



Law Council
OF AUSTRALIA

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

**Joint Standing Committee on Foreign Affairs, Defence and Trade
Human Rights Subcommittee**

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Telephone +61 2 6246 3788
Email mail@lawcouncil.au
PO Box 5350, Braddon ACT 2612
Level 1, MODE3, 24 Lonsdale Street,
Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 104,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2024 are:

- Mr Greg McIntyre SC, President
- Ms Juliana Warner, President-elect
- Ms Tania Wolff, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Mr Lachlan Molesworth, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council is grateful for the contributions received from its National Human Rights Committee.

The Law Council is also grateful for the contributions to this submission made by the following of its constituent bodies: the Law Society of New South Wales and the Law Institute of Victoria.

Executive Summary

1. The Law Council welcomes the opportunity to provide a submission to the Human Rights Subcommittee of the Joint Standing Committee on Foreign Affairs, Defence and Trade (the **Committee**) in its inquiry into Australia's efforts to advocate for the worldwide abolition of the death penalty.
2. The Law Council commends Australia's ongoing commitment to advancing the abolition of the death penalty internationally and maintaining a robust domestic legal and policy framework to ensure that Australia does not expose a person, irrespective of their nationality, to a real risk of execution.
3. The Law Council opposes the imposition or execution of the death penalty in all circumstances for all people.¹ It is the position of the Law Council that no person should be subjected to the death penalty irrespective of their nationality, personal characteristics, the nature of the crime they are alleged to have committed, the time, place or circumstances of the crime's alleged commission, or the nature or identity of any victim(s) of the alleged crime.²
4. The Law Council is committed to the international abolition of the death penalty and, in the interim, to an international moratorium on executions and the commutation of existing death sentences.
5. In addition, a number of the Law Council's Constituent Bodies have adopted their own statements of policy expressing their commitment to the abolition of the death penalty.³
6. The Law Council made a joint submission with the Australian Bar Association to the previous inquiry into Australia's Advocacy for the Abolition of the Death Penalty,⁴ and welcomed the Committee Report '*A world without the death penalty: Australia's advocacy for the abolition of the death penalty*' and many of its recommendations.⁵
7. Australia's domestic legal framework and policies relating to the provision of international police assistance retain gaps that may expose a person to the death penalty and undermine Australia's avowed opposition to the death penalty in all circumstances for all people. These gaps should be addressed by clarifying, strengthening and extending the prohibition on Australia providing assistance where it may lead to the arrest, prosecution or conviction of a person for an offence carrying the death penalty, and through the creation of standing arrangements to the effect that, where Australia provides assistance, the person of interest cannot be sentenced to death.
8. Further, while the Law Council welcomed the development of Australia's Strategy for the Abolition of the Death Penalty and endorses its overarching goals, we submit that the Australian Government should give greater regard to implementing in practice in all areas the statements of intent outlined in the Strategy. The Law Council also considers that the Department of Foreign Affairs could make both the Strategy and the Government's relevant public messaging on this issue more

¹ Law Council of Australia, [Policy Statement on the Death Penalty](#) (October 2021) 3.

² Ibid.

³ See e.g. Law Institute of Victoria 'LIV Policy: Use of the Death Penalty' see pp.5-7 <[link](#)>; Law Society of Western Australia 'Briefing Paper: Death Penalty' (July 2020) <[link](#)>

⁴ Law Council of Australia and the Australian Bar Association, 'Australia's Advocacy for the Abolition of the Death Penalty' ([Submission](#), October 2015).

⁵ Law Council of Australia, 'Recommendation of strategy for the abolition of the death penalty applauded' ([Media Release](#), 5 May 2016).

accessible and visible, and enhance its reporting on its implementation of the Strategy and assistance provided to Australian nationals and residents, including in documents such as the Department's Annual Report and Consular State of Play.

9. The Law Council welcomes the efforts of the Australian Government to persistently raise the death penalty, both bilaterally and in United Nations fora, and submits that the Government should also offer support to abolitionist states in the Pacific to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR),⁶ and seek to raise the death penalty in other fora including the Commonwealth, the Pacific Islands Forum and the East Asia Summit. Other opportunities to enhance Australia's international advocacy in relation to the death penalty include the creation of a regional coalition of likeminded countries, a Council of Eminent Persons, and efforts to leverage the skills and networks of the legal profession.
10. Australia must continue to adopt all available measures to ensure that Australians (and where the Australian Government's advocacy may have particular resonance, non-Australians) facing the death penalty or sentenced to death in a foreign jurisdiction have their sentence commuted to a term of imprisonment, and have access to consular assistance, independent legal representation and financial assistance necessary to facilitate the preparation of a comprehensive defence, appeal or clemency plea.

Summary of Recommendations

Australia's domestic legal framework and the provision of assistance

- **The Australian Government should clarify, strengthen and extend its prohibition on providing mutual assistance to foreign jurisdictions in criminal matters where such assistance may lead to the arrest, prosecution or conviction of a person for an offence carrying the death penalty.**
- **The Australian Government should create standing arrangements to the effect that, where Australia provides mutual assistance, the person of interest cannot be sentenced to death.**
- **The *Mutual Assistance in Criminal Matters Act 1987* (Cth) should be amended:**
 - **to elevate the death penalty from a discretionary ground for refusal under subsection 8(1A) to a mandatory ground for refusal under subsection 8(1); or**
 - **in the alternative—by amending subsection 8(1A) to strictly confine the 'special circumstances' discretion (e.g., where the request is for the benefit of a defendant, or where an appropriate undertaking has been given); and**
 - **Repealing subsection 8(1B).**

⁶ International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171, entered into force 23 March 1976).

- **The *Australian Federal Police National Guideline on International Police-to-Police Assistance in Death Penalty Situations* (AFP Guideline) should be amended to:**
 - **establish, as an overriding principle, that information and assistance in potential death penalty cases shall only be provided in exceptional circumstances (for example, where it would assist the defence, or where the foreign country undertakes not to impose or carry out the death penalty);**
 - **incorporate a clear prohibition on sharing information in death penalty cases unless strict criteria are met, such as the receipt of an official undertaking that the death penalty will not be sought, imposed or carried out;**
 - **require the Australian Federal Police to seek Ministerial approval before sharing information with a foreign agency in all potential death penalty cases, including where no person has been arrested or detained;**
 - **remove the person's age and personal circumstances as relevant factors in determining the Death Penalty Request Risk Category; and**
 - **remove the requirement to consider Australia's interest in promoting and securing cooperation from foreign police or law enforcement agencies in combatting crime.**
- **The AFP Guideline should be made publicly available, including information regarding the most recent updates.**
- **Across the whole sphere of government, the Australian Government should give greater regard to implementing in practice in all areas the statements of intent outlined in Australia's Strategy for Abolition of the Death Penalty and expressly strengthening this strategy as it relates to mutual assistance and the negotiation of bilateral agreements.**

Public messaging in relation to the death penalty

- **The Department of Foreign Affairs and Trade should make Australia's Strategy for the Abolition of the Death Penalty and public statements relating to the death penalty more accessible on its website.**

Legal assistance and financial support to Australians facing the death penalty

- **The *Scheme for Overseas Criminal Matters Involving the Death Penalty* and *Special Circumstances Scheme* should permit applicants to apply for reimbursement for reasonable expenses already incurred where the exigencies of the matter required payment before an application could be determined.**
- **The Australian Government should confirm that such cases may qualify as 'the most exceptional of circumstances' for the purposes of the Commonwealth Guidelines for Legal Financial Assistance.**

Strategy for the Abolition of the Death Penalty

- **The Department of Foreign Affairs and Trade should remove from its Strategy for the Abolition of the Death Penalty the express exclusion of Australia's approach to government-to-government assistance or police operations in a death penalty context.**
- **In implementing its Strategy for the Abolition of the Death Penalty, the Australian Government should:**
 - **be open, consistent and unequivocal in its condemnation of the death penalty whenever and wherever it is imposed or carried out; and**
 - **proactively maintain its commitment to the abolition of the death penalty not only in Australia, but across the world, including by:**
 - **persistently identifying the abolition of the death penalty as a matter of importance in bilateral, regional and multilateral talks, treaties and other political agreements among sovereign States;**
 - **continuing to raise issues relating to the death penalty in the Human Rights Council's Universal Periodic Review procedure;**
 - **encouraging other States to ratify the Second Optional Protocol to the ICCPR;**
 - **supporting the activities of anti-death penalty nongovernment organisations working in priority countries and jurisdictions; and**
 - **continuing collaboration with the organisations described in the Strategy.**
- **The Department of Foreign Affairs and Trade should report, annually, including in its Annual Report and Consular State of Play, on its implementation of the Strategy, including:**
 - **the extent to which consulates are trained on death penalty issues;**
 - **the number of instances where consular access is denied to Australian nationals facing the death penalty, broken down by jurisdiction; and**
 - **the number of cases of Australian nationals or residents facing the death penalty with documented mental health issues.**
- **The Department of Foreign Affairs and Trade should continue to provide funding to civil society organisations for projects relating to the abolition of the death penalty, as well as the provision of legal and other assistance to persons on death row.**
- **The Australian Government should allocate adequate funding to the Department of Foreign Affairs and Trade to support the ongoing implementation of Australia's Strategy for the Abolition of the Death Penalty.**

Opportunities for Australia to advocate for abolition internationally

- **The Department of Foreign Affairs and Trade should:**
 - **continue Australia's leadership in United Nations fora on the abolition of the death penalty;**
 - **continue to utilise the Universal Periodic Review to advocate for the abolition of the death penalty and ratification of the Second Optional Protocol, and condemn instances where the death penalty is applied in contravention of international standards; and**
 - **engage bilaterally with its counterparts, especially, in the Asia Pacific region, to encourage them to ratify the Second Optional Protocol.**
- **The Australian Government should actively seek to advance the abolition of the death penalty in Commonwealth fora, including the biennial Commonwealth Heads of Government Meetings and Commonwealth Law Ministers Meetings.**
- **The Australian Government should explore opportunities for the Pacific Islands Forum to adopt a regional position in support of abolition.**
- **The Australian Government should:**
 - **adopt all available measures to ensure that Australian nationals or residents facing the death penalty or sentenced to the death penalty in a foreign jurisdiction have their death sentences commuted to a term of imprisonment;**
 - **adopt all available measures to ensure the commutation of a non-Australian resident's death sentence in circumstances where the advocacy of the Australian Government may have particular resonance, for example, where the victims or targets of the relevant crime are Australian or where Australia was the intended destination for trafficked drugs or the object of an intended crime;**
 - **adopt all available measures to ensure that Australian nationals or residents facing the death penalty or sentenced to death in foreign jurisdictions have access to consular assistance, independent interpreters, independent legal representation and the financial assistance necessary to facilitate the preparation of a comprehensive defence, appeal and/or clemency plea; and**
 - **consider the submission of amicus curiae briefs in the hearings in foreign jurisdictions of cases of Australian nationals or residents facing the death penalty.**
- **The Australian Government should utilise all available avenues to ensure that states that retain the death penalty guarantee access to effective legal assistance at all stages of proceedings and detention, and ensure that defence lawyers can perform their vital functions without intimidation or sanctions.**
- **The Australian Government should continue to proactively raise the death penalty in bilateral meetings with retentionist countries, as well as in regional fora such as the East Asia Summit.**

