

Law enforcement and the death penalty

- 4.1 The role of law enforcement in exposing people to execution was a significant topic of discussion for the inquiry, particularly in relation to transnational drug crime.
- 4.2 This chapter examines evidence received by the Committee on the following:
- the Australian Federal Police's (AFP) cooperation with overseas law enforcement agencies on international crime prevention, as it relates to the death penalty;
 - Australia's aid to foreign law enforcement bodies, particularly in countries which retain the death penalty; and
 - international approaches to drug crime and control and their impact on the global status of capital punishment.

Police cooperation on international crime prevention

- 4.3 A number of witnesses to the inquiry raised the issue of the AFP's cooperation with international law enforcement, concerned that Australia's efforts to protect its citizens from exposure to the death penalty could be undermined by the sharing of information in possible death penalty cases.
- 4.4 In their combined submission, Amnesty International, Human Rights Watch, Human Rights Law Centre, Reprieve, Australians Detained Abroad, NSW Council for Civil Liberties, and Civil Liberties Australia, proposed that the Australian Government:
- Amend Australian laws to prohibit the Australian Federal Police from sharing information with other law enforcement agencies

that could potentially result in suspected perpetrators facing the death penalty.¹

- 4.5 This issue rose to prominence with the death sentences imposed upon Australians Andrew Chan and Myuran Sukumaran in Indonesia. The Human Rights Law Centre claimed:

It was foreseeable that AFP's provision of information would lead to members of the Bali 9 facing the death penalty. It was also open to the AFP to arrest the Bali 9 in Australia and ensure that they were tried in Australian courts that would not impose the death penalty. Yet there is nothing to prevent AFP from doing the same thing again.²

- 4.6 The United Nations Office of the High Commissioner for Human Rights (OHCHR) also expressed views on this matter:

We recommend that the Australian Parliament, the Ministry of Justice and AFP strengthen relevant laws, regulations and policies to ensure that agency-to-agency cooperation does not lead to the application and implementation of the death penalty by cooperating countries. There should not be any exception.³

- 4.7 Ms Sarah Gill submitted that the AFP's activities:

... are at odds with Australia's opposition to the death penalty and inconsistent with the approach to international cooperation articulated in the Mutual Assistance in Criminal Matters Act 1987 and the Extradition Act 1988.⁴

- 4.8 Ms Felicity Gerry QC and Ms Narelle Sherwill⁵ highlighted Ms Gill's research, which claimed that information obtained through Freedom of Information requests indicated:

In the five years to 2015, the AFP knowingly exposed about 1800 people to the risk of execution by sharing intelligence with death penalty states.⁶

1 Amnesty International, Human Rights Watch, Human Rights Law Centre, Reprieve, Australians Detained Abroad, NSW Council for Civil Liberties, Civil Liberties Australia, *Submission 21*, p. [2].

2 Human Rights Law Centre, *Submission 39*, p. 1.

3 United Nations Office of the High Commissioner for Human Rights (OHCHR), *Submission 49*, p. [7].

4 Ms Sarah Gill, *Submission 37*, p. [1].

5 Ms Felicity Gerry QC and Ms Narelle Sherwill, *Submission 31*, p. [9].

6 Ms Sarah Gill, 'AFP exposes Australians to the risk of execution in foreign countries more often than you think', *The Age* (Comment), 8 September 2015, at <www.theage.com.au/comment/the-afp-peddles-injustice-by-helping-asian-death-penalty-states-20150902-gjdvu3.html> viewed 15 March 2016.

- 4.9 Ms Gill's figure includes both Australian citizens and foreign nationals, with a majority likely to be foreign nationals.
- 4.10 The AFP provided the following table which includes figures for the same period. The figures add up to a total of 411 approved requests in the period, although a single request may relate to more than one person of interest.⁷

Table 4.1 AFP approved information sharing in potential death penalty matters

Year	Total Requests	Approved	Not Approved
2010	120	107	13
2011	90	84	6
2012	94	83	11
2013	50	47	3
2014	92	90	2

Source AFP, *Submission 22*, p. 9.

- 4.11 The AFP's submission to the inquiry sought to address concerns raised about its practices, stating that the AFP acts 'in accordance with Australian and international policies and guidelines regarding the provision of information to foreign jurisdictions in death penalty matters'.⁸
- 4.12 The submission further clarified that the AFP operates under the *Australian Federal Police National Guideline on International Police-to-Police Assistance in Death Penalty Situations (the Guideline)*, 'which is in accordance with Australia's long standing opposition to the death penalty'.⁹
- 4.13 Deputy Commissioner Leanne Close explained that the AFP's actions in relation to the Bali 9 were found by the Federal Court to be lawful:

As you may be aware, Justice Finn of the Federal Court ruled in 2006 that the AFP acted lawfully and in accordance with its legal obligations following his review of AFP actions and procedures arising from Operation Midship. The review did recommend that we review our processes to strike a better balance between justice outcomes and the AFP's responsibility to protect the community from criminal activities. Since that time we have regularly updated and reviewed our guidelines.¹⁰

7 AFP, *Submission 22*, p. 9.

8 Australian Federal Police (AFP), *Submission 22*, p. 3.

9 AFP, *Submission 22*, p. 3.

10 Deputy Commissioner Leanne Close, Deputy Commissioner Operations, Australian Federal Police, *Committee Hansard*, Canberra, 27 November 2015, p. 31.

4.14 However, the Castan Human Rights Law Centre (Monash University) drew attention to criticisms by the UN Human Rights Committee, which found in 2009 that the AFP's Guideline may still expose people to death sentences:

In 2009, in the context of news about Australia's cooperation with Indonesia in the Bali Nine case, the UN Human Rights Committee expressed its concern about Australia's 'lack of a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state, in violation of the State party's obligation under the Second Optional Protocol.'¹¹

4.15 The AFP's Guideline governs police-to-police assistance in possible death penalty cases, and was developed in consultation with the Attorney-General's Department.¹²

4.16 The following is an excerpt from the Guideline:

Assistance before detention, arrest, charge or conviction

The AFP is required to 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 for an offence carrying the death penalty.

Senior AFP management (Manager /SES-level 1 and above) must consider prescribed factors before approving provision of assistance in matters with possible death penalty implications, including:

- the purpose of providing the information and the reliability of that information
- the seriousness of the suspected criminal activity
- the nationality, age and personal circumstances of the person involved
- the potential risks to the person, and other persons, in providing or not providing the information
- Australia's interest in promoting and securing cooperation from overseas agencies in combatting crime.¹³

4.17 The Guideline also clarifies that:

11 Castan Human Rights Law Centre, Monash University, *Submission 9*, p. 3.

12 AFP, *Submission 22*, p. 8. The *Australian Federal Police National Guideline on International Police-to-Police Assistance in Death Penalty Situations* was provided as Attachment A at page 13 of the AFP submission.

