ Senator the Hon Penny Wong, 'Myanmar military regime's execution of pro-democracy activists' (Media release, 26 July 2022) <<https://www.foreignminister.gov.au/minister/penny-wong/media-release/myanmar-military-regimes-execution-pro-democracy-activists>>.

¹³⁹ Erin Handley and Mazoe Ford 'Students call for Myanmar junta to #StopExecutingOurFriends after youth activists sentenced to death, 9 December 2022' ABC News (9 December 2022) <<https://www.abc.net.au/news/2022-12-09/myanmar-death-sentences-students-protest-against-executions/101751560>>.

¹⁴⁰ Department of Foreign Affairs and Trade, Australian Government, 'Universal Periodic Review of United States: Statement by Australia', 36th sess (9 November 2020) <<https://www.dfat.gov.au/international-relations/themes/human-rights/universal-periodic-review/36th-session/universal-periodic-review-united-states-statement-australia-9-november-2020>>.

¹⁴¹ Parliamentarians for Global Action, 'Standing Against the Death Penalty in Asia: Parliamentarians Meet in Kuala Lumpur to Share and Strategise' (Web Page, 3 December 2018) <<https://www.pgaction.org/news/standing-against-death-penalty-in-asia.html>>.

¹⁴² Commonwealth, *Senate Estimates, Foreign Affairs, Defence and Trade Legislation Committee*, Senate, 25 March 2021, 70.

requirements on the death penalty, as well as encouraging the retentionist country to move towards abolition by entering into a moratorium on the death penalty or reducing the application of the death penalty. In April 2019, it was stated at Senate Estimates that thirty posts had completed bilateral strategies by that time.¹⁴³ Our research could not locate any further information about these bilateral strategies, and we note that the 2018 Strategy states that bilateral strategies will not be made public.¹⁴⁴

174. Australia has regular human rights dialogues with countries in our region, including those that retain the death penalty. A few examples include:
- a. Australia has regular bilateral dialogue and an annual human rights dialogue with the Vietnamese government, with the 19th Australia-Viet Nam Human Rights Dialogue held in Canberra on 30 July 2024.¹⁴⁵
 - b. On 23 November 2023, Australia and the Lao PDR held the 8th bilateral Human Rights Dialogue in Canberra, where death penalty issues were discussed. This followed on from the 7th dialogue, held on 9 December 2021, where Australia encouraged Lao PDR to abolish the death penalty and consider a formal moratorium.¹⁴⁶ Although Lao PDR is deemed an abolitionist state in practice, the death penalty remains in its penal code, including for drug-related offences.¹⁴⁷
175. Australia engages in bilateral dialogue with retentionist states on human rights issues such as the death penalty, even if this falls outside of a formal human rights dialogue. For example:
- a. In 2019, it was stated that Australia had engaged in informal bilateral dialogues with China on human rights issues, including the death penalty, even though the formal human rights dialogue had been suspended for at least four years at that time.¹⁴⁸
 - b. Australia encouraged Papua New Guinea to abolish the death penalty in multiple bilateral dialogues.¹⁴⁹
 - c. On 19 August 2018, Australia held its second annual Human Rights Dialogue with Iran. A number of human rights issues were discussed, including the death penalty.¹⁵⁰
 - d. In March 2020, Dr Angela Macdonald, the First Assistant Secretary of the Middle East and Africa Division of DFAT, noted in Senate Estimates that Australia 'make[s] regular representations on human rights issues, including in relation to the death penalty, to Iran.'¹⁵¹

¹⁴³ Commonwealth, *Senate Estimates, Foreign Affairs, Defence and Trade Legislation Committee*, Senate, 5 April 2019, 114.

¹⁴⁴ DFAT 2018 Strategy (n 2) 5.

¹⁴⁵ DFAT (Cth), 'Joint Media Release on the 19th Australia-Viet Nam Human Rights Dialogue' (5 August 2024) <<https://www.dfat.gov.au/news/media-release/joint-media-release-19th-australia-viet-nam-human-rights-dialogue>>

¹⁴⁶ Department of Foreign Affairs and Trade, Australian Government, *7th Australia-Lao Human Rights Dialogue* (Media Statement, 28 August 2019) <<https://www.dfat.gov.au/news/media-release/7th-australia-lao-pdr-human-rights-dialogue>>.

¹⁴⁷ Amnesty International, *Unlawful and Discriminatory: The Death Penalty for Drug Related Offences* (Report, 2023), 7.

¹⁴⁸ Commonwealth, *Estimates, Foreign Affairs, Defence and Trade Legislation Committee*, Senate, 5 April 2019, 115.

¹⁴⁹ Commonwealth, *Estimates, Foreign Affairs, Defence and Trade Legislation Committee*, Senate, 29 October 2020, 71.

¹⁵⁰ Commonwealth, *Estimates, Foreign Affairs, Defence and Trade Legislation Committee*, Senate, 25 October 2018, 122.

¹⁵¹ Commonwealth, *Estimates, Foreign Affairs, Defence and Trade Legislation Committee*, Senate, 5 March 2020, 138.

- e. On 28 September 2022, Mr Rob Mitchell, the Member for McEwen, made a statement in the House of Representatives about human rights in Iran following the killing of Mahsa Amini. He noted that the Australian government 'remains deeply concerned about the human rights situation in Iran, including the use of the death penalty, in particular for juvenile offenders; violations of political and media freedoms; and discrimination against religious and ethnic minorities.'¹⁵²
176. Australia became a full member of the support group of the International Commission Against the Death Penalty (ICDP), whose commissioners advocate for the abolition of the death penalty.¹⁵³ Included among this group of commissioners is Gloria Macapagal Arroyo, who, as President of the Philippines, abolished the death penalty in 2006. It is important to foster the relationship between the ICDP and WCADP (and its member organisations) and Australia is in a strong position to contribute to this effort given its close engagement with both organisations.
177. On 25 March 2021, Ms Frances Adamson, then Secretary of DFAT, informed the Foreign Affairs, Defence and Trade Legislation Committee that:
- For every death penalty case, we work up a specialist strategy, if you like, and elements of that can involve high-level representations. It depends a bit on the country and what clemency arrangements there might be. But every single one is looked at individually...to try to deal with the specific case as well as the general issue, to which you rightly draw attention and to which we remain very strongly committed to seeking to halt.¹⁵⁴

Countries Australia does not challenge sufficiently on the use of the death penalty

178. China, the United States of America and, in recent years Singapore, execute in high numbers, but it is not clear if the Australian Government is advocating sufficiently for change on this. We discuss our views on Singapore in more detail under Terms of Reference 2.
179. Amnesty International stopped publishing estimated figures on the use of the death penalty in China in 2009 because of concerns about how their estimates were being misrepresented by Chinese authorities. However, Amnesty International is confident on the evidence available that, in 2023, China 'continued to execute and sentence to death thousands of people but kept figures secret.'¹⁵⁵
180. We note that the Australia-China Human Rights Dialogue has been suspended since the 15th iteration of that meeting was held on 20 February 2014. On 3 June 2024, in Senate Estimates, DFAT advised that the government is not seeking to resume this dialogue. Ms Elly Lawson, Deputy Secretary, Strategic Planning and Coordination Group, DFAT indicated that it had become commonplace for the Australian Government to raise human rights issues directly and bilaterally with the Chinese Government during scheduled meetings. Ms Lawson indicated that human rights issues in China are also raised publicly, as appropriate, and advised that the

¹⁵² Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 2022, 1787.

¹⁵³ *Estimates, Foreign Affairs, Defence and Trade Legislation Committee* (n 148) 114.

¹⁵⁴ Commonwealth, *Estimates, Foreign Affairs, Defence and Trade Legislation Committee*, Senate, 25 March 2021, 71.

¹⁵⁵ Amnesty International (n 7) 4-6, 21.

Australian Government raises concerns in multilateral forums and has joined a range of statements about human rights.¹⁵⁶

181. DFAT's *First periodic report on Human Rights* in March 2022 noted that the Australian Government, through DFAT, had outlined a 'three levels of engagement' strategy to address and advocate for human rights in China and for diaspora communities in Australia. Despite these efforts, DFAT acknowledged the limitations of their influence in China and the slow pace of progress for those affected.¹⁵⁷
182. Many Australians were shocked in February 2024 when dual Australian-Chinese citizen, Dr Yang Hengjun was given a suspended death sentence in China after being imprisoned for over five years on vague espionage charges, following a trial that appeared to lack due process.¹⁵⁸
183. In March 2024, Senator Penny Wong spoke with Wang Yi, China's Foreign Minister, on Dr Yang's situation when Minister Yang was in Canberra:
- I told the Foreign Minister, Australians were shocked at the sentence imposed, and I made clear to him that the Australian Government will continue to advocate on Dr Yang's behalf. I also raised our concerns about other Australian death penalty cases. As you know, Australia opposes the death penalty in all circumstances for all peoples.¹⁵⁹
184. In June 2024, when Chinese Premier Li Qiang visited Australia, China expert John Garnaut acknowledged the Australian Government's commitment to raise Dr Yang's situation and call for an improvement in his conditions. However, he stated that it is not possible for Australia and China 'to have a stable bilateral relationship while this is happening in the background.' Mr Garnaut further stated that he thinks 'it is incumbent on us, in Australia, to set our own terms of conversation and to talk openly about things that are difficult,' rather than allowing China to set the parameters for discourse between the two countries.¹⁶⁰
185. The United States, one of Australia's closest allies, was the fifth highest executioner in 2023, behind China, Iran, Saudi Arabia and Somalia. In 2023, the United States executed 24 people – 23 men and a transgender woman – and was, for the 15th year in a row, the only country in the Americas to execute people, although several other countries in the region imposed new death sentences. The number of people executed in the United States in 2023 was an increase

¹⁵⁶ Commonwealth, *Estimates, Foreign Affairs, Defence and Trade Legislation Committee*, Senate, 3 June 2024, 69-70.

¹⁵⁷ Joint Standing Committee on Foreign Affairs, Parliament of Australia, *First periodic report on Human Rights* (31 March 2022) 33
<https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/AR1920D/FAT/Report>.

¹⁵⁸ See, eg, <https://www.cpjp.org.au/news/statement-on-dr-yang-hengjun> and <https://www.cpjp.org.au/news/yang-hengjun-statement-from-family-and-friends>.

¹⁵⁹ Senator the Hon Penny Wong, 'Press conference, Parliament House, Canberra' (Transcript, 20 March 2024)
<<https://www.foreignminister.gov.au/minister/penny-wong/transcript/press-conference-parliament-house-canberra>>.

¹⁶⁰ 'Will Dr Yang Hengjun ever receive justice?', *RN Breakfast* (ABC Radio National, 18 June 2024)
<<https://www.abc.net.au/listen/programs/radionational-breakfast/will-dr-yang-hengjun-ever-receive-justice-/103989434>>.