- **The Australian Government should form a coalition of likeminded countries who can work in concert to promote abolition of the death penalty in the Asia-Pacific region.**
- **The Australian Government should offer support to Pacific states that have abolished the death penalty to ratify the Second Optional Protocol of the International Covenant on Civil and Political Rights.**
- **The Australian Government should continue to provide justice and security assistance to Pacific countries to mitigate calls to retain, expand or reinstate the death penalty.**
- **Where appropriate, the Department of Foreign Affairs and Trade should leverage the skills and networks of Australia's legal profession in its advocacy for the abolition of the death penalty and its application only in accordance with international minimum standards.**
- **The Australian Government should propose a Council of Eminent Persons to facilitate a dialogue aimed at the progressive abolition of the death penalty in the Asia Pacific region.**

Part 1: Progress against recommendations of the Committee

11. The Committee Report '*A world without the death penalty*' made thirteen recommendations directed towards the Department of Foreign Affairs and Trade (**DFAT**), the Attorney-General's Department (**AGD**), the Australian Federal Police (**AFP**) and the Australian Government as a whole.⁷
12. In its response, the Australian Government noted, accepted, or accepted in principle all of the recommendations in the Committee's Report with the exception of Recommendation 3.⁸ A list of the Report's recommendations, and the Australian Government response to each recommendation, is set out in the **Appendix** to this submission.
13. This submission considers each of the Report's recommendations, with the exception of Recommendation 4. The Law Council has no view on this recommendation, which was accepted by the Government.

Recommendations 1–3: Australia's domestic legal framework and the provision of international police assistance

14. **Recommendation 1** of the Committee Report recommended that AGD 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 ICCPR.⁹
15. The Government accepted this recommendation and, after reviewing legislative arrangements for extradition and mutual assistance for consistency with Australia's obligations as a Party to the Second Optional Protocol, asserted that current arrangements are consistent with those obligations.¹⁰
16. The Law Council recommends further review of legislative arrangements under the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (**Mutual Assistance Act**) and provisions of the Australian Federal Police (**AFP**) National Guideline on International Police-to-Police Assistance in Death Penalty Situations, not only for compliance with Australia's obligations under international law, but also for consistency with Australia's avowed opposition to the death penalty in all cases for all people.¹¹
17. The Law Council further expresses concern that since the Committee Report (and the development of Australia's Strategy for the Abolition of the Death Penalty), Australia has entered into an international agreement, the Australia-Japan Reciprocal Access Agreement, which may expose Australian citizens or residents to the death penalty overseas.¹²

⁷ Joint Standing Committee on Foreign Affairs, Defence and Trade '*A world without the death penalty - Australia's Advocacy for the Abolition of the Death Penalty (A world without the death penalty)*' ([Report](#), 5 May 2016) xix-xxiii.

⁸ 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 (Australian Government Response)* (March 2017) <[link](#)>.

⁹ *A world without the death penalty* (n 7) 48.

¹⁰ Australian Government Response (n 8) 2.

¹¹ Department of Foreign Affairs and Trade, [Australia's Strategy for the Abolition of the Death Penalty](#) (June 2018) i.

¹² Agreement between Australia and Japan concerning the facilitation of reciprocal access and cooperation between the Australian Defence Force and the Self-Defense Forces of Japan, signed 1 June 2022 [2023] ATS 8 (entered into force 13 August 2023).

Mutual Assistance in Criminal Matters Act

18. Subsection 8(1) of the Mutual Assistance Act requires the Attorney-General to refuse a mutual assistance request in specific circumstances, including where the request relates to a political offence, or—if granted—a person would be in danger of being subjected to torture.
19. Subsection 8(1A) of the Mutual Assistance Act requires the Attorney-General to refuse a mutual assistance request in cases where a person has been arrested or detained, charged or convicted of an offence carrying the death penalty, unless they are of the opinion that, due to the existence of 'special circumstances', the assistance requested should be granted. 'Special circumstances' is not defined in the Mutual Assistance Act. However, it is intended to include circumstances where the evidence would assist the defence, or where the foreign country provides a credible and reliable diplomatic assurance to not impose or carry out the death penalty.¹³
20. The Law Council recommends amendments to the Mutual Assistance Act to elevate the death penalty to a mandatory ground of refusal under subsection 8(1). The Law Council submits that the risk that the provision of Australian assistance may lead to the imposition of the death penalty is, like the risk of torture, not a matter which should be weighed against other considerations.¹⁴
21. In the alternative, the Law Council recommends that the Mutual Assistance Act be amended to clearly define 'special circumstances' for the purposes of subsection 8(1A), with a view to limiting the Attorney-General's discretion to determine where 'special circumstances' exist.¹⁵ The Law Council notes that in practice, the 'special circumstances' discretion may operate to the benefit of a person subject to the request, by permitting assistance to allow assistance to be granted where the assistance may be of an exculpatory nature and may assist a defendant to meet the charges he or she faces.
22. However, the Law Council submits that the Attorney-General should not have unfettered discretion to accede to a mutual assistance request in a death penalty case. The retention of such discretion implies that Australia's opposition to the death penalty may be contingent on the circumstances and open to negotiation.¹⁶
23. If, as noted in the Explanatory Memorandum and Second Reading Speech, section 8(1A) is intended to operate such that assistance will only be provided for the benefit of a person subject to a foreign assistance request, or where an appropriate undertaking has been given, then these circumstances should be set out as express exceptions to an otherwise mandatory requirement to refuse a request for assistance in a death penalty case.

¹³ See Explanatory Memorandum, Mutual Assistance in Criminal Matters Legislation Amendment Bill 1996, 15; Daryl Williams Second Reading Speech, Mutual Assistance in Criminal Matters Legislation Amendment Bill 1996 (26 June 1996) <[link](#)>, Attorney-General's Department 'Foreign requests to Australia' <[link](#)>.

¹⁴ Law Council of Australia, 'Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill' ([Submission](#), March 2011) 8.

¹⁵ Law Council of Australia and Australian Bar Association submission, 'Australia's Advocacy for the Abolition of the Death Penalty' (n 4) 16. See also Law Council of Australia submission 'Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill' (n 14) 8-9.

¹⁶ Law Council of Australia submission 'Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill' (n 14) 9.

24. The Law Council further submits that only formal undertakings, that are provided by an official appropriately authorised to offer a guarantee that the death penalty will not be imposed, should be regarded as sufficient to bring a request within this exception.¹⁷
25. Subsection 8(1B) of the Mutual Assistance Act permits the Attorney-General to refuse a request in death penalty cases if they are of the opinion that the provision of assistance may result in the death penalty being imposed on a person, and, after taking into consideration the interests of international criminal cooperation, the request should not be granted.
26. The Law Council recommends that subsection 8(1B) be repealed, as it suggests that Australia's position on the death penalty is equivocal and, sometimes, it will be 'in the interests of international criminal cooperation' for Australia to be complicit in the imposition or execution of the death penalty abroad.¹⁸ Subsection 8(1B) is not at all in accord with Australia's principled opposition to the death penalty.
27. The Law Council will continue to call on the Australian Government to clarify, strengthen and extend its prohibition on providing mutual assistance to foreign jurisdictions in criminal matters where such assistance may lead to the arrest, prosecution or conviction of a person for an offence carrying the death penalty, and that it creates standing arrangements to the effect that, where Australia provides mutual assistance, the person of interest cannot be sentenced to death.¹⁹

Recommendations

- **The Australian Government should clarify, strengthen and extend its prohibition on providing mutual assistance to foreign jurisdictions in criminal matters where such assistance may lead to the arrest, prosecution or conviction of a person for an offence carrying the death penalty.**
- **The Australian Government should create standing arrangements to the effect that, where Australia provides mutual assistance, the person of interest cannot be sentenced to death.**
- **The Mutual Assistance Act should be amended:**
 - **to elevate the death penalty to a mandatory ground for refusal under subsection 8(1); or**
 - **in the alternative—by amending subsection 8(1A) to strictly confine the 'special circumstances' discretion (e.g., where the request is for the benefit of a defendant, or where an appropriate undertaking has been given); and**
 - **by repealing subsection 8(1B).**

¹⁷ Ibid 7.

¹⁸ Ibid 8, 10.

¹⁹ Law Council of Australia, Policy Statement on the Death Penalty (n 1) 8.

AFP National Guideline on International Police-to-Police Assistance in Death Penalty Situations

28. **Recommendation 2** of the Committee Report recommended amendments to the Australian Federal Police (**AFP**) National Guideline on International Police-to-Police Assistance in Death Penalty Situations (**AFP Guideline**) to incorporate a strong focus on preventing exposure of all persons to the risk of the death penalty.²⁰ While some of the recommended amendments were accepted by Government, others were noted or accepted only in principle.²¹
29. **Recommendation 3** of the Committee Report recommended that the AFP obtain guarantees that prosecutors in partner countries will not seek to apply the death penalty in drug-related situations before providing information in relation to these crimes. In situations where such guarantees cannot be obtained, the AFP should withhold provision of relevant information.²² The Government did not accept this recommendation.²³
30. For the purposes of this submission, the Law Council has considered the AFP Guideline made public and published online pursuant to the *Freedom of Information Act 1982* (Cth). The Law Council understands that the Guideline published in March 2024 is current, having been attached to the submission of the Attorney-General's Department and AFP to this inquiry.²⁴
31. The Law Council welcomes amendments to the AFP Guideline that adopt recommendations made in the Committee Report and notes that the AFP Guideline has been updated a number of times between 2016 and 2023.²⁵
32. These amendments include:
 - (a) expressly stating that the AFP Guidelines apply to all persons regardless of nationality; and
 - (b) articulating the relevant factors applied by the AFP to determine the 'Death Penalty Risk Category' of the request, as well as the responsible officer making that determination.
33. Despite these positive amendments, the AFP Guideline continues to allow the AFP a broad discretion to provide inter-agency assistance, even in circumstances where it may ultimately result in the imposition of the death penalty. To minimise the possibility of any person (including an Australian citizen) being subjected to the death penalty, the exercise of discretion by the AFP should be narrowly constrained.²⁶

²⁰ 'A world without the death penalty' (n 7) 80.