13 AFP, *Submission 22*, p. 14.

Ministerial approval is required in any case in which a person has been arrested or detained for, charged with, or convicted of an offence which carries the death penalty.¹⁴

4.18 Further, the Guideline mandates reporting the 'nature and number' of cases annually to the Minister.¹⁵

4.19 Several witnesses argued that there are shortcomings in the Guideline and the AFP's current practices. The OHCHR submitted that the current guidelines:

... do not prohibit cooperation when the information could, may, or will likely be used in a death penalty case. They only require the officials to consider this as a possible factor along with several others. Second, the management level review of requests is triggered only if the AFP 'is aware' that the information may be used in a death penalty charge.¹⁶

4.20 The Castan Centre contended that:

No indication is given in the Guideline of how these potentially conflicting interests are to be weighed. In addition, despite the evident shortcomings of the Guideline in terms of safeguards, the Government and the AFP have maintained that they are satisfied of its appropriateness.¹⁷

4.21 The Law Council of Australia and the Australian Bar Association (LCA and ABA) suggested that:

Consideration could also be given to reviewing or amending [the Guideline] to clearly set out the parameters of the exercise of discretion of senior AFP management relating to Australia's cooperation with foreign countries where the imposition of the death penalty may be a possible outcome.¹⁸

4.22 Mr Richard Galloway even proposed criminalising actions that 'lead to a conviction anywhere in the world' for a death penalty offence, and refusing entry to Australia to any foreign national involved in imposing or carrying out death sentences in their own country.¹⁹

4.23 The Australian Lawyers for Human Rights (ALHR) suggested that:

14 AFP, *Submission 22*, p. 15.

15 AFP, *Submission 22*, p. 16.

16 OHCHR, *Submission 49*, p. [7].

17 Castan Centre, *Submission 9*, p. 4-5.

18 Law Council of Australia and the Australian Bar Association (LCA and ABA), *Submission 24*, p. 15.

19 Mr Richard Galloway, *Submission 32*, p. [1].

Had it not been for inconsistencies between the safeguards applicable to mutual assistance and agency assistance, Andrew Chan and Myuran Sukumaran may not have been exposed to a sentence of death. There are currently no Australian laws that prevent a repeat of the circumstances that saw the Bali 9 sentenced to death and executed.²⁰

4.24 According to the Castan Centre, practices such as those undertaken by the AFP appear to:

... reveal a troubling inconsistency in what the Government says publicly about its strong opposition to the death penalty and what it expects of the AFP (hence what the AFP actually does) when dealing with death penalty cases overseas.²¹

4.25 Responding to the proposal that the situation could recur under the current guidelines, Deputy Commissioner Leanne Close said:

We had a number of arrests in Australia that went to some of those earlier drug importations as well as the one that resulted in the nine arrests in Indonesia. It is impossible to say. Would this new guideline have stopped that? You can never say never. We certainly have strengthened the processes for our offices working offshore and in Australia to make sure that they always consider this first before the provision of any information.²²

4.26 Civil Liberties Australia were particularly critical of the AFP's current processes cautioning that the AFP must not be allowed to 'behave [like] a rogue agency' in relation to the provision of information to overseas law enforcement agencies.²³

4.27 Some witnesses argued that stronger guidelines would not be sufficient, and suggested changes to the AFP Act were required. For instance, Ms Emily Howie (Human Rights Law Centre) stated:

We think the AFP Act should place clear parameters around information and intelligence sharing that lead to the death penalty. One way to do this is to amend the AFP Act to prohibit intelligence sharing that leads to the death penalty, unless an assurance is given by foreign counterparts that the death penalty

20 Australian Lawyers for Human Rights (ALHR), *Submission 18*, p. 9.

21 Castan Centre, *Submission 9*, p. 6.

22 Deputy Commissioner Close, AFP, *Committee Hansard*, Canberra, 27 November 2015, p. 37.

23 Mr William Murray Rowlings, Chief Executive Officer, Civil Liberties Australia *Committee Hansard*, Canberra, 27 November 2015, p. 11.

- will not be sought or imposed or, perhaps, in emergency situations, such as where there is an imminent danger to life.²⁴
- 4.28 Ms Ursula Noye (Reprieve) proposed that 'Australia's provision of assistance must be conditional upon there being appropriate safeguards against the use of the death penalty.'²⁵
- 4.29 The LCA and ABA suggested 'appropriate legislative reform of the *Australian Federal Police Act 1979 (Cth)*, in light of the complexities presently faced by the AFP in exercising discretion to disclose information'.²⁶
- 4.30 Ms Howie argued:
- ... our Extradition Act protects against surrendering people to the death penalty and the Mutual Assistance Act protects against assisting other countries if the death penalty may be imposed, whereas the AFP Act contains no such safeguards. That inconsistency should be addressed.²⁷
- 4.31 The Human Rights Law Centre proposed legislative amendments, saying:
- One way to do that might be by amending s 60A of the AFP Act to expressly prevent the sharing of prescribed information in circumstances that may lead to the imposition [of the] death penalty.²⁸
- 4.32 The ALHR suggested more Ministerial oversight would be appropriate:
- There is a pressing need for a requirement of Ministerial oversight to be introduced into the AFP guidelines concerning the sharing of information that could lead to the death penalty when Australian law enforcement agencies are providing assistance before arrest, charge, or conviction.²⁹
- 4.33 Most witnesses were focussed on suggesting changes to the AFP's Guideline, rather than the AFP Act. Amnesty proposed:
- legislative reform to ensure a guarantee is sought against a possible death penalty ...

24 Ms Emily Howie, Human Rights Law Centre, *Committee Hansard*, Melbourne, 17 November 2015, p. 12.

25 Ms Ursula Noye, Board member, Reprieve Australia, *Committee Hansard*, Melbourne, 17 November 2015, p. 12.

26 LCA and ABA, *Submission 24*, p. 15.

27 Ms Howie, Human Rights Law Centre, *Committee Hansard*, Melbourne, 17 November 2015, p. 13.

28 Human Rights Law Centre, *Submission 39*, pp. 1-2.

29 ALHR, *Submission 18*, p. 9.

- the AFP guidelines should be strengthened to ensure that at some point before arrest, Ministerial guidance is sought in cases carrying a death penalty risk.³⁰
 - The Attorney-General should request an independent audit and review of relevant law enforcement policies and procedures (particularly in relation to police cooperation and counter-narcotics) to ensure they reflect Australia's stance against the death penalty.³¹
- 4.34 The ALC and ABA suggested that the AFP's Guideline should not consider the age, nationality and circumstances of the suspect, saying:
- Such considerations appear inconsistent with absolute opposition to the death penalty - which would dictate that the personal characteristics of the suspect are irrelevant.³²
- 4.35 The ALC and ABA further suggested that the requirement to consider 'Australia's interest in promoting and securing cooperation from overseas agencies in combating crime' should also be removed from the Guideline, as it 'suggests that Australia's opposition to the death penalty is not absolute and can be put aside where it is expedient for other purposes'.³³
- 4.36 The AFP acknowledged that its 'involvement in combating transnational crime in the region primarily involves drug trafficking'³⁴ and argued that:
- The AFP would not have been able to achieve its longstanding operational results [on narcotics crime] without significant cooperation between the AFP and international law enforcement agencies.³⁵
- 4.37 Deputy Commissioner Close further stated:
- Collaboration with international police agencies is critical to the AFP's ability to combat, prevent and interdict serious and organised crimes. The cornerstone of this activity is the AFP's international network, with approximately 100 members deployed across 30 countries. Of the members deployed, 66 per cent are concentrated in the Asia-Pacific region, which highlights the importance of working within these countries to combat the flow-on effects of transnational crime to Australia. AFP members work on a range of bilateral and multilateral investigations in close partnership with host country law enforcement agencies. Of the

30 Amnesty International, *Submission 34*, p. 15.

31 Amnesty International, *Submission 34*, p. 4.

32 LCA and ABA, *Submission 24*, p. 16.

33 LCA and ABA, *Submission 24*, p. 16.

34 AFP, *Submission 22*, p. 5.

35 AFP, *Submission 22*, p. 11.

1924 investigations that are currently underway by the AFP, 69 per cent have a direct link or association with international law enforcement or transnational organised crime.³⁶

4.38 The AFP noted that several submissions to the inquiry called for legislative measures to govern the provision of information overseas in death penalty matters. Deputy Commissioner Close argued that such measures:

