



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

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*

Tabled 5 May 2016

Government's Response to Committee's Recommendations

Recommendation 1

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

Response

The Government accepts this recommendation. 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.

Recommendation 2

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

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

Response

“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”

The Government notes this recommendation. 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.

“explicitly applying the Guideline to all persons, not just Australian citizens”

The Government accepts this recommendation. 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.

“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”

The Government notes this recommendation.

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:

- a) 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
- b) 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.

“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”

The Government accepts this recommendation 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.

“articulating the criteria used by the AFP to determine whether requests are ranked ‘high’, ‘medium’ or ‘low’ risk”

The Government accepts this recommendation.

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

Recommendation 3

In light of the United Nations’ position that drug crimes, including drug trafficking, do not constitute ‘most serious crimes’ for which the death penalty may be applied under international law, the Committee recommends that the Australian Federal Police (AFP) obtain guarantees that prosecutors in partner countries will not seek to apply the death penalty before providing information in relation [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.

Response

The Government does not accept this recommendation.

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.

Recommendation 4

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

Response

The Government accepts this recommendation. 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).

Recommendation 5

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

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

Response

The Government accepts this recommendation. Guidelines have been finalised and will be attached to DFAT's internal Consular Policy Handbook.

Recommendation 6

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

- references to human rights law, including highlighting the ‘right to life’ enshrined in the Universal Declaration of Human Rights;
- condemnation for the imposition of the death penalty on juveniles and pregnant women;
- opposition to its use on people with mental or intellectual disabilities;
- highlighting the disproportionate use of capital punishment on the poor, and ethnic and religious minorities;
- communicating the risks associated with miscarriages of justice, including the irreversibility of capital punishment;
- emphasising the inherently cruel and torturous nature of the death penalty and executions; and
- refer to the ineffectiveness of the death penalty as a deterrent.

Response

The Government accepts this recommendation. These arguments are already an integral part of the advocacy the Government undertakes in opposition to the death penalty.

Recommendation 7

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

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

Response

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.

Recommendation 8

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

Response

The Government accepts this recommendation. 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.

Recommendation 9

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

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

Response

The Government accepts this recommendation.

Recommendation 10

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

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

- forming a coalition of like-minded countries who can work in concert to promote abolition of the death penalty in the Indo-Pacific region.

Response

The Government accepts this recommendation 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.

Recommendation 11

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

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

Response

The Government accepts this recommendation 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.

Recommendation 12

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

Response

The Government accepts this recommendation 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.

Recommendation 13

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

Response

The Government accepts this recommendation 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.