CAPITAL PUNISHMENT
JUSTICE PROJECT



from the previous two years, although the trend since 1998 is a downward one and it is only a minority of states that carry out executions.¹⁶¹

186. However, Amnesty International found that, in the United States, '[v]iolations of international human rights law and standards were documented in several cases of people executed in 2023, frequently made worse by procedural restrictions limiting admission of new evidence.'¹⁶²
187. As of mid-August, 12 executions have been carried out in the United States in 2024.¹⁶³ Alarming, on 25 January 2024, the state of Alabama executed Mr Kenneth Smith using the controversial and, previously untested, method of nitrogen asphyxiation. This was despite the UN OHCHR calling on Alabama to halt the execution amid concerns it 'could amount to torture or other cruel, inhuman or degrading treatment or punishment under international human rights law.'¹⁶⁴
188. The Associated Press provided an eyewitness account of Mr Smith's execution, which stated:
- Smith began to shake and writhe violently, in thrashing spasms and seizure-like movements, at about 7:58 p.m. The force of his movements caused the gurney to visibly move at least once. Smith's arms pulled against the straps holding him to the gurney. He lifted his head off the gurney and then fell back.
- The shaking went on for at least two minutes. Hood [Mr Smith's spiritual advisor] repeatedly made the sign of the cross toward Smith. Smith's wife, who was watching, cried out.
- Smith began to take a series of deep gasping breaths, his chest rising noticeably. His breathing was no longer visible at about 8:08 p.m.¹⁶⁵
189. Following Mr Smith's execution, UN experts 'condemned the method and stated that '[t]he gruesome execution of Kenneth Eugene Smith is a stark reminder of the barbaric nature of the death penalty and a powerful moment to intensify calls for its abolition in the United States of America and the rest of the world.'¹⁶⁶
190. Despite serious concerns that Mr Smith's experience showed that this new execution method is a cruel and unusual punishment, this month Alabama reached a confidential settlement

¹⁶¹ Amnesty International (n 7) 15-17.

¹⁶² Ibid 20.

¹⁶³ Death Penalty Information Center, 'Execution Database' (Web Page, 2024) <<https://deathpenaltyinfo.org/database/executions?year=2024>>.

¹⁶⁴ UN OHCHR, 'US: Alarm over imminent execution in Alabama' (Press Briefing Note, 16 January 2024) <<https://www.ohchr.org/en/press-briefing-notes/2024/01/us-alarm-over-imminent-execution-alabama>>.

¹⁶⁵ Kim Chandler, 'What happened at the nation's first nitrogen gas execution: An AP eyewitness account', *Associated Press* (28 January 2024) <<https://apnews.com/article/death-penalty-nitrogen-gas-alabama-kenneth-smith-54848cb06ce32d4b462a77b1bb25e656>>.

¹⁶⁶ Morris Tidball-Binz et al, 'United States: UN experts horrified by Kenneth Smith's execution by nitrogen in Alabama' (Press release, 30 January 2024) <<https://www.ohchr.org/en/press-releases/2024/01/united-states-un-experts-horrified-kenneth-smiths-execution-nitrogen-alabama>>.

agreement to proceed with executing another man, Mr Alan Miller, using nitrogen gas in September 2024.¹⁶⁷

191. Considering the upcoming election in the United States, it is also alarming that federal executions resumed under the Trump administration 'with 13 sentences carried out between July 2020 and January 2021, after a 17-year hiatus.' A temporary moratorium was put in place in July 2021 for people convicted under ordinary federal capital laws, but the experience under the previous Trump administration indicates this could be removed if he returns to power.¹⁶⁸
192. Gallup polling in November 2022 showed that, in 2017, support for capital punishment in the United States dipped to 55%, its lowest point since 1972, and remains steady at that figure.¹⁶⁹ While this is still a majority, the trend indicates an increasing appetite for abolition, which does not appear to have been swayed by the resumption of federal executions under the Trump administration. Australia should be using its close relationship with the United States to strongly advocate that it moves towards full abolition of the death penalty.

2016 Recommendation 11

Recommendation 11 (made May 2016)

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

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

¹⁶⁷ Kim Chandler, 'Alabama to move forward with nitrogen gas execution in September after lawsuit settlement', Associated Press (6 August 2024) <<https://apnews.com/article/alabama-nitrogen-gas-death-penalty-alan-miller-4bc1048bd64c1272c23bceb76199766f>>.

¹⁶⁸ Amnesty International (n 7) 18.

¹⁶⁹ Megan Brennan, 'Steady 55% of Americans support death penalty for murderers', Gallup (Web Page, 14 November 2022) <<https://news.gallup.com/poll/404975/steady-americans-support-death-penalty-murderers.aspx>>.

Government Response (March 2017)

Accepted in principle: *Specific techniques will be determined as the strategy is developed.*

The Government notes that it already undertakes some of these activities, including:

- *providing grants to support the work of civil society organisations advocating for the abolition of the death penalty in the Indo-Pacific region;*
- *supporting the 2016 World Congress Against the Death Penalty; and*
- *co-sponsoring resolutions on abolition of the death penalty at the United Nations.*

193. Table 7 below contains comments on progress in utilising the eight other techniques listed in Recommendation 11 that the Committee recommended to achieve the aims of the Strategy.

Table 7: Activities aligned with the Committee's recommended techniques

Recommended technique	Comments on progress
<i>Intervening to oppose death sentences and executions of foreign nationals, especially in cases where there are particular human rights concerns, such as unfair trials, or when juveniles or the mentally ill are exposed to the death penalty.</i>	<p>A search of Hansard for the 45th, 46th and 47th Parliament (covering the period 30 August 2016 to 18 July 2024) was undertaken.</p> <p>The relevant Hansard was reviewed to determine whether parliamentary debates, evidence to committees or responses to submissions provided information on interventions by the Australian government to retentionist countries about any individuals sentenced to death. This search showed at least 17 occasions where the circumstances of foreign nationals facing the death penalty were raised.</p>
<i>Commissioning research and analysis to inform the specific actions and advocacy approaches which may be most effective in each priority country.</i>	<p>DFAT provides grants that support research activities on the death penalty.</p> <p>In May 2019, DFAT awarded Monash University Law Faculty and CPJP \$400,000 to create a research, teaching and advocacy initiative, Eleos Justice, with a focus on the abolition of the death penalty in the Asia-Pacific region. In 2020, Eleos Justice appointed Dr Mai Sato as its inaugural Director. Monash University committed to a mixed University and philanthropic funding contribution. Eleos Justice has produced key empirical research including reports on the state-sanctioned killing of sexual minorities and women; state-sanctioned killings that violate religious freedoms; rape and the death penalty in South Asia and a review of pathways toward abolition of the death penalty. Eleos Justice has also regularly engaged in advocacy through various UN mechanisms, regional bodies and engagement with the Australian Parliament. The Eleos Anti-Death Penalty Clinic has provided approximately 200 Monash University law students with practical work experience on strategic litigation and advocacy with partner organisations across the Asia-Pacific region.</p>
<i>Provision of modest annual grants funding to support projects which seek to advance the cause of abolition within the region, such as efforts to influence public opinion, promoting alternatives to the death penalty, engaging with the media, political representatives, religious</i>	<p>CPJP was a recipient of \$50,000 in June 2024 to support our work with ADPAN and lawyers in Malaysia who are working on the resentencing cases of over 100 people who had previously received the mandatory death penalty. CPJP also previously received funding from DFAT when we operated under the name Reprieve Australia.</p> <p>See Appendix 2 for information on funding for CPJP and other CSOs that could be identified.</p>

Recommended technique	Comments on progress
<i>leaders, the legal profession and policy makers.</i>	
<i>Provision of funding to support the Anti-Death Penalty Asia Network and abolitionist civil society groups within the region, including to assist with advice and representation in individual cases.</i>	<p>The Anti-Death Penalty Asia Network (ADPAN) is a regional network of anti-death penalty organisations and capital defence lawyers from 20 countries across the Asia-Pacific region. In November 2022, ADPAN received funding of AUD \$42,483 from DFAT allowing ADPAN members to directly engage with UN mechanisms and to coordinate and amplify regional advocacy campaigns.</p> <p>See Appendix 2 for information on funding allocation to ADPAN and other abolitionist CSOs within the region that could be identified.</p>
<i>Provision of training and networking opportunities in Australia and elsewhere for representatives of abolitionist civil society groups within the region.</i>	<p>The 2018 Strategy states that where funding is available, posts should consider supporting National Human Rights Institutions or civil society organisations to deliver projects that further abolition of the death penalty, including training and networking opportunities for representatives of abolitionist civil society groups.¹⁷⁰ However, our research could not find details of specific networking or training opportunities that have been provided to civil society groups.</p>
<i>Where their involvement would help achieve specific objectives under the Strategy, utilising the Australian Parliamentarians Against the Death Penalty Group, Parliamentarians for Global Action, and experts such as Australian jurists.</i>	<p>Australian Parliamentarians Against the Death Penalty Group</p> <p>The Australian Parliamentarians Against the Death Penalty Group (currently co-chaired by Mr Graham Perrett MP and Senator Dean Smith) continues to pursue its activities. The Group's objectives include:</p> <ul style="list-style-type: none"> (i) advocating for the abolition of the death penalty; (ii) support[ing] organisations whose work relates to the abolition of the death penalty; and (iii) advocating for increased transparency and disclosure from countries on the number of executions and people under death sentences.¹⁷¹ <p>Parliamentarians for Global Action</p> <p>Australia is an active Parliamentarians for Global Action member.¹⁷²</p> <p>Parliamentary Friendship Group for Amnesty International Australia</p> <p>The Parliamentary Friendship Group for Amnesty International Australia aims to provide a non-partisan forum for parliamentarians to support and engage with the work of Amnesty International Australia as part of the global movement promoting and defending human rights and dignity.¹⁷³</p> <p>Law Council of Australia</p> <p>On 7 October 2021, the Law Council of Australia issued its policy statement on the death penalty.¹⁷⁴ The statement provides that the Law Council supports the 2018 Strategy. The statement also includes a commitment by the Law Council of Australia to advocate to the Australian Government with respect to the abolition of the death penalty.</p>

¹⁷⁰ DFAT 2018 Strategy (n 2) 7.

¹⁷¹ Parliament of Australia, 'Parliamentary Friendship Groups (non-country)' <https://www.aph.gov.au/About_Parliament/Parliamentary_Friendship>.

¹⁷² Parliamentarians for Global Action, 'Our Members' <<https://www.pgaction.org/membership/our-members.html>>.

¹⁷³ Parliament of Australia (n 171).

¹⁷⁴ Law Council of Australia, *Policy Statement: The Death Penalty* (7 October 2021) <<https://lawcouncil.au/resources/policies-and-guidelines/policy-statement-the-death-penalty>>.

Recommended technique	Comments on progress
<p><i>Engaging with the private sector and supportive high-profile or influential individuals in priority countries, where this may be effective.</i></p>	<p>Australia's diplomats have shown their support across Asia, at public conferences, through meetings with advocates and in attending court cases to show Australia's interest in and support for either abolition or the accused.</p> <p>On occasion, DFAT has signalled their presence and support at events deliberately and effectively, as anti-death penalty advocates in retentionist countries argue publicly and courageously for law reform.¹⁷⁵</p> <p>In 2021, The Responsible Business Initiative for Justice launched the Business Leaders Against the Death Penalty campaign, led by Sir Richard Branson which now has over 300 signatories from the global business community.¹⁷⁶ Sir Branson is a vocal critic of the use of the death penalty. In April 2022, Sir Branson's public statements, along with those of UK actor Steven Fry, drew significant international attention towards Singapore's use of the death penalty.¹⁷⁷ Australian businesses – particularly those that operate in retentionist countries – should be encouraged to join such initiatives. Australia's 2018 Strategy may encourage such participation by businesses.</p>
<p><i>Supporting the continued participation by Australian delegations at the 6th World Congress Against Supporting the continued participation by Australian delegations at the 6th World Congress Against.</i></p>	<p>In 2016, Australia participated at the 6th World Congress Against the Death Penalty in Oslo.¹⁷⁸ Australia also participated in the 7th¹⁷⁹ and 8th¹⁸⁰ World Congress Against the Death Penalty, where Australia was acknowledged as a core group member state.</p>
<p><i>Australia to continue to co-sponsor resolutions on abolition of the death penalty at the United Nations.</i></p>	<p>As noted above under Recommendation 10, Australia continues to co-sponsor resolutions on abolition of the death penalty at the United Nations, including working with Costa Rica on leading negotiations on the biennial global moratorium on the death penalty in 2022,¹⁸¹ and leading a statement opposing the death penalty on behalf of Canada, New Zealand and Australia at the UN Human Rights Council on 23 February 2023.¹⁸²</p>

¹⁷⁵ McMahon (n 86) 12 –22.