... would hamper the critical work the AFP does with our international partners in addressing transnational crime and fighting crime at its source, which could result in significant harm to Australia and our citizens. The AFP's ability to detect and prevent crime is reliant upon strong reciprocal relationships with law enforcement partners to facilitate the exchange of criminal intelligence and information. The real-time exchange of tactical information is an essential part of the AFP's ability to combat crime.³⁷

4.39 In their supplementary submission to the inquiry, the AFP provided the following 'risks associated with codification of the AFP's national guidelines':

- National Guidelines and governance instrument amendments are based on AFP internal reviews as part of a measured process over a period of time, providing greater flexibility than legislative reform.
- The processes within governance instruments may be departed from in some circumstances, so long as the decision maker has had regard to the instrument and the departure is reasonable and lawful in the circumstances. The reason for the departure is also fully recorded. Depending on the drafting of the provisions, the departure from legislative instruments may amount to the commission of a criminal offence or attract criminal or civil penalties.
- Codification of the National Guideline may inhibit flexibility between the AFP and foreign law enforcement agencies (FLEAs) which could lead to inferior outcomes and harm AFP partnerships.³⁸

4.40 However, some witnesses argued that stronger guidelines to prevent exposing people to the death penalty need not hamper cooperation between countries. For instance, Dr Bharat Malkani (University of Birmingham) stated:

36 Deputy Commissioner Close, AFP, *Committee Hansard*, Canberra, 27 November 2015, p. 32.

37 Deputy Commissioner Close, AFP, *Committee Hansard*, Canberra, 27 November 2015, pp. 31-32.

38 AFP, *Supplementary Submission 22.2*, p. 4.

One thing to remember is that in a lot of these cases you would have the upper hand, in the sense that they are coming to you requesting you for help, especially the countries that say they need death sentences to combat drug trafficking. ... So if you say, 'We are not going to assist you unless you give these assurances,' at some point they will buckle, because they need to show their citizens that they are tackling drug trafficking offences and they need your help to do that.³⁹

- 4.41 Dr Maguire, Ms Fitzsimmons and Mr Richards drew attention to the *Treaty between Australia and the Republic of Indonesia on Mutual Assistance in Criminal Matters*, which entered into force on 17 July 1999.⁴⁰ The treaty includes provision for Australia to refuse cooperation if the death penalty is in play. Dr Maguire et al argued:

It is apparent Australia is able to maintain international and bi-lateral relationships while still advocating against the death penalty, and preventing its use against people in a number of situations.⁴¹

- 4.42 Lawyers McMahon, Wilson, Haccou, O'Connell and Morrissey suggested that the issue lies in the fact that AFP makes the decisions itself, without independent oversight. They wrote:

We readily acknowledge the desirability of the AFP being able to work effectively. However, currently it appears that too much discretion resides with the AFP on this matter. In our view, it would be appropriate to consider the appointment of a Monitor, independent of the AFP and Government, with the responsibility of overseeing the provision of information overseas. ... This structure would ultimately serve the interests of Government, the AFP and the community. The reality is there will often be very difficult judgment calls, and a person or persons outside the pressures of a particular investigation, and outside of the Minister's office, are better suited to make the final decision.⁴²

- 4.43 Speaking about United States law enforcement, Mr Richard Bourke (Director, Louisiana Capital Assistance Centre) suggested that law enforcement agencies are primarily focussed on solving and preventing

39 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 5.

40 *Treaty Between Australia and the Republic of Indonesia on Mutual Assistance in Criminal Matters* (entered into force 17 July 1999), *Australian Treaty Series*, 1999 No. 10.

41 Dr Maguire, Ms Fitzsimmons and Mr Richards, *Submission 40*, p. 8.

42 McMahon, Wilson, Haccou, O'Connell and Morrissey, *Submission 12*, p. 6.

crime: 'Committed as they are to their mission, they will always want all of the tools that they could possibly have in the tool kit'.⁴³

- 4.44 Ms Howie proposed that the problem lies in the emphasis of the guidelines:

At the moment, the Australian Federal Police Act and the guidelines allow an extremely broad discretion for information sharing, and what I think we need to move towards is a default position where information sharing that could lead to the imposition of the death penalty would be prohibited.⁴⁴

- 4.45 Deputy Commissioner Close responded to suggestions that revised guidelines could stipulate that 'some crimes are in, and some crimes are out' in relation to police-to-police information sharing:

It would be easy to say, 'We won't share on drug related matters.' That will then mean that, as I pointed out, the significant percentage of investigations that we currently have within the Federal Police to stop those crime types and the drugs entering Australia will be severely limited.⁴⁵

- 4.46 The Committee sought clarification from the AFP as to whether there were any situations in which seeking an assurance that a person would not be executed for any offence had 'jeopardised your working relationships with your overseas partners'? Deputy Commissioner Close replied: 'No. I do not have any examples of that.'⁴⁶

- 4.47 Not all witnesses raised objections to the AFP's current guidelines and practices. For instance, Professor Donald Robert Rothwell (private capacity) was more complementary:

I think, to a degree, one can say that the proof is in the pudding and that is that, since [the Bali 9], no similar issues have arisen in terms of AFP cooperation with their Indonesian counterparts which raises no concerns. We have received a number of assurances in the public domain by the AFP commissioner that they are satisfied that those measures are appropriate. I think that is all I can really say at the moment on that point.⁴⁷

43 Mr Richard Bourke, Director, Louisiana Capital Assistance Center, *Committee Hansard*, Melbourne, 17 November 2015, p. 7.

44 Ms Howie, Human Rights Law Centre, *Committee Hansard*, Melbourne, 17 November 2015, p. 14.

45 Deputy Commissioner Close, AFP, *Committee Hansard*, Canberra, 27 November 2015, p. 34.

46 Deputy Commissioner Close, AFP, *Committee Hansard*, Canberra, 27 November 2015, p. 35.

47 Professor Donald Robert Rothwell, Private capacity, *Committee Hansard*, Canberra, 27 November 2015, p. 29.

4.48 Mr Gary Humphries (private capacity) suggested that the issue had a level of complexity that must be taken into account:

We took an in-principle view at the beginning that we should never share information that might lead to somebody receiving the death penalty. After a period of time we were persuaded that that a position had many practical difficulties associated with it.⁴⁸

4.49 Numerous witnesses were questioned about whether they believed there is a need to maintain some flexibility or discretion in the Guideline, particularly for dealing with situations where lives may be at risk, such as in instances of planned terrorist attacks.⁴⁹

4.50 Ms Howie's response was typical of those provided in evidence:

I think the default position needs to be that you do not disclose. If there are extraordinary circumstances, the parameters for sharing information should be set [out] very clearly in the legislation so that the decision maker knows in what circumstances that kind of information sharing would be allowed. And there should be proper monitoring of the way that is done in practice because we do not want to see an exception like that being used as a de facto means of circumventing the ordinary prohibition on information sharing.⁵⁰

4.51 In defence of its current processes and guidelines, the AFP submitted the following:

- Since the Bali 9 there has not been a situation in which an Australian citizen has been arrested, detained or charged with an offence that could lead to the death penalty as a result of AFP assistance.⁵¹ Note that this only relates to Australian citizens – not foreign nationals.
- While technically the Guideline only applies where information is 'likely to result in a prosecution', the AFP 'takes a conservative approach', also referring lower risk matters to the processes under the National Guideline.⁵²

48 Mr Gary Humphries, Private capacity, *Committee Hansard*, Canberra, 27 November 2015, p. 43.

49 See for instance: Ms Howie, Human Rights Law Centre, *Committee Hansard*, Melbourne, 17 November 2015, p. 14; and Ms Stephanie Cousins, Government Relations Manager, Amnesty International, *Committee Hansard*, Sydney, 20 November 2015, p. 3.