²¹ Australian Government Response (n 8) 2-4.

²² 'A world without the death penalty' (n 7) 80.

²³ Australian Government Response (n 8) 4-5.

²⁴ Attorney-General's Department and Australian Federal Police to the Human Rights Subcommittee of the Joint Standing Committee on Foreign Affairs, Defence and Trade 'Inquiry into Australia's efforts to advocate for worldwide abolition of the death penalty' (Submission No. 1) (July 2024) <link> 9.

²⁵ AFP National Guideline on international police-to-police assistance in death penalty situations <link>. See also Attorney-General's Department and Australian Federal Police Submission (n 24) 5.

²⁶ Law Council of Australia and Australian Bar Association submission, 'Australia's Advocacy for the Abolition of the Death Penalty' (n 4) 16.

34. The Law Council reiterates its recommendation that the AFP Guideline be amended to:
- (a) establish, as an overriding principle, that information and assistance in potential death penalty cases shall only be provided in exceptional circumstances (for example, where it would assist the defence, or where the foreign country undertakes not to impose or carry out the death penalty);
 - (b) incorporate a clear prohibition on sharing information in death penalty cases unless strict criteria are met, such as the receipt of an official undertaking that the death penalty will not be sought, imposed or carried out;
 - (c) require the AFP to seek Ministerial approval before sharing information with a foreign agency in all potential death penalty cases, including where no person has been arrested or detained;
 - (d) remove the person's age and personal circumstances as relevant factors in determining the Death Penalty Request Risk Category. Such considerations are inconsistent with Australia's absolute opposition to the death penalty, which would dictate that a person's personal characteristics are irrelevant; and
 - (e) remove the requirement to consider Australia's interest in promoting and securing cooperation from foreign police or law enforcement agencies in combatting crime. Again, this suggests that Australia's opposition to the death penalty is not absolute and can be put aside where it is expedient for other purposes. The death penalty should not be condoned, tolerated or facilitated by Australian authorities for any purpose.²⁷
35. In relation to Recommendation 3 of the Committee Report, the Law Council notes that the AFP has previously resisted a requirement that it seek guarantees from law enforcement partners and prosecutors that the death penalty will not be applied for reasons including that:
- (a) foreign law enforcement partners and prosecutors cannot provide binding or reliable assurances that the death penalty will not be applied;²⁸ and
 - (b) some states will not agree to providing a blanket assurance that the death penalty will not be applied;²⁹
36. The Law Council notes that the above has not been an impediment to other countries, such as the United Kingdom (**UK**) and Norway, from limiting police-to-police assistance in death penalty cases.
37. For example, the UK's Overseas Security and Justice Assistance Guidance provides that 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 is automatically deemed 'High Risk' and Foreign & Commonwealth Office Ministers should be consulted to determine whether, given

²⁷ Ibid 16.

²⁸ Australian Government Response (n 8) 3-4.

²⁹ Ibid 5.

the specific circumstances of the case, the UK should nevertheless provide assistance.³⁰

38. This was recognised by the Committee Report:

*[T]he UK's position in relation to police-to-police assistance is stronger than Australia's: where the AFP must consider various factors, including risk to the accused, before providing information, the UK authorities 'are generally unable to assist foreign prosecutions when [they] cannot rule out the possibility that the death penalty might result.'*³¹

39. In its supplementary submission to the Committee's previous Inquiry, the AFP indicated that it would 'work towards a similar approach to that of the UK but, in the short term, adopt a risk assessment model modified to support death penalty deliberations in an Australian law enforcement context.'³²

40. The Law Council submits that AFP should operate consistently with the whole-of-government policy that seeks to pursue the abolition of the death penalty through all available avenues.

41. As the AFP Guideline is an important component of Australia's domestic legal and policy framework in relation to the death penalty, the Law Council is of the view that AFP should publish both the AFP Guideline and information regarding its updates on its website, as the UK Government has done for its Overseas Security and Justice Assistance Guidance.

Recommendations

- **The AFP Guideline should be amended to:**
 - **establish, as an overriding principle, that information and assistance in potential death penalty cases shall only be provided in exceptional circumstances (for example, where it would assist the defence, or where the foreign country undertakes not to impose or carry out the death penalty);**
 - **incorporate a clear prohibition on sharing information in death penalty cases unless strict criteria are met, such as the receipt of an official undertaking that the death penalty will not be sought, imposed or carried out;**
 - **require the AFP to seek Ministerial approval before sharing information with a foreign agency in all potential death penalty cases, including where no person has been arrested or detained;**
 - **remove the person's age and personal circumstances as relevant factors in determining the Death Penalty Request Risk Category; and**

³⁰ Government of the United Kingdom, Foreign and Commonwealth Office, 'Overseas Security and Justice Assistance Guidance' (26 January 2017) <[link](#)>.

³¹ 'A world without the death penalty' (n 7) 63. See also Government of the United Kingdom Foreign and Commonwealth Office submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade (Submission No. 15) (18 October 2015) <[link](#)> 3.

³² See Australian Federal Police, 'Human Rights Sub-committee on the Inquiry into Australia's Advocacy for the Abolition of the Death Penalty', Supplementary Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade (Submission No. 22.2) (January 2016), 10-11 <[link](#)>; 'A world without the death penalty' (n 7) 62.

- **remove the requirement to consider Australia's interest in promoting and securing cooperation from foreign police or law enforcement agency in combatting crime.**
- **The AFP Guideline should be made publicly available, including information regarding the most recent updates.**

Australia-Japan Reciprocal Access Agreement

42. On 6 January 2022, the Prime Ministers of Australia and Japan signed an agreement concerning the Facilitation of Reciprocal Access and Cooperation between the Australian Defence Force and the Self-Defense Forces of Japan (**Australia-Japan Reciprocal Access Agreement**).³³ The Agreement facilitates defence cooperation between Australia and Japan by establishing a legal framework through which such cooperation could occur and by defining the status of the Visiting Force and Civilian Component of a Party while in the territory of the other Party.
43. During the negotiation of the Agreement, the Law Council urged the Australian Government to enter into the Agreement 'only if there is a clear legally binding commitment that Australian Defence Force members will not face the death penalty in Japan.' It further advised that, 'given the significance of the issue, any assurance cannot rest on a commitment to exercise discretion in order to ensure that the death penalty is not applied—it must be absolute and legally irrevocable.'³⁴
44. Despite the concerns raised by the Law Council and others, the Committee ultimately determined that 'the Agreement's outcomes with regard to criminal jurisdiction are acceptable when considered in the context of the Agreement's overall outcomes and strategic significance' and recommended that binding treaty action be taken.³⁵
45. The Agreement subsequently entered into force on 13 August 2023.
46. Although the Agreement is not unique in failing to guarantee protection from the death penalty for Australians serving overseas,³⁶ the Law Council records its concern that—despite the whole-of-government Strategy for the Abolition of the Death Penalty—this bilateral agreement was negotiated and concluded without any binding commitment to prevent Australian citizens being sentenced to death.

Recommendation

- **Across the whole sphere of government, the Australian Government should give greater regard to implementing in practice in all areas the statements of intent outlined in Australia's Strategy for Abolition of the Death Penalty and expressly strengthening this strategy as it relates to mutual assistance and the negotiation of bilateral agreements.**

³³ *Agreement between Australia and Japan concerning the facilitation of reciprocal access and cooperation between the Australian Defence Force and the Self-Defense Forces of Japan*, signed 6 January 2022, [2023] ATS 8 (entered into force 13 August 2023).

³⁴ Letter from the Law Council of Australia to the Minister for Foreign Affairs and the Minister for Defence (9 January 2021).

³⁵ *Ibid.* 41.

³⁶ See, e.g., *Agreement between the Government of Australia and the Government of Malaysia concerning the Status of Forces*, signed 3 February 1997, [1999] ATS 14 (entered into force 22 July 1999).

Recommendations 5–7: Australia's International Engagement

47. **Recommendation 5** of the Committee Report recommended that DFAT develop guidelines for the Department's support for Australians at risk of facing the death penalty overseas.
48. The Law Council notes that DFAT has responded to this recommendation by incorporating these Guidelines into the Department's internal Consular Policy Handbook. As the Handbook is not a public document, the Law Council is unable to comment on the progress of this recommendation.
49. The Law Council encourages DFAT to ensure that consular arrangements are sufficiently adroit to ensure that high quality legal representation and interpreter support are arranged at the investigation and trial stages of prosecutions when an individual's rights are most at risk and most capable of being protected by competent representation.³⁷

Public messaging in relation to the death penalty

50. **Recommendation 6** of the Committee Report provided specific recommendations in regard to Australia's public messaging on the death penalty. In accepting this recommendation, the Government noted that these arguments are already an integral part of the Government's advocacy in relation to the death penalty.³⁸
51. The Law Council welcomes the Australian Government's public messaging on the death penalty, which mostly takes the form of statements in United Nations fora and occasional statements by the Foreign Minister.³⁹
52. It suggests that Australia's public messaging on the death penalty would be enhanced by making both the Strategy itself and relevant statements more accessible on DFAT's website—for example by improving the search function or creating a dedicated webpage to Australia's Strategy for the Abolition of the Death Penalty.
53. The Law Council submits that it is particularly important for DFAT to enhance the visibility of its public statements relating to the death penalty since much of Australia's advocacy takes place in the form of representations or in the context of bilateral meetings and is not publicly reported.
54. In addition, there is presently limited visibility of Australia's messaging on particular issues, such as condemning the imposition of the death penalty on persons under 18 and pregnant women, opposing its use on people with mental or intellectual disabilities, communicating the risks of miscarriages of justice, and highlighting the disproportionate use of capital punishment on people experiencing poverty and ethnic and religious minorities.

³⁷ Law Council of Australia, Policy Statement on the Death Penalty (n 1) 8.

³⁸ Australian Government Response (n 8) 6.