¹⁷⁶ 'Business Leaders Against the Death Penalty' (Web Page) <<https://www.businessagainstdeathpenalty.org/>>.

¹⁷⁷ 'Court dismisses final appeal in Singapore death row case', Independent (online, 26 April 2022/0 <<https://www.independent.co.uk/news/ap-singapore-high-court-stephen-fry-supreme-court-b2065612.html>>.

¹⁷⁸ See, eg, <https://www.dfat.gov.au/news/media/Pages/australian-support-for-the-6th-world-congress-against-the-death-penalty>.

¹⁷⁹ See https://www.eeas.europa.eu/delegations/un-geneva/spotlight-7th-world-congress-against-death-penalty_en.

¹⁸⁰ See <https://www.coe.int/en/web/abolition-death-penalty/-/the-8th-world-congress-against-the-death-penalty>.

¹⁸¹ Penny Wong and Arnoldo André Tinoco (n 91).

¹⁸² Australia, CANZ Statement on High-Level Panel on the Death Penalty (n 75).

2016 Recommendation 12

Recommendation 12 (made May 2016)

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

Government Response (March 2017)

Accepted in principle: *The Department of Foreign Affairs and Trade is providing grant funding of \$320,000 per annum for the 2016-17 and 2017-18 financial years to civil society organisations working towards abolition of the death penalty. Funding for future years will be subject to budgetary considerations.*

194. A review of the 'Grant outcomes' section of DFAT's website indicates that from 1 July 2016 to the time of writing, DFAT has made grant awards totalling AUD \$473,606,770,¹⁸³ of which \$746,300 – or less than 0.16 per cent of the total grant funding – could be identified as having been awarded to projects relating to abolishing the death penalty.¹⁸⁴
195. A total of \$481,000 was awarded in the 2016-17 financial year,¹⁸⁵ and \$45,900 was awarded in the 2017-18 financial year, as grant funding to be used towards abolishing the death penalty. Further amounts of \$126,917, \$42,483 and \$50,000 were awarded in 2018-19, 2022-23 and 2023-24, respectively.¹⁸⁶ The details of identified grants are collated in **Appendix 2**.
196. While we acknowledge that these figures likely do not show the full picture of funding for projects focused on abolition of the death penalty, they do indicate that such funding allocation has typically declined over the years since the previous inquiry.
197. Continued leadership for abolition of the death penalty, as guided by the 2018 Strategy, remains a stated priority for Australia as part of its commitment to 'protecting and promoting universal human rights and defending the multilateral human rights system.'¹⁸⁷
198. As such, funding should be dedicated to supporting this commitment and we urge the Subcommittee to recommend a significant boost of sustained, ongoing funding.

Recommendation 5: *That the Australian Government provide a significant boost to the available amount of dedicated, ongoing funding to the Department of Foreign Affairs and Trade to fund grants to civil society organisations, scholarships, training, research and/or capacity building projects aimed at the abolition of the death penalty.*

¹⁸³ Australian Government, 'Grant Awards', *Grant Connect* (Web Page) <<https://www.grants.gov.au/ga/list>>.

¹⁸⁴ Ibid.

¹⁸⁵ Department of Foreign Affairs and Trade, Australian Government, 'Grant outcomes: Grant and scholarship recipients', *Grants* (Web Page) <<https://www.dfat.gov.au/about-us/grant-opportunities/Pages/grant-outcomes>>.

¹⁸⁶ Grant Awards (n 183).

¹⁸⁷ Department of Foreign Affairs and Trade, Australian Government, 'Australia's commitment to human rights', *Human rights* (Web Page) <<https://www.dfat.gov.au/international-relations/themes/human-rights>>.

2016 Recommendation 13

Recommendation 13 (made May 2016)

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

Government Response (March 2017)

Accepted in principle: *The Department of Foreign Affairs and Trade is preparing a whole-of-government strategy using existing resources. Further resourcing will be considered in the development of that strategy, bearing in mind budgetary considerations.*

199. Searches of DFAT's Portfolio Budget Statements between 2017-18 and 2024-25 have indicated that none included specific funding dedicated to the implementation of the 2018 Strategy.¹⁸⁸
200. Specific plans and programs may have been directed towards funding the implementation of the strategy, for example through Australia's Foreign Affairs and Trade Operations program, however, it is not possible to determine this from the published data.¹⁸⁹
201. Further, while there has been consideration of death penalty advocacy in DFAT's annual reports since 2017, there is no indication that funding has been directed for this purpose.
202. The following references were made to the 2018 Strategy in DFAT's Annual Reports:
 - a. *2017-18 Annual Report:* DFAT noted the introduction of the Strategy in June of 2018.¹⁹⁰
 - b. *2018-19 Annual Report:* DFAT noted support for government advocacy at the UN HRC, its membership to the International Commission Against the Death Penalty in November 2018 and its representations made to 'select governments' against the death penalty.¹⁹¹
 - c. *2019-20 Annual Report:* DFAT noted its continued advocacy, through the UN HRC and other diplomatic relations, in efforts to end the death penalty, as well as intervention in certain consular cases.¹⁹²
 - d. *2020-21 Annual Report:* DFAT noted its advocacy in Pakistan, Iran and Africa on the abolition of the death penalty, and Australia's lead role on the joint statement at the UN HRC in 2021 raising concerns about the use of the death penalty for blasphemy and apostasy.¹⁹³

¹⁸⁸ Department of Foreign Affairs and Trade, 'Portfolio Budget statements' (Web Page) <<https://www.dfat.gov.au/about-us/corporate/portfolio-budget-statements>>.

¹⁸⁹ See, eg, Department of Foreign Affairs and Trade, 'Portfolio Budget Statements 2022-23' Budget related paper No 1.18 Foreign Affairs and Trade Portfolio (Report, October 2022) 27-30.

¹⁹⁰ Australian Government, *DFAT Annual Report 2017-18* (Report, 18 September 2019) 90.

¹⁹¹ Australian Government, *DFAT Annual Report 2018-19* (Report, 17 September 2019) 12, 81, 86.

¹⁹² Australian Government, *DFAT Annual Report 2019-20* (Report, 18 September 2020) 82, 88.

¹⁹³ Australian Government, *DFAT Annual Report 2020-21* (Report, 27 September 2021) 29, 79, 85, 89, 92.

- e. *2021-22 Annual Report*: DFAT noted its continued advocacy aligned with the 2018 Strategy, and its intention to lead a resolution on the moratorium on the use of the death penalty at the UN General Assembly in late 2022.¹⁹⁴
- f. *2022-23 Annual Report*: DFAT noted that Australia and Costa Rica led the UN General Assembly resolution on the Moratorium on the Use of the Death Penalty, which received a record 125 'yes' votes.¹⁹⁵

203. Searches indicated that several DFAT departmental files have been created by the Multilateral Human Rights Section and the World Trade Organisation Reform Section between 2021-2024 relating to the 2018 Strategy,¹⁹⁶ however no further publicly available information was identified regarding the activities that were undertaken on these files.

Appointment of the Ambassador for Human Rights

- 204. On 20 December 2022, the Australian Government announced Ms Bronte Moules, an experienced diplomat, as the inaugural Ambassador for Human Rights, 'to restore Australia's leadership on human rights around the world.'¹⁹⁷
- 205. This role includes representing Australia in Human Rights Dialogues with other states. When engaging with retentionist states, these dialogues routinely cover the death penalty.¹⁹⁸ We note the Ambassador has been proactive in engaging with civil society organisations on these dialogues, both in advance to welcome advice on issues for discussion and afterwards to provide a debrief.
- 206. The Ambassador was also part of Australia's delegation to the 52nd UN HRC session in February 2023, in which statements were delivered in relation to the abolition of the death penalty.¹⁹⁹

¹⁹⁴ Australian Government, *DFAT Annual Report 2021-22* (Report, 26 September 2022) 69.

¹⁹⁵ Australian Government, *DFAT Annual Report 2022-23* (Report, 27 September 2023) 93.

¹⁹⁶ See, eg, Department of Foreign Affairs and Trade, 'List of departmental files created between 1 July 2023 and 31 December 2023' (Web Page) <<https://www.dfat.gov.au/corporate/list-departmental-files-created-between-1-july-2023-and-31-december-2023>>; Department of Foreign Affairs and Trade, 'List of departmental files created between 1 January 2023 and 30 June 2023' (Web Page) <<https://www.dfat.gov.au/corporate/list-departmental-files-created-between-1-january-2023-and-30-june-2023>>; Department of Foreign Affairs and Trade, 'List of departmental files created between 1 July and 31 December 2021' (Web Page) <<https://www.dfat.gov.au/about-us/corporate/new-departmental-files/list-departmental-files-created-between-1-july-and-31-december-2021>>.

¹⁹⁷ Penny Wong, 'Ambassador for Human Rights' (Media Release, 20 December 2022) <<https://www.foreignminister.gov.au/minister/penny-wong/media-release/ambassador-human-rights>>.

¹⁹⁸ See, eg, Australian Embassy Lao People's Democratic Republic, '8th Australia-Lao PDR Human Rights Dialogue' (Media Release, 18 December 2023); Department of Foreign Affairs and Trade, 'Australian National Statement on the 18th Australia-Vietnam Human Rights Dialogue' (Media Release, 26 April 2023).

¹⁹⁹ *DFAT Annual Report 2022-23* (n 193) 93; Australia, *CANZ Statement on High-Level Panel on the Death Penalty* (n 75).

Terms of Reference 2: Australia's international engagement to promote abolition of the death penalty

207. Our discussion in response to Terms of Reference 1 has covered much ground concerning Australia's international engagement to promote abolition of the death penalty. It is worth reiterating and commending, in particular, Australia's participation in United Nations fora.
208. This includes, with Costa Rica, leading the negotiations in 2022 on the resolution for a global moratorium on the death penalty at the UN General Assembly, as well as the consistency with which Australia raises the death penalty in the statements it makes on retentionist countries to the Universal Periodic Review process.
209. Another strong example is Australia's success in March 2021 in leading a joint statement on the death penalty as a punishment for blasphemy and apostasy. Over 50 states signed the statement, which called on countries that retain the death penalty for blasphemy or apostasy 'to remove the possibility of that penalty being imposed or carried out, both in practice and in law,' and to release anyone imprisoned for such offences.²⁰⁰
210. Other opportunities – outside of UN fora – where Australia has the potential to show leadership on promoting abolition of the death penalty include:
- a. The 53rd Pacific Island Forum Leaders Meeting, which will be held from 26-30 August 2024 in Tonga – the last state in the Pacific to retain the death penalty in law. This is an opportunity to encourage Tonga to abolish the death penalty and rule out any further consideration of extending it to drug-related offences.²⁰¹ Further, given that all other nations involved in this meeting have abolished the death penalty, it also presents an opportunity to form a regional bloc to advocate for abolition within the wider region.
 - b. The biennial Commonwealth Heads of Government Meeting (CHOGM), which will be held from 21-26 October in Samoa. As the Law Council of Australia notes in their submission to this inquiry, Commonwealth countries are 'overrepresented among retentionist states' and lagging in ratifying the Second Optional Protocol.²⁰² CHOGM would be an opportunity for Australia to raise abolition of the death penalty with the leaders of Commonwealth countries that either retain the death penalty or have not yet joined the Second Optional Protocol.
211. In this section, we believe it is also important to focus on Singapore, noting grave concerns about efforts by the Singaporean Government in recent years to limit the avenues to challenge the death penalty, including imposing fines on lawyers for representing persons on death row in 'late-stage' appeals and seeking to silence criticism by anti-death penalty activists.