50 Ms Howie, Human Rights Law Centre, *Committee Hansard*, Melbourne, 17 November 2015, p. 14.

51 Deputy Commissioner Close, AFP, *Committee Hansard*, Canberra, 27 November 2015, p. 37.

52 AFP, *Supplementary Submission 22.2*, p. 7.

- Any changes to the Guideline already require the approval of both the Minister for Justice and the Attorney-General.⁵³

4.52 The AFP advised that a significant amount of the information they provide ‘is extremely low risk’. Assistant Commissioner Scott Lee explained:

... it is hotel records, call charge records, movement records: those types of inquiries that are obviously relevant to our investigations but are not necessarily more intrusive in terms of the surveillance of an individual. With the passing of information – for example, where we would suspect a person may come into possession of drugs in those countries – in those instances, for example, where we suspect that a person may come into possession of drugs when they travelled, which we have had recently, we actually did not pass the information. But in those instances it is scalable and in those more intrusive, or those high risk areas, it is only in quite small numbers.⁵⁴

4.53 Assistant Commissioner Lee also told the Committee that the police choose *not* to communicate information in many cases:

Can I assure you that in recent days and weeks we have had individuals that we are aware of who are travelling offshore as drug couriers. We have taken active decisions not to communicate that information.⁵⁵

4.54 The following table, provided by the AFP indicates the varying risk levels allocated by the AFP to relevant approved requests for police-to-police assistance in the last three years:

Table 4.2 Risk ratings of Internally Approved Requests to provide assistance in Potential Death Penalty Situations

Year	Total Approved Requests	Low	Medium	High
2013	47	39 (83%)	8 (17%)	0
2014	90	75 (83%)	12 (13.5%)	3 (3.5%)
2015	63	52 (82.5%)	6 (9.5%)	5 (8%)
Total	200	166 (83%)	26 (13%)	8 (4%)

Source AFP, *Supplementary Submission 22.2*, p. 9.

53 AFP, *Supplementary Submission 22.2*, p. 4.

54 Assistant Commissioner Scott Lee, AFP, *Committee Hansard*, Canberra, 27 November 2015, p. 42.

55 Assistant Commissioner Scott Lee, Assistant Commissioner International Operations, Australian Federal Police, *Committee Hansard*, Canberra, 27 November 2015, p. 39.

- 4.55 The AFP clarified that the 200 approved requests in fact related to 835 persons of interest, and that about 26 per cent of those (221 persons) were Australian citizens.⁵⁶

The AFP's planned review

- 4.56 The AFP also revealed that it is currently reviewing its National Guideline.⁵⁷
- 4.57 While not intending to pre-empt the outcome of this review, the AFP indicated that it:
- ... will work towards a similar approach to that of the UK, but in the short term, adopt a risk assessment model modified to support death penalty deliberations in an Australian law enforcement context.⁵⁸

The United Kingdom's approach

- 4.58 The Committee asked the AFP to examine the UK's approach to police-to-police information-sharing and provide their opinion on its applicability to the Australian law enforcement context.
- 4.59 The UK's provision of information on a police-to-police basis has been guided by the revised *Overseas Security and Justice Assistance Human Rights Guidance* since 2014.⁵⁹
- 4.60 This Guidance document applies to all sectors, including:
- ... armed forces, police, gendarmeries, paramilitary forces, presidential guards, intelligence and security services (military and civilian), coast guards, border guards, customs authorities, reserve or local security units (civil defence forces, national guards, militias), judiciary, defence, interior and justice ministries, and criminal investigation services.⁶⁰
- 4.61 According to the AFP, the 'UK Guidance articulates the human rights and international humanitarian law risks that should be considered by Her Majesty's Government (HMG) officials prior to providing justice or security sector assistance'.⁶¹

56 AFP, *Supplementary Submission 22.2*, p. 9.

57 AFP, *Supplementary Submission 22.2*, p. 11.

58 AFP, *Supplementary Submission 22.2*, p. 11.

59 Available at: <www.gov.uk/government/speeches/overseas-security-and-justice-assistance-guidance>, viewed 30 March 2016.

60 Her Majesty's Government, *Overseas Security and Justice Assistance Human Rights Guidance*, p. 6.

61 AFP, *Supplementary Submission 22.2*, p. 11.

- 4.62 The UK Foreign and Commonwealth Office submitted that the Guidance:
... screens all British Government assistance and co-operation with foreign justice systems. A key aspect of that guidance is identifying and avoiding cases where assistance may lead to application of the death penalty. A message that we give to partners who continue to execute is that we are constrained in the assistance that we can offer them.⁶²
- 4.63 These comments suggest that the 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'.⁶³
- 4.64 According to Her Excellency Ms Unni Kløvstad (Ambassador, Royal Norwegian Embassy), Norway has similar prohibitions in place.⁶⁴
- 4.65 Ms Gill drew attention to public statements by the British Government 'in relation to transnational crime, that protection of human rights is no less important than enforcement of the rule of law'.⁶⁵
- 4.66 However, Dr Malkani criticised the UK's past performance in this area, stating that the UK 'has on occasion provided assistance to foreign authorities in the investigation and prosecution of specific individuals and offences, leading to the imposition of the death penalty'.⁶⁶
- 4.67 Dr Malkani further claimed:
In Kenya there is Ali Babitu, who is facing a death sentence as a result of the assistance of the Metropolitan Police. ... with Antigua, Kenya, Pakistan and Iran, there are quite a few examples where our assistance has led to death sentences abroad.⁶⁷
- 4.68 The AFP indicated that it has begun a formal review of the UK's model to 'benchmark and identify potential opportunities to inform the existing death penalty governance framework' in Australia.⁶⁸

62 UK Foreign and Commonwealth Office, *Submission 15*, p. [3].

63 UK Foreign and Commonwealth Office, *Submission 15*, p. [3].

64 Her Excellency Ms Unni Kløvstad, Ambassador, Royal Norwegian Embassy, *Committee Hansard*, Canberra, 15 March 2016, p. 1.

65 Ms Sarah Gill, *Submission 37*, p. [1].

66 Dr Malkani, *Submission 4*, pp. 2-3.

67 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 3.

68 AFP, *Supplementary Submission 22.2*, p. 11.

Aid to foreign law enforcement agencies

- 4.69 An additional area of concern for witnesses was Australian aid to overseas law enforcement bodies, and Australian grants to support international counter-narcotics activities.
- 4.70 The OHCHR cautioned of a need to ‘implement risk assessments’ to ensure that Australian aid to foreign law enforcement agencies or programs does not ‘directly or indirectly lead to the application and implementation of the death penalty’.⁶⁹
- 4.71 Amnesty International Australia claimed ‘Australia helps fund counter-narcotics investigations in other countries, providing over \$4 million in 2013/14’.⁷⁰
- 4.72 McMahon et al noted that ‘there is an increasing international concern that non-executing countries are funding anti-narcotics police work in countries which execute’. They added:
- The [United Nations Office on Drug and Crime] UNODC is coming under increasing scrutiny in this regard. This [Committee] should enquire in a similar vein into our own anti-narcotics funding and work in countries, such as Pakistan, where executions are common.⁷¹
- 4.73 UnitingJustice Australia claimed that ‘increases in drug law enforcement and counter-narcotics campaigns have been shown to increase the numbers of people facing the death penalty’.⁷²
- 4.74 The Australian Drug Foundation and New Zealand Drug Foundation stated:
- Harm Reduction International reports that the UNODC, the European Commission and individual European governments have all actively funded and/or delivered support to strengthen domestic drug enforcement in death penalty states.⁷³
- 4.75 Dr Malkani asserted that:
- [Britain] give[s] a lot of money to Iran and Pakistan for anti-drug-trafficking and counternarcotics efforts that is pure financial aid, but we also train border patrols and provide resources and sniffer dogs. There has been evidence that that sort of work has led to an