³⁹ See e.g.: Department of Foreign Affairs and Trade, 'CANZ Statement on High-Level Panel on the Death Penalty' ([Joint Statement](#), 28 February 2023); Minister for Foreign Affairs 'Record support for global moratorium on the death penalty at the UN' ([Media Release](#), 16 December 2022); @SenatorWong (Twitter, 8 January 2023, 3:48pm AEDT) <[link](#)> @MarisePayne (Twitter, 3 April 2019, 12:30pm AEDT) <[link](#)>; 'Joint statement led by Australia on the death penalty as a punishment for blasphemy and apostasy' ([Joint Statement](#), 9 March 2021); and 'Australian statement for the High Level Panel Discussion on the Death Penalty' ([Statement](#), 23 February 2021).

Recommendation

- **The Department of Foreign Affairs and Trade should make Australia's Strategy for the Abolition of the Death Penalty and public statements relating to the death penalty more accessible on its website.**

Legal assistance and financial support to Australians facing the death penalty

55. **Recommendation 7** of the Committee Report recommended that AGD amend the guidelines governing the *Serious Overseas Criminal Matters Scheme* and *Special Circumstances Scheme* to ensure that:
- (a) legal representatives working pro-bono on death penalty cases can access funding from the schemes in a timely manner;
 - (b) where practical, legal representatives are able to communicate with a specific contact person for the duration of the case; and
 - (c) where necessary due to time restraints, legal representatives have the ability to apply for funding for reasonable expenses already incurred.
56. In its response, the Government stated that it 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".⁴⁰
57. The Law Council notes that both schemes were altered following an amendment to the Commonwealth Guidelines for Legal Financial Assistance 2012 announced by the Attorney-General on 2 July 2018 (**Commonwealth Guidelines**).⁴¹
58. The Serious Overseas Criminal Matters Scheme has been replaced by the *Scheme for Overseas Criminal Matters Involving the Death Penalty*.⁴² A consequence of this is that persons facing imprisonment of 20 years or more are no longer included under this scheme but may be eligible for a grant under the Special Circumstances Scheme.⁴³
59. The Law Council strongly supports the implementation of both schemes to assist Australians overseas who are at risk of receiving the death penalty. The Law Council is of the view that this assistance should be as generous and flexible as possible so as to enable individuals facing such a serious abrogation of their individual human rights the best opportunity to access quality and effective legal advice and representation.⁴⁴
60. The schemes are a critical component of Australia's obligations to protect and promote respect for human rights at home and abroad and demonstrate the Australian Government's commitment to access to justice for those most vulnerable and in need. In addition, the establishment and operation of these schemes complements Australia's adherence to its particular obligations under key international human rights conventions to which it is party, including the ICCPR and

⁴⁰ Australian Government Response (n 8) 6.

⁴¹ Attorney-General's Department, 'Scheme for overseas criminal matters involving the death penalty' <[link](#)>.

⁴² Ibid.

⁴³ Ibid. See Attorney-General's Department, 'Special circumstances scheme' <[link](#)>

⁴⁴ Letter from the Law Council of Australia to the Attorney-General's Department 'Attorney-General's Department Financial Assistance Consultation' (17 May 2012).

its Second Optional Protocol relating to the abolition of the death penalty, and the United Nations Convention against Torture.⁴⁵

61. The Law Council has previously highlighted the importance that such schemes:
- (a) adopt a broad definition of the term 'disbursements', which should cover filing fees, expert report fees, setting down fees, sitting fees, transcript fees and interpreter fees, as well as those matters necessary to facilitate meaningful contact between an individual and their legal representative, such as interpreter or translation services, travel costs, accommodation, incidental expenses such as meals and potential travel insurance or other costs associated with ensuring the safety of the legal representative; and
 - (b) ensure timely access to approved funds, including quick and easy-to-follow procedures, as well as incorporating some flexibility when dealing with overseas legal representatives who may have different practices in relation to billing.⁴⁶
62. The Law Council notes that, under the Commonwealth Guidelines, legal representation costs are not included in disbursements (although both are available under the *Overseas Criminal Matters Involving the Death Penalty Scheme*),⁴⁷ and that legal representation costs are only available in exceptional circumstances.⁴⁸ The Law Council submits that circumstances in which an Australian is at risk of receiving the death penalty should qualify as 'exceptional circumstances' to warrant the grant of legal representation costs.
63. In calculating the amount of financial assistance available under the *Overseas Criminal Matters Involving the Death Penalty Scheme*, the Attorney-General's Department may have regard to comparable rates in the relevant country, and may grant financial assistance for reasonable travel of an overseas legal practitioner within the relevant country.⁴⁹ The Department generally will not provide assistance for legal representation costs incurred in Australia, costs for a legal practitioner who travels overseas to represent a grant recipient, legal representation costs relating to overseas contact order proceedings or proceedings of a similar nature and the travel expenses of a friend, relative or support person.⁵⁰
64. The Law Council further notes that, under both schemes, pursuant to the Commonwealth Guidelines for Legal Financial Assistance, the Government will refuse a grant for legal assistance on a retrospective basis 'except in the most exceptional of circumstances' and that grants are generally limited to costs incurred after the date the Attorney-General's Department receives a complete application.⁵¹ The Guidelines provide no indication of what may be considered 'the most exceptional of circumstances'.
65. This is particularly an issue in death penalty cases as there are often limited timeframes in which to lodge applications and appeals.

⁴⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

⁴⁶ Ibid.

⁴⁷ Attorney-General's Department, Commonwealth Guidelines for Legal Financial Assistance (2 July 2018) <[link](#)>: see definition of disbursements at 7.3, and table of available financial assistance at 7.1.

⁴⁸ Ibid 1.3.

⁴⁹ Ibid 7.8, 7.9.

⁵⁰ Ibid 7.8-7.9.

⁵¹ Ibid. 7.1(1).

66. In this regard, the Law Council reiterates its comments:

While the Law Council recognises the need to ensure that applicants do not accrue a large legal bill in anticipation of Government assistance, the Law Council is of the view that there will be circumstances in which a party with a potential claim must necessarily make an outlay before the issue of their eligibility may be determined. In such circumstances, the Law Council does not suggest the applicant should have a right to assistance under the schemes, but rather the opportunity to apply for reimbursement where the exigencies of the matter required payment before an application could be determined.

In order to clearly manage expectations of potential applicants for assistance in such circumstances, the Commonwealth Government could set guidelines as to the circumstances in which it would entertain such an application.⁵²

Recommendation

- **The Scheme for Overseas Criminal Matters Involving the Death Penalty and Special Circumstances Scheme should permit applicants to apply for reimbursement for reasonable expenses already incurred where the exigencies of the matter required payment before an application could be determined; and**
- **The Australian Government should confirm that such cases may qualify as ‘the most exceptional of circumstances’ for the purposes of the Commonwealth Guidelines for Legal Financial Assistance.**

Recommendations 8–13: Improving Australia’s Advocacy

Strategy for the Abolition of the Death Penalty

67. **Recommendation 8** of the Committee Report recommended that DFAT coordinate the development of a whole-of government Strategy for the Abolition of the Death Penalty. This Recommendation was accepted by government and resulted in subsequent development of the Australia’s Strategy for the Abolition of the Death Penalty (the **Strategy**) launched in 2018.
68. **Recommendations 9–11** and **13** of the Committee Report provided further recommended parameters for the Strategy. These recommendations were accepted in principle by the government noting that the specific aims, goals and resourcing of and for the Strategy would be determined as the Strategy was developed.
69. **Recommendation 12** of the Committee Report recommended that the Government provide funding to civil society, and other initiatives aimed at the abolition of the death penalty.

⁵² Letter ‘Attorney-General’s Department Financial Assistance Consultation’ (17 May 2012) (n 44).

Goals of the Strategy

70. The Law Council welcomed the development of Australia's Strategy for the Abolition of the Death Penalty as a principled and consistent whole-of-government policy which articulates and reinforces Australia's commitment to the global abolition of the death penalty.⁵³
71. While the Law Council endorses the Strategy's stated goals which incorporate and expand upon those outlined in **Recommendation 9**, it acknowledges the difficulty of measuring the contribution of the Strategy towards global progress against these goals.
72. The Law Council notes that, since the launch of the Strategy in 2018, there has been a moderate increase in the number of countries that are abolitionist in law or practice,⁵⁴ and individual jurisdictions have reduced the number of crimes that attract the death penalty or, otherwise, limited its application or use.⁵⁵
73. In particular, the Law Council welcomes a number of positive developments in the Asia-Pacific region relating to the death penalty, both of which were noted in the Committee Report as appropriate aims for Australia's Strategy:
 - (a) Papua New Guinea's abolition of the death penalty in January 2022;⁵⁶ and
 - (b) Malaysia's repeal of the mandatory death penalty in April 2023.⁵⁷
74. There has also been an increase in the number of states ratifying the ICCPR and its Second Optional Protocol, with 174 states party to the ICCPR and 91 to the Second Optional Protocol as of July 2024, compared with 168 states party to the ICCPR and 81 to the Second Optional Protocol in 2018.⁵⁸
75. However there has been no downwards trend in the overall number of executions⁵⁹ and, in 2023, the lowest number of executing countries on record carried out the highest number of known executions in close to a decade. There has also been little progress in relation to greater transparency of state reporting in relation to death sentences and executions, with China, North Korea and Vietnam being jurisdictions of particular concern.⁶⁰
76. The Strategy does not refer to the specific aims outlined in **Recommendation 10**. However, DFAT indicated that it undertakes 'many of the activities outlined in the

⁵³ Law Council of Australia, 'Law Council endorses Australian Government's Strategy for Abolition of the Death Penalty' ([Media Release](#), 16 October 2018).

⁵⁴ According to Amnesty International, as of 31 December 2023, 144 countries are abolitionist in law or practice, compared with 142 countries in 2018. Between 2018 and 2023, three countries (Papua New Guinea, Central African Republic and Sierra Leone) progressed from being abolitionist in practice to abolition for all crimes, and Kazakhstan progressed from abolition for ordinary crimes to total abolition. Chad progressed from retentionist to total abolition, and Equatorial Guinea progressed from retentionist to abolition for ordinary crimes. See Amnesty International, 'Death sentences and executions in 2023' ([Report](#), 29 May 2024) 41-42, and Amnesty International, 'Death sentences and executions in 2018' ([Report](#), 10 April 2019) 48-49.

⁵⁵ See Amnesty International, 'Death sentences and executions in 2023' (n 54) 8, 22, 35.

⁵⁶ See Moses Sakai 'The PNG Parliament abolishes the death penalty for the second time' Eleos Justice (Blog Post, 27 January 2022) <[link](#)>.