²⁰⁰ Australia, *Joint Statement Led by Australia: Death Penalty as a Punishment for Blasphemy and Apostasy* (n 98).

²⁰¹ Capital Punishment Justice Project et al, 'Tonga: Government must not extend the death penalty to drug-related offences' (Joint Statement, 11 June 2024) <<https://www.cpjp.org.au/news/joint-statement-tonga>>.

²⁰² Law Council of Australia, *Submission to the Inquiry into Australia's efforts to advocate for the worldwide abolition of the death penalty* (12 August 2024) 28.

212. The previous inquiry was very positive about both Singapore and Malaysia taking steps towards abolition. While Malaysia has since abolished the mandatory death penalty, Singapore has been regressive, and Australia should be challenging this.
213. Since 2016, Singapore has executed persons every year, other than in 2020 and 2021.²⁰³ In 2020, at the height of the pandemic, execution warrants were issued however they were stayed due to legal challenges.²⁰⁴
214. In March 2022, executions resumed; 19 executions have taken place to date. Of these 19 executions, 18 men were executed – one male convicted of murder, the remaining in relation to drug offences. In July 2023, Singapore carried out its first execution of a woman in almost 20 years.²⁰⁵
215. The Government of Singapore is steadfast in its use of the death penalty for drug offences. Following the most recent execution on 7 August 2024, the Central Narcotics Bureau stated: ‘Capital punishment is imposed only for the most serious crimes, such as the trafficking of significant quantities of drugs which cause very serious harm, not just to individual drug abusers, but also to their families and the wider society.’²⁰⁶
216. International law is clear that retentionist governments such as Singapore must be encouraged to restrict their use of the death penalty to the international law standard of ‘most serious crimes’.²⁰⁷ Of course, this should be seen as a first step towards abolishing the death penalty.
217. The definition of ‘most serious crimes’ in the ICCPR is strictly limited to ‘intentional killing’.²⁰⁸ The United Nations Office on Drugs and Crime (UNODC) has confirmed that ‘[t]he three international drug control conventions, which form the foundation of the global drug control system that has been agreed by nearly every country in the world, cannot be used to justify the use of the death penalty for drug-related offences alone.’²⁰⁹
218. Lawyers in Singapore are increasingly discouraged from taking on death penalty cases beyond a certain point, with lawyers being personally fined for lodging ‘late-stage’ appeals. Over

²⁰³ Cornell Center on Death Penalty Worldwide, ‘Country Report Database – Singapore’ (Web Page, August 2024) <<https://deathpenaltyworldwide.org/database/#/results/country?id=66>>.

²⁰⁴ *Syed Suhail bin Syed Zin v Attorney-General* [2020] SGCA 122; *Moad Fadzir Bin Mustaffa v Public Prosecutor* [2020] SGCA 97.

²⁰⁵ Rebecca Ratcliffe, ‘Singapore executes a woman for first time in almost two decades’, *Guardian* (online, 28 July 2023) <<https://www.theguardian.com/world/2023/jul/28/singapore-woman-execute-death-penalty-saridewi-djamani-executed>>.

²⁰⁶ Central Narcotics Bureau, ‘Execution of a Convicted Drug Trafficker – 7 August 2024’ (Statement, August 2024) <<https://www.cnb.gov.sg/NewsAndEvents/News/Index/execution-of-a-convicted-drug-trafficker---7-august-2024>>.

²⁰⁷ Mai Sato, ‘Human rights violations, the death penalty, and floating international law’, *Monash Lens* (Monash University, 13 March 2023) <<https://lens.monash.edu/@politics-society/2023/03/13/1385536/human-rights-violations-the-death-penalty-and-floating-international-law>>.

²⁰⁸ UN OHCHR, ‘General Comment No. 36 on article 6: right to life’ (Report, September 2019) [36] <<https://www.ohchr.org/en/calls-for-input/general-comment-no-36-article-6-right-life>>.

²⁰⁹ UNODC, ‘Statement attributable to the UNODC spokesperson on the use of the death penalty’ (Statement, 27 June 2019) <<https://www.unodc.org/unodc/en/press/releases/2019/June/statement-attributable-to-the-unodc-spokesperson-on-the-use-of-the-death-penalty.html>>.

recent years, death row prisoners have been forced to represent themselves, with lawyers and local activists who assist them doing so at great personal, professional, and financial risk.²¹⁰

219. In January 2024, the High Court of Singapore dismissed an application by two King's Counsel, one from England and one from Australia, to appear pro-bono on behalf of four persons on death row.²¹¹ This case demonstrates the difficulty that persons on death row in Singapore experience in getting *any* lawyers to appear on their behalf, beyond a certain point in their cases.
220. In May 2024, the High Court dismissed an application by 36 unrepresented persons on death row challenging the Legal Aid Assistance Scheme for Capital Offences practice of not assigning lawyers to appear on post-appeal applications for persons awaiting capital punishment.²¹² The appeal will be held in September 2024; again, the persons on death row will be unrepresented.
221. Further, human rights defenders, including capital defence lawyers and civil society organisations in Singapore – and particularly those that publicly criticise government policy – are subject to scrutiny and persistent efforts to curtail their activities. Such actions by the government have become even more blatant recently, with the Minister for Home Affairs and Law, Mr K Shanmugan naming and criticising specific human rights defenders in Parliament on 8 May 2024.²¹³
222. Noting Singapore's unwavering commitment to the death penalty, and to silencing pro-abolition arguments made to date, we believe that the Australian Government is well placed to strongly advocate for the Government of Singapore to at least limit its use of the death penalty to adhere with the international human rights law standard of 'most serious crimes' and ensure fair trial rights are guaranteed for persons on death row.
223. CPJP and other civil society organisations in Australia are well placed to implement education and awareness raising campaigns, given the strong regional ties between Australia and Singapore. The previous inquiry noted there was 'scope for private sector companies, CEOs and high-profile individuals to play a stronger role in the campaign against the death penalty, [but] acknowledge[d] that this is an area that requires more thought and exploration.'²¹⁴ The current inquiry provides just such an opportunity to explore this.

²¹⁰ Anti-Death Penalty Asia Network, 'Singapore: It's Time for Meaningful Engagement with Civil Society on the Death Penalty' (Statement, 31 October 2022) <<https://adpan.org/singapore-its-time-for-meaningful-engagement-with-civil-society-on-the-death-penalty/>>.

²¹¹ Selina Lum, 'High Court rejects bids by two King's Counsel to act for 4 drug traffickers on death row', *Strait Times* (online, 30 January 2024) <<https://www.straitstimes.com/singapore/courts-crime/high-court-rejects-bids-by-two-king-s-counsel-to-act-for-4-drug-traffickers-on-death-row>>.

²¹² *Iskander bin Rahmat and Others v Attorney-General* [2024] SGHC 122.

²¹³ Parliamentary Speeches, Ministerial Statement on Singapore's National Drug Control Policy – Speech by Mr K Shanmugan, Minister for Home Affairs and Minister for Law (8 May 2024) [169]-[174] <<https://www.mha.gov.sg/mediaroom/parliamentary/ministerial-statement-on-singapore-national-drug-control-policy/>>.

²¹⁴ 2016 Committee report (n 17) 162 [6.232].

Terms of Reference 3: Opportunities and risks for Australia to advocate for the abolition of the death penalty internationally, including:

a) Engagement with international institutions and likeminded countries

224. Since the previous inquiry, Australia released the 2018 Strategy, which is internationally recognised as a particularly strong commitment to abolitionist leadership, and has taken the lead on efforts at the United Nations, having held a term on the UN HRC from 2018-2020.
225. It is clear that Australia is taken seriously on this issue. However, as covered in detail in our response to Terms of Reference 1, to maintain credibility and the ability to influence others, the Australian Government must be consistent in its opposition to the death penalty and advocacy for its worldwide abolition. And it must be seen to be consistent.
226. In signing the Reciprocal Access Agreement with Japan in the knowledge that members of the Australian Defence Force could face capital charges – and having not insisted on a clear assurance otherwise – Australia has, in the eyes of experts on the death penalty, clearly breached its own 2018 Strategy.²¹⁵
227. This not only risks undermining Australia's reputation as an anti-death penalty advocate, but, if retentionist governments take the view that a country with such a principled abolitionist stance as Australia will compromise, it 'could have a knock-on effect on undermining the sincerity of other anti-death penalty crusaders' in the eyes of retentionist countries.²¹⁶
228. To counter this, Australia could consider collaborating more closely with likeminded countries that have strong, vocal positions against the death penalty, such as the European Union, UK and Norway, all of which, similarly to Australia, have 'declared their mission to end the death penalty worldwide.'²¹⁷
229. Australia's commitment in the 2018 Strategy must be reflected in legislation and must factor into all our dealings with other countries, including police-to-police assistance from the AFP; mutual assistance between the Australian Government and other governments; and raising the abolition of the death penalty at all human rights dialogues, in all bilateral advocacy and in forums where Australia is on the international stage.

²¹⁵ Sato (n 1) 6-7.

²¹⁶ Sato (n 1) 8.

²¹⁷ Sato (n 1) 2.

b) Advocacy for Australians subject to or potentially subject to the death penalty

230. At the outset of this response, it is important to state our full support for Australia's principled approach of opposing the death penalty 'in all circumstances for all people,' as entrenched in the 2018 Strategy. This is critical to being a genuine abolitionist leader and to a commitment that human rights apply equally to all.
231. At the same time, Australia has specific obligations to provide consular assistance to its own citizens overseas. Further, the Australian Government is clear that they make 'appropriate diplomatic representations' on behalf of Australians facing the death penalty, as reiterated by both Prime Minister Anthony Albanese and Treasurer Jim Chalmers at the time of Mr Gregor Haas' arrest in Manila in May 2024.²¹⁸
232. We are acutely aware that this is an area where quiet diplomacy often takes place and commend the government for efforts that may not be known about until resolved. For example, in June 2023, Prime Minister Albanese announced that he had secured clemency for two Australian citizens who faced the death penalty in Vietnam. This was achieved while the Prime Minister was in Vietnam and perceived as linked to improved relations between the countries and the signing of a number of agreements, including one for Australia to provide Vietnam with a \$105 million package to help decarbonise its economy.²¹⁹
233. CPJP works with an extensive network of skilled lawyers in Australia, including barristers, solicitors and former judges, a number of whom have experience representing Australians in death penalty cases overseas. In the process of preparing this submission, they have advised us that they would welcome the opportunity for a roundtable to discuss, pre-emptively, international litigation strategies that might be deployed with the support of DFAT in future cases involving Australians abroad. Such a meeting could help further clarify the risks and opportunities.

Choosing local legal representation

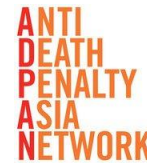
234. In the 2016 Committee report, DFAT is quoted as stating that, as part of assisting Australians detained overseas who may be facing a possible death sentence, they advise detainees that: 'While consular officers can provide you with a list of local English-speaking lawyers, consular officers are not lawyers and cannot provide you or your family with legal advice of make recommendations as to which lawyer you should choose.'²²⁰

²¹⁸ Cloe Read, 'Early stage': PM speaks on Gregor Haas arrest in Philippines', *The Age* (online, 19 May 2024) <<https://www.theage.com.au/politics/federal/early-stage-pm-speaks-on-gregor-haas-arrest-in-philippines-20240519-p5jett.html>>.

²¹⁹ Sarah Ferguson and Marina Freri, 'Two Australians who faced the death penalty granted clemency in Vietnam, says Albanese', *ABC 7.30* (5 June 2023) <<https://www.abc.net.au/news/2023-06-05/australians-death-penalty-vietnam-clemency-albanese-7-30/102442404>>.