69 OHCHR, *Submission 49*, p. [9].

70 Amnesty International Australia, *Submission 34*, pp. 14-15.

71 McMahon et al, *Submission 12*, p. 5.

72 UnitingJustice Australia, *Submission 25*, p. 8.

73 Australian Drug Foundation and New Zealand Drug Foundation, *Submission 28*, p. 2.

increase in the number of people convicted of drug-trafficking offences who are then sentenced to death. There is a clear causal link.⁷⁴

4.76 Ms Gerry QC and Ms Sherwill submitted that the UK, Ireland and Denmark 'have recently withdrawn funding for [drug] supply control operations in Iran', due at least in part to death penalty concerns.⁷⁵

4.77 Dr Malkani, and other witnesses⁷⁶ argued that:

... it is imperative that Australia does not inadvertently act in such a way that facilitates the use of capital punishment elsewhere. If Australia is complicit in the use of the death penalty abroad, this will inevitably limit the extent to which Australia can be effective in advocating for abolition.⁷⁷

4.78 The World Coalition Against the Death Penalty highlighted a statement by the UNODC in 2012 that if 'executions for drug-related offences continue, UNODC may have no choice but to employ a temporary freeze or withdrawal of support'.⁷⁸

4.79 However, according to the World Coalition, the UNODC has continued to fund law enforcement-focused counter-narcotics activities in countries which continue to apply the death penalty for drug offences:

Earlier this year it was finalizing a new five year funding settlement in Iran, a country that has executed at least 394 drug offenders in 2015.⁷⁹

4.80 In light of these findings, the World Coalition proposed:

... that abolitionist donors should freeze all financial support pending an investigation into how it has been spent, clear risk assessments and accountability mechanisms being put in place. Australia could play a strong role in calling for this investigation and accountability mechanisms.⁸⁰

4.81 International Drug Policy Consortium (IDPC) proposed that Australia should:

74 Dr Malkani, University of Birmingham, *Committee Hansard*, Canberra, 27 November 2015, p. 3.

75 Ms Felicity Gerry QC and Ms Narelle Sherwill, *Submission 31*, p. [9].

76 See for instance: Mrs Susan Wilkinson, *Submission 5*, p [1]; Mr Stephen William, *Submission 7*, p. [1].

77 Dr Malkani, *Submission 4*, p. 1.

78 UNODC Position Paper, *UNODC and the Promotion and Protection of Human Rights*, 2012, at <www.unodc.org/documents/justice-and-prison-reform/UNODC_Human_rights_position_paper_2012.pdf> viewed 12 April 2016.

79 World Coalition Against the Death Penalty (WCADP), *Submission 36*, p. 3.

80 World Coalition Against the Death Penalty (WCADP), *Submission 36*, p. 3.

Call on the UNODC to cease support for drug enforcement operations in countries where such support can lead to increased use of the death penalty and executions.⁸¹

- 4.82 The Australian Drug Foundation and New Zealand Drug Foundation suggested Australia 'advocate for UNODC and European states to use the influence of drug enforcement aid as a tool to promote abolishing the death penalty for drug offences'.⁸²

Australia's aid commitments

- 4.83 In light of these concerns and recommendations, the Committee sought clarification from the Department of Foreign Affairs and Trade (DFAT) as to the size, scope and nature of Australia's involvement in funding the UNODC, overseas law enforcement bodies and counter-narcotics programs.
- 4.84 DFAT coordinated a whole of government response focussing on Australia's financial support to the UNODC, which has been provided 'as part of a regional and global approach to addressing the problem of illicit drugs and transnational crime'.⁸³
- 4.85 The following provides a summary of support funded through Australian government agencies since 2010:
- Australia provided voluntary annual General Purpose contributions to UNODC up until 2012. The General Purpose contribution for 2010-11 was AU\$1.5 million, and AU\$750,000 for 2011-12.
 - Australia's contributions to UNODC projects peaked in 2012, when Australia provided approximately US\$11.3 million.
 - In 2013 Australia provided approximately US\$7.1 million; in 2014 approximately US\$6 million; and in 2015 approximately US\$4.3 million, some of which relates to funding for multi-year projects commenced in previous years.⁸⁴
- 4.86 DFAT advised that Australia ceased general annual up-front contributions to the UNODC after 2012, with more recent contributions being 'project-based' and delivered through various Australian government agencies.⁸⁵

81 International Drug Policy Consortium (IDPC), *Submission 16*, p. 3.

82 Australian Drug Foundation and New Zealand Drug Foundation, *Submission 28*, p. 3.

83 Department of Foreign Affairs and Trade (DFAT), 'Attachment E: Australian funding to the UN Office on Drugs and Crime 2010-2016', *Answers to Questions on Notice Number No. 12*, p. [1].

84 DFAT, 'Attachment E: Australian funding to the UN Office on Drugs and Crime 2010-2016', *Answers to Questions on Notice Number No. 12*, p. [1].

85 DFAT, 'Attachment E: Australian funding to the UN Office on Drugs and Crime 2010-2016', *Answers to Questions on Notice Number No. 12*, p. [1].

4.87 DFAT defended the Australian Government's funding of the UNODC, stating that:

The UNODC advises that it adheres to 2005 UN General Assembly Resolution 60/1 as well as an internal human rights due diligence policy. These documents dictate that UN support cannot be provided to non-UN security forces where there is a real risk of the receiving entities committing violations of human rights.⁸⁶

4.88 DFAT noted that witnesses were concerned about UNODC activities in Iran and Pakistan. DFAT explained that Australia has 'contributed approximately USD 4.8 million from 2010 to 2015', and claimed that this funding:

... provided by the Department of Immigration and Border Protection, was for the UNODC's project to help Pakistan combat migrant smuggling and human trafficking. The project aimed to: strengthen Pakistan's legal, regulatory and enforcement frameworks on migrant smuggling and human trafficking; enhance knowledge and skills of Pakistani law enforcement officers; and assist Pakistan to collect and analyse migration-related crime information.⁸⁷

4.89 The Department of Immigration and Border Protection (DIBP) also indicated, through DFAT, that the funding was used for:

- specialist training
- the provision of technical equipment
- a comprehensive analysis of the national legislative framework instrument to identify and address gaps in national legislation.⁸⁸

4.90 DIBP further argued:

The project focuses on legislation related to human trafficking and migrant smuggling – not on drug trafficking. We also note that the UNODC opposes the death penalty in all circumstances. Therefore, DIBP is willing to partner with UNODC to implement projects on the ground in Pakistan.⁸⁹

86 DFAT, *Answers to Questions on Notice Number No. 12*, p. 12.

87 DFAT, *Answers to Questions on Notice Number No. 12*, p. 12.

88 DFAT, *Response to Questions on Notice Number No. 7*, p. [3].

89 DFAT, *Response to Questions on Notice Number No. 7*, p. [3].

- 4.91 However, the UNODC website describes the program as having three outcomes, one of which is dedicated to drug trafficking: 'Outcome 1: Drug and precursor trafficking operations identified and acted upon'.⁹⁰
- 4.92 Regardless, DFAT advised the Committee that in its view Australian funding has not led to executions in Pakistan and Iran, stating:
- In light of the due diligence processes ... and the nature of the UNODC activities Australia has funded in Pakistan and Iran, the government is confident that this funding did not lead to any persons being arrested and placed on death row or executed for narcotics-related crime. The government has no plans at this time to make any further contributions to UNODC country programs in Pakistan or Iran.⁹¹

International approaches to drug crime and control

- 4.93 Witnesses to the inquiry were concerned with the number of executions that are carried out for drug offences, especially in the Asia Pacific region and Iran.⁹²
- 4.94 Ms Felicity Gerry QC and Ms Narelle Sherwill stated that an estimated 1000 people are executed worldwide for drug offences each year.⁹³
- 4.95 This estimate was also highlighted by the Australian and New Zealand Drug Foundations, who argued that in some countries 'drug offenders comprise a significant proportion, or even a majority, of those executed'.⁹⁴
- 4.96 Ruth Birgin (Australians Against Capital Punishment) presented a similar view:
- ... the majority of death sentences are delivered to people who have committed drug related offences. Likewise, the majority of executions in all retentionist countries are meted out to people who have been convicted of drug related offences.⁹⁵

90 'Pakistan: Illicit Trafficking and Border Management', *UNODC website*, at <www.unodc.org/pakistan/en/illicit-trafficking-and-border-management.html> viewed 15 March 2016.