⁵⁷ See United Nations Office of the High Commissioner for Human Rights 'Malaysia: UN experts hail parliamentary decision to end mandatory death penalty' (Press Release, 11 April 2023) <[link](#)>.

⁵⁸ See International Covenant on Civil and Political Rights (New York, 16 December 1966) 999 UNTS 171 <[link](#)>; and Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (New York, 15 December 1989) 1642 UNTS 414 <[link](#)>.

⁵⁹ Executions increased by 31% in 2023 compared with 2022, with this increase being largely attributable to a 48% increase in executions in Iran: Amnesty International 'Death sentences and executions in 2023' (n 54).

⁶⁰ Ibid 6-7.

recommendation, including bilateral advocacy in all of the countries identified'.⁶¹
The Law Council provides further comments on developments (or the lack thereof) relating to these specific aims under Part 2.

Implementation of the Strategy

77. Although the Strategy does not refer to all of the 'techniques' outlined in **Recommendation 11**, the Law Council notes that the Strategy is multipronged, and encompasses public diplomacy, bilateral advocacy and representations, and project support for National Human Rights Institutions and civil society organisations, as well as multilateral advocacy in fora including the United Nations, ASEAN, the Pacific Islands Forum and the Commonwealth.
78. The Law Council further notes that DFAT expressed its intention that the Strategy "would focus on work to reduce the use of the death penalty for drug crime and other economic crimes, like corruption, which do not meet the definition of 'most serious crimes,'"⁶² and that DFAT would develop and implement tailored strategies for posts in retentionist countries.⁶³
79. The Law Council is unable to comment on the extent to which DFAT's implementation of the Strategy has focused on work to limit the application of the death penalty to offences that meet the threshold of 'most serious crimes,' nor on the content of or progress achieved under the country-specific strategies, which are internal documents.
80. The Law Council welcomes DFAT's continued advocacy in relation to the death penalty at the United Nations, including Australia's active role in leading negotiations of the biennial resolution of the United Nations General Assembly in support of a global moratorium on the death penalty,⁶⁴ Australia's statements and other engagement in the Human Rights Council,⁶⁵ and Australia consistently raising the death penalty in the context of the Universal Periodic Review.⁶⁶
81. The Law Council notes that the Australian Government's multilateral engagement constitutes the visible implementation of the Strategy, with representations and bilateral engagement as well as specific project support and funding for civil society organisations being far less visible.⁶⁷
82. Despite the Strategy being labelled as a 'whole-of-government' strategy, it explicitly excludes consideration of Australia's approach to government-to-government assistance or police operation in a death penalty context, and notes that these are

⁶¹ Australian Government Response (n 8) 8.

⁶² Department of Foreign Affairs and Trade, 'Australia's Advocacy for the Abolition of the Death Penalty', Submission to the Joint Standing Committee for Foreign Affairs, Defence and Trade (Submission No. 35) (October 2015) <[link](#)> 11.

⁶³ Australia's Strategy for the Abolition of the Death Penalty (n 11) 7.

⁶⁴ Minister for Foreign Affairs 'Record support for global moratorium on the death penalty at the UN' ([Media Release](#), 16 December 2022).

⁶⁵ See e.g.: Department of Foreign Affairs and Trade, 'CANZ Statement on High-Level Panel on the Death Penalty' ([Joint Statement](#), 28 February 2023); 'Joint statement led by Australia on the death penalty as a punishment for blasphemy and apostasy' ([Joint Statement](#), 9 March 2021); and 'Australian statement for the High Level Panel Discussion on the Death Penalty' ([Statement](#), 23 February 2021).

⁶⁶ See, e.g., Department of Foreign Affairs and Trade, 'Universal Periodic Review of China - Advance Questions from Australia (8 January 2024) <[link](#)>; Statement by Australia on the Universal Periodic Review of Saudi Arabia 22 January 2024) <[link](#)>; Statement by Australia on the Universal Periodic Review of Bangladesh (13 November 2023) <[link](#)>.

⁶⁷ See, e.g., Department of Foreign Affairs and Trade Annual Report 2019-20 83 <[link](#)>; Department of Foreign Affairs and Trade Annual Report 2020-21 <[link](#)> 79; Department of Foreign Affairs and Trade Annual Report 2021-22 69 <[link](#)>; and Department of Foreign Affairs and Trade Annual Report 2022-23 93 <[link](#)>.

governed by the *Extradition Act 1988* (Cth), Mutual Assistance Act, and the AFP Guideline.⁶⁸

83. The Strategy also notes 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',⁶⁹ that 'other government agencies which have an international presence or maintain relationships with international government partners must also be cognisant of Australia's opposition to the death penalty and should take all relevant opportunities to raise Australia's opposition to the death penalty',⁷⁰ and that 'Australia may also discourage countries from using the death penalty by refusing to provide or placing conditions around the provision of information, assistance, goods or services in situations where the death penalty may be applied.'⁷¹
84. The Law Council submits that these aspects of the Strategy appear to be contradictory, by explicitly excluding the extradition and mutual assistance legislation and AFP Guidelines from the whole-of-government Strategy, before proceeding to note their relevance.

⁶⁸ Australia's Strategy for the Abolition of the Death Penalty (n 11) 2.

⁶⁹ Ibid 4.

⁷⁰ Ibid 11.

⁷¹ Ibid 11.

Recommendations

- **The Department of Foreign Affairs and Trade should remove from its Strategy for the Abolition of the Death Penalty the express exclusion of Australia's approach to government-to-government assistance or police operations in a death penalty context.**
- **In implementing its Strategy for the Abolition of the Death Penalty, the Australian Government should:**
 - **be open, consistent and unequivocal in its condemnation of the death penalty whenever and wherever it is imposed or carried out; and**
 - **proactively maintain its commitment to the abolition of the death penalty not only in Australia, but across the world, including by:**
 - **persistently identifying the abolition of the death penalty as a matter of importance in bilateral, regional and multilateral talks, treaties and other political agreements among sovereign States;**
 - **continuing to raise issues relating to the death penalty in the Human Rights Council Universal Periodic Review procedure;**
 - **encouraging other States to ratify the Second Optional Protocol to the ICCPR;**
 - **supporting the activities of anti-death penalty nongovernment organisations working in priority countries and jurisdictions; and**
 - **continuing collaboration with the organisations described in the Strategy.**

Engagement with civil society

85. The Law Council notes that, pursuant to its Strategy, DFAT established a Consultative Group on Australia's Strategy for Abolition of the Death Penalty (**Consultative Group**), to which the Law Council nominated a representative.

Monitoring implementation and reporting

86. The Law Council notes that the Strategy refers to an expectation that diplomatic posts and consular missions report to Canberra by cable at least annually on the status of the death penalty in the country of accreditation, including legislation regulating the use of the death penalty and its practical application, statistics on the use of the death penalty (including to note where these are not publicly available), public opinion and the role of civil society, and prospects for progress towards abolition.⁷² The Law Council is not able to comment on whether this internal reporting has taken place.

87. While acknowledging the sensitivity of specific consular cases and some government-to-government discussions, the Law Council would welcome enhanced public reporting by DFAT in relation to its implementation of the Strategy, as well as relevant thematic and country-specific developments. The Law Council suggests

⁷² Australia's Strategy for the Abolition of the Death Penalty (n 11) 7.

that enhanced reporting on the death penalty could be included in DFAT's Annual Report as well as the annual Consular State of Play.

Recommendations

- **The Department of Foreign Affairs and Trade should report annually, including in its Annual Report and Consular State of Play, on its implementation of the Strategy, including:**
 - **the extent to which consulates are trained on death penalty issues;**
 - **the number of instances where consular access is denied to Australian nationals facing the death penalty, broken down by jurisdiction; and**
 - **the number of cases of Australian nationals or residents facing the death penalty with documented mental health issues.**

Resourcing of the Strategy and funding to civil society

88. The Law Council welcomes DFAT's efforts, consistent with **Recommendation 12**, to provide funding to civil society organisations for projects relating to the abolition of the death penalty and the provision of legal and other assistance to persons on death row.
89. In relation to **Recommendation 13**, the Law Council notes that the Australian Government undertook to develop and implement the Strategy using existing resources. The Law Council is unable to comment on the adequacy of ongoing resourcing of the Strategy.

Recommendations

- **The Department of Foreign Affairs and Trade should continue to provide funding to civil society organisations for projects relating to the abolition of the death penalty, as well as the provision of legal and other assistance to persons on death row.**
- **The Australian Government should allocate adequate funding to DFAT to support the ongoing implementation of Australia's Strategy for the Abolition of the Death Penalty.**

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

Engagement with international institutions and likeminded countries

United Nations

90. The United Nations remains the pre-eminent forum for Australia's public advocacy to promote the global abolition of the death penalty. The Law Council notes that the United Nations has been described as a 'moral entrepreneur' in relation to the death penalty,⁷³ with its various organs setting limitations and safeguards regarding the use of the death penalty,⁷⁴ and establishing (through the Second Optional Protocol to the ICCPR) a treaty framework for complete and irreversible abolition.⁷⁵ In addition, the biennial UN General Assembly resolution calling for a global moratorium on the death penalty serves as a barometer of the strength of the abolitionist movement.⁷⁶
91. As noted above, the Law Council welcomes DFAT's continued advocacy in relation to the death penalty in United Nations fora.⁷⁷
92. The World Coalition Against the Death Penalty has identified 10 target countries for 2024 that have not ratified the Second Optional Protocol to the ICCPR, including Fiji, Samoa and the Marshall Islands.⁷⁸ The Law Council recommends that Australia should direct particular attention to encouraging these jurisdictions to ratify the Second Optional Protocol, and continue to identify priority countries in the Asia Pacific region in which Australia's advocacy may be particularly effective.
93. The Law Council further notes the particular importance of the UPR as a forum for Australia to support progress towards abolition through tailored advocacy and engagement. Fiji's abolition of the death penalty for all offences has been attributed to sustained advocacy by numerous abolitionist countries as part of Fiji's UPR in 2010.⁷⁹ The UPR has made over 1,270 recommendations to establish moratoria with a view to abolition, and countries including Nauru, Samoa, Niger and Liberia have accepted such recommendations.⁸⁰

⁷³ Mai Sato 'Politics of International Advocacy Against the Death Penalty: Governments as Anti-Death Penalty Crusaders' *International Journal for Crime, Justice and Social Democracy* 11(3) 2022 <[link](#)> 2.