²²⁰ 2016 Committee Report (n 17) 92 [5.49].

CAPITAL PUNISHMENT
JUSTICE PROJECT



235. Our understanding is that this remains the case. Based on experiences of people we have assisted, providing an unvetted list is problematic, as the choice of lawyer, and the advice they provide in the first instance, can be critical to a person's chances of avoiding the death penalty.
236. For example, there are a number of jurisdictions where sentence reductions are possible in exchange for cooperation with investigators, but there are strict rules on when and how such cooperation must be given. If a person is not advised of this by their lawyer, they may miss the opportunity, and this can be the difference between a prosecutor seeking the death penalty or a lesser sentence.
237. In our view it is not sufficient that the key requirement be language alone. Such lists should identify if lawyers have experience on death penalty cases or, at a minimum, practice in criminal law. The 2016 report cited the submission by McMahon et al to the previous inquiry, where they stated: 'It is important that regular due diligence as to the names on the list occurs. It is important that only the most appropriate lawyers be on such lists.'²²¹ This remains true.

Improving support for Australians facing the death penalty

238. Consular officials are correct that they are not in a position to provide legal advice or recommendations regarding legal representation. We note that organisations such as CPJP, ADPAN and WCADP have extensive networks and can assist to identify relevant capital defence lawyers, CSOs and NGOs in retentionist countries that DFAT and consular officials can and should consult.
239. In cases where an Australian is facing the death penalty, effective legal representation often necessitates a collaborative approach between local lawyers and pro-bono legal teams coordinated by CPJP in Australia. CPJP often works with lawyers representing Australians facing a death penalty charge or sentence by supporting their families in their advocacy and media strategies; gathering relevant evidence from Australian institutions, experts and individuals; organising translations of key documents; engaging with key stakeholders on behalf of the individual; and undertaking strategic legal research under the direction of the local lawyers appointed to act.
240. Australians arrested abroad are at a significant disadvantage being foreign nationals in unfamiliar judicial systems. Effective legal representation is often achieved through this participatory approach, with CPJP being able to gather relevant information to complement and enhance the legal case of the lawyers on the ground.
241. Currently this work is unfunded, with CPJP relying on volunteer lawyers and fundraising for translation fees. If this work was funded within the legal representation scheme, it could be undertaken on a more coordinated and sustainable basis. Strategically, this would also ensure that lawyers on the ground are armed with accurate and effective evidence, expert reports, where appropriate, and an ability to engage with international mechanisms that lawyers operating in retentionist countries may not have easy access to.

²²¹ McMahon et al Submission No 12 (n 8) 5, cited in 2016 Committee report (n 17) 100 [5.83].

242. CPJP has observed that it is significantly more difficult to have a sentence of death reviewed and removed after the sentence has been imposed at the trial phase. In an ideal scenario, resourcing the early stages of a death-eligible case, including the funding of expert evidence and analysis to avoid the imposition of a sentence of death, could negate the need to fund further appellate hearings.

Recommendation 4 (part 2): That DFAT, in collaboration with Australian embassies, consulates and representative offices in retentionist countries, improve their approach to assisting Australians exposed to the risk of the death penalty in foreign jurisdictions, by:

- *ensuring that the list of lawyers provided to detainees who are at risk of facing the death penalty only includes lawyers who have experience on death penalty cases or, at a minimum, practice in criminal law; and*
 - *funding CSOs and NGOs in Australia to support and amplify the work of lawyers on the ground in retentionist countries.*
-

c) Addressing heightened risk of the death penalty based on sexual orientation and gender identity, ethnicity, religion and political beliefs

243. Some countries that retain the death penalty do so for offences that should not be criminalised at all. For example, in speaking at the UN HRC in 2023, Dr Sato of Eleos Justice stated that the criminalisation of adultery, same-sex sexual acts and blasphemy or apostasy – let alone the imposition of the death penalty for these acts – is not only contrary to the right to life but to many other rights, including women’s rights, and the rights to equality before the law without discrimination and freedom of religion.²²²
244. Despite this, adultery, so-called ‘religious offences’, and same-sex sexual acts are punishable by death in 12 countries.²²³ While known numbers of executions for these offences are small, our research has found that in at least two countries executions have been carried out for same-sex sexual acts and for religious offences.
245. However, focusing on the fact that only a small number of executions are carried out for such offences misses the point about the operationalisation of the death penalty. In countries that retain the death penalty for these offences, whether through legislation or prescribed by unwritten Sharia law, the state is declaring that people are deserving of death if they leave

²²² Sato (n 207).

²²³ These 12 countries include Afghanistan, Brunei, Iran, Mauritania, Nigeria, Pakistan, Qatar, Saudi Arabia, Somalia, Uganda, United Arab Emirates, and Yemen; See, eg, Mai Sato and Christopher Alexander, ‘State-Sanctioned Killing of Sexual Minorities: Looking Beyond the Death Penalty’ (Research Report, Eleos Justice and Capital Punishment Justice Project, February 2021) 17 <https://bridges.monash.edu/articles/report/State-Sanctioned_Killing_of_Sexual_Minorities_Looking_Beyond_the_Death_Penalty/14069318>; Human Dignity Trust, ‘Map of Jurisdictions that Criminalise LGBT People’ <https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/?type_filter=death_pen_applies>.

their religion, engage in consensual sexual relations outside of marriage or in same-sex sexual acts. Such declarations also have a chilling trickle-down effect within communities by legitimising vigilantism and honour killings.

246. In challenging such offences, it is important for Australia to stress that applying the death penalty for these 'offences' is not only wrong because the death penalty is inherently wrong, but that these so-called offences should never be criminalised in the first place.
247. The Australian Government has proved its ability to conduct constructive advocacy with countries that, while they retain the death penalty, do not apply it for same-sex sexual acts, political offences or religious offences. As noted above under our response to Terms of Reference 2, Australia led a statement calling on states to remove the death penalty for blasphemy or apostasy, where it is currently retained. Despite retaining the death penalty themselves, both Japan and the United States co-signed this statement.
248. Having succeeded here, the Australian Government could look for other opportunities to engage in similar advocacy with retentionist states, as this may be a way to incrementally restrict the application of the death penalty.
249. In **Appendix 3**, we provide some information about the challenges faced by people who are part of vulnerable minorities – and often intersecting minorities at that – when it comes to the application of the death penalty in specific countries. We consider this information useful for abolitionists to gain a fuller picture of the associated risks and opportunities for these cohorts of people.

d) Cooperation with civil society and non-government organisations

250. We note that our submission has already identified critical opportunities for the Australian Government to cooperate with CSOs and NGOs, including the opportunity to improve such relationships to ensure Australians facing the death penalty overseas are connected quickly with appropriately experienced lawyers. The risk of not being supported in such a manner cannot be overstated. Australia's abolitionist stance would be enhanced if consular officials could do everything in their power to ensure citizens are given the best opportunity to avoid being subjected to the death penalty.
251. For the benefit of both Australian citizens and any person facing the death penalty, regardless of their nationality, there is and there needs to be a close working relationship between government, predominantly represented by DFAT and the Attorney-General's Department, and NGOs like CPJP and ADPAN. Government and consular staff, on the one hand, have the resources and knowledge of government behind them. On the other hand, CPJP and ADPAN have specialised knowledge from our close working relationships with local and international CSOs and NGOs.
252. For this close working relationship to be effective, it is in the government's interest for CPJP to have stable funding to cover our core infrastructure costs including a full-time CEO and three or four part-time support staff. CPJP is currently reliant on project-based grants, which

CAPITAL PUNISHMENT
JUSTICE PROJECT



can only be effectively obtained and administered if CPJP's core infrastructure is stable and properly funded. As an NGO operating safely in an abolitionist country we provide much needed support to regional partners, which is a key aspect of implementing the 2018 Strategy.

253. Government priorities in opposing the death penalty and pursuing the bipartisan 2018 Strategy need to be re-energised. This must also continue to be a bipartisan commitment and approach within Parliament.
254. It appears that the lessons of 2015, when all parties worked so closely together to oppose the executions of Andrew Chan and Myuran Sukumaran in Indonesia, may have faded in the minds of officials and politicians. We are concerned that support for implementation of the 2018 Strategy – including via adequate staffing within DFAT – appears to have reduced since Australia's term on the Human Rights Council ended on 31 December 2020.
255. Contributing to this concern is the announced plan to review and rewrite the strategy in 2023. CSOs were brought together in January 2023 and later consulted again in smaller groups – for example, CPJP, Eleos Justice and the ADPAN were invited to a joint follow-up meeting – yet it appears no further significant consultations were conducted, and the revised strategy remains unreleased.
256. As stated in the 2018 Strategy, DFAT established a death penalty consultative group, and three of the submitting organisations are members. However, this group has not met since January 2023. We encourage DFAT to make better and more consistent use of this group, as it is a key opportunity to access the expertise of organisations and individuals who are fully committed to the abolition of the death penalty.

Appendix 1 Key Amendments to the AFP National Guideline

As noted in the body of our submission, the AFP National Guideline on International Police-to-Police Assistance in Death Penalty Situations was updated following the 2016 Committee report recommendations. It is not clear from available public sources when the guideline was updated, however the table below identifies and summarises the key amendments made in response to Recommendation 2 of the 2016 Committee report.

Clause number (previous version)	Description in previous version of guideline	Key amendments noted in the revised AFP National Guideline (current version)
Clause 1	Disclosure and compliance	The compliance section has been updated to include reference to the AFP Commissioners' Order on security (CO9).
Clause 5	Introduction – the introduction sets out what the guideline governs.	<p>The introduction section (clause 3) has been updated to specify that the guideline governs not just police-to-police assistance but also cooperation (including the sharing of information).</p> <p>The previous guideline governed 'police-to-police assistance in possible death penalty cases', whereas the amended wording has been expanded to apply to any situation where an identified person, 'regardless of nationality, may be exposed to the death penalty.'</p> <p>The revised version includes a paragraph on the purpose of the guideline and an additional paragraph has been included setting out the primary aim of the AFP.</p>
Clause 6	Authority to provide information to foreign law enforcement agencies	The revised guideline updates the first sentence to note that the AFP 'is authorised to provide police services and police support services for the purpose of assisting or cooperating with foreign law enforcement agencies', expanding on the previous version which just stated that the AFP was 'authorised to provide assistance and cooperate with foreign law enforcement agencies'.
Clause 7	Policy for cooperation with foreign law enforcement agencies	<p>The reference to the previous range of measures to strengthen the policies dating back to 29 January 2009 has been deleted and reference to the 2016 Committee Report has been included (clause 5).</p> <p>A new paragraph states that the guideline has been updated to reflect the Government response to the Committee's recommendations.</p>