91 DFAT, *Answers to Questions on Notice Number No. 12*, p. 13.

92 For instance: Ms Susan Lepper, *Submission 27*; the IDPC, *Submission 16*; Human Rights Watch, *Submission 23*.

93 Ms Felicity Gerry QC and Ms Narelle Sherwill, *Submission 31*, p. [8].

94 Australian Drug Foundation and New Zealand Drug Foundation, *Submission 28*, p. 1.

95 Ms Birgin, *Australians Against Capital Punishment, Committee Hansard*, Canberra, 27 November 2015, p. 22.

- 4.97 The Australian and New Zealand Drug Foundations pointed out that more countries today utilise the death penalty for drug crimes (33 countries) than did in 1979 (10 countries).⁹⁶
- 4.98 The Australian and NZ Drug Foundations also noted the irony that ‘while most [drug-related] deaths [are] due to opioids, cannabis traffickers make up a large number, and in some countries even a majority of drug-related offenders sentenced to die’.⁹⁷
- 4.99 The IDPC remarked that the trend towards executing for drug offences is particularly prevalent in the Asia Pacific region:
- Many of those executions were for drug offences, including the 14 individuals executed so far this year in Indonesia, and in 2014, over 40 [per cent] of the officially announced executions in Iran (122 of 289 individuals), 46 [per cent] of the reported executions in Saudi Arabia (42 of 90 individuals), 8 [per cent] of the recorded executions in China, and the two individuals executed in Singapore that year. In Vietnam, 80 [per cent] of the people receiving a death sentence in 2014 were convicted of a drug offence.⁹⁸
- 4.100 The Honourable Justice Lex Lasry AM QC (private capacity) highlighted the political nature of these executions in countries such as Indonesia:
- It is a simplistic approach, but it is: we have a drug problem and the only way we can solve this drug problem is to be hard on drug traffickers and couriers; therefore, we send the message to everybody involved in the drug industry that if you are caught you will be executed.⁹⁹
- 4.101 Witnesses offered a number of arguments against applying the death penalty for drug crimes. Professor Rothwell stated that, according to international law and UN policy, drug offences do not constitute ‘the most serious crimes’, for which the death penalty may be applied:
- At the moment there has been no decision by an international court or tribunal on precisely that question but ... the preponderance of legal opinion, not only from academics such as

96 Australian Drug Foundation and New Zealand Drug Foundation, *Submission 28*, p. 1.

97 Australian Drug Foundation and New Zealand Drug Foundation, *Submission 28*, p. 1.

98 IDPC, *Submission 16*, p. 1.

99 The Hon. Justice Lex Lasry AM QC, Private capacity, *Committee Hansard*, Melbourne, 17 November 2015, p. 3.

me, but also relevant UN bodies, is that drugs do not constitute the most serious crimes.¹⁰⁰

4.102 The IDPC also provided evidence that the International Narcotics Control Board, which was established to monitor states' implementation of UN narcotics control measures, actively encourages states which retain the death penalty to consider abolishing it for drug offences and to seek 'proportionate sentencing' for such offences.¹⁰¹

4.103 The UN further clarified its views in the 2012 *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, in which it wrote:

... it is alarming that the States that do resort to the death penalty for these offences sometimes do so with high frequency. A small group of States is responsible for the vast majority of death sentences and executions for drug-related offences worldwide: China, the Islamic Republic of Iran, Saudi Arabia and Viet Nam, followed by, to a lesser extent, Malaysia and Singapore.¹⁰²

4.104 The Special Rapporteur's report further clarified:

The special rapporteurs on health and torture have confirmed the view of the current mandate holder and the Human Rights Committee that the weight of opinion indicates that drug offences do not meet the threshold of 'most serious crimes' to which the death penalty might lawfully be applied.¹⁰³

4.105 Aussies Against Capital Punishment argued that 'drug smuggling must be universally recognized as not qualifying as a heinous crime'.¹⁰⁴ It added:

Drug mules who face execution are often individuals of low socio economic status driven to this activity either by force or for economic reasons. This is not an appropriate punishment for these individuals.¹⁰⁵

4.106 Professor Rothwell suggested advocating for the UN to develop a clearer statement on what constitutes the 'most serious crimes' for which the

100 Professor Rothwell, *Committee Hansard*, Canberra, 27 November 2015, p. 28. See also: IDPC, *Submission 16*, p. 1.

101 IDPC, *Submission 16*, pp. 1-2.

102 United Nations General Assembly, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 2012, UN Document number A/67/275, p. 11.

103 United Nations General Assembly, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 2012, UN Document number A/67/275, p. 12.

104 Aussies Against Capital Punishment, *Submission 13*, p. [1].

105 Aussies Against Capital Punishment, *Submission 13*, p. [1].

death penalty can be applied, particularly to address the question of drug trafficking:

I can certainly see merit in there being a more contemporary authoritative statement on the interpretation of article 6 on the particular question we are talking about – that is, what are the categories and most serious crimes?¹⁰⁶

4.107 The IDPC pointed to evidence that found no deterrent effect in using the death penalty in relation to drug crimes, adding:

... the majority of individuals sentenced with the death penalty for drug offences do not play a serious or high-level role in drug trafficking operations. They are often poor, vulnerable to exploitation, and engaged in low-level drug trafficking roles, therefore, easily replaced.¹⁰⁷

4.108 Human Rights Watch proposed that Australia should focus efforts on removing mandatory sentencing for drug crimes, 'starting with Malaysia, where Australia has a great deal of influence and where now the Prime Minister's office is considering doing away with mandatory sentencing for drug crimes'.¹⁰⁸

4.109 The Hon Justice Lasry AM QC provided some suggestions for approaching this debate with Singapore:

The question is: we need to understand what the problem is and then go to them and say, 'We've looked at the aspects of the drug problem you are trying to solve. Here is what the data shows in other countries. This is what we think you can do to improve the drug problem in your country and here is why we think you can improve it. That does not include executing people because it does not work'.¹⁰⁹

4.110 Dr Daniel Pascoe provided some arguments that may be useful in Islamic countries in South East Asia. He commented:

I have heard of one judge in the Indonesian Supreme Court who used this justification as being a good Muslim to impose a death sentence for a drugs crime. The other point to note there – the way to refute that – is that the Koran mentions nothing of drug crimes. Drug crimes form the majority of death sentences in South-East Asia. It is not murder, serious crimes against the person, apostasy,