⁷⁴ See, e.g. Human Rights Committee 'General Comment No. 36 – Article 6: right to life, UN Doc CCPR/C/GC/36 (3 September 2019) <[link](#)>; United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty (25 May 1984) UN Doc E/RES/1984/50 <[link](#)>.

⁷⁵ Ratification of the ICCPR and its Second Optional Protocol creates binding international law obligations not to reinstate capital punishment or to execute: William Schabas, *The abolition of the death penalty in international law* (Cambridge University Press 3rd ed, 2002).

⁷⁶ Daniel Pascoe and Sangmin Bae 'Latest Developments in the UNGA Death Penalty Moratorium Resolutions' University of Oxford Faculty of Law Death Penalty Research Unit (Blog Post, 18 May 2021) <[link](#)>.

⁷⁷ See n 64.

⁷⁸ Central African Republic, Chad, Congo, Fiji, Ghana, Marshall Islands, Samoa, Sierra Leone, Suriname and Zambia. See World Coalition Against the Death Penalty 'Just One More Step: Ratifying International and Regional Protocols' (10 June 2024) <[link](#)>

⁷⁹ Daniel Pascoe and Andrew Novak 'Holdouts in the South Pacific: Explaining Death Penalty Retention in Papua New Guinea and Tonga in *International Journal for Crime, Justice and Social Democracy* 11(3) 2022 <[link](#)> 46.

⁸⁰ Speech by the Acting UN High Commissioner for Human Rights, Nada Al-Nashif 'Pathways to moratorium on the use of the death penalty: Effective and good practices from Member States' (Keynote Speech, 23 September 2022) <[link](#)>.

94. The Law Council submits that Australia’s advocacy and engagement in United Nations fora should continue to be guided by the policy goals listed in Australia’s Strategy for the Abolition of the Death Penalty.⁸¹

<p>Recommendation</p> <ul style="list-style-type: none"> • The Department of Foreign Affairs and Trade should: <ul style="list-style-type: none"> ○ continue Australia’s leadership in United Nations fora on the abolition of the death penalty; ○ continue to utilise the Universal Periodic Review to advocate for the abolition of the death penalty and ratification of the Second Optional Protocol, and condemn instances where the death penalty is applied in contravention of international standards; and ○ engage bilaterally with its counterparts, especially in the Asia Pacific region, to encourage them to ratify the Second Optional Protocol.

Commonwealth

95. Despite progress towards abolition since 2018,⁸² Commonwealth countries continue to be overrepresented among retentionist states. As shown in **Table 1**, as of 2023, 41.1% of Commonwealth states have abolished the death penalty, and a total of 62.5% are abolitionist in law or practice, compared with 56.3% and 72.4% globally.⁸³ 19 of the 37 states that voted against the UNGA resolution 77/222 in 2022 were Commonwealth countries, with a further 10 abstaining.⁸⁴

Table 1: Status of abolition in Commonwealth countries compared to global total

	Commonwealth		Global Total	
	No.	% of total	No.	% of total
<i>Total abolition</i>	23	41.1%	112	56.3%
<i>Abolition for ordinary crimes</i>	1		9	
<i>Abolition in practice</i>	10		23	
<i>Total abolitionist in law and practice</i>	32	62.5%	144	72.4%
<i>Retentionist</i>	21	37.5%	55	27.6%
<i>Total</i>	56		199	

96. The Law Council notes that only 14 of the 56 Commonwealth States have ratified the Second Optional Protocol, despite a further 10 having abolished the death penalty.⁸⁵ Of these, eight are Pacific states: Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tuvalu and Vanuatu (see below).

97. Australia should actively seek to advance the abolition of the death penalty in Commonwealth fora, including the biennial Commonwealth Heads of Government (**CHOGM**) Meetings and Commonwealth Law Ministers Meeting.

⁸¹ Australia’s Strategy for the Abolition of the Death Penalty (n 11) 3.

⁸² Papua New Guinea and Sierra Leone abolished the death penalty in 2022, and Zambia abolished the death penalty for ordinary crimes in the same year. In addition, Malaysia abolished the mandatory death penalty.

⁸³ Figures derived from Amnesty International, ‘Death sentences and executions in 2023’ (n 54) 40-41.

⁸⁴ Ibid.

⁸⁵ The Gambia has ratified the protocol but is yet to abolish the death penalty in law.

Recommendation

- **The Australian Government should actively seek to advance the abolition of the death penalty in Commonwealth fora, including the biennial Commonwealth Heads of Government Meetings and Commonwealth Law Ministers Meetings.**

Pacific Islands Forum

98. The Law Council suggests that the Australian Government explore opportunities for the Pacific Islands Forum to adopt a regional position supporting abolition. It submits that the adoption of such a position is consistent with the values of the 2050 Strategy for the Blue Pacific Continent, particularly, those relating to good governance, the rule of law and the defence and promotion of all human rights.⁸⁶

Recommendation

- **The Australian Government should explore opportunities for the Pacific Islands Forum to adopt a regional position in support of abolition.**

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

99. The Law Council acknowledges the efforts of the Australian Government to provide consular assistance to Australian citizens and permanent residents who are arrested, charged or convicted of criminal offences abroad, including for offences that are punishable by the death penalty.

100. The Law Council further acknowledges the efforts of the Australian Government, through representations and careful advocacy, to support Australian citizens and permanent residents facing the death penalty abroad. In particular, the Law Council welcomes the positive outcomes achieved in particular cases, such as securing clemency for two Australian citizens who faced the death penalty in Vietnam.⁸⁷

Recommendations

- **The Australian Government should:**
 - **adopt all available measures to ensure that Australian nationals or residents facing the death penalty or sentenced to the death penalty in a foreign jurisdiction have their death sentences commuted to a term of imprisonment;**
 - **adopt all available measures to ensure the commutation of a non-Australian resident's death sentence in circumstances where the advocacy of the Australian Government may have particular resonance, for example, where the victims or targets of the relevant crime are Australian or where Australia was the intended destination for trafficked drugs or the object of an intended crime;**
 - **adopt all available measures to ensure that Australian nationals or residents facing the death penalty or sentenced to death in**

⁸⁶ See Pacific Islands Forum Secretariat, 2050 Strategy for the Blue Pacific Continent (2022) 7 <[link](#)>.

⁸⁷ Sarah Ferguson and Marina Freri, Securing release of two Australians in Vietnam' (ABC News, 5 June 2024) <[link](#)>.

foreign jurisdictions have access to consular assistance, independent interpreters, independent legal representation and the financial assistance necessary to facilitate the preparation of a comprehensive defence, appeal and/or clemency plea; and

- **consider the submission of amicus curiae briefs in the hearings in foreign jurisdictions of cases of Australian nationals or residents facing the death penalty.**

Opportunities and risks for Australia to advocate for the abolition of the death penalty internationally

Ongoing issues of concern

101. The Law Council encourages DFAT to engage in advocacy in relation to:

- (a) The continued application of the death penalty contrary to international minimum standards, including:
 - (i) its application to offences that do not meet the threshold of 'most serious crimes,' such as political and religious offences and drug-related offences (including in China, Indonesia, Iran, Malaysia, Myanmar, Saudi Arabia, Singapore, Thailand, and Vietnam);⁸⁸
 - (ii) its application in circumstances that violate fair trial standards (particularly in Afghanistan, Bangladesh, China, Iran, Myanmar, North Korea, Pakistan, Saudi Arabia, and Singapore);⁸⁹
 - (iii) the imposition of the death penalty against persons who were children at the time of the offence (particularly in Iran);⁹⁰ and
 - (iv) the carrying out of executions that violate the requirement to inflict the minimum possible suffering (particularly, in the United States);⁹¹
- (b) The continued lack of transparency regarding the application and execution of the death penalty, especially, in China, Vietnam and North Korea;⁹² and
- (c) Prison conditions and treatment of persons on death row which fall below international standards (including in Japan and Vietnam).⁹³

102. The Law Council also encourages DFAT to continue to monitor the situation in Brunei Darussalam, after authorities expanded the application of the death penalty under its Syariah Penal Code,⁹⁴ and in the Philippines, where the reintroduction of the death penalty regrettably remains on the legislative agenda despite the country

⁸⁸ See Amnesty International, 'Death sentences and executions in 2023' (n 54) 14.

⁸⁹ Ibid 13.

⁹⁰ Ibid 32.

⁹¹ 'United States: UN experts horrified by Kenneth Smith's execution by nitrogen in Alabama' (Press Release, 30 January 2024) <[link](#)>.

⁹² See Amnesty International, 'Death sentences and executions in 2023' (n 54) 7.

⁹³ CrimelInfo and Eleos Justice (Monash University) 'Imposition of the death penalty and its impact: Japan' (29 April 2022) <[link](#)>. Karie Nguyen, 'Three Hidden Facets of the Death Penalty in Vietnam' The Vietnamese (9 August 2023) <[link](#)>.

⁹⁴ See Claudia Yee, 'What explains Brunei's expansion of the death penalty in 2019?' Eleos Justice (Blog Post, 31 August 2021) <[link](#)>.

having ratified the ICCPR and its Second Optional Protocol⁹⁵ and despite the view of the Human Rights Committee that the reintroduction of the death penalty by States parties to the Second Optional Protocol is a violation of that treaty.⁹⁶

Emerging issues of concern

Efforts to weaken United Nations resolutions on the death penalty.

103. The Law Council is concerned regarding efforts to weaken the biennial United Nations General Assembly resolution calling for an international moratorium on the death penalty, as well as the biennial Human Rights Council resolution on the question of the death penalty, through the introduction of a new operative paragraph 'reaffirming the sovereign right of all States to develop their own legal systems, including determining appropriate legal penalties, in accordance with their international law obligations'.⁹⁷ This paragraph, referred to as the 'sovereignty amendment', was introduced into the General Assembly resolution in 2016, where it has remained.⁹⁸
104. The Law Council welcomes the continued efforts of the Australian Government to oppose such amendments to resolutions of the General Assembly and Human Rights Council.

Laws and policies that restrict the right to appeal

105. The Law Council has previously expressed concern regarding Singapore's *Post-Appeal Applications in Capital Cases Act 2022*,⁹⁹ which sets an unreasonably high bar for death row prisoners to apply to stay or challenge their execution or conviction and permits applications to be summarily dismissed without hearing or struck out on technical grounds with no recourse for review.¹⁰⁰
106. The Law Council encourages the Australian Government, through its multilateral advocacy, public diplomacy and bilateral engagement, to highlight that the rights to seek pardon or commutation of sentence and have one's conviction and sentence reviewed continue to apply post-appeal.¹⁰¹

Laws, policies and practices that reduce access to legal representation and penalise capital defence lawyers

107. The Law Council is concerned by measures that directly or indirectly limit access to legal representation, including by reducing, restricting or withdrawing legal assistance for death row inmates, imposing additional requirements or liabilities on capital defence lawyers or, otherwise, sanctioning capital defence lawyers.