Clause number (previous version)	Description in previous version of guideline	Key amendments noted in the revised AFP National Guideline (current version)
None	None	<p>A new clause 6 has been added on the Role of the Sensitive Investigations Oversight Board for Death Penalty Requests.</p> <p>This clause provides that matters involving the death penalty are deemed sensitive as per the AFP National Guideline on sensitive investigations. As such, all death penalty requests whether pre or post arrest require Sensitive Investigations Oversight Board oversight and decision by the relevant Deputy Commissioner.</p>
Clause 7	Assistance before detention, arrest, charge or conviction	<p>Clause 7.1 of the revised AFP National Guideline clarifies that any assistance before detention, arrest, charge or conviction are 'pre-arrest cases'.</p> <p>The previous version of the guideline provided that if the AFP is aware that the provision of <i>information</i> is likely to result in prosecution for an offence carrying the death penalty, Senior AFP management must consider certain factors before approving assistance.</p> <p>The revised guideline has been amended as follows:</p> <ul style="list-style-type: none"> • if an AFP appointee is aware that the provision of <i>assistance or cooperation</i> is likely to result in prosecution for an offence carrying the death penalty, they must complete and submit a request form for consideration by the Commander International Engagement (CIE); • the CIE must provide initial advice and determine the risk category based on relevant factors; • the request must be sent from CIE to Sensitive Investigations Oversight Board via the relevant International Assistant Commissioner, irrespective of the risk category; and • Sensitive Investigations Oversight Board must consider, meaningfully discuss and assess the relevant risks and decide whether the AFP will provide assistance or cooperate. <p>The relevant factors are included in clause 7.2 and are an expanded list of the factors included in the previous guideline.</p>
None	None	<p>Clause 7.3 includes a description of the categories of risk being low, medium and high.</p>
Clause 7	Assistance after detention, arrest, charge or conviction	<p>Clause 7.4 of the revised AFP National Guideline clarifies that any assistance after detention, arrest, charge or conviction are 'post-arrest cases'.</p> <p>The previous guideline provided that Ministerial approval is required in any case in which a person has been arrested or detained for, charged with, or convicted of an offence which carries the death penalty.</p>

Clause number (previous version)	Description in previous version of guideline	Key amendments noted in the revised AFP National Guideline (current version)
		<p>The revised guideline has been amended as follows:</p> <ul style="list-style-type: none"> All post-arrest requests require a Ministerial Brief to be prepared for Sensitive Investigations Oversight Board endorsement prior to Ministerial approval. CIE must provide initial advice and determine the risk category based on the relevant factors detailed in clause 7.2. The Ministerial Brief and supporting material must be submitted to the Sensitive Investigations Oversight Board Secretariat once cleared by the International Assistance Commissioner.
None	None	<p>A new clause 8 is included in the revised AFP National Guideline which provides guidance on when Sensitive Investigations Oversight Board delegation is not required.</p> <p>If an AFP appointee has considered a potential death penalty situation in accordance with the guideline, and has determined that it is not likely that assistance or cooperation will result in an identified person/s being detained, arrested, charged or prosecuted for an offence carrying the death penalty, the AFP appointee must make an AFP record of the decision, which must be reviewed and endorsed by the relevant specialised or regional commander.</p>
Clause 8	Approval Process	<p>The approval process has been renamed as 'Death Penalty Request process' in the revised guideline (clause 9). The steps involved have been significantly expanded for both pre-arrest and post-arrest cases.</p>
Clause 7 and Clause 8	Assistance by AFP appointees and Procedures for AFP appointees in PNG	<p>These provisions have been deleted in the revised AFP National Guideline.</p>
Clause 9	Reporting	<p>The Reporting section of the revised guideline (clause 10) retains the requirement for the Commissioner to report to the Minister annually on the nature and number of cases where assistance is provided to foreign law enforcement agencies in death penalty cases.</p> <p>A new paragraph has been included stating that the relevant International Command for each continent is responsible for mandatory reporting to the Minister.</p>
Clause 11	References	<p>Additional references have been included in the revised guideline.</p>

CAPITAL PUNISHMENT
JUSTICE PROJECT

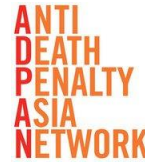
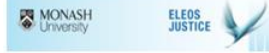


Appendix 2 DFAT grant allocation for projects aimed at the abolition of the death penalty

As noted above under the review of progress towards Recommendation 12 of the 2016 Committee report, since 1 July 2016, AUD \$746,300 could be identified as having been awarded as grant funding for projects relating to the abolishment of the death penalty.

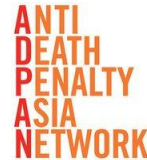
Financial Year	Purpose	Program Name	Grant Program	Grant Activity	Recipient Name	Value	Total for Financial Year
2023-2024	<p>Following the abolition of the mandatory death penalty in Malaysia, the purpose of CPJP's project is to support the resentencing of people on death row in Malaysia. CPJP will work with a legal team that is representing at least 120 people. Due to the volume of people seeking resentencing and the pace at which the Malaysian Government intends to complete the process, the team is under great pressure.</p> <p>The project will also fund on-the-ground costs associated with taking affidavits and sourcing expert witnesses and reports. The success of the resentencing process is important regionally, demonstrating abolitionist leadership in a highly retentionist part of the world, and for the individuals who have a real prospect of having their sentences converted.</p>	Program 1.1: Foreign Affairs and Trade Operations	Human Rights Advocacy Grant Program	Fund the Capital Punishment Justice Project (CPJP) project to support the resentencing of people on death row in Malaysia.	CPJP	\$50,000.00	\$50,000.00
2022-2023	The grant activity's purpose is to strengthen the death penalty abolitionist agenda by building support for moratoriums through the UN mechanisms and strategic advocacy. It will also challenge the increasing pace of executions in Southeast Asia through public campaigns.	Program 1.1 - Foreign Affairs and Trade Operations	Human Rights Advocacy Grant Program	The activity will encompass: visible engagement with governments on death penalty policies in multilateral fora; public campaigns promoting death penalty abolition; greater engagement in	Anti-Death Penalty Asia Network	\$42,483.00	\$42,483.00

CAPITAL PUNISHMENT
JUSTICE PROJECT



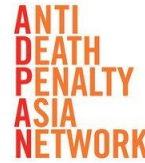
Financial Year	Purpose	Program Name	Grant Program	Grant Activity	Recipient Name	Value	Total for Financial Year
				international human rights processes on death penalty issues.			
2018-2019	Undertake research into discrimination against minorities and the death penalty. Focus will be on LGBTI communities and the death penalty, and women on death row. This aligns with Australia's Strategy for Abolition of the Death Penalty.	DFAT 18/19 1.1 Foreign Affairs and Trade Operations	Ad hoc/One-off	Research into discrimination against minorities in the application of the death penalty	Reprivee Australia	\$50,000.00	\$126,917.00
	Grant to LBH Masyarakat in support of Promoting Safeguard Mechanisms in the Death Penalty Regime in Indonesia	1.1 Foreign Affairs & Trade Operations	Ad hoc/one-off	Grant to LBH Masyarakat	LBH Masyarakat	\$10,000.00	
	Grant in support of Catholic Human Rights Committee in support of Publishing a Book on Abolition of the Death Penalty Movement in Korea	1.1 Foreign Affairs & Trade Operations	Ad hoc/one-off	Grant to Catholic Human Rights Committee	Catholic Human Rights Committee	\$9,972.00	
	Host a ten day, structured study tour for Asian death penalty litigators in Melbourne. The project aligns with Australia's Strategy for Abolition of the Death Penalty and supports its focus on the Indo-Pacific Region.	DFAT 18/19 1.1 Foreign Affairs and Trade Operations	Ad hoc/One-off	Death Penalty Litigation Study Tour	Melbourne Law School	\$27,661.00	
	Grant to Taiwan Alliance to End the Death Penalty in support of Let's Discuss the Alternatives to the Death Penalty: A Public Deliberation Project	1.1 Foreign Affairs & Trade Operations	Ad hoc/one-off	Grant to Taiwan Alliance to End the Death Penalty	Taiwan Alliance to End the Death Penalty	\$10,000.00	
	Grant to Death Penalty Information Center in support of Creating Interactive Visual Online Resources and Data Analyses for States with	1.1 Foreign Affairs & Trade Operations	Ad hoc/one-off	Grant to Death Penalty Information Center	Death Penalty Information Center	\$10,000.00	

CAPITAL PUNISHMENT
JUSTICE PROJECT



Financial Year	Purpose	Program Name	Grant Program	Grant Activity	Recipient Name	Value	Total for Financial Year
	Potential Abolition and for Abolitionist States where Reinstatement Could Occur						
	Grant to The National Coalition to Abolish the Death Penalty in support of Justice Powered by Information and Action	1.1 Foreign Affairs & Trade Operations	Ad hoc/one-off	Grant to The National Coalition to Abolish the Death Penalty	The National Coalition to Abolish the Death Penalty	\$9,284.00	
2017-2018	To promote Australia's human rights policy objective of encouraging jurisdictions in our region that retain the death penalty to move towards a moratorium or to limit the use of capital punishment.	1.1 Foreign Affairs & Trade Operations	Ad hoc/One-off	Support for regional advocacy against the death penalty	Reprieve Australia	\$35,900.00	\$45,900.00
	To support an activity by the Anti-Death Penalty Asia Network (ADPAN) to plan its advocacy for abolition of the death penalty in Asia.	1.1 Foreign Affairs & Trade Operations	Ad hoc/One-off	Support regional advocacy against the death penalty	Reprieve Australia	\$10,000.00	
2016-2017	Research to further our understanding of the use of the death penalty in South-East Asia with a view to encouraging all jurisdictions that retain the death penalty to move towards a moratorium or to limit the use of capital punishment.	Capital punishment, international law and practice in South-East Asia	Ad hoc/One-off	Not available	Monash University	\$11,000.00	\$481,000.00
	To promote Australia's human rights objective of encouraging all jurisdictions that retain the death penalty to move towards a moratorium or to limit the use of capital punishment.	Parliamentary Campaigns for the Abolition of the Death Penalty in Asia	Ad hoc/One-off	Not available	Parliamentarians for Global Action	\$200,000.00	

CAPITAL PUNISHMENT
JUSTICE PROJECT



Financial Year	Purpose	Program Name	Grant Program	Grant Activity	Recipient Name	Value	Total for Financial Year
	To promote Australia's human rights objective of encouraging all jurisdictions that retain the death penalty to move towards a moratorium or to limit the use of capital punishment.	Strengthening the capacity of National Human Rights Institutions in the Asia Pacific to promote the abolition of the death penalty	Ad hoc/One-off	Not available	Asia Pacific Forum of National Human Rights Institutions	\$110,000.00	
	To promote Australia's human rights objective of encouraging all jurisdictions that retain the death penalty to move towards a moratorium or to limit the use of capital punishment.	Accompanying parliamentarians, national institutions and civil society for the abolition of the death penalty in South East Asia	Ad hoc/One-off	Not available	Together Against the Death Penalty (Ensemble contra la peine de mort, ECPM)	\$110,000.00	
	To promote Australia's human rights objective of encouraging all jurisdictions that retain the death penalty to move towards a moratorium or to limit the use of capital punishment.	Activities to oppose the death penalty	Ad hoc/One-off	Not available	Reprieve Australia Inc	\$50,000.00	
						Total	\$746,300.00

Appendix 3 Heightened risk of the death penalty for identified groups

Terms of Reference 3(c) sought input on opportunities and risks for Australia to advocate for the abolition of the death penalty internationally, including addressing the heightened risk of the death penalty based on sexual orientation and gender identity, ethnicity, religion and political beliefs.

Here we provide we provide some information about the challenges faced by people who are part of vulnerable minorities – and often intersecting minorities at that – when it comes to the application of the death penalty in specific countries. We consider this information useful for abolitionists to gain a fuller picture of the associated risks and opportunities for these cohorts of people.

Sexual orientation and gender identity

The LGBTQIA+ community face increased levels of discrimination and persecution by governments and populations based on their sexual orientation. Sixty-three jurisdictions criminalise private, consensual, same-sex sexual activity.¹ Iran, Northern Nigeria, Saudi Arabia, Somalia, and Yemen impose the death penalty, while in Afghanistan, Brunei, Mauritania, Pakistan, Qatar, UAE and most recently Uganda, the death penalty is a legal possibility for private, consensual same-sex sexual conduct.²

Afghanistan

The maximum penalty under the Penal Code 2017 for same-sex sexual activity is two years and, under the Penal Code, implementation of Sharia law is allowed, where same-sex sexual activity is punishable by death.³

Reporting within Afghanistan is restricted, and it is difficult to gain accurate information on executions, extrajudicial killings, and other targeted killings on the basis of sexual orientation.