106 Professor Rothwell, *Committee Hansard*, Canberra, 27 November 2015, p. 30.

107 IDPC, *Submission 16*, p. 2.

108 Mr Robertson, Human Rights Watch, *Committee Hansard*, Sydney, 9 December 2015, p. 25.

109 The Hon. Justice Lex Lasry AM QC, Private capacity, *Committee Hansard*, Melbourne, 17 November 2015, p. 5.

rape and so forth; drug crimes are the main issue in South-East Asia.¹¹⁰

- 4.111 Aussies Against Capital Punishment acknowledged that the argument can be hard to win due to the political nature of executions in the region. Ms Birgin asserted that execution for drug crimes is often ‘a bit of a scapegoat to draw attention away from more difficult governmental challenges’.¹¹¹
- 4.112 DFAT’s submission stated that the planned whole-of-government 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’.¹¹²

Harm reduction

- 4.113 The IDPC argued that, while the death penalty is ‘ineffective’ for addressing drug-related activities:
- ... there are other drug policy measures that have proven to be effective for preventing and reducing the harms relating to drug use, notably harm reduction measures to address the risks of overdose, HIV, viral hepatitis and tuberculosis.¹¹³
- 4.114 Ms Gerry QC and Ms Sherwill referred to recent Australian research, funded by the National Drug Law Enforcement Research Fund, which ‘revealed that drug seizures by Australian police had no effect on drug-related harm as measured by emergency department admissions or arrests.’¹¹⁴
- 4.115 Acknowledging the serious problems caused by drug abuse in societies in the region, McMahon et al asserted that Australia could ‘take the lead in the region to investigate and critique the status quo on drug control’. They wrote:
- Without condoning or encouraging drug use or abuse, governments in the region, including our own, need to grapple with the reality that the law and order approach to drug use and abuse has proven inadequate over recent decades.¹¹⁵

110 Dr Daniel Pascoe, *Committee Hansard*, Canberra, 27 November 2015, p. 49.

111 Ms Birgin, *Australians Against Capital Punishment, Committee Hansard*, Canberra, 27 November 2015, p. 23.

112 DFAT, *Submission 35*, p. 11.

113 IDPC, *Submission 16*, p. 2.

114 Ms Felicity Gerry QC and Ms Narelle Sherwill, *Submission 31*, p. [10].

115 McMahon et al, *Submission 12*, p. 4.

4.116 Dr Maguire proposed that there is a role for countries like Australia to promote a health-focussed, harm reduction approach to managing illicit drugs in the region:

If we look at Indonesia, a prominent current case, Australia could offer support in relation to drug treatment and prevention programs, considering that at the moment people are being executed solely for drug-related offences and President Widodo has cited drug offending as a national scourge and something that is killing many Indonesian young people.¹¹⁶

4.117 The IDPC suggested Australia could engage with retentionist governments by assisting with alternative, and more 'humane', approaches to drug control. It wrote:

Such assistance should aim to achieve improved outcomes for public health, human rights, human security, development and social inclusion through the implementation of harm reduction measures for people who use drugs, and proportionate sentencing frameworks for drug offences.¹¹⁷

4.118 The Australian Drug Foundation and New Zealand Drug Foundation asserted that harm reduction methods, such as education and health promotion, are under-utilised strategies, 'especially in countries that impose capital punishment for drugs offences'. The Foundations added:

The drug treatment sectors in these states should be supported and expanded to implement international best practice, so their drug problems are more effectively addressed.¹¹⁸

United Nations General Assembly Special Session on Drugs

4.119 Witnesses saw the United Nations Special Session (UNGASS) on the world drug problem, held in April 2016, as an opportunity to challenge the concerning number of drug-crime-related executions.¹¹⁹

4.120 Ms Birgin argued that:

... regarding the upcoming UNGASS on the so-called world drug problem – which might perhaps more aptly be described as the world bad drug policy problem – the Australian government could also consider pressing the United Nations Office on Drugs and Crime to follow its own human rights guidance to ensure that

116 Dr Maguire, University of Newcastle, *Committee Hansard*, Canberra, 27 November 2015, p. 14.

117 IDPC, *Submission 16*, p. 3.

118 Australian Drug Foundation and New Zealand Drug Foundation, *Submission 28*, p. 4.

119 Witnesses including: McMahon et al, *Submission 12*; Aussies Against Capital Punishment, *Submission 13*; and IDPC, *Submission 16*.

UNODC programs are not complicit in executions or death sentences.¹²⁰

4.121 Aussies Against Capital Punishment also proposed that the Australian Government:

... consider commitment to and promotion of the 10by20 campaign, which is being led by the International Drug Policy Consortium and has been joined by a number of other prominent international civil society organisations. It is to ask for the redirection of just 10 per cent of international drug enforcement aid into health and harm reduction programs by 2020. This would in turn impact on the reduction in the use of the death penalty for drug couriers.¹²¹

4.122 DFAT confirmed that it has advocated against the death penalty in past forums dedicated to the international narcotics problem:

Australia has ... used our annual appearance at the Commission on Narcotic Drugs (CND) to underscore our opposition to the death penalty. During the CND's 58th session in March 2015, the Assistant Minister for Health made a strong statement outlining Australia's opposition to the use of the death penalty in all circumstances, including in relation to offences of a drug-related nature. The Assistant Minister for Health also called on the UN Office on Drugs and Crime to continue its efforts in advocating for death penalty abolition as it relates to drug offences.¹²²

4.123 Dr Lachlan Strahan (First Assistant Secretary, Multilateral Policy Division) further explained that the death penalty has been an issue of concern leading up to Australia's involvement in UNGASS 2016:

We have been working to include anti-death-penalty language in the draft outcome document of the UNGASS on the world drug problem. Given that this is, however, a divisive issue in this context, we have been meeting a fair bit of quite strong opposition to this language, so we have been working with others to get some language which can be appropriately framed and will survive this discussion. We would note that the outcome document already invites states to firstly consider alternative measures to incarceration for actions of a minor or non-violent nature, and,

120 Ms Birgin, *Australians Against Capital Punishment, Committee Hansard*, Canberra, 27 November 2015, p. 22.

121 Ms Birgin, *Australians Against Capital Punishment, Committee Hansard*, Canberra, 27 November 2015, p. 22.

122 DFAT, *Submission 35*, p. 6.

secondly, to promote consistent and proportionate sentencing, and to promote the severity of penalties that is consistent with the gravity of the offences. So we are doing our best in that context.¹²³

4.124 The WCADP acknowledged Australia's attempts to have the issue of the death penalty and drugs included at UNGASS, saying:

Australia joined the statement, signed by 58 countries, on the issue of the death penalty, regretting that the Joint Ministerial Statement of the 2014 high-level review by the Commission on Narcotic Drugs of the implementation by Member States of the Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem did not include language on the death penalty. In preparation for the UNGASS, Australia could join other countries to make sure that the abolition of the death penalty is high on the agenda and that UNGASS makes some recommendations on abolition, at least for drug-related offences.¹²⁴

4.125 By the time this report is tabled, UNGASS 2016 will have already been conducted from 19 to 21 April 2016. However, there are a number of future forums where Australia could continue to prosecute these arguments.

4.126 The IDPC pointed to the UN Commission on Narcotic Drugs¹²⁵ and also asserted that:

Australia could consider requesting that the Human Rights Council set up a Special Procedure to focus specifically on the impact of the world drug problem on the enjoyment of human rights.¹²⁶

Human trafficking victims

4.127 Witnesses including the IDPC offered evidence suggesting that a proportion of drug couriers or 'drug mules' may be coerced or 'tricked' into breaking the law.¹²⁷

4.128 Ms Gerry QC and Ms Sherwill submitted that:

123 Dr Lachlan Strahan, First Assistant Secretary, Multilateral Policy Division, DFAT, *Committee Hansard*, Sydney, 9 December 2015, p. 8.

124 WCADP, *Submission 36*, p. 3.

125 IDPC, *Submission 16*, pp. 2-3.

126 IDPC, *Submission 16*, p. 3.

127 See for example: Ms Felicity Gerry QC and Ms Narelle Sherwill, *Submission 31*, p. [16]; Reprieve Australia, *Submission 41*, p. 12.