⁹⁵ In 2023, there were three bills in the Philippines House of Representatives and one in the Senate under the 19th Congress (2022-25) penalising a range of crimes with death. Neri Javier Colmenares, 'Analysing the Success of Death Penalty Campaigns in the Philippines: Strategies, Tactics and Framing' *Australian Journal of Asian Law*, 2023, 24(1), 31.

⁹⁶ Human Rights Committee, General Comment No. 36 (n 74) para 34.

⁹⁷ Missing Persons, Extrajudicial Executions, Death Penalty Moratorium among Rights Questions of Six Draft Resolutions Approved by Third Committee' (Press Release, 11 November 2022) <[link](#)>.

⁹⁸ 'Resolution 77/222: Moratorium on the use of the death penalty' UN Doc [A/RES/77/222](#) (see operative paragraph (OP) (1). <[link](#)>; cf. 'Resolution 69/186: Moratorium on the use of the death penalty' UN Doc [A/RES/69/186](#) (18 December 2014) <[link](#)>.

⁹⁹ Law Council of Australia and International Bar Association Human Rights Institute ([Joint Statement](#), 21 September 2023). See *Post-appeal Applications in Capital Cases Act 2022* (Singapore) <[link](#)> and Explanatory Statement <[link](#)>.

¹⁰⁰ Transformative Justice Collective, 'The Post-Appeal Applications in Capital Cases Bill: A brief' (30 November 2022) <[link](#)>. See *Supreme Court of Judicature Act 1969* (Singapore), ss 60G, 60H, 60J.

¹⁰¹ Human Rights Committee, General Comment No. 36 (n 74) para 41.

It reiterates that capital cases require, at minimum, scrupulous adherence to international fair trial standards, including access to legal counsel.¹⁰²

108. The Law Council has previously condemned the imposition of personal costs orders against capital defence lawyers in Singapore, which deters capital defence lawyers from taking up capital cases and lodging applications post-appeal.¹⁰³ This has resulted in an increase in persons on death row appearing unrepresented in the days before their scheduled execution because they have been unable to find a lawyer willing to take on their case.¹⁰⁴ United Nations special procedures mandate holders have written to the Government of Singapore to express their concern in relation to these measures.¹⁰⁵
109. The Law Council encourages the Australian Government to utilise all available avenues to ensure that states that retain the death penalty guarantee access to effective legal assistance at all stages of proceedings and detention (including in the form of state-funded legal assistance and representation),¹⁰⁶ and ensure that defence lawyers can perform their vital functions without intimidation or sanctions.¹⁰⁷

Recommendation

- **The Australian Government should utilise all available avenues to ensure that states that retain the death penalty guarantee access to effective legal assistance at all stages of proceedings and detention, and ensure that defence lawyers can perform their vital functions without intimidation or sanctions.**

The introduction of new methods to carry out executions

110. On 25 January 2024, Kenneth Smith was executed in Alabama using nitrogen hypoxia, the first execution in the world using this method.¹⁰⁸ In addition to Alabama, Oklahoma and Mississippi have authorised the use of nitrogen gas in executions. The introduction of these methods is partly in response to increased difficulty of sourcing the drugs used in lethal injections after European manufacturers refused to sell drugs to be used in executions.¹⁰⁹
111. In addition to its opposition to capital punishment in all cases for all people, Australia should specifically and vocally oppose the use of such experimental capital punishment methods on the basis that they amount to cruel, inhuman or degrading

¹⁰² Human Rights Committee 'General Comment No. 32 – Article 14: right to equality before courts and tribunals and to a fair trial (23 August 2007) UN Doc CCPR/C/GC/32 para 59.

¹⁰³ Law Council of Australia and the International Bar Association Human Rights Institute Joint Statement on the Death Penalty (21 September 2023) <[link](#)>. See Criminal Procedure Rules 2018 (Singapore) s 11 <[link](#)>.

¹⁰⁴ Kirsten Han 'WTC Long Read: The death row prisoners' Zoom meeting' (6 August 2022) <[link](#)>.

¹⁰⁵ Communication SGP 1/2023 – Mandates of the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on the situation of human rights defenders, (27 March 2023) <[link](#)>.

¹⁰⁶ UN Basic Principles on the Role of Lawyers (7 September 1990) paras (1)-(3) <[link](#)>. See also United Nations, Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems' (20 December 2012) UN Doc A/RES/67/187 <[link](#)>.

¹⁰⁷ Ibid paras 13, 16.

¹⁰⁸ 'United States: UN experts horrified by Kenneth Smith's execution by nitrogen in Alabama' (n 91).

¹⁰⁹ See also Elizabeth Wolfe, Dakin Andone, Holly Yan and Caitlin Danaher, 'Alabama carries out first known execution with nitrogen gas in the US. Now the state's AG expects more states to follow' CNN (26 January 2024) <[link](#)>.

treatment or punishment,¹¹⁰ and violate the principle that detained persons shall not be subjected to any medical or scientific experimentation which may be detrimental to their health.¹¹¹

State-sanctioned extra-judicial killings

112. The Law Council notes the relationship between the death penalty and state-sanctioned extrajudicial killing,¹¹² whether States actively engage in, condone, excuse or otherwise fail to prevent it.¹¹³ While not a focus of the present inquiry, the Law Council suggests that the Australian Government give further consideration to the issue of state-sanctioned extrajudicial killings, and consider bringing this issue within the ambit of its Strategy for the Abolition of the Death Penalty.
113. State sanctioned extrajudicial killing is a longstanding and widespread concern; which has occurred in many countries and for multiple reasons. In 1993, Amnesty International analysed the different contexts in which such breaches of international human rights occur and the ways in which such human rights are breached.¹¹⁴
114. While there are different causes, extrajudicial killings frequently are perpetrated or permitted by national governments as a form of retaining power and violently suppressing dissent.¹¹⁵
115. According to Amnesty International, particularly blatant recourse to extra-judicial killings occurred as part of a so-called “war on drugs” during the presidency of Rodrigo Duterte in the Philippines. Such killings have been documented by Amnesty International as continuing during the subsequent and current presidency of President Ferdinand Marcos Jnr.¹¹⁶

Opportunities

Advocacy for abolition in Asia

116. Asia continues to be the region with the highest number of executions in the world, largely due to indications that China carries out more executions each year than the rest of the world combined¹¹⁷ and to high numbers of executions in North Korea and Vietnam.
117. These figures and headlines detract from a general pattern of decline in executions across Asia, with only six countries carrying out executions in 2023,¹¹⁸ and an overall decline in the number of executions in the 20 countries that retain the death

¹¹⁰ ‘United States: UN experts alarmed at prospect of first-ever untested execution by nitrogen hypoxia in Alabama’ (Press Release, 3 January 2024) <[link](#)>.

¹¹¹ United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, UN Doc A/RES/43/173 (9 December 1988) Principle 22 <[link](#)>.

¹¹² See Trial International, ‘Extrajudicial Executions’ <[link](#)>.

¹¹³ See Mai Sato and Christopher Alexander ‘State-sanctioned killing of sexual minorities: Looking Beyond the Death Penalty’ ([Report](#), February 2021).

¹¹⁴ Amnesty International “‘Disappearances’ and extrajudicial executions as violations of international human rights in ‘Disappearances’ and Political Killings: Human Rights Crisis of the 1990s – A Manual For Action (July 1993) <[link](#)>.

¹¹⁵ See, e.g., United Nations, ‘Bangladesh using enforced disappearance, extrajudicial killings to silence rights defenders: Experts’, UN News, (11 July 2023) <[link](#)>.

¹¹⁶ See Amnesty International ‘The State of the World’s Human Rights’ (April 2024) 305 <[link](#)>.

¹¹⁷ Amnesty International ‘Death sentences and executions in 2023’ (n 54) 21.

¹¹⁸ Afghanistan, Bangladesh, China, North Korea, Singapore and Vietnam: Amnesty International ‘Death sentences and executions in 2023’ (n 54) 6-7.

penalty.¹¹⁹ Brunei Darussalam, Laos, the Maldives, South Korea, Sri Lanka and Tonga are considered abolitionist in practice and Indonesia, Malaysia, Thailand and India have not carried out executions since 2016, 2017, 2018 and 2020, respectively. The exception to this trend is Myanmar, which resumed executions in 2022 after a 30-year moratorium.¹²⁰

118. Consistent with the specific goals outlined in the Strategy, the Law Council encourages the Australian Government to maintain its principled advocacy to:
- (a) increase adherence to the United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty;¹²¹
 - (b) ensure that people facing a death sentence can access adequate legal representation and that their rights to a fair trial and due process are realised;
 - (c) improve the conditions and treatment of prisoners on death row; and
 - (d) increase transparency in the application of the death penalty, including by encouraging countries to report the numbers of people sentenced or executed.
119. The Law Council reiterates its previous recommendation that Australia seek to establish a regional coalition of countries opposed to capital punishment.¹²²

Recommendations

- **The Australian Government should continue to proactively raise the death penalty in bilateral meetings with retentionist countries, as well as in regional fora such as the East Asia Summit;**
- **The Australian Government should form a coalition of likeminded countries who can work in concert to promote abolition of the death penalty in the Asia-Pacific region.**

Advocacy for abolition in the Pacific

120. Following its abolition in Fiji, Nauru and Papua New Guinea, Tonga is the only Pacific Islands Forum member retaining the death penalty.¹²³
121. As noted above, eight Pacific countries that have abolished the death penalty (Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tuvalu and Vanuatu) are yet to ratify the Second Optional Protocol. This has been attributed to resourcing constraints.¹²⁴
122. The Law Council further notes that the failure of state-based responses to violent crime has generated public and political support for the retention, expansion or

¹¹⁹ Jonathan Liljeblad, Myanmar's Regression on Capital Punishment: A Pariah in Southeast Asia, Australian Journal of Asian Law 24(1) (13 September 2023) <[link](#)>

¹²⁰ Ibid.

¹²¹ United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty, UN Doc E/RES/1984/50 (25 May 1984) <[link](#)>

¹²² Law Council of Australia and Australian Bar Association submission, 'Australia's Advocacy for the Abolition of the Death Penalty' (n 4) 12.