In August 2021, a Taliban judge stated that for same-sex sexual activities, 'there can only be two punishments,' stoning or death.⁴ In October 2022, it was reported that a gay man had been executed by the Taliban due to his sexual orientation.⁵

The LGBTQIA+ community within Afghanistan face increased persecution from the Taliban and are often forced into hiding at the expense of their own mental health.⁶

¹ 'Map of Jurisdictions that Criminalise LGBT People', *Human Dignity Trust* (Web Page, 2024) <<https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/>>.

² 'Map of Jurisdictions' (n 1); 'Somalia: Freedom in the World', *Freedom House* (Web Page, 2024) <<https://freedomhouse.org/country/somalia/freedom-world/2024>>.

³ *Penal Code 2017* (Afghanistan) ss 645-650.

⁴ Emma Powys Maurice, 'Taliban-controlled Afghanistan will 'crush gay men to death with 10ft walls' warns judge', *Pink News* (online, 14 July 2021) <<https://www.thepinknews.com/2021/07/14/taliban-afghanistan-gay/>>.

⁵ Josh Milton, 'Man with dreams of becoming a doctor slaughtered by Taliban just for being gay', *Metro* (online, 12 October 2022) <<https://metro.co.uk/2022/10/12/man-with-dreams-of-becoming-a-doctor-killed-by-taliban-for-being-gay-17548986/>>.

⁶ "Even if you go to the skies, we'll find you": LGBT People in Afghanistan After the Taliban Takeover', *Human Rights Watch* (Web Page, 26 January 2022) <<https://www.hrw.org/report/2022/01/26/even-if-you-go-skies-well-find-you/lgbt-people-afghanistan-after-taliban-takeover>>.

Islamic Republic of Iran

The Islamic Republic of Iran is the most profuse executor of sexual minorities.⁷ The 2013 Penal Code, outlawing same-sex sexual activity is extremely detailed and distinguishes between 'active' and 'passive' participants when handing out sentences.⁸

Honour killings – the killing of LGBT people by family members for having brought 'shame' or 'dishonour' on the family⁹ – are distinguished from murder under law and carry diminished penalties, incentivising violence against LGBT people by the Iranian government.¹⁰

In 2023 there were a total of 853 executions recorded in Iran, increasing by 43% from 2022.¹¹ Included among these, the Islamic Republic executed 22 people on charges of rape, a term often used by officials to freely execute LGBT people.¹²

Between 1979 and 2020, there have been 241 known executions for same-sex sexual conduct in the Islamic Republic, including carrying out executions for same-sex sexual offences as recently as 2022. Mehrdad Karimpour and Farid Mohammadi were imprisoned for six years on 'sodomy' charges and were executed by hanging in January 2022.¹³ In June 2022, another gay man was executed for charges of 'sodomy' along with nine others in the northern city of Karaj.¹⁴ He was killed alongside Mehdi Khalgoldi on charges of 'rape'.¹⁵

Yemen

In 2023 the number of executions in Yemen increased from 4 to 15.¹⁶ All parties to the conflict in Yemen – the Southern Transitional Council, the Houthi de facto authorities and the Internationally Recognised Government – persecute and target LGBTI people, subjecting them to the terror of arbitrary arrest, torture, threats and harassment.¹⁷

⁷ Mai Sato and Christopher Alexander, 'State-Sanctioned Killing of Sexual Minorities: Looking Beyond the Death Penalty' (Research Report, Eleos Justice and Capital Punishment Justice Project, February 2021) 17 <https://bridges.monash.edu/articles/report/State-Sanctioned_Killing_of_Sexual_Minorities_Looking_Beyond_the_Death_Penalty/14069318>.

⁸ Ibid 32; *Penal Code 2013* (Iran) ss 233-240.

⁹ Sato and Alexander (n 7) 61; Maryam Dehkordi 'A Dark History: Honor Killings of Iran's LGBTQ Citizens', *IranWire* (Web Page, 2 August 2020) <<https://iranwire.com/en/features/67398/>>.

¹⁰ Sato and Alexander (n 7) 40.

¹¹ 'Worldwide Wednesday International Roundup: Afghanistan, China, Iran, Qatar, Saudi Arabia, United States, Vietnam, Yemen and Zimbabwe', *Death Penalty Information Centre* (Web Page, 6 March 2024) <<https://deathpenaltyinfo.org/news/worldwide-wednesday-international-roundup-afghanistan-china-iran-qatar-saudi-arabia-united-states-vietnam-yemen-and-zimbabwe>>.

¹² Josh Milton, 'Iran brutally executes gay man over 'sodomy' charges', *Pink News* (online, 4 July 2022) <<https://www.thepinknews.com/2022/07/04/iran-gay-man-execution-sodomy/>>.

¹³ Maggie Baksa, 'Two gay men executed by Iran's cruel regime for the 'crime of sodomy'', *Pink News* (online, 31 January 2022) <<https://www.thepinknews.com/2022/01/31/iran-gay-sodomy-mehrdad-karimpou-farid-mohammadi/>>.

¹⁴ Milton (n 12).

¹⁵ Ibid.

¹⁶ Amnesty International, *Global Report: Death Sentences and Executions in 2023* (Report, 29 May 2024) 30 <<https://www.amnesty.org/en/documents/act50/7952/2024/en/>>.

¹⁷ 'Yemen: Huthis must stop executions and release dozens facing LGBTI charges', *Amnesty International* (Web Page, 9 February 2024) <<https://www.amnesty.org/en/latest/news/2024/02/yemen-huthis-must-stop-executions-and-release-dozens-facing-lgbti-charges/>>.

Between 2020 and 2022, multiple security forces in Yemen targeted 17 people with non-conforming sexual orientation, gender identity or expression, or sex characteristics.

In 2024, more than 40 individuals were sentenced to death, flogging or prison for charges relating to same-sex conduct.¹⁸ Nine individuals were sentenced to death in January 2024 on charges of homosexuality, spreading immorality and immoral acts.¹⁹ Particularly concerning is the death sentences imposed on 13 students in southern Yemen for charges of 'spreading homosexuality'.²⁰ Trans or non-gender conforming individuals are particularly at risk in Yemen with the Houthis arresting five people for their refusal to conform to 'masculine' and 'feminine' presentations and LGBTQIA+ activism.²¹

United States

The United States had one of the highest incidences of reported murders against trans and gender diverse persons between 2008 and September 2023, accounting for 406 of 4,690 murders.²²

In 2023, the United States increased executions from 18 to 24 executions, one of whom was a transgender woman.²³ The 'trans panic' defence in homicide trials facilitates violence against trans people, having been raised in 32 cases concerning the killings of trans women between 2000 and 2019.²⁴

Trans women face increased violence and are more likely to die in custody due to 'discrimination in and denial of access to essential services'.²⁵ In May 2022, transgender woman DeeDee Hall died while handcuffed and strapped to a stretcher by police officers while en route to a hospital. She was restrained with a spit hood over her face and her cries were ignored by the officers. Her death was ruled an accident, however the autopsy report found a correlation with her heart failure and the way she was restrained.²⁶

Somalia

Somalia was responsible for all 38 executions carried out in the Sub-Saharan African region in 2023, increasing from 11 recorded executions in 2022,²⁷ the highest total number of recorded executions since 2015.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid; Eleanor Noyce 'Houthi rebels sentence 13 to death on homosexuality charges in Yemen', *Pink News* (online, 8 February 2024) <<https://www.thepinknews.com/2024/02/08/houthi-rebels-death-penalty-homosexuality-charges/>>.

²¹ Noyce (n 20).

²² Trans Respect Versus Transphobia Worldwide, *Trans Murder Monitoring: Absolute numbers (2008–Sept 2023)* (Web Page, updated November 2023) <<https://transrespect.org/en/map/trans-murder-monitoring/>>.

²³ 'Global: Executions soar to highest number in almost a decade', *Amnesty International* (Web Page, 29 May 2024) <<https://www.amnesty.org/en/latest/news/2024/05/global-executions-soar-highest-number-in-decade/>>; Amnesty International (n 16) 17.

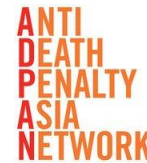
²⁴ Eleos Justice, 'Killing of transgender, gender diverse, and intersex persons' (Report, Monash University, 8 May 2024) 2 <https://bridges.monash.edu/articles/report/Killing_of_transgender_gender_diverse_and_intersex_persons/26062684>; W Carsten Andresen, 'Research Note: Comparing the Gay and Trans Panic Defenses' (2022) 32(1-2) *Women & Criminal Justice* 219-241.

²⁵ Agnes Callamard, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings*, UN Doc A/HRC/35/23 (6 June 2017) [46].

²⁶ Maggie Prosser and Kelli Smith, 'Grand jury doesn't indict Dallas officers, medic after transgender woman's Death', *Dallas News* (online, 11 May 2023) <<https://www.dallasnews.com/news/courts/2023/05/11/grand-jury-doesnt-indict-dallas-officers-medic-after-transgender-womans-death/>>.

²⁷ Amnesty International (n 16) 37.

CAPITAL PUNISHMENT
JUSTICE PROJECT



The Somali Islamist group al Shabaab targets LGBT individuals and, in 2017, shot a man and a 15-year-old for having sex and another man for spying.²⁸ The men were convicted in an al-Shabaab court and shot in front of hundreds of civilians.²⁹

Nigeria

In 2020, in Nigeria's northern state of Bauchi, three men were sentenced to death by stoning after being convicted on charges of engaging in homosexuality.³⁰ Nigeria imposes lengthy prison terms for those convicted of public displays of same-sex relationships, and in October 2023, a mass arrest took place during a 'gay wedding'. Twenty-three of the 76 people arrested remain in detention with the risk of being subjected to conversion therapy.³¹

Saudi Arabia

Information on the death penalty for LGBTQIA+ peoples is difficult to obtain as it is 'very hidden' in Saudi Arabia.³² Saudi Arabia was responsible for 15% of all globally recorded executions in 2023, despite having a 12% decrease in executions from 2022.³³ In 2019, a mass execution took place where 37 men were executed under charges of espionage and terrorism, with an allegation that five of the men also took part in same-sex intercourse.³⁴

Uganda

The Anti-Homosexuality Act 2023 (AHA) expanded offences criminalising LGBT people and imposed the death penalty for 'aggravated homosexuality' on 'serial offenders'. The AHA was unanimously upheld, with the exception of four provisions, in a Ugandan Constitutional Court in April 2024.³⁵

In August 2023, a 20-year-old man was the first person charged under the 'aggravated homosexuality' provisions in the AHA. While capital punishment was never officially abolished in Uganda, the country has not carried out executions since 2005. The introduction of the AHA is abhorrent and has led to widespread horror and devastation internationally, particularly for the LGBT community.³⁶

²⁸ Feisal Omar 'Somali Islamists kill man and teenager for gay sex, another man for spying', *Reuters* (Web Page, 11 January 2017) <<https://www.reuters.com/article/world/somali-islamists-kill-man-and-teenager-for-gay-sex-another-man-for-spying-idUSKBN14V00U/>>.

²⁹ Sato and Alexander (n 7) 59.

³⁰ Ardo Hazzard 'Nigerian Islamic court orders death by stoning for men convicted of homosexuality', *Reuters* (online, 2 July 2022) <<https://www.reuters.com/world/africa/nigerian-islamic-court-orders-death-by-stoning-men-convicted-homosexuality-2022-07-02/>>.

³¹ 'Nigeria', *Human Dignity Trust* (Web Page, 2024) <<https://www.humandignitytrust.org/country-profile/nigeria/>>.