Not every drug offender can be considered a trafficked person, however it is increasingly recognised that the vast majority of individuals apprehended with drugs in their possession – so-called ‘drug mules’ – are not the primary initiators, financiers, or profiteers behind drug trafficking operations. In recognition of the low status that most drug traffickers occupy within drug syndicates, Singapore recently amended its mandatory sentencing to allow judicial discretion in cases where an offender could be considered a ‘courier’, rather than a supplier or organizer.¹²⁸

4.129 Reprieve Australia pointed to research from Thailand which showed:

... while women make up only 10 per cent of the death row population, 83 percent of those women have been sentenced to death for drug related offences. This data shows that women are disproportionately represented in death eligible drug crimes, and their specific vulnerability to being victims of human trafficking.¹²⁹

4.130 Discussing the example of Mary Jane Voloso, currently under sentence of death in Indonesia, Ms Gerry QC and Ms Sherwill concluded:

Australia must work both locally and transnationally to better equip law enforcement officers, legal professionals and members of the judiciary to recognise and tackle likely circumstances of human trafficking and thus reduce the number of vulnerable people exposed to risk of execution.¹³⁰

4.131 Reprieve expressed concern that despite Australian Crime Commission views that ‘a significant number of drug traffickers are duped or manipulated by crime syndicates’, there remains a lack of formal processes to identify victims of human trafficking.¹³¹

4.132 Ms Gerry QC and Ms Sherwill added that:

... in Australia there is no defence (partial or complete) that the suspect was a victim of human trafficking and therefore exploited nor do defences of mental impairment allow for involuntary acts in the context of human trafficking. This needs to change ... this is not just a sentencing issue. Trafficked victims need to be identified before they are charged, during any legal proceedings and for the purposes of appeal.¹³²

128 Ms Felicity Gerry QC and Ms Narelle Sherwill, *Submission 31*, p. [16].

129 Reprieve Australia, *Submission 41*, p. 12.

130 Ms Felicity Gerry QC and Ms Narelle Sherwill, *Submission 31*, p. [3].

131 Reprieve Australia, *Submission 41*, p. 12.

132 Ms Felicity Gerry QC and Ms Narelle Sherwill, *Submission 31*, pp. [18-19].

- 4.133 Reprieve put forward suggestions for action, including proposing that the Australian Government:
- ... resource the monitoring of human trafficking with respect to drug trafficking, particularly in our region, and develop and implement mechanisms to identify and protect victims from the death penalty.¹³³
- 4.134 Reprieve also referred the Committee to the UK, which has introduced the *Modern Slavery Act 2015* (UK), designed to protect exploited persons.¹³⁴
- 4.135 Section 45 of the *Modern Slavery Act* provides a defence in cases of offences committed by a person subject to slavery or human trafficking, provided the person was compelled or the offence was a direct consequence being enslaved or trafficked.¹³⁵
- 4.136 Reprieve contended:
- Australia can complement this leadership by advocating, in appropriate fora, for greater restrictions on the use of the death penalty, including more proportionate sentencing and guaranteed protections for vulnerable and exploited people.¹³⁶
- 4.137 Among other recommendations, Ms Gerry QC and Ms Sherwill proposed:
- Advocacy for victims of human trafficking must be available at a frontline position, with law enforcement and legal professionals trained to differentiate them from a regular criminal offender.
 - Introduce 'Human Trafficking Protection' Laws modelled on the *Modern Slavery Act 2015* in England and Wales.¹³⁷

Committee comment

- 4.138 The Committee acknowledges community concerns regarding the Australian Federal Police's practices of sharing information with foreign law enforcement bodies in cases which may lead to the death penalty being imposed.
- 4.139 The need to combat transnational crime cannot override the need to uphold Australia's human rights obligations and avoid exposing people to the death penalty.

133 Reprieve Australia, *Submission 41*, p. 12.

134 Reprieve Australia, *Submission 41*, p. 12.

135 *Modern Slavery Act 2015* (UK) c. 30 s. 45.

136 Reprieve Australia, *Submission 41*, p. 12.

137 Ms Felicity Gerry QC and Ms Narelle Sherwill, *Submission 31*, pp. [21 and 24].

- 4.140 Australia has an obligation to not only protect Australian citizens from exposure, but to avoid exposing foreign nationals to the death penalty where it is in a position to do so.
- 4.141 The Committee acknowledges that the AFP's current guidelines and policies do not prohibit it from exposing people to the death penalty in foreign jurisdictions, and that it retains discretion in these matters. However, the Committee believes the AFP take this issue seriously, and is encouraged to see the AFP is currently reviewing the *Australian Federal Police National Guideline on International Police-to-Police Assistance in Death Penalty Situations*.
- 4.142 The Committee recommends that the AFP strengthen the Guideline by ensuring that it:
- articulates as its primary aim preventing the exposure of persons to arrest or charge in retentionist countries for crimes that attract the death penalty;
 - explicitly applies to all persons, not just Australian citizens;¹³⁸
 - includes a requirement that the AFP seek assurances from foreign law enforcement bodies that the death penalty will not be sought or applied if information were to be provided; and
 - includes a provision for cases where there is a 'high risk' of exposure to the death penalty to be directed to the relevant Minister for decision.
- 4.143 If these amendments were to be made, the Committee believes that amendments to the *Australian Federal Police Act 1979* (Cth) may not be necessary.
- 4.144 In light of UN statements that drug crimes, such as trafficking, do not constitute 'most serious crimes' for which the death penalty may be applied under international law,¹³⁹ the Committee encourages the AFP to work to reduce information-sharing in relation to drug crimes *where exposure to the death penalty is a genuine risk*.
- 4.145 The Committee accepts assurances that recent Australian aid for foreign law enforcement projects has not led to executions. However, the Committee encourages relevant Government agencies to be vigilant in ensuring that Australian assistance for overseas law enforcement projects does not directly or indirectly expose people to the threat of execution.

138 The Committee notes the current Guideline *does* apply to all persons, but that nationality is a factor taken into consideration when deciding whether or not to provide information. This distinction should be removed.

139 United Nations General Assembly, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 2012, UN Document number A/67/275, p. 12.

- 4.146 The Committee acknowledges that the worldwide problems of drug abuse and drug crime cannot be solved by executing drug dealers and drug traffickers. As such, the Committee urges that retentionist countries be encouraged to adopt health-based and education-focussed harm reduction approaches to reduce the demand for illicit drugs.
- 4.147 The Committee is encouraged that the Australian representatives to the United Nations Special Session (UNGASS) on the world drug problem, held in April 2016, strongly communicated Australia's stance against the death penalty.
- 4.148 The Committee encourages Australian agencies, diplomats and parliamentarians to identify further opportunities to promote harm reduction approaches to dealing with drug crime, and lobby against the application of the death penalty for drug crimes.
- 4.149 The Committee is concerned about the issue of human trafficking in relation to the application of the death penalty to drug runners, or 'drug mules'.
- 4.150 The Committee notes recent developments in the United Kingdom, which has introduced the *Modern Slavery Act 2015* (UK) to protect exploited persons, including providing a defence for those compelled to commit a crime under the conditions of slavery.¹⁴⁰
- 4.151 The Committee encourages the AFP to be especially vigilant in seeking to protect those who fall into this category from exposure to the death penalty.

140 UK Government, 'Modern Slavery Act 2015', *legislation.gov.uk*, at <www.legislation.gov.uk/ukpga/2015/30/section/45/enacted> viewed 8 April 2016.

Recommendations

Recommendation 2

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

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

Recommendation 3

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