¹²³ Tonga is considered de facto abolitionist, having not imposed a death sentence or carrying out an execution since 1982.

¹²⁴ Pacific jurisdictions continue to highlight the difficulty of meeting reporting obligations under the core UN human rights treaties and their optional protocols. See, e.g.: **Tuvalu** A/HRC/WG.6/44/TUV/11 (para 35), A/HRC/10/84 (para 18); **Fiji** A/HRC/43/8 (para 136); **Samoa** A/HRC/WG.6/39/WSM/1 (paras 111-112, 114), **Papua New Guinea** A/HRC/WG.6/39/PNG/1 (paras 46-47), **Nauru** A/HRC/WG.6/37/NRU/1 (paras 64-65).

reintroduction of the death penalty in Pacific jurisdictions.¹²⁵ In this context, it has been suggested that assistance to effectively address crime and instability may carry more weight than advocacy with reference to human rights-based or religious arguments.¹²⁶ This underscores the need for Australia to continue in its commitment, in partnership with Pacific Island jurisdictions, to enhancing security and justice in the region.

Recommendations

- **The Australian Government should offer support to Pacific states that have abolished the death penalty to ratify the Second Optional Protocol to the ICCPR; and**
- **The Australian Government should continue to provide justice and security assistance to Pacific countries to mitigate calls to retain, expand or reinstate the death penalty.**

Leveraging legal profession networks and expertise

123. The Law Council submits that, in view of its knowledge of legal and procedural protections and international networks, Australia's legal profession is well-placed to support the Australian Government's advocacy for the abolition of the death penalty and its application only in accordance with international minimum standards.
124. This may include providing pro bono representation and support to persons facing the death penalty, assisting in the preparation of amicus briefs, and engaging with national, regional and international legal professional associations.
125. Pursuant to its Death Penalty Policy Statement, the Law Council continues to strategically identify opportunities to provide information about its opposition to the death penalty, the basis for that opposition and its related advocacy work.¹²⁷ When appropriate opportunities present themselves and to the extent that resources allow, the Law Council works with key counterpart legal professional associations seeking to advance the case for abolition in their jurisdictions, a moratorium on executions, the commutation of outstanding death sentences and the ratification of the Second Optional Protocol to the ICCPR.
126. The Law Council draws attention to, and seeks to address, circumstances which come to its attention where lawyers or civil society groups in retentionist countries suffer sanctions, discrimination or disadvantage because of their work against the death penalty or in representing defendants in death penalty cases.¹²⁸
127. To the extent that resources allow, the Law Council is also committed to providing assistance and support to Australian legal practitioners who provide pro bono and legal assistance to Australian citizens and residents facing the death penalty, abroad, and to working with its counterpart legal professional associations in retentionist countries to protect and support lawyers who take on capital defence cases.¹²⁹

¹²⁵ See Pascoe and Novak 'Holdouts in the South Pacific' (n 79) 51. See also Radio New Zealand 'Honiara mayor calls for Solomons to reintroduce death penalty' (25 April 2017) <[link](#)>; ABC News, 'Kiribati contemplates introduction of capital punishment' (9 September 2014) <[link](#)>.

¹²⁶ Ibid 51.

¹²⁷ Law Council of Australia, Policy Statement on the Death Penalty (n 1) 9.

¹²⁸ Ibid.

¹²⁹ Ibid.

128. Since the adoption of the Law Council's Death Penalty Policy Statement in 2021, we have proactively raised the death penalty in bilateral meetings and correspondence with the Malaysian Bar, the Japan Federation of Bar Associations, the Law Society of Singapore, the Taiwan Bar Association, Papua New Guinea Law Society and Tonga Law Society. In particular, the Japan Federation of Bar Associations and Malaysian Bar have both adopted principled positions and undertaken unwavering domestic advocacy to promote abolition in Japan and Malaysia,¹³⁰ and the Law Council has supported these efforts and provide advice regarding advocacy strategies and levers of influence.
129. The Law Council also engages in death penalty advocacy in partnership with international legal professional associations such as the International Bar Association Human Rights Institute and the Commonwealth Lawyers Association.¹³¹
130. The Law Council reiterates its support for the establishment of a Council of Eminent Persons comprised of senior judges, lawyers and others with specialist knowledge in the field to act as influencers and advance regional discussions in private and public fora.¹³²

Recommendations

- **Where appropriate, the Department of Foreign Affairs and Trade should leverage the skills and networks of Australia's legal profession in its advocacy for the abolition of the death penalty and its application only in accordance with international minimum standards.**
- **The Australian Government should establish a Council of Eminent Persons to facilitate a dialogue aimed at the progressive abolition of the death penalty in the Asia Pacific region.**

¹³⁰ Japan Federation of Bar Associations 'Declaration Calling for Reform of the Penal System Including Abolition of the Death Penalty' (7 October 2016) <[link](#)>; Japan Federation of Bar Associations Letter to the Minister of Justice 'Request to Abolish the Death Penalty' (23 October 2020) <[link](#)>; Japan Federation of Bar Associations Letter to the Minister of Justice 'Letter of Request regarding the Death Penalty System, including its Abolition' (11 January 2023) <[link](#)>; Malaysian Bar 'The Malaysian Bar Renews its Calls to Abolish the Death Penalty' (Press Statement, 19 November 2020) <[link](#)>, Malaysian Bar 'Abolition of Mandatory Death Penalty a Step Towards the Right Direction, But Abolish Capital Punishment Entirely' (Press Release, 11 June 2022) <[link](#)>.

¹³¹ See, e.g. joint statements of the Law Council of Australia and the International Bar Association Human Rights Institute on [Singapore](#) (21 September 2023) and [Myanmar](#) (22 June 2022).

¹³² Law Council of Australia and Australian Bar Association submission, 'Australia's Advocacy for the Abolition of the Death Penalty' (n 4) 12.

Appendix: Summary of the Committee's Recommendations in 'A world without the death penalty'¹³³ and Australian Government response¹³⁴

No.	Recommendation	Government Response
Australia and the death penalty		
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.	Recommendation accepted. <i>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.</i>
Law enforcement and the death penalty		
2	The Committee recommends the <i>Australian Federal Police (AFP) National Guideline on International Police-to-Police Assistance in Death Penalty Situations</i> (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;	Recommendation noted. <i>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.</i>

¹³³ Joint Standing Committee on Foreign Affairs, Defence and Trade, 'A world without the death penalty: Australia's Advocacy for the Abolition of the Death Penalty' ([Report](#), 5 May 2016).

¹³⁴ 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 ([Response](#), March 2017).

<p>(b) explicitly applying the Guideline to all persons, not just Australian citizens;</p>	<p>Recommendation accepted.</p> <p><i>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.</i></p>
<p>(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;</p>	<p>Recommendation noted.</p> <p><i>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.</i></p> <p><i>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:</i></p> <p><i>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</i></p> <p><i>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.</i></p>
<p>(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; and</p>	<p>Recommendation accepted in principle.</p> <p><i>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.</i></p>

		<p><i>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.</i></p>
	<p>(e) articulating the criteria used by the AFP to determine whether requests are ranked 'high,' 'medium' or 'low' risk.</p>	<p>Recommendation accepted.</p> <p><i>The Guideline is currently being reviewed and will reflect this in the revised version.</i></p>
<p>3</p>	<p>In light of the United Nations' position that drug crimes, including drug trafficking, do not constitute 'most serious crimes' for which the death penalty may be applied under international law, the Committee recommends that the Australian Federal Police (AFP) obtain guarantees that prosecutors in partner countries will not seek to apply the death penalty before providing information in relation these crimes. In situations where such guarantees cannot be obtained, the AFP should withhold provision of information that may be relevant to the cases concerned.</p>	<p>Recommendation not accepted.</p> <p><i>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.</i></p> <p><i>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.</i></p>
<p>Australia's international engagement</p>		
<p>4</p>	<p>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'.</p>	<p>Recommendation accepted.</p> <p><i>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).</i></p>

5	<p>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.</p> <p>This document should guide the coordination of:</p> <ul style="list-style-type: none"> • consular assistance; • diplomatic representations; • legal support and funding assistance • communications and media strategies; and • other forms of support offered by the Government. 	<p>Recommendation accepted.</p> <p><i>Guidelines have been finalised and will be attached to DFAT's internal Consular Policy Handbook.</i></p>
6	<p>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:</p> <ul style="list-style-type: none"> • 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. 	<p>Recommendation accepted.</p> <p><i>These arguments are already an integral part of the advocacy the Government undertakes in opposition to the death penalty.</i></p>

7	<p>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:</p> <ul style="list-style-type: none"> • 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. 	<p>Recommendation accepted.*</p> <p><i>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.</i></p> <p>* The Government did not explicitly accept this recommendation, however stated that it had already achieved this objective.</p>
Improving Australia's advocacy		
8	<p>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.</p>	<p>Recommendation accepted.</p> <p><i>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.</i></p>
9	<p>The Committee recommends that the goals of the Strategy for Abolition of the Death Penalty include:</p> <ul style="list-style-type: none"> • 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. 	<p>Recommendation accepted.</p> <p>(No further comment)</p>

<p>10</p>	<p>The Committee recommends that the specific aims of the Strategy for Abolition of the Death Penalty include:</p> <ul style="list-style-type: none"> • 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 IndoPacific region. 	<p>Recommendation accepted in principle.</p> <p><i>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.</i></p>
<p>11</p>	<p>The Committee recommends that the following techniques, among others, be utilised to achieve the aims of the Strategy for Abolition of the Death Penalty:</p> <ul style="list-style-type: none"> • 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; 	<p>Recommendation accepted in principle.</p> <p><i>Specific techniques will be determined as the strategy is developed.</i></p> <p><i>The Government notes that it already undertakes some of these activities, including:</i></p> <ul style="list-style-type: none"> • <i>providing grants to support the work of civil society organisations</i> • <i>advocating for the abolition of the death penalty in the Indo-Pacific region;</i>

	<ul style="list-style-type: none"> • 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. 	<ul style="list-style-type: none"> • <i>supporting the 2016 World Congress Against the Death Penalty; and</i> • <i>co-sponsoring resolutions on abolition of the death penalty at the United Nations.</i>
<p>12</p>	<p>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.</p>	<p>Recommendation accepted in principle.</p> <p><i>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.</i></p>
<p>13</p>	<p>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.</p>	<p>Recommendation accepted in principle.</p> <p><i>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.</i></p>