³² Sato and Alexander (n 7) 33.

³³ Amnesty International (n 16) 9.

³⁴ Tamara Qiblawi and Ghazi Balkiz 'Exclusive: Saudi Arabia said they confessed. But court filings show some executed men protested their innocence', *CNN World* (online, 26 April 2019) <<https://edition.cnn.com/2019/04/26/middleeast/saudi-executions-court-documents-intl/index.html>>.

³⁵ 'Uganda' *Human Dignity Trust* (Web Page, 2024) <<https://www.humandignitytrust.org/country-profile/uganda/>>.

³⁶ Ali Condon 'Uganda man faces death penalty over 'aggravated homosexuality' charge under anti-gay law', *Pink News* (online, 29 August 2024) <<https://www.thepinknews.com/2023/08/29/uganda-aggravated-homosexuality-charge-death-penalty/>>.

Ethnicity, religion, and political beliefs

Afghanistan

In September 2021, following a period of reduced executions, a senior Taliban official announced that executions were to make a resurgence.³⁷ Among those most at risk of executions and extrajudicial killings are the Hazara ethnic group, who practise the Shi'a form of Islam, as opposed to the dominant Sunni form in Afghanistan.³⁸ Other persecuted ethnic groups under Taliban rule include the Tajiks and Uzbeks.

Australia can continue to recognise the plight of ethnic minority groups in Afghanistan by expediting humanitarian visas for those under threat.³⁹ Australia can also persist in denouncing the legitimacy of Taliban rule in Afghanistan and condemning the Taliban's usage of the death penalty and extrajudicial killings, particularly in relation to ethnic minorities. Sanctions can also be imposed on key Taliban members.

Bangladesh

As a result of the ethnic cleansing that they face in Myanmar on account of their Muslim faith, the Rohingya people have been displaced, with many seeking refuge in Bangladesh.⁴⁰

In 2022, 49 of the 225 extrajudicial killings recorded to have occurred in Bangladesh were of Rohingyas, despite comprising only 0.6% of the population.⁴¹ In June 2022, a Rohingya refugee received a capital sentence for drug offences, with the judge stating although the crime would not typically result in the death penalty, the offence warranted a severe punishment as it was an attack on national security.⁴² The judgment suggests racial bias may have been a factor in the sentencing of this individual.

Further, 21 individuals, including two opposition leaders, were sentenced to death by the controversial International Crimes Tribunal, which was established to investigate the human rights violations committed during Bangladesh's War of Independence in 1971.⁴³

³⁷ 'Afghanistan: Executions will return, says senior Taliban official', *BBC* (online, 24 September 2021) <<https://www.bbc.com/news/world-asia-58675153>>.

³⁸ Nina Evason, 'Afghan Culture: Religion', *Cultural Atlas* (Web Page, 2019) <<https://culturalatlas.sbs.com.au/afghan-culture/afghan-culture-religion>>.

³⁹ 'A message from the Department of Home Affairs to the Afghan Australian community - 29 March 2022' *Department of Home Affairs* (Web Page, 2022) <<https://www.homeaffairs.gov.au/help-and-support/afghanistan-update/message-to-the-afghan-australian-community>>.

⁴⁰ United Nations High Commissioner for Refugees 'Joint Government of Bangladesh – UNHCR Population Roadmap as of 31 January 2022' *Operational Data Portal* (16 February 2022) <<https://data.unhcr.org/en/documents/details/90958>>.

⁴¹ Odhikar, *Annual Human Rights Report 2020 Bangladesh* (Report, 25 January 2021) <http://odhikar.org/wp-content/uploads/2021/01/Annual-HR-Report-2020_Eng.pdf>.

⁴² Samaya Anjum, 'Rohingya Man Sentenced to Death in Bangladesh', *The Diplomat* (online, 30 June 2022) <<https://thediplomat.com/2022/06/rohingya-man-sentenced-to-death-in-bangladesh/>>.

⁴³ 'Bangladesh: Two opposition leaders face imminent execution after serious flaws in their trials and appeals', *Amnesty International* (Press Release, 27 October 2015) <<https://www.amnesty.org/en/latest/news/2015/10/bangladesh-imminent-executions/>>.

CAPITAL PUNISHMENT
JUSTICE PROJECT



Belarus

In March 2023, a bill was signed introducing capital punishment for state officials and military personnel convicted of high treason.⁴⁴ This is in contravention of the ‘most serious crimes’ element required under the ICCPR, which Belarus has ratified.⁴⁵

China

Since 2017, China has escalated in its persecution of the primarily Muslim Uyghur people in Xinjiang, under the guise of counter-terrorism. The death penalty and state-sanctioned killing has been utilised to suppress the Uyghur populace, and numerous executions of Uyghur people have been documented. One such case is of Tashpolat Tiyp, a Uyghur academic who ‘disappeared’ in 2017, and is believed by NGOs, including Amnesty International, to have received the death penalty for ‘playing a role in trying to split Xinjiang from China’.⁴⁶

Islamic Republic of Iran

The Islamic Republic of Iran has drastically increased its use of the death penalty following the ‘Women Life Freedom’ uprising of 2022. The number of executions has increased from 576 in 2022 to 853 in 2023, with at least six being in relation to the uprising.⁴⁷ As of 16 August 2024, at least 373 executions have been carried out by the Islamic Republic this year.⁴⁸

Iran’s Baluchi ethnic minority is an at-risk group, accounting for 20% of all executions despite constituting only 5% of Iran’s population.⁴⁹ Iran also applies the death penalty to religious crimes. Additionally, individuals from Iran’s Kurdish Sunni minority and Ahwazi Arab ethnic minority groups have been sentenced to death for their alleged political affiliations.⁵⁰

North Korea

North Korea has been known to weaponise the death penalty as a tool to repress dissenters. Exact figures are difficult to verify, however, reports indicate that they continue to execute individuals who do not satisfy the ‘most serious crimes’ requirement under international law.⁵¹

⁴⁴ Daria Dergacheva ‘Ways of punishing dissent in Lukashenka’s Belarus’, *Global Voices* (Web Page, 2 May 2023) <<https://globalvoices.org/2023/05/02/ways-of-punishing-dissent-in-lukashenkas-belarus/>>.

⁴⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁴⁶ Alice Su and Tracy Wilkinson ‘A Uighur scholar facing potential execution is one of over a million detained by China’, *Los Angeles Times* (online, 29 September 2019) <<https://www.latimes.com/world-nation/story/2019-09-28/a-uighur-scholar-faces-execution-as-international-pressure-fails-to-budge-chinas-xinjiang-policies>>.

⁴⁷ Amnesty International (n 16) 31.

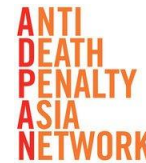
⁴⁸ Iran Human Rights (Web Page, 2024) <<https://www.iranhr.net/en/>>.

⁴⁹ Ibid.

⁵⁰ ‘Four Kurdish men at grave risk’, *Amnesty International* (Web Page, 12 January 2024) <<https://www.amnesty.org/en/documents/mde13/7580/2024/en/>>.

⁵¹ Kim Jieun, ‘Publicly executed for killing a woman while trying to steal beans’, *Radio Free Asia* (online, 23 December 2023) <<https://www.rfa.org/english/news/korea/public-execution-12222023162046.html>>.

CAPITAL PUNISHMENT
JUSTICE PROJECT



In January 2023, the Pyongyang Cultural Language Protection Act was passed, allowing the death penalty to be applied for those who utilise elements of the South Korean language or foreign languages.⁵²

Saudi Arabia

In July 2023, the Specialised Criminal Court sentenced Mohammad bin Nasser al-Ghamdi to death under counter-terrorism laws for social media posts in which he 'criticised the Saudi King and Crown Prince and Saudi's foreign policy, called for the release of detained religious clerics, and protested increased prices'.⁵³ This is an example of the increasingly harsh measures that authorities are taking to prevent citizens from expressing opinions online.

Singapore

Within Singapore, the death row population is primarily composed of Malay or other minority ethnicities. In 2021, it was reported that '64.9% of offenders who received death sentences between 2010 and 2021 for drug offences were of Malay ethnicity, from different nationalities.'⁵⁴ UN experts concur: 'We are concerned that a disproportionate number of those being sentenced to death for drug-related offences are minority persons and tend to be from economically disadvantaged backgrounds....The practice amounts to discriminatory treatment of minorities such as Malays and vulnerable persons.'⁵⁵

In 2021, 17 death row inmates filed a challenge against the Attorney General, citing that they were discriminated against on account of their Malay ethnicity. However, the application was dismissed.⁵⁶

Foreign nationals are also in a particularly disadvantaged position. Of the 77 individuals facing the death penalty from 2010 to 2021, 14 were of Malaysian nationality.⁵⁷ In addition to facing language barriers and discrimination, many are also potential victims of human trafficking. They are also often limited in resources and isolated from family members.

United States

Twenty-four executions were recorded in the United States in 2023. Of those who were executed, six people were Black, two people were Hispanic, and one person was Native American.⁵⁸ People of colour

⁵² *Pyongyang Cultural Language Protection Act*, January 2023, *Daily NK* <https://www.dailynk.com/english/wp-content/uploads/sites/2/2023/03/Pyongyang-Cultural-Language-Protection-Act_English-and-Korean-Versions_Daily-NK.pdf>.

⁵³ 'Saudi Arabia: Drop 'ludicrous' conviction and death sentence against man convicted over social media posts', *Amnesty International* (Web Page, 31 August 2023) <<https://www.amnesty.org/en/latest/news/2023/08/saudi-arabia-drop-ludicrous-conviction-and-death-sentence-against-man-convicted-over-social-media-posts/>>.

⁵⁴ 'Investigating the presence of structural biases in the criminal punishment system', *Transformative Justice Collective* (Statement, 21 August 2021) <<https://transformativejusticecollective.org/2021/08/16/investigating-the-presence-of-structural-biases-in-the-criminal-punishment-system/>>.

⁵⁵ Office of the United Nations High Commissioner for Human Rights 'Singapore: UN experts call for immediate moratorium on executions for drug offences' (Press Release, 29 July 2022) <<https://www.ohchr.org/en/press-releases/2022/07/singapore-un-experts-call-immediate-moratorium-executions-drug-offences>>.

⁵⁶ *Ibid.*

⁵⁷ *Syed Suhail bin Syed Zin and Others v Attorney-General* [2021] SGHC 274 <https://www.elitigation.sg/gd/s/2021_SGHC_274>.

⁵⁸ 'Execution List 2023', *Death Penalty Information Center* (Web Page, 4 January 2023) <<https://deathpenaltyinfo.org/executions/2023>>.

CAPITAL PUNISHMENT
JUSTICE PROJECT



continue to be sentenced to death at a disproportionate rate in the United States, particularly if their crimes involved white victims.

In contrast, none of the 15 white defendants executed in 2023 were convicted of killing a person of colour. In states such as Texas, this overrepresentation is even more prominent, as five of the eight individuals executed were people of colour.⁵⁹

In addition, Reprieve, an NGO advocating for the abolition of the death penalty, noted that errors made in the lethal injection process occurred more often during the executions of Black individuals.⁶⁰

Further, six men continued to face capital prosecution before controversial military commissions at Guantánamo Bay, Cuba, in relation to the 9/11 attacks.⁶¹

⁵⁹ Death Penalty Information Centre, *The Death Penalty in 2023: Year End Report* (Report, 1 December 2023) <<https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2023-year-end-report>>.

⁶⁰ Chiara Eisner 'States botched more executions of Black prisoners. Experts think they know why', *NPR* (online, 18 April 2024) <<https://www.npr.org/2024/04/18/1245290751/botched-executions-black-race-death-penalty>>.

⁶¹ Amnesty International (n 16) 20.